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DaNell Bartunek, appellee, v. State of Nebraska, appellant.

666 N.W.2d 435

Filed July 25, 2003. No. S-02-710.

1. **Tort Claims Act: Appeal and Error.** In an appeal from a judgment rendered in an action brought under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996), the factual findings of the trial court will not be disturbed unless clearly wrong.
2. ____: ____. Whether the allegations made by a plaintiff constitute a cause of action under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996), is a question of law, on which an appellate court has a duty to reach its conclusions independent of the conclusions reached by the district court.
3. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
4. **Tort Claims Act: Proof.** In order to recover in a negligence action brought pursuant to the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996), a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
5. **Police Officers and Sheriffs: Probation and Parole: Liability.** Law enforcement officials, including supervising probation officers and, consequently, state and local governments, generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct.
6. **Negligence.** There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (1) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct or (2) a special relation exists between the actor and the other which gives to the other a right to protection.
7. **Police Officers and Sheriffs: Probation and Parole: Liability.** Liability is established if a probation officer has specifically undertaken to protect a particular individual and the individual has specifically relied upon the undertaking. Such a duty to provide police or probation services arises when there is some form of privity—a special relationship—between the probation officer and the victim that sets the victim apart from the general public and there are explicit assurances of protection that give rise to reliance on the part of the victim.
8. **Police Officers and Sheriffs: Probation and Parole.** More than general reliance is needed to require a probation officer or police officer to act on behalf of a particular individual. The plaintiff must specifically act or refrain from acting in such a way as to exhibit particular reliance upon the actions of the probation officer or police officer in providing personal protection.
9. **Negligence.** One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.
10. **Probation and Parole.** In the absence of additional circumstances, a supervising probation officer does not "take charge" of a probationer to the degree necessary to

create a duty to control every aspect of a probationer's conduct so as to prevent bodily harm to others.

Appeal from the District Court for Red Willow County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded with directions to dismiss.

Don Stenberg, Attorney General, and Melanie J. Whittamore-Mantzios for appellant.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, and Nelson O. Tyrone III, of Garland, Samuel & Loeb, for appellee.

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

GERRARD, J.

NATURE OF CASE

DaNell Bartunek was assaulted in her home by George Andrew Piper, her former boyfriend, who was a convicted felon on probation at the time of the assault. Bartunek sued the State for failing to properly supervise Piper's behavior and was awarded damages in the sum of $300,000 by the district court. The dispositive question presented in this appeal is what duty is owed by the State to protect individual citizens from harm caused by the criminal conduct of probationers the State is charged with supervising.

BACKGROUND

Piper was convicted in 1997, pursuant to a no contest plea, of possession of burglary tools and criminal trespass, and placed by the district court on intensive supervision probation (ISP). ISP was created in 1990 to relieve prison overcrowding by using electronic monitoring to supervise probationers in the community. ISP is intended for those who do not need incarceration, but are not suitable for traditional probation. ISP officers have more frequent contact with the probationers assigned to them and are on call 24 hours a day via pager.

After his release from jail, Piper lived with Bartunek and her two children from a prior relationship. Piper and Bartunek met

with Fred Snowardt, the ISP officer to whom Piper was assigned, in order to establish and review the terms of Piper's electronic monitoring program. Piper's order of probation set forth several requirements, including that he refrain from unlawful, disorderly, injurious, or vicious acts; be employed or seek employment; refrain from using alcohol; and attend Alcoholics or Narcotics Anonymous meetings. Piper went to live with Bartunek at her residence in McCook, Nebraska, after his release from jail on May 22, 1997. An electronic monitoring system was installed at Bartunek's residence, and Piper's ankle bracelet was attached. In essence, Piper was placed on an in-house curfew, and the electronic monitoring system was intended to help enforce the terms of the curfew.

Piper did not fully comply with the terms of his ISP. Initially, Piper failed to comply with Snowardt's requirement that Piper produce copies of 40 completed job applications per week. Piper did not regularly attend Alcoholics or Narcotics Anonymous meetings, and there was evidence suggesting that when Piper was released from the in-house curfew to seek employment, Piper did not go where he was supposed to go. However, Piper did obtain employment and passed the alcohol and drug tests that were administered. Snowardt did not seek to have Piper's ISP revoked.

In June 1997, Bartunek took her children and went to spend the weekend with her father in Trenton, Nebraska. Bartunek observed that one of her sons was bruised around the buttocks and lower back, and Piper had previously told Bartunek that he had spanked the child. Bartunek decided to break off her relationship with Piper, based on that incident and other instances in which Piper had been physically aggressive with Bartunek, particularly in demanding that Bartunek have sex with him. Later, Bartunek reported the spanking incident to the McCook Police Department; a citation was issued for child abuse, but the county attorney did not prosecute the matter.

On June 16, 1997, Bartunek and her father asked Piper to move out of her residence. Piper called Snowardt, who came to Bartunek's residence that evening and told Bartunek that it would be better if Piper moved the following day, because of the difficulty of moving the electronic monitoring equipment that

had been installed at Bartunek's residence. Bartunek and the children went to stay with Bartunek's father, but Snowardt ultimately managed to move Piper from the residence that evening.

Bartunek later reported to Snowardt that after Piper left the residence, her rent money was missing. Snowardt did not pursue the matter and, at trial, did not recall the incident. Nor did Snowardt report the allegation of child abuse to the district court. Piper continued to contact and harass Bartunek. Snowardt told Piper to stop contacting Bartunek. Piper did not comply, and for a time, Snowardt did not pursue the matter. After Bartunek's father reported that Piper had left a note on Bartunek's car, on July 21, 1997, Snowardt again told Piper to stop harassing Bartunek. Snowardt did not notify the court. On July 25, Piper confronted Bartunek outside her children's daycare center and threatened Bartunek because Piper's note had been given to Snowardt. Snowardt again told Piper to stay away from Bartunek and again failed to notify the court.

On August 15, 1997, Piper came to Bartunek's house and demanded a ride to a local store. Bartunek complied and testified that Piper had been drinking. That evening, Piper missed his in-house curfew. Snowardt was notified and telephoned Bartunek's father and Bartunek. Snowardt also notified the McCook Police Department and directed them to detain Piper. An officer of the McCook Police Department was dispatched to Bartunek's residence. The officer helped Bartunek secure the premises and searched the premises, finding nothing.

Close to midnight, Bartunek heard a noise in the basement and called police; officers were dispatched. Moments later, Piper came into the bedroom, naked except for his socks, and displayed a carving knife that he had taken from Bartunek's kitchen. Piper and Bartunek fought, and Piper attempted to rape Bartunek. Two officers of the McCook Police Department then arrived, broke into the house after they heard screaming, and subdued and arrested Piper. Piper was charged with and convicted of burglary, attempted first degree sexual assault, use of a deadly weapon to commit a felony, second degree assault, being a felon in possession of a deadly weapon, and resisting arrest.

After compliance with the presentment requirements of the State Tort Claims Act, Bartunek filed an action in the district

court seeking damages for the alleged negligence of the State in its supervision of Piper. Specifically, Bartunek alleged that her injuries from the sexual assault were proximately caused by the State's failure to revoke Piper's ISP when Piper failed to comply with its terms, and its failure to protect Bartunek from Piper's threats, particularly after Piper missed his in-house curfew. The State denied Bartunek's allegations and affirmatively alleged the defenses of sovereign immunity for a discretionary function, judicial or quasi-judicial immunity, contributory negligence, assumption of the risk, and failure to mitigate damages.

After trial, the district court made factual findings generally consistent with the facts recited above. The court found that Bartunek suffers from posttraumatic stress disorder as a result of the attack. The court found that Snowardt was negligent in his supervision of Piper and in his failure to protect Bartunek from Piper, primarily based on Snowardt's failure to seek revocation of Piper's ISP after Piper's repeated violations of its terms. The court rejected the State's affirmative defenses and entered judgment for Bartunek in the amount of $300,000.

ASSIGNMENTS OF ERROR

The State assigns, as consolidated, that the district court erred in finding that (1) the State was not entitled to sovereign immunity based upon derivative judicial immunity, (2) Snowardt was negligent in his supervision of Piper, (3) the State owed a duty to Bartunek, (4) the State failed to meet its burden of proof as to the affirmative defenses of contributory negligence and assumption of the risk, and (5) Bartunek suffered $300,000 in damages.

STANDARD OF REVIEW

[1-3] In an appeal from a judgment rendered in an action brought under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996), the factual findings of the trial court will not be disturbed unless clearly wrong. See *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000). However, whether the allegations made by a plaintiff constitute a cause of action under the State Tort Claims Act is a question of law, on which an appellate court has a duty to reach its conclusions independent of the conclusions reached

by the district court. See *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42 (1992). Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003).

ANALYSIS

[4] The first and only issue that is necessary for us to address is whether a special relationship existed which gave rise to a specific duty on the part of the State to protect Bartunek from Piper. In order to recover in a negligence action brought pursuant to the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Id.* The threshold question is whether Bartunek has proved the existence of facts sufficient to establish that the State's probation officer owed a special duty to protect Bartunek from harm caused by Piper's criminal conduct. See *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993).

[5,6] Law enforcement officials, including supervising probation officers and, consequently, state and local governments, generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct. See *id.* However, we have adopted Restatement (Second) of Torts § 315 at 122 (1965), which provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

See, *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998); *Hamilton, supra*. Comment *c.* to § 315 of the Restatement further provides that the relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316 through 319. See *Popple, supra*. Bartunek relies on both § 315(a) and (b).

SPECIAL RELATIONSHIP BETWEEN PROBATION OFFICER AND VICTIM—§ 315(b)

[7] Section 315(b) has been considered and applied by this court. We have stated that

> [l]iability is established if police have specifically undertaken to protect a particular individual and the individual has specifically relied upon the undertaking. *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983). Such a duty to provide police services arises when there is some form of privity—a "special relationship"—between the police department and the victim that sets the victim apart from the general public and there are explicit assurances of protection that give rise to reliance on the part of the victim.
>
> We recognize that there are situations that provide exceptions to the no-duty rule: (1) where individuals who have aided law enforcement as informers or witnesses are to be protected or (2) where the police have expressly promised to protect specific individuals from precise harm. These two situations were discussed at length in *Morgan*. The court in *Morgan* recognized that a special relationship undoubtedly exists where an individual assists law enforcement officials in the performance of their duties.

Brandon v. County of Richardson, 252 Neb. 839, 843-44, 566 N.W.2d 776, 780 (1997). Accord *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

> "[A] special relationship does not come into being simply because an individual requests assistance from the police. . . . Otherwise, a police officer's general duty to the public inevitably would narrow to a special duty to protect each and every person who files a complaint with the department and attaches a request for help. . . .
>
> "Nor is the situation changed when the police gratuitously promise to provide protection. . . . A promise to act adds nothing to the obligation law enforcement officers have already assumed as members of a police force guided exclusively by the public interest. . . .
>
> "Between these boundaries are circumstances where the police do not benefit from a citizen's aid but nevertheless affirmatively act to protect a specific individual or a specific

> group of individuals from harm, in such a way as to engender particularized and justifiable reliance."

Hamilton v. City of Omaha, 243 Neb. 253, 260, 498 N.W.2d 555, 560-61 (1993), quoting *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983). The same principles generally apply to supervising probation officers.

[8] Furthermore, more than general reliance is needed to require the probation officer or police officer to act on behalf of a particular individual. The plaintiff must specifically act or refrain from acting in such a way as to exhibit particular reliance upon the actions of the probation officer or police officer in providing personal protection. Liability may be established, therefore, if the probation officer or police have specifically undertaken to protect a particular individual and the individual has specifically relied upon the undertaking. See *Hamilton, supra*. Accord *Sweeney v. City of Gering*, 8 Neb. App. 675, 601 N.W.2d 238 (1999).

Plainly, the exception identified in *Brandon* for witnesses and informants is inapplicable in the instant case, and Bartunek does not argue that it is. Similarly, as in *Hamilton, supra*, the record does not reveal that any specific assurances made by Snowardt were relied upon by Bartunek.

Bartunek offered no evidence to suggest that Snowardt made any assurances to her that affected her behavior prior to the assault. The record does show that on the evening before the assault, Snowardt assured Bartunek's father that there was no need for him to go to Bartunek's home because Snowardt would notify the McCook Police Department that Piper had missed his curfew. However, the record also shows that in that instance, Snowardt did exactly as he had promised, because he instructed the police to locate and arrest Piper and to go check on Bartunek. The police went to Bartunek's residence, searched the house, and helped Bartunek secure the premises. Moreover, even if Bartunek's father relied on Snowardt's assurance, this falls short of showing that Bartunek herself, as the plaintiff, relied on Snowardt's assurances.

In short, there was no evidence that Bartunek acted or refrained from acting in such a way as to exhibit particular reliance on the actions of Snowardt. See, *Hamilton, supra*; *Sweeney, supra*. Without such evidence, Bartunek showed no

special relationship between herself and the State that gave rise to a tort duty.

MEANING OF "TAKES CHARGE OF THIRD PERSON"—§§ 315(a) AND 319

[9] This court has not previously analyzed Restatement (Second) of Torts § 315(a) (1965), the parameters of which are further defined by *id.*, § 319 at 129, providing that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." However, the illustrations to this section make plain that the phrase "takes charge" is intended to refer to a custodial relationship. The two illustrations provided are (1) the escape of a delirious smallpox patient from a hospital, resulting in further infections, and (2) the escape of a "homicidal maniac" from an asylum. See *id.* at 130.

Courts are divided on whether a parole or supervising probation officer generally has a duty under § 319 to control the behavior of a parolee or probationer. However, the majority of courts have concluded that the level of control afforded to a parole or probation officer is not such that an officer assigned to supervise a parolee or probationer "takes charge of a third person" within the meaning of the Restatement. See, e.g., *Kim v. Multnomah County*, 328 Or. 140, 970 P.2d 631 (1998); *Schmidt v. HTG, Inc.*, 265 Kan. 372, 961 P.2d 677 (1998); *Fitzpatrick v. State*, 439 N.W.2d 663 (Iowa 1989); *Fox v. Custis*, 236 Va. 69, 372 S.E.2d 373 (1988); *Small v. McKennan Hosp.*, 403 N.W.2d 410 (S.D. 1987); *Lamb v. Hopkins*, 303 Md. 236, 492 A.2d 1297 (1985); *Humphries v. N.C. Dept. of Correction*, 124 N.C. App. 545, 479 S.E.2d 27 (1996). Cf. *Seibel v. City and County*, 61 Haw. 253, 602 P.2d 532 (1979). But see, *Bishop v. Miche*, 137 Wash. 2d 518, 973 P.2d 465 (1999); *A.L. v. Commonwealth*, 402 Mass. 234, 521 N.E.2d 1017 (1988); *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986), *supersession by statute recognized, Harris v. State, Dept. of Health*, 123 Idaho 295, 847 P.2d 1156 (1992); *Division of Corrections v. Neakok*, 721 P.2d 1121 (Alaska 1986). The Supreme Court of Oregon explained:

> As evidence that a probation officer exercises a degree of control over a probationer such that the officer effectively "takes charge" of the probationer, plaintiffs point to the fact that a probation officer can, among other things, impose sanctions on a probationer, search his home or his person without a warrant, and cause warrants to be issued for the probationer's arrest if the probationer violates a condition of his probation. Although the existence of those powers demonstrates that probation officers have the ability to compel a probationer's compliance with the conditions of his probation, they do not permit the inference that a probation officer can control a probationer's conduct in such a way as to prevent him from harming others. By contrast, in a custodial relationship, a custodian is responsible for controlling the person's activities and is required to, and actually has the legal ability to, take precautions to prevent the person from doing harm.

Kim, 328 Or. at 147 n.3, 970 P.2d at 635 n.3. We agree with the foregoing rationale.

Like a custodial relationship, the relationship between a supervising probation officer and a probationer is continuing in the sense that it normally exists for an extended period of time. However, unlike a prisoner, a probationer is generally free to conduct his or her day-to-day affairs and is responsible only for reporting certain activities to the probation officer as they occur. See, *Fox, supra*; *Small, supra*; *Lamb, supra*. Unlike a jailer, a probation officer is not responsible for visually supervising a probationer on a 24-hour-per-day basis. Absent the legal responsibility of custodial or round-the-clock visual supervision, there is no logical basis for imposing an ongoing duty on a probation officer to prevent illegal conduct by a probationer.

[10] We agree with the majority of courts to have decided this issue and likewise hold that in the absence of additional circumstances, a supervising probation officer does not "take charge" of a probationer to the degree necessary to create a duty to control every aspect of a probationer's conduct so as to prevent bodily harm to others. The fact that the probation in this case was "intensive supervision probation" does not except it from the general rule.

ISP imposes additional parameters on a probationer's activities and, most significantly, employs technological advances to provide the probation officer with the ability to enforce more stringent and detailed terms of probation. However, ISP does not change the essential nature of the relationship between the probation officer and probationer. With the exception of the in-house curfew imposed in this case, Piper was permitted to go about his day-to-day affairs without supervision, constrained only by the requirement that he seek permission in advance to leave home and explain for what reasons he would be out. While the ISP monitoring equipment provided notice if Piper missed his curfew, it did not permit the State to generally monitor his movements or to locate him in the event that curfew was missed. Piper was required to be at home unless permitted to leave, and Snowardt was informed if he was not, but once out of his home, Piper was able to conduct his affairs unmonitored by the State. On the facts of this case, the more rigorous requirements of ISP did not transform the relationship between Piper and the State into a custodial relationship within the meaning of accepted rules of tort law articulated in Restatement (Second) of Torts §§ 315(a) and 319 (1965).

The district court erred in concluding that the State was liable for failing to protect Bartunek from Piper's criminal conduct. There was no special relationship between Snowardt and Bartunek, or between Snowardt and Piper, that gave rise to a legal duty for Snowardt to control Piper's behavior and prevent him from harming Bartunek. Absent such a duty, Bartunek has failed to prove a cause of action for negligence on the part of the State. Because this conclusion is dispositive, we need not consider issues relating to breach, causation, or damages, nor is it necessary to consider the State's other assignments of error.

CONCLUSION

The district court erred in concluding that the State had a particular duty to protect Bartunek from Piper's criminal acts. Bartunek failed to show the special relationship between herself and Snowardt, or between Snowardt and Piper, necessary for such a duty to arise. Consequently, Bartunek failed to prove an essential element of her cause of action, and the district court

erred in not dismissing her petition. The judgment of the district court is reversed, and the cause is remanded with directions to dismiss Bartunek's petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD K. COOK, APPELLANT.
667 N.W.2d 201

Filed August 1, 2003. No. S-01-951.

1. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
3. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
5. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
6. **Trial: Evidence: Appeal and Error.** The erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.

7. **Presentence Reports: Waiver.** A defendant has a qualified right to review his or her presentence report, and the defendant may, with his or her attorney, examine the presentence report subject to the court's supervision. However, the defendant waives that qualified right by not notifying the trial court that he or she has not personally reviewed the report and that he or she wishes to do so.
8. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
9. **Effectiveness of Counsel: Proof: Convictions: Words and Phrases: Appeal and Error.** To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt.
10. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
11. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Clarence E. Mock III and Denise E. Frost, of Johnson & Mock, 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.

I. NATURE OF CASE

Richard K. Cook was convicted in the district court for Douglas County of first degree murder and use of a weapon to

commit a felony. Cook was sentenced to life imprisonment on the murder conviction and 49½ to 50 years' imprisonment on the weapons conviction. Cook appeals his convictions and sentences. We affirm.

II. STATEMENT OF FACTS

1. Discovery and Investigation of Crime

On the morning of April 29, 2000, two men found the body of a young woman, later identified as Amy Stahlecker, on the bank of the Elkhorn River near the intersection of West Maple Road and Highway 275 in Douglas County, Nebraska. Stahlecker's body had multiple gunshot wounds, including a shot to the back of the head that exited through the face and two shots to the face that exited through the back of the head. The men notified law enforcement officers of their discovery, and the Nebraska State Patrol began an investigation of the crime.

The body was found at a point along the river where the river was spanned by a bridge that was part of West Maple Road. At and near the bridge, West Maple Road was a four-lane concrete road with two eastbound and two westbound lanes separated by a concrete median. Investigators found a large blood smear and a trail of blood drops on the bridge, the median, and the eastbound lanes of West Maple Road. The trail of blood drops led from the median to the north side of the bridge directly above where the body was found. Blood from the stain was later tested, and the DNA was consistent with that of Stahlecker. On the median, investigators found bullet and scalp fragments and a bracelet that had been worn by Stahlecker.

A white Ford Explorer with a blown tire was found along Highway 275 near an intersection with West Maple Road and near the location where Stahlecker's body was found. It was later discovered that the Explorer was owned by Stahlecker's friend, Angella Dowling. On Friday evening, April 28, 2000, Stahlecker left her mother's home in Fremont, Nebraska, and went to her cousin's home in Arlington, Nebraska. Stahlecker and her cousin then joined Dowling, and the three drove in the Explorer to Omaha for dinner. After dinner, they met other friends at a bar in Omaha and stayed there until about 1 a.m. on April 29. Stahlecker's cousin and Dowling decided to stay in

Omaha with their respective boyfriends, and it was determined that Stahlecker would drive the Explorer to Fremont for the night and then return to Omaha the next morning to pick up the other two women. Although Stahlecker's subsequent route is unknown, she was apparently heading west on Highway 275 toward Fremont when the Explorer blew a tire near the spot where the Explorer was found that same morning.

An autopsy on Stahlecker's body revealed various abrasions and contusions in addition to the gunshot wounds to the head and face. Bruises were found on both forearms and on some fingers of the left hand. Contusions and abrasions were found on both legs, and there was a gunshot wound to the hip. The forensic pathologist who testified at trial opined that bruises on the right knuckles could have been "defensive" injuries sustained while Stahlecker was still alive. The pathologist also opined that the gunshot wound to the back of the head which exited through the face was the fatal wound and was a "distant shot" that was not fired at close range. The two shots to the face were fired at an "intermediate" range within 2 feet of the face. In the pathologist's opinion, the two shots to the face were not the fatal shots and were the result of very rapid gun discharge or were fired at a time when Stahlecker was unconscious. The autopsy revealed that Stahlecker had a blood alcohol content of .156 when she died. The autopsy also revealed semen in the vaginal area, indicating intercourse shortly before death; however, the autopsy showed no evidence of vaginal or anal tears or bruising.

Investigators had no suspect in the killing until May 2, 2000, when a Washington County deputy sheriff was contacted by Michael Hornbacher through a mutual friend. The deputy was acquainted with Hornbacher as well as Cook, a friend of Hornbacher and the defendant in this case. Hornbacher told the deputy that Cook had confessed to killing Stahlecker. The deputy interviewed Hornbacher at his office in Omaha, and Hornbacher later went to the Nebraska State Patrol offices where he gave investigators oral and written statements. Based on the information provided by Hornbacher, investigators went to the Norwest Financial branch office in Council Bluffs, Iowa, where Cook worked. The investigators did not formally arrest Cook but told

him he needed to come with them to the State Patrol offices in Omaha to be interviewed regarding the Stahlecker investigation. Investigators transported Cook to Omaha and did not allow him to drive his own vehicle, a Ford F-150 pickup truck.

Officers took Cook's truck to the State Patrol offices while Cook was being interviewed. They later returned the truck to Council Bluffs, obtained a search warrant, and brought the truck back to Nebraska State Patrol headquarters in Omaha, where the truck was searched. The search revealed blood traces on the interior of the driver's side door and floormat. Later DNA tests showed that the blood traces were consistent with Stahlecker's blood. Clothing fibers found on the passenger-side seat were consistent with the fabric of underwear worn by Stahlecker.

During the interview, investigators photographed Cook's face and body. Cook's hands and forearms showed substantial scrapes and cuts. Cook's supervisor at Norwest Financial later testified that she had noticed the injuries to Cook's arms and hands on Monday, May 1, 2000, and that he had told her he was injured after falling off his bicycle over the weekend.

2. Cook's Arrest and Trial

Cook was arrested, and on June 12, 2000, the State filed an information charging Cook with first degree murder and use of a weapon to commit a felony. Cook pled not guilty, and a jury trial was conducted April 16 through 26, 2001.

At trial, both Hornbacher and Cook testified regarding the events of April 28 and 29, 2000. Their stories were substantially similar regarding the events of the evening of April 28, but their stories differed markedly regarding the events which occurred after midnight on April 29. Cook got home from work on Friday, April 28, at about 6:15 p.m. and soon thereafter told his wife, Jeanette Cook (Jeanette), that he was going out. Cook and Hornbacher met to work out together at a gym. The two had been friends for several years. They both worked for Norwest Financial and frequently worked out together. After working out, they stopped at a sandwich shop and then went to the apartment shared by Hornbacher and his girl friend, Michelle Childs. Childs had already left the apartment to go to McCormack's sports bar to play volleyball. Cook and Hornbacher went to McCormack's to

watch Childs' volleyball game. They drove in Cook's truck and arrived at McCormack's at about 8:30 p.m.

Cook and Hornbacher stayed at McCormack's after the volleyball game, socializing with various people. Both drank several beers and some shots. After some time, Childs and Hornbacher got into an argument because she was upset that he was getting drunk and that he did not want to leave when she was ready to go. Childs decided to leave and asked whether Cook could give Hornbacher a ride and whether Hornbacher could stay at Cook's apartment that night. Cook agreed and called his wife, Jeanette, at around 11:40 p.m. to let her know Hornbacher would be staying with them. Jeanette, who was angry with Cook for staying out late, did not answer the telephone and allowed the answering machine to take his message.

Hornbacher and Cook stayed at McCormack's for approximately another hour. Hornbacher's and Cook's stories diverge at the point when they left McCormack's. At trial, Hornbacher testified for the State and Cook testified in his own defense. Their differing versions of events are recounted below.

3. Hornbacher's Version

Hornbacher testified that he and Cook left McCormack's separately. Hornbacher saw Cook leave in Cook's truck, and Hornbacher got a ride from two women he did not know and a man he had met that night. They drove Hornbacher to his and Childs' apartment, where he let himself in and passed out in bed. Hornbacher woke up around 11 or 11:30 a.m. on Saturday, April 29, 2000. Hornbacher argued with Childs and decided to leave the apartment. Hornbacher could not find his keys, cellular telephone, and checkbook and realized he might have left them in Cook's truck the night before. Hornbacher called Cook to arrange to pick up the items he had left in Cook's truck. Cook did not want Hornbacher to come to Cook's apartment, so they arranged for Cook to pick up Hornbacher in front of Hornbacher's apartment. After getting off the telephone, Hornbacher told Childs he thought Cook was "acting pretty weird."

Cook picked up Hornbacher some time later. As they drove in the truck, Hornbacher could tell Cook was upset, and Cook indicated that he was concerned about something that would affect

his family. Cook drove to Walnut Grove Park, where he parked the truck, and Cook and Hornbacher talked for what Hornbacher described as "an eternity." Hornbacher testified that Cook told him that after he left McCormack's, he had driven out west on Highway 275, where he encountered a young woman with a flat tire. Hornbacher noticed abrasions on Cook's arms but Cook would not tell Hornbacher how he got them. Hornbacher's cellular telephone rang, and he located it beneath the seat. Cook told Hornbacher that the telephone must have fallen beneath the seat when he and the woman with the flat tire had sexual intercourse in the front seat of the truck. Cook showed Hornbacher a scrap of paper tucked into the sun visor and told Hornbacher the woman had given him her name and telephone number. Cook then told Hornbacher that after the intercourse, the woman had "weirded out," and Cook thought she might try to claim that he had raped her. Cook ordered the woman to get out of the truck, and then he "lost it" and grabbed his 9-mm handgun from the truck's console and "unloaded" it on the woman. Cook told Hornbacher he then dumped the woman's body in a ravine.

Cook drove Hornbacher back to Hornbacher's apartment and regained his composure on the way. Cook told Hornbacher he had cleaned his truck twice that morning in order to get rid of any evidence linking him to the woman's death. Cook left, and Hornbacher went into his apartment where Childs was still in bed. Hornbacher recounted to her his conversation with Cook. Hornbacher stayed at his own apartment the rest of the day.

Hornbacher and Childs heard media reports about Stahlecker's death on Sunday, April 30, 2000. Hornbacher testified that he wanted to urge Cook to confess to authorities, but Childs objected. Hornbacher did nothing until the evening of Monday, May 1, when he contacted the aforementioned mutual friend to get him into contact with the Washington County sheriff's deputy. Hornbacher spoke to the deputy on Tuesday, May 2, and told him about Cook's confession.

4. Cook's Version

Cook testified in his own defense. He testified that while they were at the bar, he drank two shots provided by Hornbacher. One was a shot of "GHB," a substance sometimes called the "date

rape drug," which acts as a sedative, diminishing inhibitions and blotting out memory. Cook was drunk at the time Hornbacher gave him the GHB and did not take it intentionally. When he and Hornbacher left McCormack's, Cook saw Hornbacher get into a car with some other people. Cook decided to follow them in his truck because he had told Childs that Hornbacher could stay at Cook's apartment. The other people took Hornbacher to Hornbacher's apartment. Cook saw Hornbacher at his apartment door, fumbling for his keys. Cook pulled up and told Hornbacher he had left his keys in Cook's truck. Hornbacher got into Cook's truck, and the two decided to go to a bar in Fremont that featured female strippers. Cook thought the bar might still be open.

While driving toward Fremont on Highway 275, Cook encountered Stahlecker and the disabled Ford Explorer. Cook decided to stop to help her, despite Hornbacher's protests. Cook tried to change the tire but decided he could not because the rim was bent. He could not call for help because his cellular telephone did not work, and he could not find Hornbacher's cellular telephone, which had fallen beneath the seat. Cook decided they should look for an open service station to get help. Stahlecker got into the front seat with Cook, and Hornbacher got into the back seat, where he passed out or fell asleep. Cook drove toward Omaha on West Maple Road.

They found no open service station, and Stahlecker suggested they return to the Explorer. Neither Cook nor Stahlecker was certain where the Explorer was, and they had trouble finding it. Cook suggested that they just "chill out," since they were both drunk, and he pulled into an off-road area on West Maple Road. He and Stahlecker laughed, talked, and listened to the radio while Hornbacher was passed out or sleeping in the back seat. Cook offered to give Stahlecker a back rub, and she agreed. Cook testified that they were soon engaged in sexual foreplay and began undressing. They then engaged in what Cook described as consensual sexual intercourse in the front passenger seat.

As they were dressing, Cook told Stahlecker he would like to see her again and he gave her one of his business cards so she could give him her telephone number. She wrote "Amie" and a Fremont telephone number on the card and gave it back to him. At that time, Hornbacher spoke up from the back seat. Neither

Cook nor Stahlecker had realized he was awake. Hornbacher forcefully demanded that Stahlecker perform oral sex on him. She refused, and Hornbacher began to argue with her. The argument escalated despite Cook's attempts to calm Hornbacher, and Hornbacher reached over the seat to grab Stahlecker's shoulder. She pulled away, opened the passenger-side door, and walked up to West Maple Road.

Cook got out of the truck, intending to either give Stahlecker her keys or offer her a ride home. He then heard two gunshots and turned to see Hornbacher leaning out of the driver's side window with Cook's gun in his hand, shooting at Stahlecker. Cook began to run toward Stahlecker. Because it was dark, he did not see the median on West Maple Road, and he ran into the median and tripped, scraping his arms and hands. Cook heard the truck accelerating behind him and saw Hornbacher drive the truck up onto West Maple Road. When Hornbacher caught up to Stahlecker, he parked the truck, jumped out of it with the gun, and followed her. Cook saw Hornbacher shoot Stahlecker in the back of the head from a distance of about 10 feet. Stahlecker collapsed. Hornbacher approached her, and when he was within 5 feet, Hornbacher shot her twice in the face.

Cook ran to Stahlecker and checked for a pulse. Finding no pulse, he realized she was dead. Cook asked Hornbacher why he had killed her. Hornbacher did not reply but instead told him to "get her off the road." Because Hornbacher still had the gun and Cook feared for his own safety, he did as Hornbacher directed. Together they dragged Stahlecker's body across the road and shoved it off the bridge. Cook saw Hornbacher pick up Stahlecker's keys, which Cook had dropped. Cook and Hornbacher got into the truck to return to Omaha. They were driving east on Dodge Street back into Omaha, and when they approached a bridge over the Elkhorn River, Hornbacher told Cook to slow down. As they were driving over the bridge, Hornbacher threw Stahlecker's keys into the river. Cook speculated that Hornbacher might also have thrown Cook's gun into the river, because Cook did not know where it was.

The two continued into Omaha and argued about what to do next. Cook testified that Hornbacher threatened that if he said anything about Stahlecker's death, Cook "would go down, too."

Cook dropped Hornbacher off at Hornbacher's apartment at about 3:30 a.m. and told him they should talk after they sobered up. Hornbacher took the gun's ammunition and clip with him. On his way home, Cook stopped at a carwash where he washed blood off the seats and vacuumed the interior of the truck. He arrived home about 4:30 a.m. He undressed and washed the scrapes on his hands and arms and applied antibiotic ointment before going to bed. Cook's wife, Jeanette, was awake, and he showed her his injuries. He told her he had been in a fight but that if anyone asked her, she should say he was injured falling off his bicycle.

Cook slept until about 7 a.m., when he awoke and began routine Saturday morning chores. He washed a load of laundry, including the clothes he had worn the night before. Cook drove to Standing Bear Lake, where he rode his bicycle on the trails. Before long, he fell off the bicycle and landed on his arms and hands. Cook returned home around 10 a.m. Jeanette was sleeping but their daughter was awake, and he gave her breakfast. Jeanette awoke around 12:30 p.m. and was angry with Cook for going out the night before. She left to go study. After Jeanette left, Hornbacher called Cook. The two decided to meet at Hornbacher's apartment, and Cook picked him up at about 1:30 p.m. At trial, Cook attempted to give testimony regarding his version of their conversation in the truck. However, the court sustained the State's hearsay objections, and Cook made no offer of proof of the testimony he would have given regarding the conversation.

5. Other Witnesses and Evidence

Various other witnesses testified for the State, and Cook offered other testimony and evidence in his defense. Additional evidence and testimony which relates to Cook's assignments of error on appeal will be related here.

Immediately after Hornbacher testified at trial, the State called Childs as a witness. She testified similarly to Hornbacher and Cook regarding the events of April 28, 2000. In addition, she testified that Hornbacher got home at around 12:50 a.m. and did not go out again. Childs also testified that after Hornbacher met with Cook the following day, he came home and told her that Cook had told Hornbacher that the night before, Cook had

had consensual sex with a woman and thereafter shot her. In most respects, Childs' version of Cook's statements was similar to Hornbacher's testimony.

The State also presented the testimony of Amy Hoffmeyer. Hoffmeyer worked with Childs and played volleyball with her at McCormack's on April 28, 2000. After volleyball, Hoffmeyer remained at McCormack's, socializing with various people including Hornbacher and Cook. Hoffmeyer testified that as she was putting her keys into the ignition of her car after leaving the bar, Cook knocked on the window. He told her he wanted her to come back into the bar to get to know him better. She said no, but Cook persisted with his requests, at one point reaching into the car to put his hand on her shoulder. She mentioned that she knew he was married but that he said he did not care. Cook eventually gave up, and she drove home. On cross-examination, Hoffmeyer testified that she had not felt threatened by Cook, she just thought it odd that he wanted to get to know her better considering that he was married.

Before Cook testified in his defense, a hearing was held outside the presence of the jury in which Cook's attorney said he anticipated that the State would cross-examine Cook about an incident with "a woman named Yvette" that occurred at McCormack's on the evening of April 28, 2000. In the hearing, it was stated that a woman named "Yvette Carmen" had told friends that while she was on her way to the bathroom, Cook had grabbed her, took her to the parking lot, started to kiss her, and put his hand down her pants. Cook also apparently tried to get her into his truck. Cook's attorney wanted to get any such question prohibited as improper prior bad acts evidence. The State argued the evidence was offered for the purpose of showing Cook's intent to get a woman into his truck to have sex. After much discussion, the district court stated, "The sexual acts is [sic] 403. The other, getting into the truck, I'll just rule when the time comes." See Neb. Rev. Stat. § 27-403 (Reissue 1995).

During cross-examination, the State asked Cook to tell about the incident where he followed Hoffmeyer outside to her car. After Cook told his side of the story, the State asked about a subsequent time that evening that Cook had gone out to the parking lot. Cook said that he had gone outside to get some fresh air and

that "[s]omeone did come outside with me, but I did not ask them [sic] to come outside with me." Upon further questioning, Cook stated that he did not know the person's name but that the person was female. The State asked what Cook and the female did in the parking lot, and Cook stated, "We — again, we talked, and we kissed and that was it. We were out there for less than five minutes and came back in." Throughout this questioning, Cook's attorney objected on the basis of relevance and the district court overruled the objections. Finally, the State asked, "Did you ask her to get in your truck with her [sic]?" Cook's attorney then objected, and the court sustained the objection. The State then moved on to a different line of questioning.

Jeanette testified for the State regarding, inter alia, her interaction with Cook on April 29, 2000, the day following the killing of Stahlecker. During cross-examination, Cook's attorney asked whether at about 12:30 p.m. of that day she had gone to study but had instead written a letter to Cook. She said that she had. When Cook's attorney began to question Jeanette further about the letter, the State objected on the basis of hearsay and relevance. During a side-bar conference, it was stated that the letter was never given to Cook and that instead Jeanette had given it to the defense attorney some time after Cook's arrest. The court sustained the hearsay objection but allowed Cook to make an offer of proof of the letter. In the letter, Jeanette expressed that she was angry with Cook for having been out late with Hornbacher the night before. She also expressed her ongoing dissatisfaction related to Cook's friendship with Hornbacher and recounted various incidents in which she thought Hornbacher had a negative influence on Cook, including incidents in which Cook covered for Hornbacher because he was cheating on his girl friend. Jeanette expressed her desire that Cook not allow his friendship with Hornbacher to affect his relationship with her.

Charles O'Callaghan, an investigator for the Nebraska State Patrol, testified for the State regarding the investigation of Stahlecker's killing. During cross-examination, defense counsel asked whether O'Callaghan had executed a search warrant on Hornbacher's residence, and O'Callaghan replied that he had not. On redirect, in reference to the testimony that investigators had not searched Hornbacher's residence, the prosecutor elicited

testimony that in order to get a search warrant, investigators must have probable cause that the person committed a crime. The prosecutor asked O'Callaghan, "At any point in time in this investigation, did you have probable cause that Mike Hornbacher committed any crime?" O'Callaghan replied, "No."

Michael Auten, a state patrol forensic chemist, testified for the State. Defense counsel elicited testimony from Auten that if ordered to do so, Auten could test the clothes worn by Hornbacher on the night of the killing to test for comparison to fibers found in Cook's truck and on Stahlecker's clothing. In a side-bar conference, defense counsel moved for an order for production of Hornbacher's clothing for fiber analysis. The court denied the motion, and defense counsel did not pursue the issue further.

During Hornbacher's testimony, on cross-examination, the following exchange occurred between defense counsel and Hornbacher:

> [Defense counsel:] You had never known . . . Cook to be violent with a woman before, did you, sir?
>
> [Hornbacher:] Not until after this trial started.
>
> [Defense counsel:] And —
>
> [Hornbacher:] I take that back. I do.
>
> [Defense counsel:] Excuse me, sir. At the time that you gave this statement on May 10th, did you indicate that you had never seen him do that to a woman?
>
> [Hornbacher:] I've never seen him do it to a woman, no.

Defense counsel then moved on to other questioning.

6. Motions, Verdict, and Sentencing

The State charged Cook with first degree murder under alternative theories. In the information, the State charged that Cook "did . . . purposely and with deliberate and premeditated malice, or during the perpetration of, or attempt to perpetrate a First Degree Sexual Assault, kill Amy Stahlecker." Cook was also charged with use of a weapon to commit a felony, but Cook was not separately charged with first degree sexual assault.

At the end of the State's case, Cook's attorney moved the court:

> for a dismissal of these charges against the defendant for the reason that the State has failed to meet it's [sic] prima facie case against the defendant. And my guess is you'll probably

> let it go to the jury on the issue of first degree murder, but I'm going to ask the Court to consider dismissing the action against the defendant on the first degree sexual assault. And then in the alternative, sir, I would ask the Judge — this Court to enter an acquittal of the defendant on those two charges, but particularly the sexual assault charge.

The district court overruled the motion. At the end of all the evidence, Cook renewed his motion and the district court again overruled it.

Cook's attorney objected to the jury instruction on the count of first degree murder, stating, "I'm going to object to this, the State being able to charge Mr. Cook with both deliberate and premeditated malice or during the perpetration of a first degree sexual assault." The district court asked, "Do you think the State should be required to elect?" When Cook's attorney replied in the affirmative, the district court overruled the objection. In instructing the jury on the charge of murder, the district court gave a step instruction, in which it instructed the jury on four types of homicide: first degree murder-felony murder, first degree murder-premeditated murder, second degree murder, and manslaughter. As part of the step instruction, the district court instructed the jury to first consider whether Cook committed felony murder and, if it found that he had not, then to consider whether he committed premeditated murder.

On April 26, 2001, the jury returned verdicts finding Cook guilty of first degree murder and use of a firearm to commit a felony. The verdict form stated that the jury found Cook guilty of "Murder in the First Degree" but did not specify whether the jury found him guilty of "first degree murder-felony murder" or "first degree murder-premeditated murder." Cook, through defense counsel, filed a motion for new trial. Cook, pro se, filed additional motions for new trial. The district court overruled the motions for new trial.

A presentence investigation report was prepared prior to sentencing. The report included a probation officer's report, in which the probation officer concluded that Cook "has a very volatile temper, is a womanizer and could almost be considered a sociopath" and that Cook is "a very dangerous individual." The probation officer then asked that the district court "consider

life imprisonment with an additional 50 years for the charge of Use of a Firearm to Commit a Felony." The report also contained various letters written in support of Cook.

On July 20, 2001, the court sentenced Cook to life imprisonment on the first degree murder conviction and to 49½ to 50 years' imprisonment on the weapons conviction. Cook appeals his convictions and sentences.

III. ASSIGNMENTS OF ERROR

Cook asserts that the district court erred in (1) sustaining the State's hearsay objection and disallowing Cook's testimony regarding his version of his conversation with Hornbacher on the day following Stahlecker's killing, (2) overruling Cook's motion for directed verdict on the felony murder theory of the first degree murder charge, (3) allowing evidence of prior bad acts involving Hoffmeyer and Carmen and failing to give a limiting instruction with regard to such evidence, (4) sustaining the State's hearsay objection and disallowing evidence of the contents of the letter Jeanette wrote to Cook, (5) failing to order that Cook be allowed to review the presentence investigation report prior to sentencing, (6) imposing an excessive sentence; and (7) overruling his motions for mistrial and for a new trial.

Cook also asserts that he was denied effective assistance of counsel and that his trial counsel was deficient in the following respects: (1) failing to object to hearsay testimony by Childs that Hornbacher told her that Cook had told him that he had killed Stahlecker, (2) failing to object to the testimony of Hoffmeyer which Cook asserts was evidence of a prior bad act, (3) eliciting testimony from Hornbacher regarding Cook's prior incidents of violence toward women, (4) failing to request a limiting instruction regarding the proper use of prior bad acts evidence involving Hoffmeyer and Carmen, (5) failing to object to O'Callaghan's testimony regarding a determination of probable cause when no proper foundation had been established for such expert testimony, (6) failing to request a continuance in order to pursue fiber evidence which might have connected Hornbacher to the crime, and (7) failing to object to portions of the presentence investigation report which Cook asserts contained unsupported conclusions of the probation officer.

IV. STANDARDS OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *Id.*

[3] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Leibhart, ante* p. 133, 662 N.W.2d 618 (2003).

V. ANALYSIS

1. Testimony by Cook Regarding Conversation With Hornbacher

In his first assignment of error, Cook contends that the district court erred in sustaining the State's objection to testimony by Cook regarding his conversation with Hornbacher the day following the killing of Stahlecker. Because Cook made no offer of proof, we cannot find that his testimony would have met an exception to the hearsay rule, and we therefore conclude that the court did not err in sustaining the State's objection.

With respect to his own statements during the conversation, Cook argues that his testimony was not hearsay because it was offered to rebut express charges against him. Cook cites Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1995), which provides that a statement is not hearsay if the declarant testifies at the trial or

hearing and is subject to cross-examination concerning the statement, and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

With respect to Hornbacher's statements during the conversation, Cook argues that his testimony was admissible under Neb. Rev. Stat. § 27-613 (Reissue 1995) as extrinsic evidence of a prior inconsistent statement by a witness regarding a material fact. Section 27-613(2) provides in part, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require." Cook argues that Hornbacher was available to be afforded an opportunity to explain or deny any statements which Cook would testify that Hornbacher had made.

Cook notes three points in his testimony regarding the conversation with Hornbacher where hearsay objections were sustained. First, defense counsel asked Cook, "Can you tell the ladies and gentlemen of the jury what the nature of the conversation was between you and . . . Hornbacher?" The State objected on the basis of hearsay, and the court stated, "The question calls for hearsay. That's sustained." Next, defense counsel immediately stated "Okay. Do you remember what you — you can't talk about what . . . Hornbacher said. Do you remember what you had discussed with Mr. Hornbacher?" Cook began to reply, "I discussed what I had told . . . ." The State broke in to object on the basis of hearsay, and the court sustained the objection.

Finally, a bit later, defense counsel asked Cook, "Did you and . . . Hornbacher arrive at some sort of plan of action, if you will, as a result of the driving around you did?" Cook replied

> Not really. We discussed what had happened the night before. He was worried sick about his phone until it went off and actually rang, and he was really relieved that it did. He was also worried sick about his checkbook that was missing. He felt it was going to be out at the crime scene. He and I discussed that. He, again, reiterated to me that . . . .

The State interrupted to object to what Hornbacher reiterated on the basis of hearsay, and the court sustained the objection. Cook

made no offer of proof at these three points or at any other point as to what he would have testified in response to the questions.

Cook argues that his assignment of error may be reviewed on appeal despite his failure to make an offer of proof. Cook cites Neb. Rev. Stat. § 27-103(1) (Reissue 1995) which provides:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

Cook also cites *Anderson/Couvillon v. Nebraska Dept of Soc. Servs.*, 253 Neb 813, 572 N.W.2d 362 (1998) (in absence of offer of proof, question becomes whether substance of evidence was apparent from context within which question was asked). Cook argues that in the present case, despite the lack of an offer of proof, the substance of his proposed testimony was apparent from the context within which the questions were asked.

The lack of an offer of proof in this case prevents this court from determining the nature of the proposed testimony and therefore from determining its admissibility. Each of the questions to which the State objected asked for testimony regarding an out-of-court statement, and without an offer of proof, we cannot determine on appeal whether such statements would have met an exception to the hearsay rule. The substance of Cook's proposed testimony was not apparent from the context in which the questions were asked. The questions generally called for testimony regarding the content of the conversation, but the specific content to which Cook would have testified was not apparent. It would require speculation on this court's part to find that such proposed testimony would have met either of the categories of admissible testimony urged by Cook on appeal. We therefore reject Cook's first assignment of error.

2. Directed Verdict on Felony Murder

For his second assignment of error, Cook asserts that the district court erred in denying his motion for a directed verdict on a portion of the State's charges against him. In particular, Cook argues that the evidence with respect to sexual assault as a

predicate for felony murder was not sufficient to establish that sexual penetration was without consent. We conclude that the evidence was sufficient to submit the charges to the jury and that therefore, the district court did not err in overruling Cook's motion for directed verdict.

Cook argues that the district court should have directed a verdict on the felony murder theory of first degree murder because the State failed to put on evidence that Cook's sexual intercourse with Stahlecker was without consent. The State argues that there was sufficient evidence to support submitting an instruction on felony murder based on sexual assault to the jury and notes evidence that Cook had numerous scrapes on his arms and hands and that in addition to the gunshot wounds, Stahlecker had numerous injuries, some defensive, on her hands, arms, legs, and toes. The State also notes that Cook gave differing stories as to how he received his wounds. He told Jeanette that he sustained the injuries in a fight but told her to tell others that he sustained the injuries in a fall from his mountain bike. Further, Cook testified at trial that he sustained the injuries when he tripped over a median on Highway 275 while fleeing from Hornbacher. The State argues that the wounds to both Cook and Stahlecker and Cook's attempts to cover up the cause of his injuries could lead a jury to infer that there was a struggle between Cook and Stahlecker and a sexual assault.

[4] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id.*

We conclude that the evidence in the present case was sufficient to prevent a directed verdict on the felony murder charge. The evidence noted by the State with respect to the element that sexual penetration be without consent was sufficient to support a jury finding that sexual intercourse was without consent and was instead a product of sexual assault, thus precluding a directed

verdict. The jury could reasonably infer that the injuries indicated that the sexual intercourse between Cook and Stahlecker was without Stahlecker's consent. There was not a complete failure of evidence to establish the underlying felony of sexual assault as an element of felony murder, and the jury could reasonably have found Cook guilty of first degree murder under a felony murder theory. The district court therefore did not err in rejecting Cook's motion for directed verdict, and we reject Cook's second assignment of error.

3. Prior Bad Acts With Amy Hoffmeyer and Yvette Carmen

As his third assignment of error, Cook asserts that the district court erred in allowing the jury to hear otherwise inadmissible evidence regarding Cook's interactions with Hoffmeyer and Carmen in violation of Neb. Rev. Stat. § 27-404(2) (Reissue 1995). Cook argues that such evidence was prior bad acts evidence offered for an improper purpose, that the procedural requisites of § 27-404(3) were not followed, and that the court failed to give a limiting instruction with respect to the purpose for which such evidence could be considered. Cook's arguments are limited to admission under § 27-404, and accordingly we so limit our analysis. The evidence regarding Hoffmeyer and the evidence regarding Carmen are in different postures procedurally, and therefore we will discuss each separately.

(a) Amy Hoffmeyer

[5] Hoffmeyer testified at trial without objection by Cook. Cook complains on appeal that Hoffmeyer's testimony was inadmissible as improper prior bad acts evidence. A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002). Because Cook did not object to Hoffmeyer's testimony at trial, Cook has waived the right to assert prejudicial error regarding Hoffmeyer's testimony on appeal.

(b) Yvette Carmen

[6] Although there was much discussion outside the presence of the jury about potential testimony regarding Carmen, Carmen

did not testify at trial, and the only evidence which might implicate Carmen was testimony by Cook on cross-examination that an unnamed woman had followed him to the parking lot and that they had briefly talked and kissed. Section 27-404(2) deals with evidence of "other crimes, wrongs, or acts" admitted "to prove the character of a person in order to show that he or she acted in conformity therewith." Whether or not the testimony regarding Cook's kissing an unnamed woman was evidence of an act admitted to prove his character, we conclude that any error in admitting the evidence was harmless error. To the extent the testimony regarding kissing an unnamed woman proved anything about Cook's character, it was cumulative of other testimony which Cook offered in his own direct examination, including Cook's testimony that he had had sexual intercourse with Stahlecker. Generally, erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *State v. Harms*, 264 Neb. 654, 650 N.W.2d 481 (2002). We therefore find no merit to Cook's third assignment of error.

4. Jeanette Cook's Letter

As his fourth assignment of error, Cook asserts that the district court erred in disallowing evidence of the contents of the letter written to Cook by Jeanette. We conclude that Cook has demonstrated no exception to the hearsay rule which would allow admission of the letter.

Cook argues it was error to refuse to admit the letter into evidence because the letter was relevant to assess Jeanette's credibility and it gave evidence of Cook's relationship and history with Hornbacher which would explain Cook's actions in covering up for Hornbacher after Hornbacher allegedly killed Stahlecker. Cook argues that the letter was not hearsay because it was not offered to prove the truth of the matters asserted but to prove that the statements were made.

We agree with the State's argument that the letter was hearsay and that Cook has demonstrated no exception to the hearsay rule that would allow its introduction into evidence. "Hearsay" is defined in § 27-801(3) as "a statement, other than one made

by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and Neb. Rev. Stat. § 27-802 (Reissue 1995) provides that hearsay is not admissible except as provided by other rules. Although Cook argues the letter was not hearsay, the only apparent purpose for admitting the letter as evidence was to prove the truth of the matters asserted regarding the nature and history of Cook's friendship with Hornbacher. There was no apparent purpose in proving the mere fact that Jeanette was the author of the letter, particularly considering that the letter was never given to Cook and therefore could not have affected his actions. Further, the letter does not appear relevant to assessing Jeanette's credibility because Cook has demonstrated no inconsistency between statements she made in the letter and statements she made at trial. We therefore conclude the district court did not err in sustaining the State's objection to the letter, and we reject Cook's fourth assignment of error.

5. Presentence Investigation Report

As his fifth assignment of error, Cook asserts that the district court erred in failing to afford Cook an opportunity to review the presentence investigation report prior to sentencing. Cook notes that there is nothing in the record indicating that the court ordered that Cook be afforded an opportunity to personally review the report or that Cook did in fact see the report prior to sentencing. However, as the State notes, there is also nothing in the record indicating that Cook requested an opportunity to review the report or that his request was denied. Further there is nothing in the record indicating that Cook complained at sentencing or elsewhere that he had not had an opportunity to review the record. Because there is nothing in the record to indicate that Cook requested the opportunity to review the report or that the court denied such a request, we conclude there is no merit to Cook's assignment of error.

[7] Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2000) requires that "when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation." Subsection (6) of § 29-2261

provides in part that "[t]he court may permit inspection of the report or examination of parts thereof by the offender or his or her attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender." We have held that a defendant has a qualified right to review his or her presentence report and that the defendant may, with his or her attorney, examine the presentence report subject to the court's supervision. *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994); *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990). However, we have also held that the defendant waives that qualified right by not notifying the trial court that he or she has not personally reviewed the report and that he or she wishes to do so. *Barrientos, supra.* See, also, *State v. Keller*, 195 Neb. 209, 237 N.W.2d 410 (1976) (where neither defendant nor attorney requested inspection of report, trial judge did not err by failing to furnish copy of report).

Where, as in the present case, no request has been made, the trial court has no affirmative duty to order a review by the defendant of the presentence investigation report. The district court did not err in failing to order a review, and we find no merit in Cook's fifth assignment of error.

6. Excessive Sentence

As his sixth assignment of error, Cook asserts that the district court imposed an excessive sentence. Two sentences were imposed on Cook. On the conviction for first degree murder, Cook was sentenced to life in prison, and on the conviction for use of a weapon to commit a felony, he was sentenced to 49½ to 50 years' imprisonment. The potential sentences for first degree murder are either death or life imprisonment. Because Cook received the more lenient sentence available upon conviction for first degree murder, his arguments regarding excessive sentence relate only to his sentence for use of a weapon to commit a felony.

[8] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). Use of a firearm to commit a felony is a Class II felony, Neb. Rev. Stat. § 28-1205(2)(b) (Reissue 1995), and the potential range of sentences for a Class II felony is a term

of imprisonment from 1 to 50 years, Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002). Therefore, Cook's sentence was within statutory limits, and it will not be overturned on appeal unless Cook demonstrates an abuse of discretion.

Cook argues that his sentence was unduly influenced by an unsupported recommendation in the presentence investigation report. Without conducting any objective analytical tests of Cook, the probation officer concluded that Cook "could almost be considered a sociopath." The probation officer stated that Cook was a very dangerous individual and that he should be given the maximum 50-year sentence on the weapons charge. Cook argues that the probation officer's conclusions were unsupported by fact and that a determination that one is a sociopath or is dangerous should be based on more involved testing than was given Cook.

Cook also notes his lack of a criminal history, evidence that he was gainfully employed and supported Jeanette and his child, and evidence that he was drunk and possibly under the influence of other drugs at the time of the killing as factors which should have favored a more lenient sentence. Cook argues the court blindly accepted the probation officer's recommendation and imposed the maximum sentence. Cook further argues that the sentence on the weapons charge was excessive when compared to other cases in which a defendant was given a life sentence on a first degree murder charge and was also sentenced on a related weapons charge.

We find no abuse of discretion in the district court's sentencing. The court was able to make its own conclusions regarding Cook's dangerousness based on the evidence it saw and heard at trial, including Cook's own testimony. Cook does not demonstrate that the court's sentencing determination was unduly influenced by the opinions of the probation officer. Although the sentence was at the top of the range, considering the evidence and the nature of the killing in this case, we cannot say that the sentence was the result of an abuse of discretion. We therefore reject Cook's sixth assignment of error.

7. Ineffective Assistance of Counsel

As his seventh assignment of error, Cook asserts that he received ineffective assistance of counsel at trial and that his

counsel's deficient performance prejudiced his defense. Cook specifies the following instances of ineffective assistance of counsel:

> defense counsel's failure to object to testimony by Amy Hoffmeyer and Michelle Childs, counsel's inquiry regarding Cook's alleged prior violence toward women, counsel's failure to request limiting jury instructions, counsel's failure to object to an expert opinion regarding probable cause, failure to request a continuance regarding late-disclosed scientific evidence, and failure to object to certain conclusions and recommendations in the presentence investigation report.

[9] To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Leibhart, ante* p. 133, 662 N.W.2d 618 (2003). To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt. *Id.*

[10] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *Id.* The determining factor is whether the record is sufficient to adequately review the question. *Id.* The U.S. Supreme Court has recently observed that there may be instances where trial counsel's ineffectiveness is so apparent from the record or the deficiencies are sufficiently obvious that ineffective assistance of counsel claims are suited to resolution on direct appeal. *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003). The U.S. Supreme Court has also noted:

> Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable

> strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse.

Massaro, 538 U.S. at 505. In this regard, we have observed that if the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. Leibhart, supra.*

With respect to the numerous assignments of error involving claims of ineffective assistance of trial counsel, Cook emphasized at oral argument trial counsel's failure to object to certain testimony by Childs, who testified for the State shortly after Hornbacher. Without objection by defense counsel, Childs testified that the day following Stahlecker's killing, Hornbacher told her that Cook stated that he had had consensual sex with a woman and admitted to killing her. Cook argues that Childs' testimony regarding what Hornbacher told her was inadmissible hearsay and that as a result, defense counsel was ineffective for failing to object to such testimony. The State concedes that Childs' testimony was hearsay but argues that there was no prejudice to Cook because Childs' testimony was merely cumulative of Hornbacher's testimony regarding Cook's admission to the killing.

On the present record, we cannot say that failure to object to the testimony necessarily constituted deficient performance on the part of trial counsel. It is conceivable that trial counsel allowed Childs to testify without objection in order to emphasize the portion of her testimony in which Cook is said to have engaged in consensual sex in an effort to negate the underlying felony of first degree sexual assault with respect to the charge of felony murder. This approach would have been consistent with trial counsel's motion for directed verdict as to felony murder

based on Cook's claim that evidence of the underlying felony was insufficient to submit felony murder to the jury, an argument we have rejected *supra*. Trial counsel may have had other strategic reasons not apparent on this record such as the expectation of exploiting inconsistencies between Hornbacher's and Childs' testimony. The record in this direct appeal is not adequate for us to make a determination regarding the strategy employed by trial counsel or whether trial counsel was ineffective. We therefore make no determination with respect to this claim.

After reviewing each of Cook's other allegations of ineffective counsel, we conclude that the record on appeal is not adequate for this court to determine that counsel's assistance was ineffective. For each argument advanced by Cook, we find either that Cook has not provided sufficient evidence to establish that counsel's performance was deficient or that resolution of the argument requires an assessment of defense counsel's trial strategy, which requires an evaluation of matters outside the record before us on direct appeal. We therefore conclude that the record on direct appeal is not sufficient to adequately review these arguments, and because these matters have not been raised or ruled on at the trial level and may require an evidentiary hearing, we will not address these matters on direct appeal. See *State v. Leibhart, ante* p. 133, 662 N.W.2d 618 (2003).

8. Motions for Mistrial and for New Trial

As his eighth and final assignment of error, Cook asserts that the "many and varied" evidentiary errors in this case combined with the deficient performance of defense counsel created an inherently defective trial. Brief for appellant at 62. Cook argues that because of these deficiencies, the district court erred in overruling his motions for mistrial and for new trial. Cook provides little argument beyond the above assertions and does not specify what errors required the granting of mistrial or new trial.

[11] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002). Because we have found no merit in Cook's other assignments of error and the record on appeal does not allow us to determine whether Cook received

ineffective assistance of counsel, we do not find that Cook has established that his trial was inherently defective. We therefore find no merit in Cook's final assignment of error and conclude that the district court did not err in overruling Cook's motions for mistrial and for new trial.

VI. CONCLUSION

We conclude that each of Cook's assignments of error is either without merit or not susceptible to review on direct appeal. We therefore affirm Cook's convictions and sentences.

AFFIRMED.

DAVID ZANNINI ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS, V. AMERITRADE HOLDING CORP. ET AL., APPELLEES.

667 N.W.2d 222

Filed August 1, 2003. No. S-02-142.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Evidence: Records.** Unless the exhibit is marked, offered, and accepted, it does not become part of the record and cannot be considered as evidence in the case.
3. **Summary Judgment: Evidence: Records: Appeal and Error.** Exhibits which are not offered, marked, or received by the trial judge at the summary judgment hearing may not be considered on appeal.
4. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Evidence: Proof.** The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. That party must therefore produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
6. **Constitutional Law: Statutes.** Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state law that conflicts with federal law is invalid.

7. **Securities Regulation: Brokers: Claims.** In the absence of preemptive regulations, facets of investor claims involving the relationship between investors and their brokers; the bargains struck between investors and their brokers; and the efficacy of a broker's trading system, especially as compared to its representations regarding the same, are permitted to proceed in state court.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for further proceedings.

E. Virgil Falloon, of Falloon Law Office, and of Counsel, Herbert E. Milstein, Lisa M. Mezzetti, and Victoria S. Nugent, of Cohen, Milstein, Hausfeld & Toll, P.L.L.C., and Burton H. Finkelstein, Douglas W. Thompson, Jr., and Richard M. Volin, of Finkelstein, Thompson & Loughran, for appellants.

Robert J. Kriss and Adrienne L. Hiegel, of Mayer, Brown, Rowe & Maw, and Patrick B. Griffin and Richard P. Jeffries, of Kutak Rock, L.L.P., for appellees.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Appellants, David Zannini, Christopher Pitcher, Anthony Parente, and William Sigler, filed this purported class action on behalf of themselves as well as all other subscribers to the brokerage and securities clearing services offered by appellees, Ameritrade Holding Corp.; Ameritrade, Inc.; Ameritrade Clearing, Inc.; and Advanced Clearing, Inc. (collectively Ameritrade). Appellants' "Second Amended Class Action Complaint at Law" is the operative petition (petition). The focus of the petition taken as a whole is that Ameritrade failed to provide securities trading services as advertised or agreed to. In their petition, appellants allege, inter alia, that Ameritrade engaged in acts of fraudulent inducement, misrepresentation, and negligence; breached its subscriber agreements; and violated Nebraska's Consumer Protection Act, Neb. Rev. Stat. § 59-1601 et seq. (Reissue 1998), with regard to the brokerage services it provided appellants. The district court granted Ameritrade's motion for summary judgment and dismissed appellants' petition.

We conclude that the properly received evidence and the pleadings do not support the district court's order granting summary judgment. We reverse, and remand for further proceedings.

II. STATEMENT OF FACTS

Ameritrade is a retail discount securities brokerage firm which provides subscribers with opportunities to trade securities by a variety of methods, including by Internet, by automated telephone system, and by personally speaking to a broker on the telephone. Appellants allege that individuals subscribe to Ameritrade's services by entering into a contract.

Appellants, as Ameritrade subscribers, filed this purported class action against Ameritrade in the district court for Douglas County. The action has not been certified as a class action. In the petition filed September 10, 1999, appellants claim to represent a class of approximately 217,000 people who were Ameritrade subscribers during the time period of February 1, 1998, to May 10, 1999 (the class period). The petition, consisting of 90 numbered paragraphs, is divided into several sections, including "Nature of the Action," "Venue and Jurisdiction," "Class Action Allegations," and "Substantive Allegations," followed by seven separately identified "causes of action" which begin at paragraph 52. Each "cause of action" incorporates the previous allegations.

In paragraph 1 of the "Nature of the Action" section, appellants allege that they seek to recover damages caused by Ameritrade's violations of Nebraska's Consumer Protection Act and the common law. In paragraph 3 of the "Nature of the Action" section, appellants allege generally that Ameritrade's system was "overburdened, causing frequent inability to place trades and substantial delays in the placement and execution of trades." In paragraph 25 of the "Substantive Allegations" section, appellants allege that they entered into a contract with Ameritrade.

In paragraph 28 of the "Substantive Allegations" section, appellants allege, inter alia, that during the class period they

> encountered difficulties in placing trade orders via the internet[, that] the automated telephone trade services were not available[, and that] delays occurred when [they tried] to reach brokers. [Appellants] also experienced significant

> lag times as a result of Ameritrade's untimely execution of orders . . . .

Appellants allege that this delay resulted from an aggressive and successful marketing campaign in which Ameritrade's subscriber base increased dramatically and that Ameritrade's systems were unable to handle this growth. According to paragraph 41 of the "Substantive Allegations" section,

> The delays associated with placing and executing trades were the result of [Ameritrade's] emphasis on marketing and sales to increase the subscribership. Meanwhile, [Ameritrade was] neglecting Ameritrade's systems and existing subscribers because the systems could not handle the additional volume. [Ameritrade] at all relevant times knew of the problems and failed to adequately remedy the difficulties, warn subscribers of the difficulties, or adequately provide subscribers with the means by which to avoid such problems.

In paragraph 45 of the "Substantive Allegations" section, appellants allege that they have been "consistently unable to utilize Ameritrade's [s]ervices as a result of [Ameritrade's] overmarketing and failure to maintain adequate systems." Paragraph 45 contains four subsections in which it is alleged that each of the four named plaintiffs suffered financial loss with respect to particular trading orders identified therein.

Based upon these and other similar assertions, appellants set forth seven "causes of action" in their petition. In their first "cause of action," entitled "Fraudulent Inducement," appellants allege that Ameritrade made "material misrepresentations" and "failed to inform" appellants that the Ameritrade systems had "technological limitations which led to significant delays in *placing* and *executing* trades, affecting the terms of trades." (Emphasis supplied.) In their second "cause of action," entitled "Negligent Misrepresentation," appellants allege, inter alia, that Ameritrade negligently misrepresented to appellants that it was capable of allowing appellants to "place orders on-line or alternatively place orders via telephone in a timely manner without unreasonable delay," and further that Ameritrade misrepresented that its systems were "capable of quickly executing such trades" without delay. In the third enumerated "cause of action," captioned

"Breach of Contract and of the Implied Covenant of Good Faith and Fair Dealing," appellants allege that they each entered into subscriber agreements with Ameritrade and that Ameritrade breached those agreements by forcing appellants to "[experience] delays in placing trades [and experience] unreasonable lag times in Ameritrade's execution of trades." In their fourth "cause of action," appellants allege, generally, that Ameritrade engaged in unfair and deceptive practices in violation of Nebraska's Consumer Protection Act through material misrepresentations and false advertising. Appellants' fifth cause of action, entitled "Negligence," alleges, inter alia, that Ameritrade acted negligently through its misrepresentations concerning its ability to place and execute trade orders. The sixth and seventh "causes of action," labeled "Unjust Enrichment" and "Injunctive and Equitable Relief," respectively, do not constitute separate claims which appellants assert against Ameritrade, but, rather, set forth the nature of relief appellants seek.

We note that each "cause of action" contains a paragraph generally stating the following: "[Appellants] reallege each allegation contained in each of the paragraphs above as if fully set forth herein." As a consequence, each "cause of action" incorporates the general allegations and the allegations of the preceding "causes of action."

On October 10, 2000, Ameritrade filed its motion for summary judgment, urging summary judgment on four separate grounds. Ameritrade argued, restated, that appellants' claims (1) failed to state a cause of action for which relief may be awarded, (2) were "barred" by the Commerce Clause of the U.S. Constitution, (3) were without merit because there is no industry standard for "execution time" in terms of the deadline for executing a trade, and (4) were preempted under the Supremacy Clause of the U.S. Constitution.

Ameritrade's motion came on for hearing on December 13, 2000. During the summary judgment hearing, in support of its motion, Ameritrade's counsel offered and caused to be admitted into evidence two exhibits, exhibit 6, a Securities and Exchange Commission document describing the "best execution" rule, and exhibit 7, the affidavit of William Wood. Following the same hearing, appellants' counsel marked two exhibits, exhibits 8 and

9, but the record does not reflect that these additional exhibits were either offered or admitted into evidence. In an order entered January 3, 2002, the district court granted Ameritrade's motion for summary judgment, dismissing appellants' petition in its entirety. On February 1, 2002, appellants filed their notice of appeal.

III. ASSIGNMENTS OF ERROR

On appeal, appellants assign four errors. Appellants claim, renumbered and restated, that the district court (1) erred in granting Ameritrade's motion for summary judgment, based upon "inappropriate legal and evidentiary standards"; (2) improperly dismissed appellants' Consumer Protection Act claim; (3) erroneously dismissed appellants' negligence claim based upon the premise that appellants have a commercial relationship with Ameritrade; and (4) erroneously concluded that federal law preempted appellants' negligence claim.

IV. STANDARDS OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003); *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003). In appellate review of a summary judgment, the 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. *Bennett v. Labenz, supra.*

V. ANALYSIS

1. Summary Judgment and Record on Appeal

Before assessing the correctness of the district court's ruling on Ameritrade's motion for summary judgment, it is necessary to ascertain the scope of the record properly before the district court. The record reflects that during the hearing on Ameritrade's motion for summary judgment, Ameritrade's counsel offered and the district court admitted in evidence two exhibits, exhibits 6 and 7. The record further reflects that after the hearing was adjourned,

appellants "marked" two additional exhibits, exhibits 8 and 9. According to the record on appeal, however, these additional exhibits were neither offered nor admitted into evidence for purposes of the summary judgment hearing.

Furthermore, for the sake of completeness, we note that on April 30, several months after the district court's January 3, 2002, ruling on Ameritrade's motion for summary judgment and appellants' filing of this appeal, the parties entered into a stipulation with regard to the record. Although not "so ordered" or certified, the parties stipulated that certain documents, marked as exhibits 10 through 28, were "to be simply marked and made a part of the bill of exceptions" and that other documents, marked as exhibits 29 through 32, were "to be marked and made a part of the bill of exceptions and received into evidence."

[2,3] In connection with motions for summary judgment, we have stated that "[u]nless the [exhibit] is marked, offered, and accepted, it does not become part of the record and cannot be considered . . . as evidence in the case." *Altaffer v. Majestic Roofing*, 263 Neb. 518, 520-21, 641 N.W.2d 34, 37 (2002). We have also stated that exhibits which were not "offered, marked, or received by the trial judge at the summary judgment hearing . . . may not be considered on appeal." *Rodriguez v. Nielsen*, 259 Neb. 264, 269, 609 N.W.2d 368, 372 (2000). See, also, *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982) (stating that exhibits not received into evidence at trial court level do not form part of bill of exceptions on appeal).

In the instant case, the only exhibits marked, offered, and received in evidence by the district court at the hearing on Ameritrade's motion for summary judgment were Ameritrade's exhibits 6 and 7. Although "marked" as exhibits, the record on appeal does not reflect that exhibits 8 through 32 were either offered or admitted in evidence by the district court. Because these additional exhibits were neither offered nor admitted in evidence, they were not properly before the district court in its evaluation of the motion for summary judgment and are not part of the record which can be considered in this appeal in which we are asked to review the propriety of the district court's ruling on Ameritrade's motion for summary judgment. Accordingly, in considering appellants' assignments of error, the evidentiary

items before this court are exhibits 6 and 7. In connection with the preemption analysis, we also refer to appellants' petition. See *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003).

2. Evaluation of Ameritrade's Evidence in Support of Its Motion for Summary Judgment

[4,5] This court has stated that the primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law. See, *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002); *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. That party must therefore produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002).

From the evidence properly before both the district court and this court, we conclude that Ameritrade failed to demonstrate its entitlement to a judgment. Exhibit 6 is a document apparently prepared by the Securities and Exchange Commission, describing the "best execution" rule, which rule, discussed in greater detail below, requires a broker-dealer to use reasonable efforts to maximize the economic benefit to the client in each transaction. See *Newton v. Merrill, Lynch, Pierce, Fenner & Smith*, 135 F.3d 266, 270 (3d Cir. 1998), *cert. denied* 525 U.S. 811, 119 S. Ct. 44, 142 L. Ed. 2d 34. The document can best be characterized as informational and does not contribute substantively to establishing Ameritrade's entitlement to a judgment.

Exhibit 7 is the affidavit of Wood, dated October 10, 2000. Wood is identified as the executive vice president of Ameritrade, Inc. Wood's affidavit addresses the execution time of three orders which were alleged in paragraph 45 of the petition to have been

placed by appellants. Exhibit 7 also refers to two orders alleged to have been placed by appellants which were not executed.

Although Zannini complains about three trades in paragraph 45 of the petition, the Wood affidavit refers only to the execution of two. Although Sigler complains about the delay and difficulty in placing an order, the Wood affidavit speaks only to the time of execution after the order was placed. Although Parente complains about the delay in placing a "stop-order," the Wood affidavit speaks only to the time Ameritrade took to route the order to the market. Although Pitcher complains that his stop-order sales transaction at $104 per share on 1,000 shares of a certain stock was placed and remained unexecuted 10 minutes later, the Wood affidavit speaks only to the time Ameritrade took to route the order to the market "at the stop-limit price of $105-1/2 per share."

The Wood affidavit does not respond to all of the allegations in paragraph 45 of the petition, much less present evidence which would dispose of all the "causes of action" set forth in paragraph 52 et seq. In summary, Ameritrade has failed to properly produce evidence demonstrating its entitlement to judgment. See *Newman v. Thomas, supra.*

3. Fifth "Cause of Action," Negligence: Best Execution and Operational Capability

Appellants contend on appeal that the district court erred in dismissing their fifth "cause of action." Despite the absence of an evidentiary record supporting its entitlement to summary judgment, Ameritrade nevertheless argues on appeal that based on the petition, the district court did not err in entering summary judgment in its favor as to the fifth "cause of action," entitled "Negligence." Ameritrade argues that on the face of the petition, this "cause of action" can be generally characterized as claiming that Ameritrade failed in its duty to satisfy the "best execution" rule and failed to meet standards of operational capability. Ameritrade states that appellants are unable to establish their claims relative to best execution and that their claims relative to operational capability are preempted by federal law. Given the record and language of the petition, we agree with appellants that the district court erred in dismissing the fifth "cause of action."

(a) "Best Execution" Rule

The fifth "cause of action" appears to involve the "best execution" rule, which concerns the manner in which a broker-dealer executes a client's trade.

> The duty of best execution, which predates the federal securities laws, has it roots in the common law agency obligations of undivided loyalty and reasonable care that an agent owes to his principal. Since it is understood by all that the client-principal seeks his own economic gain and the purpose of the agency is to help the client-principal achieve that objective, the broker-dealer, absent instructions to the contrary, is expected to use reasonable efforts to maximize the economic benefit to the client in each transaction.
>
> The duty of best execution thus requires that a broker-dealer seek to obtain for its customer order the most favorable terms reasonably available under the circumstances.

(Footnote omitted.) *Newton v. Merrill, Lynch, Pierce, Fenner & Smith*, 135 F.3d 266, 270 (3d Cir. 1998).

In addition to price, a number of other terms are relevant to best execution, including "the size of the order; . . . the speed of execution available on competing markets; . . . the trading characteristics of the security; . . . the availability of accurate information comparing markets and the technology to process such data; . . . the availability of access to competing markets; and . . . the cost of such access." Joseph M. Furey and Beth D. Kiesewetter, *On-Line Broker-Dealers: Conducting Compliance Reviews in Cyberspace*, 56 Bus. Law. 1461, 1475 (2001). See, also, *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d at 270 n.2.

Ameritrade asserts that the merits of a best execution claim must be judged on an individual order or trade basis and that because appellants refuse to identify or provide the particulars as to any trade, they cannot succeed on this theory. In making its assertion, Ameritrade relies on information, evidently obtained as the result of discovery, not properly in the record and therefore not properly before the district court or this court. Referring to the petition generally and paragraph 45 in particular, we note that appellants have identified and complained about specific orders. Assuming that Ameritrade is accurate in its assertion that

the best execution claims must be established by evidence of specific orders, and given the allegations in the petition regarding specific orders, we cannot say at this stage on this record that appellants' claims involving best execution are impossible of proof. Accordingly, we reject Ameritrade's argument.

(b) Operational Capability

On appeal, Ameritrade argues that to the extent that appellants' fifth "cause of action," entitled "Negligence," is based on the allegation that Ameritrade failed to meet a certain level of operational capability, such claim was properly dismissed by virtue of the district court's ruling in favor of Ameritrade on its motion for summary judgment. Ameritrade argues that claims involving operational capability are preempted by federal law and, thus, that dismissal of the fifth "cause of action" was proper. As we understand Ameritrade's assertion, its preemption argument is limited to claims based on operational capability as alleged in the fifth "cause of action." In this connection, we specifically make no comment regarding the potential for preemption as to any other "cause of action." On this record, we reject Ameritrade's assertion of preemption as to the fifth "cause of action" and, therefore, agree with appellants that the district court's dismissal of the fifth "cause of action" was error.

It has been proposed that a securities firm's operational capability includes the ability "to assure the prompt and accurate entry of customer orders, execution, comparison, allocation, clearance and settlement of securities transactions, the maintenance of customer accounts, and the delivery of funds and securities." Operational Capability Requirements of Registered Broker-Dealers and Transfer Agents and Year 2000 Compliance, 64 Fed. Reg. 12127, 12128 (March 11, 1999) (proposed rules).

The parties direct the court to 15 U.S.C. § 78*o*(b)(7) (2000) as the recent source of federal operational capability. This section reads in relevant part as follows:

> No registered broker or dealer or government securities broker or government securities dealer registered (or required to register) under section 78*o*-5(a)(1)(A) of this title shall effect any transaction in, or induce the purchase or sale of, any security unless such broker or dealer meets

> such standards of operational capability and such broker or dealer and all natural persons associated with such broker or dealer meet such standards of training, experience, competence, and such other qualifications as the [Securities and Exchange] Commission finds necessary or appropriate in the public interest or for the protection of investors.

The parties assert, and the court understands, that federal rules and regulations defining the standards of operational capability as noted in 15 U.S.C. § 78*o*(b)(7) have been considered but were not adopted during the class period.

[6] Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state law that conflicts with federal law is invalid. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002). "A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). There are three types of federal preemption: express, implied, and conflict preemption. *Eyl v. Ciba-Geigy Corp., supra.*

Express preemption occurs when the U.S. Congress explicitly declares federal legislation to have a preemptive effect. It can also occur when a federal agency, acting within the scope of its powers conferred by Congress, expressly declares an intent to preempt state law. *Id.*

Even without an express declaration from Congress or a federal agency, federal preemption may be implied, and state law claims may be preempted, when Congress is determined to have intended federal law to " 'occupy the field' " to the exclusion of state law claims. *Crosby v. National Foreign Trade Council*, 530 U.S. at 372. Finally, to the extent state law conflicts with a federal statute, the state law is "naturally preempted." *Id.* "We will find preemption where it is impossible for a private party to comply with both state and federal law . . . ." *Id.* Ameritrade indicates in its appellate brief that its preemption argument is founded on conflict preemption.

Appellants argue that the concept embodied in federal "operational capability" has long been recognized and coexists with state law principles. Brief for appellants at 30. Appellants further argue that in the absence of explicit federal rules and regulations

regarding "operational capability," their claims concerning Ameritrade's alleged failure to meet operational capability during the class period are not preempted and that the district court erred to the extent it stated to the contrary.

Ameritrade responds that by virtue of preemption, any standard of operational capability imposed as a result of a state court's ruling in this case would conflict with federal precepts regarding operational capability or federal standards to be set under 15 U.S.C. § 78*o*(b)(7), and that the state court should, therefore, forebear ruling on appellants' claims pertaining to operational capability. In this regard, Ameritrade relies on cases such as *Guice v. Charles Schwab & Co., Inc.*, 89 N.Y.2d 31, 674 N.E.2d 282, 651 N.Y.S.2d 352 (1996), *cert. denied* 520 U.S. 1118, 117 S. Ct. 1250, 137 L. Ed. 2d 331 (1997).

This court finds *Guice* distinguishable. In *Guice*, the New York Court of Appeals determined that although the plaintiffs-investors' complaints regarding order flow payments were alleged as common-law causes of action, such claims were preempted by the 1975 amendments to the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (2000), and implementing regulations promulgated by the Securities and Exchange Commission. The existence of explicit commission regulations was critical to the New York court's analysis and its conclusion that New York common law was preempted because it could interfere with the regulations which exhibited the method by which the federal government sought to reach its stated goal regarding order flow. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987). Compare *Roskind v. Morgan Stanley Dean Witter & Co.*, 80 Cal. App. 4th 345, 95 Cal. Rptr. 2d 258 (2000), *cert. denied* 531 U.S. 1119, 121 S. Ct. 868, 148 L. Ed. 2d 781 (2001) (stating that in absence of federal rules or regulations, plaintiff-investor action pertaining to trading ahead brought under California unfair competition law and breach of fiduciary duty not preempted).

Although decided under other federal statutory provisions, we find cases such as *Abada v. Charles Schwab & Co., Inc.*, 127 F. Supp. 2d 1101 (S.D. Cal. 2000), *Spielman v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 01 Civ. 3013(DLC), 2001 WL 1182927 (S.D.N.Y. Oct. 9, 2001), *appeal dismissed* 332 F.3d

116 (2d Cir. 2003) (appeal of district court's remand order based on perceived lack of federal jurisdiction dismissed), and *Shaw v. Charles Schwab & Co., Inc.*, 128 F. Supp. 2d 1270 (C.D. Cal. 2001), more instructive.

Abada involved an investor's allegations under state law that defendant's online broker failed to timely place his order contrary to the broker's advertisements. In *Abada*, the federal court rejected the defendant's arguments that the claim was solely subject to the federal Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737, 756 (1995) (codified in part at 15 U.S.C. §§ 77z-1 and 78u (Supp. V 1999)). The case was remanded to the state court. The court observed that "any loss suffered by plaintiff was the result of [the defendant]'s technical inability to process an order request" and that the alleged misrepresentation by the defendant did not affect the value of the security but "merely involved the relationship between [the defendant] and its customers." 127 F. Supp. 2d at 1103.

Spielman involved an investor's allegations under six state law causes of action that the defendant misrepresented transaction fees. In *Spielman*, the federal court rejected the defendant's argument that the case was preempted under the federal Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78bb(f) (2000). The case was remanded to the state court. The court observed that "the transaction fees charged by [the defendant] affect the cost of trading, [and] this cost is part of [the defendant]'s bargain with its accountholders." *Spielman v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2001 WL 1182927 at *5. In this regard, the court observed that the plaintiff's lawsuit did not involve the value of any particular security, compare *In re Ames Dept. Stores Inc. Stock Litigation*, 991 F.2d 953 (2d Cir. 1993), nor did it relate to the quality of the investment, compare *Suez Equity Investors v. Toronto-Dominion Bank*, 250 F.3d 87 (2d Cir. 2001), both areas traditionally reserved for federal court.

Shaw involved plaintiffs-investors' allegations under state law that the defendant's broker's commission rate for Web-based trading was improper and challenged the efficacy of broker's Web-based trading system as being deficient. In *Shaw*, the federal court rejected the defendant's arguments that the plaintiffs' claims were preempted under the Securities Litigation Uniform

Standards Act of 1998. The case was remanded to the state court. The court observed that the defendant's actions "induced [the plaintiffs] to select Defendant as their broker rather than some other brokerage firm" and that the "claims relate to the vehicle by which [the defendant] delivered securities." 128 F. Supp. 2d at 1274.

[7] The court is aware that the federal provisions and state laws at issue in *Abada*, *Spielman*, *Shaw*, and other similar cases are not precisely the same as the ones raised herein. However, we take away from such cases the knowledge that in the absence of preemptive regulations, facets of investor claims involving the relationship between investors and their brokers; the bargains struck between investors and their brokers; and the efficacy of a broker's trading system, especially as compared to its representations regarding the same, have been permitted to proceed in state court. The allegations of the fifth "cause of action" which incorporate all previous allegations appear to bear on each of these facets. With due regard to 15 U.S.C. § 78*o*(b)(7) as it relates to operational capability, and in the absence of a record which may clarify appellants' true claims, we are not persuaded that the issues raised by the allegations in the petition's fifth "cause of action," as they are currently pled are preempted.

It has been observed that a court should "not assume that Congress exercises its Supremacy Clause power lightly . . . and [it] must be 'certain of Congress' intent' before [it] find[s] that federal law overrides the balance between state and federal powers." *Missouri Mun. League v. F.C.C.*, 299 F.3d 949, 953 (8th Cir. 2002) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991)), *cert. granted* No. 02-1386, 2003 WL 1609505 (U.S. June 23, 2003). Given the law and record before us, we cannot make the preemption assumption urged by Ameritrade. Accordingly, we conclude that the district court erred in granting Ameritrade's motion for summary judgment on all "causes of action," including the fifth "cause of action."

VI. CONCLUSION

The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled. See *Hogan*

v. Garden County, 264 Neb. 115, 646 N.W.2d 257 (2002). The summary judgment procedure thus encompasses the opportunity of an evidentiary hearing at which the proponent of the motion for summary judgment may demonstrate by the receipt of evidence its entitlement to judgment. The record properly made in this case does not demonstrate Ameritrade's entitlement to judgment.

Accordingly, we agree with appellants that the evidence and the pleadings do not support the district court's grant of summary judgment. Therefore, we reverse the district court's judgment and remand the cause for further proceedings. We decline to consider appellants' remaining assignments of error, as they are unnecessary to the disposition of the appeal. See *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000). The order of the district court is reversed, and the matter is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. TERRELL R. CANNON, RESPONDENT.

666 N.W.2d 734

Filed August 1, 2003. No. S-02-490.

1. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
2. ____. The following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
3. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
4. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
5. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the

attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.

6. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.

Original action. Judgment of disbarment.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for respondent.

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

PER CURIAM.

INTRODUCTION

On May 24, 2002, amended formal charges (formal charges) were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Terrell R. Cannon. Five counts were alleged. The alleged facts surrounding each count are set forth below in this opinion. Respondent's answer disputed the allegations. A referee was appointed and heard evidence. The referee filed a report on November 25, 2002. With respect to count I, the referee concluded that respondent had engaged in misconduct and failed to act competently in violation of the Code of Professional Responsibility, Canon 1, DR 1-102(A)(1) and (5), and Canon 6, DR 6-101(A)(2) and (3). With respect to count II, the referee concluded that respondent had engaged in misconduct and failed to act competently in violation of DR 1-102(A)(1), (4), and (5), and DR 6-101(A)(3). With respect to count III, the referee concluded that respondent had engaged in misconduct, paid for a recommendation of his services, improperly contacted prospective clients, and divided fees with a nonlawyer, in violation of DR 1-102(A)(1) and (2); Canon 2, DR 2-103(A); Canon 2, DR 2-104(A)(1), (2), and (3); and Canon 3, DR 3-102(A)(1), (2), and (3). With respect to count IV, the referee concluded that respondent had engaged in misconduct and charged an unwarranted fee in violation of DR 1-102(A)(1) and (4) and Canon 2, DR 2-106(A). With respect to count V, the referee concluded that respondent had engaged in misconduct,

improperly withdrawn from representation, neglected a matter, and failed to represent a client zealously in violation of DR 1-102(A)(1) and (4); Canon 2, DR 2-110(A)(1) and (2); DR 6-101(A)(3); and Canon 7, DR 7-101(A)(2).

The referee recommended that respondent be suspended from the practice of law for 2 years followed by 2 years' probation. Neither relator nor respondent filed exceptions to the referee's report, and relator filed a motion for judgment on the pleadings. In an order entered January 29, 2003, this court sustained in part, and in part overruled the motion. We adopted the referee's findings of fact, and we sustained that portion of the motion which sought a determination that respondent had violated the Code of Professional Responsibility provisions set forth in the formal charges. We overruled the relator's motion to the extent it sought the court's approval of the referee's proposed discipline, and we ordered the parties to submit briefs on the issue of the appropriate discipline to be imposed on respondent.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 18, 1981. He has practiced in Lincoln. Formal charges were filed on May 24, 2002. The referee was appointed on July 10. A hearing was conducted on October 10, 11, and 15. Evidence regarding the formal charges and two prior reprimands was received. The referee filed his report on November 25.

The substance of the referee's findings with respect to count I may be summarized as follows: A.W. hired respondent in October 1998 to institute a paternity action. Although A.W. signed the petition in August 1999, respondent did not file the petition until October 29, 1999, after he had received notice from the Counsel for Discipline's office of A.W.'s grievance. The petition was styled as a petition in intervention, with A.W. as the intervenor. There was, however, no pending paternity action, a fact respondent failed to investigate. The petition also alleged that paternity and child support had been established, when, in fact, neither had been legally determined. The trial court denied respondent's request to amend the petition, and A.W. terminated respondent's representation. At the referee's hearing, respondent attempted to

excuse his behavior and his delay in filing the petition by claiming that A.W. had failed to give him the address of the putative father on a timely basis. The referee determined that this claim was patently false, however, as A.W. provided respondent with the putative father's address when she completed an initial questionnaire for respondent, and the putative father was later served with process at this same address months after the petition was filed.

The substance of the referee's findings with respect to count II may be summarized as follows: Sharon Selvage hired respondent to represent her in a divorce action. After respondent filed the action on January 11, 2000, counsel for Selvage's husband mailed to respondent a voluntary appearance, which respondent failed to file, but instead mistakenly forwarded to Selvage. Service of process was not perfected, and no activity occurred in the case. Therefore, on or about October 12, the district court automatically dismissed the action without prejudice. After discovering the dismissal, respondent filed a "Notice of Hearing," purporting to set two motions for hearing, a motion to reinstate and a motion to set case for trial. Respondent failed, however, to file either motion.

A hearing was held on October 27, 2000, and the district court judge refused to reinstate the case. On November 6, respondent wrote to Selvage:

> As you are aware, we were scheduled to have a hearing on October 27, 2000 . . . on the divorce, and [the husband's] attorney had filed a Voluntary Appearance, but for some unknown reason the record and the court did not have a copy of it, thus [the district court] dismissed the case without prejudice, allowing us to re-file the action again.
>
> I am in the process of re-filing your Petition [and] should you have any questions or objections, please contact me as soon as possible, if not I will re-file it omn [sic] or before November 15, 2000.

The referee concluded that this letter contained several misstatements. First, Selvage's husband's attorney had not filed the voluntary appearance. Second, the letter implied the action had been dismissed on October 27, 2000, as a result of the hearing, when, in fact, it had been automatically dismissed several weeks earlier. Finally, respondent could not simply refile the petition, but had to draft a new one to be signed by Selvage.

In December 2000, Selvage executed a new petition prepared by respondent and returned the same to him. Respondent told Selvage that he filed the new petition in December. On February 28, 2001, however, respondent contacted Selvage and admitted that the new petition had actually been lost and that he needed her to reexecute a petition. On March 10, Selvage received the replacement petition in the mail. She subsequently dismissed respondent as her attorney.

The substance of the referee's findings with respect to count III may be summarized as follows: Beginning in 1993 or 1994 and continuing until 1999, respondent had a fee-splitting agreement with Hoang Nguyen, a Vietnamese national who was not an attorney, pursuant to which respondent shared fees with Nguyen in exchange for Nguyen's directing Vietnamese clients to respondent, which clients were previously unknown to respondent. Nguyen worked out of respondent's office on North 27th Street in Lincoln, and Nguyen paid a portion of the rent and utilities for the office. The referee identified the following specific examples of respondent's fee-splitting arrangement with Nguyen:

1. On August 17, 1999, respondent settled a case for Cuc Kim, receiving a fee of $2,446.66. On that same day, respondent paid Nguyen $1,233.33, which Nguyen testified was for the Kim case.

2. In October 1999, respondent received a fee in the amount of $3,466.66 in the Son Do case. On October 2, respondent paid Nguyen $1,877.33, which Nguyen testified was for the Do case.

3. Respondent received a fee in the amount of $9,000 for the Van Bui case. On January 19, 1999, respondent paid Nguyen $5,371.25, which Nguyen testified was for the Bui case, including expenses.

4. Respondent paid Nguyen a total of $29,058.49 in 1997.

The above evidence and the fact that respondent had no explanation as to "virtually any payment that he made" to Nguyen led the referee to the conclusion that respondent had a fee-splitting arrangement with Nguyen. At the hearing, in response to this evidence, respondent claimed that he had been "set up" by Nguyen. The referee concluded, however, that he could find no credible evidence of a setup, in particular noting that Nguyen's fee-splitting arrangement with respondent ended in the fall of 1999 and that Nguyen did not contact the Counsel for

Discipline's office until May 2000, after respondent refused to provide Nguyen with a 1099 tax form for 1999.

The substance of the referee's findings with respect to count IV may be summarized as follows: On January 11, 2001, Anh Pham and Thang Tran hired respondent to represent them with regard to an automobile accident. Shortly thereafter, they hired a new attorney to represent them with regard to the same accident. On or about January 24, Pham sent notice to respondent that she was terminating his representation. On or about March 29, respondent sent a notice of attorney's lien to the insurance company which insured the driver who had injured Pham and Tran, claiming entitlement to $500 for services rendered to Pham. The new attorney later found out about the lien and asked respondent about it. In a letter dated August 8, 2001, respondent claimed that Pham and Tran had come to his office and signed contracts, that his office had sought out medical care for Pham and Tran and scheduled appointments, that his office had handled a total of five calls from Pham and Tran, and that his office had handled the property damage. Ultimately, the new attorney paid respondent $200 to settle the matter.

The referee concluded that the August 8, 2001, letter was not accurate. The new attorney, not respondent, had handled the property damage claim. Respondent had never met Pham, and at the referee's hearing, respondent admitted that the majority of the "work" on the case was unkept appointments.

The substance of the referee's findings with respect to count V may be summarized as follows: On or about July 20, 1998, Melvin Northrup, Jr., retained respondent to represent him in a workers' compensation claim against Northrup's former employer. Respondent filed the action, and trial was later held on the petition. Following the trial, the Workers' Compensation Court ruled against Northrup. Pursuant to Northrup's direction, respondent filed an appeal. In a letter to Northrup, respondent assured Northrup that he would deliver his "top most performance to win" the appeal. Respondent failed, however, to file a brief or to appear at the review hearing. Respondent notified the court that he would not attend the review hearing but did not advise Northrup. The appeal was denied, and respondent failed to notify Northrup of the outcome of the appeal.

In his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules recited above. With respect to the discipline which ought to be imposed for the foregoing violations, and considering the mitigating and aggravating factors the referee found present in the case, the referee recommended a 2-year suspension followed by 2 years' probation.

In view of the fact that neither party filed written exceptions to the referee's report, on December 9, 2000, relator filed a motion under Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). In an order filed January 29, 2003, this court sustained in part, and in part overruled the motion. We determined that since neither party had filed exceptions to the referee's report, the referee's factual findings were "final and conclusive," and we sustained that portion of the motion which sought a determination that respondent had violated the Code of Professional Responsibility. Accordingly, we found that each of the five counts alleged in the formal charges was supported by clear and convincing evidence, and we concluded that by virtue of respondent's conduct, respondent had violated DR 1-102(A)(1), (2), (4), and (5); DR 2-103(A); DR 2-104(A)(1), (2), and (3); DR 2-106(A); DR 2-110(A)(1) and (2); DR 3-102(A)(1), (2), and (3); DR 6-101(A)(2) and (3); and DR 7-101(A)(2).

To the extent the relator's motion sought this court's approval of the referee's proposed discipline, the motion was overruled. We reserved the issue of discipline to this court, and we ordered the parties to file simultaneous briefs on the issue of the appropriate discipline, including but not limited to disbarment, to be imposed against respondent. The parties having filed their briefs and oral argument having been heard, the cause is now ready for final disposition.

ANALYSIS

[1,2] We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the

circumstances.'" *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

[3,4] With respect to the imposition of attorney discipline in an individual case, we have stated that "'[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.'" *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). See, also, *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Thompson, supra*; *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

[5] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Thompson, supra*; *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002); *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

The evidence in the present case establishes a lengthy pattern of numerous and serious offenses including the mismanagement of cases to the detriment of clients. With respect to count III involving fee-splitting, notwithstanding the testimony and documentary evidence which established this charge, respondent continued to deny the allegations and claimed he was "set up." Additionally, the referee's report determined that with regard to disputed evidence presented at the hearing, respondent's

testimony was "not credible," and that respondent "was prone to blame his failings upon his office staff." We have previously recognized that a respondent's lack of candor during attorney disciplinary proceedings "demonstrates neither a present nor a future fitness to continue in the practice of law." *Denton*, 258 Neb. at 610, 604 N.W.2d at 839. Additionally, a lawyer may not avoid responsibility for misconduct by hiding behind an employee's behavior and may not avoid a charge of unprofessional conduct by contending his or her employees are incompetent. *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989). See *State ex rel. Counsel for Dis. v. Petersen*, 264 Neb. 790, 652 N.W.2d 91 (2002) (Gerrard, J., concurring in the result).

With respect to the appropriate discipline to be imposed, respondent focused almost entirely on the fee-splitting count and so circumscribed urged this court to accept the referee's recommendation of 2 years' suspension followed by 2 years' probation. In this regard, this court is aware that discipline imposed for cases involving fee-splitting has been variable in other jurisdictions, running from 6-months' suspension, see *In the Matter of H. L. Trauffer*, 272 Ga. 499, 532 S.E.2d 96 (2000), to disbarment, see *Matter of Disciplinary Action Against Nassif*, 547 N.W.2d 541 (N.D. 1996). We emphasize that the present case is not one involving formal charges limited to a single count of fee-splitting, but, rather, encompasses five counts involving a variety of violations, in which many of the underlying acts occurred over a timeframe during which respondent was already subject to the attorney disciplinary process occasioned by two previous attorney discipline cases. Although we take the fee-splitting disciplinary jurisprudence in other cases into account, we must nevertheless focus on the proper discipline to be imposed herein which results from five separate and varied counts which were preceded by two prior reprimands.

[6] This court has consistently noted that cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. *State ex rel. NSBA v. Miller*, 258 Neb. 181, 602 N.W.2d 486 (1999). In this regard, we note that the record reflects that respondent has been involved in two prior disciplinary proceedings. In 1997, respondent received a private reprimand for violating DR 6-101(A)(3)

and Canon 9, DR 9-102(A)(1) and (2), (B)(3) and (4), and (C)(1). With regard to these rule violations, respondent was found to have commingled personal and private funds in his attorney trust account and to have paid personal expenses from that account. Respondent was also found to have failed to account for or distribute interest earned on his attorney trust account.

In 1999, respondent received another private reprimand. In this second disciplinary proceeding, it was determined that respondent violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), and DR 7-101(A)(2) when he failed to maintain complete and accurate records of client proceeds and distributed advertising materials that could have been misleading and could have created in the reader an unjustified expectation concerning respondent's legal services.

In the instant case, we acknowledge that a

> judgment of permanent disbarment is a most severe penalty, as anyone who is dependent upon some special skill or knowledge for his own livelihood will quickly recognize if he contemplates for a moment the impact of being deprived by judicial fiat of the use of that skill and knowledge.

State ex rel. Nebraska State Bar Assn. v. Cook, 194 Neb. 364, 387, 232 N.W.2d 120, 132 (1975). When we balance, however, the severity of respondent's current rule violations, involving repeated acts of neglect and a fee-splitting arrangement with a nonlawyer that was ongoing for at least 5 years, with the cumulative nature of respondent's actions, the need to protect the public, the need to deter others from similar conduct, the reputation of the bar as a whole, and respondent's privilege to practice law, we can only conclude that the appropriate judgment is to disbar respondent. See *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000).

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. We have also considered respondent's lack of candor during the disciplinary process and his two prior disciplinary proceedings. Upon due consideration, the court rejects the referee's recommendation and finds instead that respondent should be disbarred.

CONCLUSION

It is the judgment of this court that respondent should be disbarred from the practice of law. We therefore order that respondent be disbarred effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

PERRY LUMBER COMPANY, INC., APPELLEE, V. DURABLE SERVICES, INC., APPELLANT.

667 N.W.2d 194

Filed August 1, 2003. No. S-02-709.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
2. **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.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from 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.
4. **Expert Witnesses.** The standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), are used to evaluate the admissibility of expert opinion testimony.
5. ____. The level of inquiry in a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), may vary depending upon the nature of the expert testimony challenged.
6. **Trial: Expert Witnesses.** Once the validity of the expert's reasoning or methodology has been satisfactorily established, any remaining questions regarding the manner in which that methodology was applied in a particular case will generally go to the weight of such evidence.
7. **Trial: Evidence.** Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. It is not essential that conditions existing at the time of the experiment be identical with those existing at the

> time of the occurrence, but the conditions should be essentially similar, that is, similar in all those factors necessary to make the comparison a fair and accurate one. The lack of similarity regarding the nonessential factors then goes to the weight of the evidence rather than to its admissibility.

Appeal from the District Court for Phelps County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded for a new trial.

Jeffrey H. Jacobsen and William T. Wright, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, for appellee.

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

STEPHAN, J.

Durable Services, Inc. (Durable) appeals from an order of the district court for Phelps County overruling its motion for new trial after a jury verdict awarding damages to Perry Lumber Company, Inc. (Perry), in this civil action. Durable contends that the trial court erred in refusing to allow its expert witness to testify regarding the results of a test he conducted in the process of formulating his expert opinion.

BACKGROUND

Perry filed this action against Durable to recover damages which resulted from a January 21, 1999, fire on Perry's premises. Perry claimed that the fire was caused by Durable's improper construction and installation of heating and air-conditioning improvements made on Perry's premises in approximately December 1992. Specifically, Perry claimed that Durable was negligent in improperly constructing and installing duct heaters in the system. Perry asserted theories of recovery based upon negligence, breach of implied warranty, and breach of contract and requested damages in the amount of approximately $1.3 million.

On the second day of trial, Perry presented the expert testimony of Samuel Wineman during its case in chief. Wineman is a mechanical engineer with 43 years' experience in the field of commercial heating, ventilating, and air-conditioning systems. Wineman testified that ductwork is insulated to absorb sound

and offer thermal insulation. The insulation can be used either inside or outside the ductwork. In his opinion, however, interior insulation is properly used only when sound reduction is required. He testified that interior duct insulation is rough and absorbent and has a tendency to capture and hold particles which make the insulation more combustible. Wineman further testified that interior duct insulation can become disconnected from the lining and blow downstream within the ductwork, where it can come into contact with a duct heater and burn. For these reasons, Wineman opined that interior duct insulation is not safe to use with electric duct heaters, even though the use is allowable under applicable codes.

Wineman testified that he had personally conducted no tests to determine whether the interior duct insulation used in the Perry installation was combustible. He noted, however, that an industry standard test known as the Steiner test is performed on insulation. This test utilizes a fireproof tunnel of approximately 2 by 2 by 25 feet, and the insulation to be tested is laid in the tunnel. Fire is then ignited at one end by a gas jet at a given temperature, and it is observed how far the flame will spread over the insulation and what pattern the flame and smoke make. Wineman testified that the industry test indicates that insulation very similar to that used in the Perry ductwork burns approximately 25 percent of the amount that red maple burns. Wineman noted that the duct insulation used in the Perry project was made of slightly different components than the current insulation manufactured by the same manufacturer, although both had the same "flame spread" rating of 25 percent. He testified that the fact that the duct insulation in the Perry project had 7 years of accumulated dust would increase its flame spread rating.

During his direct examination by Perry's counsel, Wineman was asked to describe testing conducted on duct insulation by Durable's expert, Lloyd Brown, based upon his review of Brown's deposition. Wineman stated that Brown "had the insulation in open air, and he ignited one end with a torch and put — was — and it didn't burn." Wineman testified that this test differed from the Steiner test and that it could not give an accurate indication of the flame spread of the insulation. Wineman stated his opinion that the test was not accurate and did not duplicate

the circumstances of the Perry fire because it was done outside the ductwork, there was no continual source of ignition, and there was no airflow to feed oxygen. Wineman subsequently testified that in his opinion, the Perry fire was caused when a piece of interior insulation broke loose inside the ductwork, came in contact with an electric duct heater, and began burning. He testified that the coils on the duct heater reach temperatures of approximately 900 degrees Fahrenheit.

Brown, who holds a doctorate in electrical engineering and is a licensed professional engineer with approximately 30 years' experience in fire investigation, testified as an expert witness for Durable during its case in chief on the fourth day of trial. He stated that he obtained a sample of the interior insulation used in the Perry ductwork from the manufacturer and learned that only minor changes had been made to the composition of the insulation in the last 30 years, with no change in its fire rating.

Brown testified that insulating the interior of ductwork, instead of the exterior, is more efficient and results in less heat loss. He further testified that interior lining helps to avoid accumulation of water during cooling and helps absorb sound. Brown disagreed with Wineman's opinion that it was improper to use interior duct insulation in a system with electric heat ducts. Brown further testified that the temperature of the coils in the heat ducts varies depending upon the airflow; with no airflow, the temperature can be 1,200 or 1,400 degrees Fahrenheit, but with airflow, the temperature is about 300 or 400 degrees Fahrenheit.

During direct examination, Brown was asked whether he conducted any tests to determine if interior duct insulation would work in the Perry system, and he answered in the affirmative. At that point, the jury was excused and the court announced that it would conduct "what could be termed a Daubert hearing" because Perry's counsel had "alerted" the court that "he feels that the test run by this expert will not meet the standards of Daubert." See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The objection or comment which apparently prompted the hearing does not appear in the record. In response, Durable's counsel stated for the record that the "objection" was raised only on the morning of Brown's testimony and that two photographs depicting Brown's test had

previously been shown to the jury during opening statements without objection.

Out of the presence of the jury, Brown then testified that he attempted to determine if the insulation would burn by hanging the insulation in his laboratory and placing a lighted blow torch at the bottom of the insulation. He testified that based on the color of the flame, the temperature was 1,200 to 1,400 degrees. The flame caused the insulation to melt and disintegrate, but it would not burn. Brown further testified that his test would have exceeded any conditions the insulation would have encountered in the heating unit. He specifically testified that putting airflow on the flame would have caused it to cool. He also testified that he had more oxygen in his laboratory than he would in a duct, so the insulation would be more likely to burn in open air. He noted that the test could not have been any more severe on the material.

Brown testified that he had discussed his test methodology with another fire investigator, but he was unaware of any published peer review. He opined that there was "zero possibility of an error" in his test. He admitted that he had not done other tests on insulation. Brown further testified that any dust or lint on the insulation would have simply burned off and not affected his test.

After Brown's testimony, which the district court characterized as an "offer of proof," the court asked Perry's counsel to state his objection to Brown's testifying that he had put the insulation to a blow torch. Counsel objected on grounds that the test was not scientific and that it did not accurately reflect the conditions in this case. The court refused to allow Brown to testify regarding his test, stating:

> I guess . . . what I'm having trouble with is under Daubert you have to have "the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation." We don't know if the material he used was one of the same age as the material that burned. We don't know if the temperature in the duct was the same as the temperature in his office. We don't know how much oxygen was in the duct compared to the oxygen in his office. I don't think this meets — I know what you're saying about it just being a common sense test, but I think Daubert requires if you're going to put in expert testimony, then it's got to be

> expert testimony, not common sense. It's expert testimony. . . . And I'm going to exclude the evidence on him putting the blow torch to it because we don't have any evidence it's the same temperature, same conditions. I don't think it meets the standards of Daubert, and so I'm going to rule that you cannot present that evidence to the jury.

In response to defense counsel's request for clarification of its ruling, the court stated: "You can ask [Brown] if he ran a test, yes, no. You can ask him if based on his expert opinion whether — you can ask him — you can't ask him about the fact he put a blow torch to it and it wouldn't burn." The court further stated that defense counsel would be permitted to ask Brown if the insulation would burn. Perry's counsel then stated that he would have a foundational objection to that question. After hearing additional argument, the court ruled:

> I'll let him state his opinion because he said he looked at all the other evidence, and so he has been qualified as an expert in this area based on his experience. And he is entitled to express his opinion. You just cannot bring up that test because I'm ruling that this test is not scientific and does not conform with Daubert.

When Brown's direct examination resumed in the presence of the jury, he testified that the insulation was made of fiberglass and that fiberglass was not combustible and would not burn. Over a foundational objection, Brown testified that the cause of the fire was "accidental" and that there was insufficient information to determine the ignition source of the fire.

The jury returned a verdict in favor of Perry in the amount of $960,840. Durable filed a motion for judgment notwithstanding the verdict or, in the alternative, a motion for new trial. This motion asserted, inter alia, that the court erred in not permitting Brown to testify regarding the tests he performed and "in allowing [Perry] to make a *Daubert* style motion on the fourth day of trial, minutes before the testimony of [Brown] and in sustaining said motion." The motion was overruled, and Durable filed this appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Durable assigns, restated and consolidated, that the district court abused its discretion in excluding Brown's expert testimony concerning the torch test he performed on the insulation.

STANDARD OF REVIEW

[1] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *State v. Leibhart, ante* p. 133, 662 N.W.2d 618 (2003); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[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. *McClure v. Forsman, ante* p. 90, 662 N.W.2d 566 (2003); *Macke v. Pierce, ante* p. 9, 661 N.W.2d 313 (2003); *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003).

[3] 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. *Leibhart, supra*; *Schafersman, supra.*

ANALYSIS

[4-6] Trial of this case commenced on April 22, 2002. In *Schafersman*, 262 Neb. at 232, 631 N.W.2d at 876, we directed that in trial proceedings commencing on or after October 1, 2001, "the admissibility of expert opinion testimony under the Nebraska rules of evidence should be determined based upon the standards first set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)." We characterized the *Daubert* standards as requiring "proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion." *Schafersman*, 262 Neb. at 225, 631 N.W.2d at 872. The *Daubert* standards apply not only to "scientific" knowledge, but to all types of expert testimony. *Schafersman, supra*, citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). See,

also, *Leibhart, supra*. The *Daubert* standards are used to evaluate "the *admissibility* of expert opinion testimony." (Emphasis supplied.) *Schafersman*, 262 Neb. at 231, 631 N.W.2d at 876. *Daubert* does not require that courts "reinvent the wheel" each time that evidence is adduced. *Schafersman*, 262 Neb. at 228, 631 N.W.2d at 874. The level of inquiry in a *Daubert* hearing may vary depending upon the nature of the expert testimony challenged. *Leibhart, supra*. Once the validity of the expert's reasoning or methodology has been satisfactorily established, any remaining questions regarding the manner in which that methodology was applied in a particular case will generally go to the weight of such evidence. *Leibhart, supra*; *Schafersman, supra*.

[7] In this case, the trial court permitted Brown to state his opinion that fiberglass insulation was not combustible. However, relying upon *Daubert*, the court excluded evidence of the test, or experiment, which Brown had conducted in arriving at this opinion. Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003). It is not essential that conditions existing at the time of the experiment be identical with those existing at the time of the occurrence, but the conditions should be essentially similar, that is, similar in all those factors necessary to make the comparison a fair and accurate one. *Id.*; *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994); *Shover v. General Motors Corp.*, 198 Neb. 470, 253 N.W.2d 299 (1977). The lack of similarity regarding the nonessential factors then goes to the weight of the evidence rather than to its admissibility. *Kudlacek, supra*.

The distinction between admissibility and weight of expert testimony is critical to our analysis of this case. At the point in the trial when Perry sought to exclude evidence concerning the test conducted by Brown, the evidence had already been admitted through the following direct examination of Wineman, Perry's own expert:

> Q Now, there was some testing done by . . . Brown, an expert retained by the defendant in this case. Were you provided with . . . Brown's deposition?

A Yes.

Q And were you provided — did that deposition detail his testing of insulation?

A Yes.

Q Could you tell us briefly what he did to test the insulation?

A To the best of my memory, he had the insulation in open air, and he ignited one end with a torch and put — was — and it didn't burn.

Wineman was then asked to give an opinion "as to whether the testing procedure done by . . . Brown would accurately indicate the burning capability of this insulation." Wineman responded that in his opinion, the test was inaccurate, and then explained his reasoning.

As a result of this testimony adduced by Perry during its case in chief, the methodology and results of Brown's test were received in evidence and made known to the jury. By utilizing a strategy of adducing this evidence in order to rebut it through direct examination of its own expert, Perry effectively waived any objection to its admissibility. The only remaining issue was the weight, if any, which the evidence should be given in determining the cause of the fire. In this regard, the jury heard Wineman's opinion that Brown's test did not produce accurate results, but the court's subsequent ruling prevented the jury from hearing Brown's reasons for believing the test to be accurate and for relying upon the result in forming his opinion that the insulation material would not support combustion. By erroneously excluding Brown's testimony concerning test results which Perry's expert had already identified and impugned, the district court unfairly restricted the jury's ability to determine the probative weight of such evidence as a basis for Brown's expert opinion. Inasmuch as the cause of the fire was a critical issue of fact in the case, such error affected a substantial right of Durable and necessitates a new trial.

Because we conclude that Perry waived any objection to admissibility of the test results by adducing the evidence through its expert in its case in chief, we do not reach the issue of whether the evidence could have been excluded if a timely objection under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,

509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), or other objection had been made.

CONCLUSION

The district court erred in ruling that Durable's expert could not testify concerning the results of his test which Perry had previously placed in evidence through the testimony of its own expert. Accordingly, the district court abused its discretion in denying Durable's motion for new trial. The judgment of the district court is therefore reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

JIMMY M. DAWES, APPELLANT AND CROSS-APPELLEE, V. WITTROCK SANDBLASTING & PAINTING, INC., AND CONTINENTAL WESTERN GROUP, DOING BUSINESS AS UNION INSURANCE COMPANY, ITS WORKERS' COMPENSATION INSURER, APPELLEES AND CROSS-APPELLANTS.

667 N.W.2d 167

Filed August 1, 2003. No. S-02-889.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
5. **Final Orders: Appeal and Error.** A party may appeal from a court's order only if the decision is a final, appealable order.
6. **Workers' Compensation: Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 48-179 (Cum. Supp. 2002), the appeal from the single judge to the review panel of the Nebraska Workers' Compensation Court must be taken from a final order.

7. **Final Orders: Appeal and Error.** Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
8. **Attorney Fees: Costs.** Attorney fees, where recoverable, are generally treated as an element of court costs.
9. **Judgments: Attorney Fees: Costs.** An award of costs in a judgment is considered part of the judgment, and a party seeking a statutorily authorized attorney fee, for services rendered in a trial court, must make a request for such fees prior to a judgment in the cause, so the award of attorney fees, if appropriate, may be made a part of the judgment or final order.
10. **Workers' Compensation: Final Orders: Case Disapproved: Appeal and Error.** To the extent that *Delgado v. IBP, inc.*, 11 Neb. App. 165, 645 N.W.2d 831 (2002), and *Martinez v. Greater Omaha Packing*, 12 Neb. App. 10, 664 N.W.2d 486 (2003), indicate that an award of the Nebraska Workers' Compensation Court is not a final, appealable order unless it expressly disposes of all the matters presented to the court, those cases are expressly disapproved.
11. **Workers' Compensation: Words and Phrases.** The compensability of a condition resulting from the cumulative effects of work-related trauma is to be tested under the statutory definition of accident.
12. **Workers' Compensation: Time.** In an occupational disease context, the date of injury, for purposes of Neb. Rev. Stat. § 48-137 (Reissue 1998), is that date upon which the accumulated effects of the disease manifest themselves to the point the injured worker is no longer able to render further service.
13. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation.
14. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
15. **Workers' Compensation: Limitations of Actions: Intent.** Payment of wages or reimbursement of medical expenses by an employer under an employee benefit plan or group health insurance agreement does not constitute remuneration in lieu of workers' compensation benefits so as to toll the statute of limitations, unless, by the conduct of the employer, it may reasonably be inferred that such payments were made with an intent that payment constitutes compensation and a conscious recognition of liability for compensation benefits on the part of the employer.
16. **Workers' Compensation: Limitations of Actions.** Neb. Rev. Stat. § 48-144.04 (Reissue 1998) establishes when the statute of limitations begins to run if an initial report required by Neb. Rev. Stat. § 48-144.01 (Reissue 1998) is not filed, but does not provide for tolling of an already-running statute of limitations when and if subsequent reports are not filed.
17. **Workers' Compensation: Rules of Evidence: Presumptions: Proof.** Pursuant to Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 1995), in all cases not otherwise provided for by statute or by the Nebraska Evidence Rules, a presumption imposes on

the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. This rule applies to the rebuttable presumption that an opinion regarding loss of earning capacity expressed by a vocational rehabilitation counselor appointed or selected pursuant to Neb. Rev. Stat. § 48-162.01(3) (Supp. 1999) is correct.

18. **Workers' Compensation: Words and Phrases.** Temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.
19. **Workers' Compensation.** Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.
20. ____. The determination as to the length of temporary total disability is one of fact.
21. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the single judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
22. **Workers' Compensation: Judgments: Appeal and Error.** The findings of fact made by a single judge of the Workers' Compensation Court are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong on the evidence or the decision was contrary to law.
23. ____: ____: ____. While a Workers' Compensation Court review panel has the statutory authority to remand a case, it exceeds that authority when it remands a case with directions to reconsider a decision without first concluding that the single judge made an error of fact or law.
24. **Workers' Compensation: Judgments.** An order of a single judge of the Workers' Compensation Court may be "contrary to law" within the meaning of Neb. Rev. Stat. § 48-179 (Cum. Supp. 2002) if the order fails to satisfy the requirements of Workers' Comp. Ct. R. of Proc. 11 (2000).
25. **Workers' Compensation: Evidence: Proof.** When an employee in a workers' compensation case presents evidence of medical expenses resulting from injury, he or she has made out a prima facie case of fairness and reasonableness, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable.
26. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred upon it by statute.
27. **Workers' Compensation.** The Workers' Compensation Court can only resolve disputes that arise from the provisions of the Nebraska Workers' Compensation Act.
28. **Workers' Compensation: Jurisdiction.** The Nebraska Workers' Compensation Act does not confer jurisdiction on the Workers' Compensation Court to hear personal injury suits against nonemployers.
29. **Subrogation: Words and Phrases.** Subrogation is the substitution of one person who is not a volunteer, the subrogee, for another, the subrogor, as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee.
30. **Subrogation: Equity: Contracts: Statutes.** A party's right to subrogate may arise under principles of equity, may be contractual, or may be set out in statute.

31. **Workers' Compensation: Jurisdiction: Equity.** The Workers' Compensation Court does not have general equitable jurisdiction.
32. **Workers' Compensation: Insurance.** Payment of private insurance benefits does not entitle an employer to reduce an employee's benefits due under the Nebraska Workers' Compensation Act.
33. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Words and Phrases: Appeal and Error.** A reasonable controversy under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002) may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.
34. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures.** To avoid the penalty provided for in Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002), an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation.
35. **Workers' Compensation: Judgments: Words and Phrases.** The phrase "reduction in the amount of such award," within the meaning of Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002), ordinarily refers to the total amount of the award to the employee.
36. **Workers' Compensation: Proof.** Under Neb. Rev. Stat. § 48-151(2) (Supp. 1999), three elements must be demonstrated in order to prove that a workers' compensation injury is the result of an accident: (1) the injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce at the time objective symptoms of injury.
37. **Workers' Compensation: Words and Phrases.** For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at a identifiable point in time requiring the employee to discontinue employment and seek medical treatment.
38. **Workers' Compensation: Time: Proof: Words and Phrases.** For purposes of the Nebraska Workers' Compensation Act, the time of an accident is sufficiently definite, for purposes of proving that an accident happened "suddenly and violently," if either the cause is reasonably limited in time or the result materializes at an identifiable point.

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

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

Dallas D. Jones and Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees.

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

GERRARD, J.

The appellant, Jimmy M. Dawes, was awarded benefits by a single judge of the Nebraska Workers' Compensation Court, but that award failed to address some of the issues presented by Dawes' petition. A review panel of the compensation court affirmed some aspects of Dawes' award, but ordered that other issues be remanded to the single judge for further consideration. Dawes appeals from the order of the review panel. Dawes filed a petition to bypass review by the Nebraska Court of Appeals, which was supported by the other parties to the appeal. We granted the petition in order to address whether the single judge's award, because it did not expressly dispose of all the issues before the court, was a final, appealable order.

BACKGROUND

FACTS

The claimant, Dawes, injured his back in January 1996, while performing duties for his employer, Wittrock Sandblasting & Painting, Inc. (Wittrock). In August 1996, Dawes stopped work and sought medical attention for his injury. Dawes underwent surgery to correct a herniated lumbar disk at L4-5. Dawes returned to work in October 1996.

At the time of the 1996 injury, Dawes was covered by his wife's health insurance. The record contains two letters, dated September 20, 1996, to Dawes from Union Insurance (Union), Wittrock's workers' compensation insurance carrier. One letter, memorializing a telephone call, stated that Dawes' claim for workers' compensation benefits had been denied. The second letter, referencing the same telephone call as the first, stated that "in the spirit of compromise," Union would provide Dawes with lost-time benefits, as well as reimbursement for any out-of-pocket expenses.

The purpose of the first letter, according to Union's claims representative, was for Dawes to show the letter of "denial" to his wife's health insurance carrier, so that his medical expenses would be covered by his wife's insurance. In actuality, however, Union paid Dawes benefits for temporary total disability and temporary partial disability pursuant to the terms of the agreement

expressed in the second letter. The last such payment resulting from the 1996 injury was made on February 10, 1998.

Dawes sought medical care for back pain on a few occasions in early 1997 and had an isolated snow-shoveling incident in March 1998. Dawes also began to seek medical treatment for back pain in the summer of 1999. Dawes seriously injured his back in October 1999 and stopped work to seek medical treatment. Dawes underwent an anterior lumbar interbody fusion at L4-5 and L5-S1, performed by Dr. Tim Watt. In February 2000, Union refused Dawes' claim for workers' compensation coverage for the 1999 injury.

SINGLE JUDGE'S FINDINGS

Dawes filed a petition in the Workers' Compensation Court in March 2000, and an operative amended petition in September. On December 4, 2001, the single judge of the compensation court entered an award providing workers' compensation benefits to Dawes for disability resulting from the 1999 injury. Specifically, the single judge determined that "the heavy labor that [Dawes] performed over the years with [Wittrock] resulted in a repetitive trauma injury to his low back and specifically a new injury on October 25, 1999."

The single judge determined that Dawes was entitled to temporary total disability benefits for the period between October 25, 1999, and June 20, 2000, and permanent partial disability benefits thereafter based on a 40-percent loss of earning capacity. The single judge based this determination on a letter dated June 20, 2000, releasing Dawes to return to work with a 15-pound lifting restriction. The letter was signed by Dr. Watt's nurse practitioner, "dictating for" Dr. Watt. The single judge also ordered payment of certain medical expenses incurred after the October 1999 injury. The single judge found that Dawes' health insurance carrier was entitled to reimbursement for any expenses it may have paid.

The single judge also determined that the 1996 injury was the result of a work-related accident. However, since the last payment made as a result of that accident occurred in February 1998, and Dawes' first petition was filed in March 2000, the single judge determined that any claim relating to the 1996 injury

was time barred by Neb. Rev. Stat. § 48-137 (Reissue 1998). The single judge therefore found it unnecessary to determine if the "compromise" between Dawes and Union was, in fact, payment of benefits within the meaning of § 48-137. The single judge eliminated all medical expenses incurred prior to the October 1999 injury. However, the single judge determined that since Dawes returned to work without restrictions in 1996, all of Dawes' disability following the 1999 injury was attributable to the 1999 injury.

Review Panel Order

The review panel affirmed the single judge's finding that the 1999 injury was work related and that Dawes' temporary total disability began on October 25, 1999. However, the review panel ordered that the case be remanded for "further consideration" by the single judge of the date on which Dawes' period of temporary total disability ended. The review panel did not conclude, however, that the single judge was clearly wrong on the evidence or that the decision was contrary to law. Dawes had argued to the review panel that the June 20, 2000, letter was not prepared by Dr. Watt and that Dawes was unable to return to his prior employment within the restrictions imposed by the letter. The review panel directed the single judge to "consider" Dawes' argument on remand.

The review panel also remanded the case for reconsideration of Dawes' loss of earning capacity. The single judge had determined that the opinion of the court-appointed vocational rehabilitation counselor had not been rebutted by the expert tendered by the defense. The review panel stated that the single judge had erred by continuing to accord the court-appointed counselor's opinion the statutory rebuttable presumption of correctness after contrary evidence had been submitted, as such presumption " 'disappears' " on the introduction of contrary evidence.

The review panel also remanded the case for specific determinations on certain medical expenses to which the single judge's award did not speak. The review panel directed the single judge to consider, on remand, the amount of reimbursement to which Dawes' health insurance carrier might be entitled. The review panel also concluded, despite the lack of an express finding in

this regard by the single judge, that there was a reasonable controversy which precluded an award of waiting-time penalties and attorney fees.

ASSIGNMENTS OF ERROR

Dawes assigns, restated, that the review panel erred in (1) finding no evidence that Dawes' condition was the result of an occupational disease, (2) concluding that Dawes' claim for benefits regarding his 1996 injury was barred by § 48-137, (3) remanding the issue of Dawes' loss of earning capacity to the single judge for reconsideration based on the conclusion that the rebuttable presumption of correctness "disappears" upon receipt of contrary evidence, (4) remanding the issue of Dawes' temporary total disability when the evidence shows that Dawes did not reach maximum medical improvement until August 2000, (5) failing to award reimbursement of all medical expenses for treatment of Dawes' back injury after the October 1999 accident when those expenses were uncontested, (6) directing the single judge to determine the subrogation interest of Dawes' health insurance carrier, (7) finding that there was a reasonable controversy, and (8) failing to award attorney fees on review when Wittrock did not obtain a reduction in the amount of the award.

On cross-appeal, Wittrock assigns, restated, that the review panel erred in (1) affirming the finding of the single judge that Dawes suffered a compensable accident in October 1999 and (2) remanding the issue of the period of temporary total disability to the single judge.

STANDARD OF REVIEW

[1-3] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single

judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Schwan's Sales Enters. v. Hitz*, 263 Neb. 327, 640 N.W.2d 15 (2002). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

ANALYSIS

APPELLATE JURISDICTION—FINAL ORDER

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999). This case presents a jurisdictional issue with respect to the finality of the award of the single judge, because certain matters, set forth above, were not expressly discussed in the award.

[5,6] A party may appeal from a court's order only if the decision is a final, appealable order. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002). Neb. Rev. Stat. § 48-179 (Cum. Supp. 2002) provides that "[e]ither party at interest who refuses to accept the final findings, order, award, or judgment of the Nebraska Workers' Compensation Court on the original hearing may, within fourteen days after the date thereof, file with the compensation court an application for review before the compensation court . . . ." Under § 48-179, the appeal from the single judge to the review panel must be taken from a final order. *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999).

Both Dawes and Wittrock argue that this court should overrule the decision of the Court of Appeals in *Delgado v. IBP, inc.*, 11 Neb. App. 165, 645 N.W.2d 831 (2002). Dawes concedes that if *Delgado* is applied in the instant case, the order of the single judge is not a final, appealable order. In *Delgado* and a companion case, *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W.2d 571 (2002), the Court of Appeals addressed the issue of final, appealable orders in workers' compensation cases and dismissed both appeals after raising the question of appellate jurisdiction sua sponte.

In *Hamm*, the single judge entered an award of temporary total disability and permanent partial disability benefits, but expressly reserved ruling on medical expenses and mileage due and owing, and set a hearing date to resolve the latter issues. The employer filed an application for review. The review panel affirmed in part and reversed in part, and remanded the case to the single judge to resolve the medical expenses and mileage. The employer appealed. The Court of Appeals, on its own motion, determined that the order of the single judge was not a final, appealable order because it did not resolve all the issues before it and, thus, that both the review panel and the Court of Appeals lacked jurisdiction over the case. *Id.* The Court of Appeals vacated the order of the review panel and remanded the cause with directions for the review panel to dismiss the application for review. *Id.*

In *Delgado, supra*, released on the same date, the single judge awarded permanent partial disability and temporary partial disability benefits and medical expenses, but made no findings or order concerning other issues presented by the claimant's petition, including vocational rehabilitation, penalties, interest, or attorney fees. Unlike *Hamm*, in *Delgado*, the single judge did not expressly reserve ruling on the issues; rather, the single judge's order simply failed to discuss them. The employee applied for review of the award, but the review panel decided that the single judge's failure to address the remaining issues was not error because the absence of a specific finding indicated that the single judge found a lack of merit to the employee's claims. The review panel decided, however, that the single judge had failed to provide a reasoned decision about the employee's loss of earning capacity, and remanded the case to the single judge for a decision on that issue.

The employee appealed, and the Court of Appeals rejected the review panel's conclusion that the single judge made an implied ruling denying interest, penalties, and attorney fees by not discussing or ruling upon such matters. *Id.* The Court of Appeals stated that it was "impossible . . . to know whether the trial judge actually intended an implied denial or whether he simply forgot to rule upon those issues." *Id.* at 168, 645 N.W.2d at 834. The Court of Appeals concluded that the order of the single judge was

nonfinal, vacated the order of the review panel, and remanded the cause with directions to dismiss the application for review.

[7] Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990). This principle underlies the Court of Appeals' decision in *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W.2d 571 (2002), in which issues were expressly reserved by the single judge for later determination. The instant case is distinguishable, however, as the issues not discussed in the award were not expressly reserved for later determination. It is apparent, from an examination of the award and the procedural posture of the case, that the award was meant to be a final determination of the rights and liabilities of the parties.

We recently addressed a similar situation in *Olson v. Palagi, ante* p. 377, 665 N.W.2d 582 (2003). In *Olson*, the respondent to a petition to modify a child support obligation asked, in her answer to the petition, to be awarded attorney fees and costs. The district court's order disposing of the petition, however, did not speak to attorney fees and costs. After the judgment was entered, the respondent filed an application for attorney fees and costs. The petitioner then appealed the merits of the order, and the respondent did not cross-appeal. After the appeal was disposed of, the district court held a hearing and awarded the respondent attorney fees and costs. See *id.*

[8,9] On appeal from the order of attorney fees and costs, we determined that the district court did not have jurisdiction to award attorney fees and costs. *Id.* We noted that attorney fees, where recoverable, are generally treated as an element of court costs. *Id.*, citing *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002). We stated that an award of costs in a judgment is considered part of the judgment and that a party seeking a statutorily authorized attorney fee, for services rendered in a trial court, must make a request for such fees prior to a judgment in the cause, so the award of attorney fees, if appropriate, may be made a part of the judgment or final order. *Id.*

Applying those principles, we concluded that the order of the district court disposing of the petition to modify was a final, appealable order. *Id.* The silence of the judgment on the issue of attorney fees "must be construed as a denial of [the respondent's] request [for attorney fees] under these circumstances." *Id.* at 380, 665 N.W.2d at 585. Because the respondent failed to appeal from the district court's implicit denial of attorney fees, the respondent later had no recourse for the recovery of such fees. See *id.*

The same principles guide our resolution of the situation presented in the instant case. The single judge's order was clearly intended to serve as a final adjudication of the rights and liabilities of the parties. No issues were reserved for further determination. As a practical matter, the substantial effect of the judgment was to dispose of the entire case, end the litigation, and leave nothing for the court to do. See *Alaskans for a Common Language v. Kritz*, 3 P.3d 906 (Alaska 2000). See, e.g., *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001); *UAP-Columbus JV 326132 v. Nesbitt*, 234 Cal. App. 3d 1028, 285 Cal. Rptr. 856 (1991), citing *Lyon v. Goss*, 19 Cal. 2d 659, 123 P.2d 11 (1942). The silence of the single judge's order on the requests for relief not spoken to, including medical expenses and waiting-time penalties, must be construed as a denial of those requests under the circumstances.

[10] As a practical matter, the single judge affected a final adjudication by failing to award certain aspects of the relief requested by Dawes. Had the single judge expressly reserved ruling on those matters, the award would not have been final. See *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W.2d 571 (2002). However, Dawes asked for benefits, and the single judge, by awarding some of those benefits and failing to reserve any issues for later determination, effectively denied Dawes' remaining claims, and the resulting award was final and appealable. To the extent that *Delgado v. IBP, inc.*, 11 Neb. App. 165, 645 N.W.2d 831 (2002), and *Martinez v. Greater Omaha Packing*, 12 Neb. App. 10, 664 N.W.2d 486 (2003), would indicate otherwise, they are hereby disapproved.

We note, however, that while the single judge's omissions are not fatal to the finality of this award, they may nonetheless

constitute error requiring reversal or remand of the cause. Workers' Comp. Ct. R. of Proc. 11 (2000) provides:

> All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

In *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998), this court determined that certain statements in the order of the single judge were contradictory on the question of the employer's liability. Citing rule 11, we determined that "[n]either party should prevail on the basis of an ambiguity." *Owen*, 254 Neb. at 695, 578 N.W.2d at 64. Finding that the failure of the single judge to clearly determine the issue precluded meaningful appellate review, we remanded the cause to the single judge with directions to enter an order complying with the requirements of rule 11. *Owen, supra*. See, also, *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000); *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996).

The situation is somewhat analogous to those faced by the appellate courts of this state when district courts, in determining child support, have failed to supplement their orders with the completed forms required by the Nebraska Child Support Guidelines. See, e.g., *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001). In such instances, while the lower court's failure to include necessary findings is not a jurisdictional defect, it may nonetheless be error requiring a remand for a proper calculation of support. See *id.*

Analysis of Repetitive Trauma Injuries

[11] Both Dawes and Wittrock urge this court to overrule precedent and hold that repetitive trauma injuries are not "accidents," but "occupational diseases." We have held that while such cases have some characteristics of both accidental injury and occupational disease, the compensability of a condition resulting from the cumulative effects of work-related trauma is

to be tested under the statutory definition of accident. See, e.g., *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001); *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001); *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000); *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999); *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999); *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992); *Vencil v. Valmont Indus.*, 239 Neb. 31, 473 N.W.2d 409 (1991), *disapproved, Jordan, supra*; *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), *disapproved, Jordan, supra*; *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980). See, also, *Morris v. Nebraska Health Systems, ante* p. 285, 664 N.W.2d 436 (2003) (distinguishing between repetitive trauma cases and occupational disease cases).

[12] The parties ask that this authority be overruled, albeit with substantially different motives. Dawes seeks to connect his 1996 injury to his 1999 injury as part of one "occupational disease," so that both the 1996 injury and 1999 injury are compensable. In an occupational disease context, the date of injury, for purposes of § 48-137, is that date upon which the accumulated effects of the disease manifest themselves to the point the injured worker is no longer able to render further service. See *Morris, supra*. Wittrock, on the other hand, argues that repetitive trauma should be treated as an occupational disease and that Dawes did not prove an occupational disease; thus, Dawes is entitled to no compensation for either injury.

[13] We decline the parties' invitation to overrule our precedent. As previously noted, it has been the law for many years that repetitive trauma injuries are tested under the definition of accident, as opposed to occupational disease. We reaffirmed this rule, very recently, in *Morris, supra*. Furthermore, four justices of this court invited the Legislature to consider this issue over a decade ago. See *Vencil, supra* (Caporale, J., concurring, joined by Boslaugh, White, and Fahrnbruch, JJ.). When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation. *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000). The Legislature has not

only acquiesced in our interpretation of Neb. Rev. Stat. § 48-151 (Supp. 1999) regarding repetitive trauma injuries, but has declined the express invitation of a majority of this court to consider and amend our interpretation.

[14] The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). The parties in this case have provided no reason compelling enough to justify departure from our prior cases. Therefore, Dawes' first assignment of error is without merit.

Statute of Limitations for 1996 Injury

Dawes assigns that the single judge erred in determining that Dawes' claim for medical benefits relating to the 1996 injury was time barred by § 48-137. Dawes' first argument is that the 1996 injury should be treated, not as an accident, but as part of the course of an occupational disease. We have already determined that this argument is without merit.

Dawes then argues that, even analyzing the 1996 injury as an accident, his claim is not time barred. Section 48-137 provides, in relevant part:

> In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under the Nebraska Workers' Compensation Act, or unless, within two years after the accident, one of the parties shall have filed a petition as provided in section 48-173. . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment.

We assume without deciding, for purposes of this opinion, that the payments made by Union pursuant to the "compromise agreement" constitute payment of compensation within the meaning of the Nebraska Workers' Compensation Act. In making that assumption, we do not address whether the "compromise agreement" was itself appropriate, ethical, or legal.

The last payment made by Union for benefits resulting from the 1996 injury was made on February 10, 1998. Dawes' petition was not filed until September 22, 2000. When payments of compensation have been made pursuant to an agreement between the parties, as in the instant case, the statute of limitations set forth in § 48-137 will not take effect until the expiration of 2 years from the time of the making of the last payment. See *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997). There has been no allegation that this case presents any exception to the statute of limitations, such as a latent and progressive injury, or a material increase in the claimant's disability. See, *id.*; *Binkerd v. Central Transportation Co.*, 236 Neb. 350, 461 N.W.2d 87 (1990). Consequently, Dawes' claims relating to the 1996 injury are time barred.

[15] Dawes argues, however, that his medical insurance carrier made payments, in 1998 and 1999, for treatment of recurrent back pain caused by the 1996 injury and that these payments were made less than 2 years prior to the filing of his petition. Dawes relies on *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 636-37, 371 N.W.2d 294, 301 (1985), in which we held that

> payment of wages or reimbursement of medical expense by an employer under an employee benefit plan or group health insurance agreement does not constitute remuneration in lieu of workmen's compensation benefits so as to toll the statute of limitations, unless, by the conduct of the employer, it may reasonably be inferred that such payments were made with an intent that payment constitute[s] compensation and a conscious recognition of liability for compensation benefits on the part of the employer.

The facts of this case do not fall within the exception we recognized in *Maxey*. In *Maxey*, the claimant's medical expenses were paid, not by his employer's workers' compensation insurance carrier, but by the employer's health insurance carrier. We rejected the claimant's argument that those insurance payments were "payments of compensation" within the meaning of § 48-137. But we left open the possibility that an employer might be estopped from asserting the statute of limitations where the employer had recognized its liability for workers' compensation

benefits, and directed payments to be made by a health insurance carrier to satisfy that obligation. See *Maxey, supra*. The concern was that a claimant might misunderstand the character of payments received. See *id.* However, "voluntary payment of wages or medical benefits does not toll the statute of limitations unless the employer is aware or should be aware that it constitutes payment of compensation for the injury." *Id.* at 637, 371 N.W.2d at 301.

In this case, the health insurance carrier was not associated with the employer. Rather, Dawes was covered by his wife's health insurance plan, and there was no possibility of confusion regarding the source or character of the medical coverage. The concern expressed in *Maxey* about possible confusion regarding the nature of the benefits received is simply not present in this case. Instead, in *Maxey*, we specifically rejected the argument that benefits paid by collateral sources were "compensation" sufficient to toll § 48-137. That principle applies here. The last "payment of compensation" made in this case for the 1996 injury was made by Union more than 2 years prior to the filing of Dawes' petition.

Finally, Dawes argues that § 48-137 was tolled in this case by Neb. Rev. Stat. § 48-144.04 (Reissue 1998), which provides in relevant part:

> Any employer, risk management pool, or insurance carrier who fails, neglects, or refuses to file any report required of him or her by the Nebraska Workers' Compensation Court shall be guilty of a Class II misdemeanor for each such failure, neglect, or refusal. . . . In addition to the penalty, where an employer, risk management pool, or insurance carrier has been given notice, or the employer, risk management pool, or the insurance carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file a report thereof, the limitations in section 48-137 . . . shall not begin to run against the claim of the injured employee or his or her dependents entitled to compensation . . . or in favor of either the employer, risk management pool, or the insurance carrier until such report shall have been furnished as required by the compensation court.

Dawes argues that pursuant to § 48-144.04, the statute of limitations was tolled when neither Wittrock nor Union filed one of

the "Subsequent Report[s]" of payment required by Workers' Comp. Ct. R. of Proc. 30 (2000).

[16] The plain language of § 48-144.04, however, does not support Dawes' argument. Neb. Rev. Stat. § 48-144.01 (Reissue 1998) requires an employer or insurance carrier to file an initial report of a death or injury. Section 48-144.04 then provides that the statute of limitations in § 48-137 does not "begin to run" until the employer or insurance carrier is aware of the death or injury of an employee, and does not file a report of that death or injury. When read in pari materia, see *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001), the "report" of "injury or death" in § 48-144.04 is a clear reference to the initial report required by § 48-144.01. Section 48-144.04 establishes when the statute of limitations "begins to run" if an *initial* report is not filed, but plainly does not provide for tolling of an already-running statute of limitations if subsequent reports are not filed. The initial report of the 1996 injury, required by § 48-144.01, was timely filed.

The facts of this case do not present any exception to § 48-137 under which Dawes' petition was timely filed. The single judge and review panel correctly concluded that any claims for benefits resulting from the 1996 injury are time barred by § 48-137. Dawes' second assignment of error is without merit.

Loss of Earning Capacity—Opinion of Vocational Rehabilitation Counselor

Dawes next assigns that the review panel erred in remanding the issue of loss of earning capacity to the single judge. The single judge's order in this case discussed the opinion of a court-appointed vocational rehabilitation counselor, who concluded that Dawes suffered a 40-percent loss of earning capacity. The single judge, citing *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999), stated that the opinion of the court-appointed counselor was entitled to a presumption of correctness. See Neb. Rev. Stat. § 48-162.01(3) (Supp. 1999). The single judge noted rebuttal evidence offered by Wittrock, but found that it did not rebut the presumption of correctness to which the opinion of the court-appointed counselor was entitled.

The review panel concluded that the single judge erred. The review panel stated that "a rebuttable presumption 'disappears'

upon the receipt of contrary evidence" and that "[a]fter the receipt of contrary evidence in the present case, the trial court continued to accord the opinion of the court-appointed counselor the statutory presumption of correctness, which was error as a matter of law." Consequently, the review panel remanded the issue of loss of earning capacity to the single judge for reconsideration.

[17] The review panel's analysis, however, is contrary to our opinion in *Variano*, 256 Neb. at 326, 589 N.W.2d at 851, in which we stated:

> A "rebuttable presumption" is generally defined as "[a] presumption that can be overturned upon the showing of sufficient proof." Black's Law Dictionary 1186 (6th ed. 1990). "In all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 1995). We hold that this rule applies to the rebuttable presumption that an opinion regarding loss of earning capacity expressed by a vocational rehabilitation counselor appointed or selected pursuant to § 48-162.01(3) is correct.

Accord, *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002); *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001); *Noordam v. Vickers, Inc.*, 11 Neb. App. 739, 659 N.W.2d 856 (2003); *Romero v. IBP, inc.*, 9 Neb. App. 927, 623 N.W.2d 332 (2001).

By holding that the rebuttable presumption of correctness established by § 48-162.01(3) was governed by Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 1995), we rejected the "bursting bubble" theory upon which the review panel's analysis was based. See, *McGowan v. McGowan*, 197 Neb. 596, 250 N.W.2d 234 (1977) (explaining effect of Neb. Evid. R. 301); Fed. R. Evid. 301 advisory committee note (explaining that proposed Fed. R. Evid. 301, upon which Neb. Evid. R. 301 is based, rejected "bursting bubble" theory under which presumption vanishes upon introduction of contrary evidence); G. Michael Fenner, *Presumptions: 350 Years of Confusion and It Has Come to This*, 25 Creighton L. Rev. 383 (1992).

Thus, pursuant to § 48-162.02(3) and § 27-301, the burden was placed on Wittrock to prove the incorrectness of the court-appointed counselor's opinion. See *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002) (applying Neb. Evid. R. 301). The single judge's opinion correctly applies the law as explained by our decision in *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999). Dawes is correct in arguing that the review panel erred in concluding otherwise. This purported legal error was the sole basis for the review panel's conclusion that the issue of loss of earning capacity should be remanded. Therefore, the decision of the review panel is reversed to the extent that it requires the single judge to reconsider Dawes' loss of earning capacity. Instead, the decision of the single judge on that issue should be affirmed.

End Date of Temporary Total Disability

Dawes' fourth assignment of error, and Wittrock's second assignment of error on cross-appeal, are that the review panel erred in remanding the issue of Dawes' temporary total disability to the single judge. Dawes argues that the single judge erred in finding that Dawes' period of temporary total disability ended on June 20, 2000, but that the review panel should have determined, as a matter of law, that Dawes' temporary total disability lasted until the date of his maximum medical improvement on August 8, 2000. Wittrock, on the other hand, argues that the single judge was correct and that the review panel should have affirmed the single judge's finding. Because the parties' separate assignments of error are directed at the same issue, we consider them together.

The single judge determined that Dawes' period of temporary total disability ended on June 20, 2000, based upon a letter from Dr. Watt's nurse practitioner, "dictating for" Dr. Watt. The letter cleared Dawes to return to work subject to certain restrictions on his lifting and movement. The review panel, however, determined that "this matter should be remanded to [the single judge] for further consideration." The review panel did not conclude that the single judge's finding was incorrect. Rather, the review panel simply requested that the single judge "consider" that the letter on which the single judge relied was prepared by Dr. Watt's nurse

practitioner instead of Dr. Watt and whether Dawes was employable within the restrictions imposed by the letter. The review panel also pointed the parties to other evidence that the single judge could consider on remand.

[18,19] Temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform. *Id.*

[20,21] Dawes argues that he was unable to work within the restrictions imposed by the June 20, 2000, letter. However, the record contains competent evidence to support the finding of the single judge. The report of the court-ordered vocational rehabilitation counselor set forth the occupations for which, in the opinion of the counselor, Dawes was qualified. Several of those occupations, according to the report, would impose only light or sedentary physical demands—within the physical restrictions imposed in the June 20 letter. The determination as to the length of temporary total disability is one of fact. *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991). The record contains competent evidence supporting the single judge's finding that June 20 was the end date of Dawes' temporary total disability, and if the record contains evidence to substantiate the factual conclusions reached by the single judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court. See *Frauendorfer, supra*. Dawes' assignment of error is without merit.

[22,23] For many of the same reasons, however, Wittrock's assignment of error on cross-appeal does have merit. The findings of fact made by a single judge of the Workers' Compensation Court are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong on the evidence or the decision was contrary to law. See, § 48-179; *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996). While "remanding" a case and directing the single judge to

"reconsider" a finding of fact is not, taken literally, a reversal of the single judge's order, under the circumstances presented here, it has the same effect. While a review panel has the statutory authority to remand a case, see *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998), we are of the view that a review panel exceeds that authority when it remands a case with directions to "reconsider" a decision without first concluding that the single judge made an error of fact or law.

[24] As previously stated, the findings of the single judge regarding temporary total disability were not clearly wrong. Furthermore, no error of law underlying the single judge's finding has been identified. While a single judge's order may be "contrary to law" within the meaning of § 48-179 if it fails to satisfy the requirements of rule 11, see *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998), the single judge's finding on this issue was consistent with rule 11. The single judge made a clear finding of fact and identified the evidence in the record on which that finding was based, literally complying with the requirement that the decision "clearly and concisely state and explain the rationale for the decision" and "specify the evidence upon which the judge relies." See rule 11.

In the absence of an error of fact or law, the review panel erred in directing the single judge, on remand, to reconsider the ending date of Dawes' temporary total disability. The single judge's finding was clearly stated and supported by the record. The order of the review panel is reversed to the extent that it directs the single judge to reconsider that finding.

UNCOMPENSATED MEDICAL EXPENSES

[25] As previously noted, the review panel directed the single judge, on remand, to dispose of two medical bills to which the single judge's award did not speak. Dawes argues that the review panel should have found as a matter of law that he should be compensated for those expenses. When an employee in a workers' compensation case presents evidence of medical expenses resulting from injury, he or she has made out a prima facie case of fairness and reasonableness, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable. *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537,

451 N.W.2d 910 (1990). Dawes argues that he made a prima facie case with respect to the unawarded expenses that was not rebutted, thus entitling him to compensation for those expenses.

Dawes argues that the record does not contain any evidence rebutting the fairness or reasonableness of the expenses, or the causal relationship between the expenses and his 1999 injury. Our review of the record supports this argument. The record contains the two medical bills omitted in the single judge's award: $440 for magnetic imaging performed by the Lincoln Radiology Group on November 19, 1999, and $3,024 from the Lincoln Surgical Group for Dawes' lumbar fusion. The record also contains the medical reports associated with these bills, establishing their relationship to Dawes' injury. Wittrock does not argue that the expenses were not fair and reasonable, nor does our review of the record provide any basis for such an argument.

Nonetheless, we do not conclude that the review panel erred in remanding this issue to the single judge. The single judge listed all of the medical expenses she found to be compensable, but expressly denied compensation for other medical expenses, one of which lacked a supporting medical record, and the remainder of which were incurred prior to the 1999 injury. The single judge's award simply does not mention the expenses noted above. We agree with the review panel that it cannot be discerned, from the single judge's award, why those expenses were omitted. In that respect, the single judge's award does not meet the requirements of rule 11, because we are unable to conduct a "meaningful appellate review."

We note that this case must be remanded to the single judge in any event, because the parties agree, as did the review panel, that the single judge erred in her calculations of Dawes' average weekly wage. The review panel ordered that the case be remanded for a recalculation in that regard, and none of the parties to this appeal challenge that aspect of the review panel's order. Nor does either party dispute the review panel's calculation that based on the dates found by the single judge, Dawes is entitled to 34$^{2}/_{7}$ weeks of temporary total disability, rather than the 33$^{4}/_{7}$ weeks ordered by the single judge. Since the case must be remanded to the single judge in any event, we agree with the review panel that the single judge should be required, in the first instance, to

explain and resolve her incomplete discussion of Dawes' claimed medical expenses. The single judge should either explain why the expenses were denied, or award the expenses if she finds that to be appropriate. Therefore, Dawes' fifth assignment of error shall be resolved in that manner.

SUBROGATION INTEREST OF HEALTH INSURANCE CARRIER

The single judge's order set forth the medical expenses she found to be compensable and stated that Principal Health Insurance Company (Principal), Dawes' health insurance carrier, "should be reimbursed as its interest may appear for payments made on behalf of the plaintiff." The single judge did not specify how this reimbursement was to be made, ordering only that Wittrock "pay for and on behalf of [Dawes] the medical and hospital expenses incurred by [Dawes] as a result of said accident and injury."

Dawes argued to the review panel that the single judge had erred by failing to order that Dawes be reimbursed for expenses that had been paid either by him or by Principal. The review panel rejected this argument, stating that Dawes "is not entitled to reimbursement for payments made by a health insurer." The review panel ordered that Principal be reimbursed. The review panel, relying upon *Kidd v. Winchell's Donut House*, 237 Neb. 176, 465 N.W.2d 442 (1991), ordered that on remand, the single judge should specify the amount of reimbursement. Dawes now assigns that the review panel erred in directing the single judge to determine the extent of Principal's subrogation interest in Dawes' workers' compensation award.

Dawes' assignment of error has merit. The Workers' Compensation Court does not have jurisdiction to determine Principal's subrogation interest, if any, in Dawes' workers' compensation award. In *Miller v. M.F.S. York/Stormor*, 257 Neb. 100, 595 N.W.2d 878 (1999), an injured employee filed a petition in the Workers' Compensation Court, requesting compensation and seeking a determination as to the amount of credit to which the employer was entitled as a result of the employee's settlement of a third-party tort action filed in federal court. We concluded, however, that the Workers' Compensation Court did not have jurisdiction to make such a determination. *Id.*

[26-28] As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred upon it by statute. *Id.* The Workers' Compensation Court can only resolve disputes that arise from the provisions of the Nebraska Workers' Compensation Act. *Miller, supra.* In *Miller*, we held that the Nebraska Workers' Compensation Act did not confer jurisdiction on the Workers' Compensation Court to hear personal injury suits against nonemployers. The employee's suit against the tort-feasor at issue in that case did not arise under the provisions of the Nebraska Workers' Compensation Act, and the Workers' Compensation Court did not have jurisdiction to determine the amount of credit to which the employer may have been entitled. *Miller, supra.*

[29,30] The same principles of law apply here. A dispute between Dawes and Principal regarding Principal's subrogation interest, if any, does not arise under the provisions of the Nebraska Workers' Compensation Act. Subrogation is the substitution of one person who is not a volunteer, the subrogee (in this case, Principal), for another, the subrogor (Dawes), as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee. See *Combined Insurance v. Shurter*, 258 Neb. 958, 607 N.W.2d 492 (2000). A party's right to subrogate may arise under principles of equity, may be contractual, or may be set out in statute. *Id.* In this case, any subrogation interest of Principal must arise in equity or pursuant to Principal's health insurance contract.

[31] However, the Workers' Compensation Court does not have general equitable jurisdiction. See *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991). Nor does any provision of the Nebraska Workers' Compensation Act afford the Workers' Compensation Court jurisdiction to resolve contractual disputes between employees and third-party insurers. Cf. *Miller, supra.* We conclude, therefore, that the Workers' Compensation Court does not have jurisdiction to determine whether, or to what extent, Principal may have a subrogation interest in the proceeds of Dawes' workers' compensation award.

[32] Dawes also correctly contends that any benefits to which he is entitled should be paid to him. Neb. Rev. Stat. § 48-130 (Reissue 1998) provides:

> No savings or insurance of the injured employee or any contribution made by him or her to any benefit fund or protective association independent of the Nebraska Workers' Compensation Act shall be taken into consideration in determining the compensation to be paid thereunder; nor shall benefits derived from any other source than those paid or caused to be paid by the employer as herein provided be considered in fixing compensation under such act.

Pursuant to § 48-130, the payment of private insurance benefits does not entitle an employer to reduce an employee's benefits due under the Nebraska Workers' Compensation Act. *Nunn v. Texaco Trading & Transp.*, 3 Neb. App. 101, 523 N.W.2d 705 (1994). While a private insurance policy may provide that benefits payable under the private insurance policy can be offset by workers' compensation benefits paid, that is a contract issue, and not a matter for the Workers' Compensation Court to resolve. See, *Miller v. M.F.S. York/Stormor*, 257 Neb. 100, 595 N.W.2d 878 (1999); *Nunn, supra.*

Furthermore, Neb. Rev. Stat. § 48-147 (Cum. Supp. 2002) provides that

> liability for compensation under [the Nebraska Workers' Compensation Act] shall not be reduced or affected by any insurance of the injured employee, or any contribution or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer.

While both §§ 48-130 and 48-147 preclude an employer from reducing an employee's workers' compensation benefits due to the employee's private insurance, § 48-147 specifically provides that the employee has the right to recover the workers' compensation benefits directly from the employer.

Kidd v. Winchell's Donut House, 237 Neb. 176, 465 N.W.2d 442 (1991), relied upon by the review panel, is not to the contrary. In *Kidd*, this court directed the Workers' Compensation

Court to determine the subrogation rights of the then Nebraska Department of Social Services (DSS) in workers' compensation benefits awarded to a recipient of DSS medical assistance benefits. However, we did so based on Neb. Rev. Stat. § 68-716 (Cum. Supp. 1988), which then provided:

> An application for medical assistance benefits shall give a right of subrogation to the Department of Social Services. Subject to sections 68-1038 to 68-1046, subrogation shall include every claim or right which the applicant may have against a third party when such right or claim involves money for medical care. The third party shall be liable to make payments directly to the Department of Social Services as soon as he or she is notified in writing of the valid claim for subrogation under this section.

We held that pursuant to § 68-716, in a workers' compensation case, DSS and any third party liable to DSS were entitled to a determination of the subrogation interest.

In *Kidd, supra*, the Workers' Compensation Court was required to determine the subrogation interest of DSS because the broad language of § 68-716 gave DSS a subrogation interest in "*every* right or claim" the applicant had against a third party, and required the third party (in that case, the employer) to make payments directly to DSS. Jurisdiction to decide the matter was conferred on the Workers' Compensation Court by statute. See *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003) (Workers' Compensation Court possesses only such authority as is delineated by statute). In this case, however, there is no applicable analog to § 68-716.

We conclude that the Workers' Compensation Court lacks jurisdiction to determine Principal's subrogation interest, if any, in Dawes' workers' compensation award. Dawes is entitled to the full measure of his compensation benefits, and any interest of Principal must be determined in another proceeding brought in a court of competent jurisdiction. See *Miller v. M.F.S. York/Stormor*, 257 Neb. 100, 595 N.W.2d 878 (1999). The order of the review panel is reversed to the extent that it directs the single judge to determine how Principal should be reimbursed, and the order of the single judge should be reversed to the extent that it states Principal should be reimbursed.

REASONABLE CONTROVERSY AND ATTORNEY FEES

Dawes' seventh assignment of error states that the review panel erred in determining that there was a reasonable controversy, such that Dawes was not entitled to waiting time penalties. Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002) authorizes a penalty of 50 percent of compensation payable where there is no reasonable controversy regarding an employee's claim for workers' compensation and payment is delinquent for 30 days. *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000). The penalty statute is to encourage prompt payment of benefits. *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000). In summary, the mandate for prompt payment of benefits requires that employees and insurers promptly handle and decide claims. If they do not, and there is no reasonable controversy about compensability, then penalties will be assessed. *Hale v. Vickers, Inc.*, 10 Neb. App. 627, 635 N.W.2d 458 (2001).

[33,34] A reasonable controversy under § 48-125 may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). To avoid the penalty provided for in § 48-125, an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987); *Hale, supra.*

As previously noted, the single judge made no finding regarding the existence of a reasonable controversy. The review panel resolved the issue as a matter of law by concluding that a reasonable controversy existed. We agree with this determination. As noted by the review panel, Wittrock presented the expert medical opinion of an orthopedic surgeon, who opined that Dawes' condition "occurred as a result of a life-long wear and

tear arthritic disease process . . . and is not the result of any specific event, at work or elsewhere." The expert rejected the idea that repetitive labor was a cause of lumbar disk disease and concluded, to a reasonable degree of medical certainty, that Dawes suffered from a severe degenerative disk disease which was "not due to any specific injury."

When there is conflict in the medical testimony adduced at trial, reasonable but opposite conclusions can be reached by the compensation court. *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999). Here, Wittrock presented expert medical testimony that would have supported a finding that Dawes' condition was not the result of an accident arising out of and in the course of employment. See Neb. Rev. Stat. § 48-101 (Reissue 1998). While this opinion was not adduced until after the denial of benefits, it is evidence that Wittrock had an actual basis in law or fact for denying Dawes' claim. See *Mendoza, supra*. Consequently, the review panel did not err in determining that a reasonable controversy was presented.

Dawes' final argument is that the review panel should have awarded attorney fees because Wittrock's appeal to the review panel did not result in a reduction of the award. Section 48-125 provides, in relevant part:

> If the employer files an application for review before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such review . . . .

Dawes contends "[t]he review panel rejected all of defendants' assigned errors." Brief for appellant at 49.

[35] Dawes' argument is not entirely accurate. As previously noted, the review panel, finding merit in errors assigned by *both* sides, determined that the single judge erred in her calculation of Dawes' average weekly wage. The review panel remanded this issue for recalculation by the single judge, and no one contests that disposition before this court. " '[R]eduction in the amount of such award,' " within the meaning of § 48-125, ordinarily refers to the total amount of the award to the employee. *Miller v. Meister & Segrist*, 255 Neb. 805, 817, 587 N.W.2d 399, 408 (1998). Until

Dawes' average weekly wage is recalculated on remand, it will be impossible to tell whether or not Wittrock's application for review will have resulted in a decrease in Dawes' award. Consequently, whether or not Dawes is entitled to attorney fees for proceedings in the compensation court is a matter that must be determined by that court after the case is remanded to the single judge. The review panel did not err by failing to award attorney fees prior to the final determination of Dawes' award.

COMPENSABILITY OF 1999 INJURY

The final issue we consider is presented by Wittrock's remaining assignment of error on cross-appeal. Wittrock assigns that the review panel erred in affirming the single judge's finding that Dawes' 1999 injury was the result of an accident within the meaning of the Nebraska Workers' Compensation Act. Specifically, Wittrock argues that Dawes failed to show that he missed work and sought medical treatment within a reasonably limited period of time after the presentation of his symptoms.

[36] Under § 48-151(2), an accident is defined as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." We have previously recognized that under § 48-151(2), three elements must be demonstrated in order to prove that a workers' compensation injury is the result of an accident: (1) the injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce at the time objective symptoms of injury. *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001).

[37] Wittrock argues that in order to occur "suddenly and violently," the cumulative effects of repeated work-related trauma must produce objective symptoms requiring discontinuance of employment "within a reasonably limited period of time." See *Vencil v. Valmont Indus.*, 239 Neb. 31, 32, 473 N.W.2d 409, 411 (1991), *disapproved, Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999). See, also, *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), *disapproved, Jordan, supra*. But we disapproved *Vencil* and *Maxson* in *Jordan*. In *Jordan*, we explained that for purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean

instantaneously and with force, but, rather, the element is satisfied if the injury occurs at a identifiable point in time requiring the employee to discontinue employment and seek medical treatment. Accord, *Fay, supra*; *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999).

[38] We have stated that most jurisdictions regard the time of an accident as sufficiently definite, for purposes of proving this element, "if either the cause is reasonably limited in time *or the result materializes at an identifiable point.* 1B Larson, Workmen's Compensation Law § 39.00 (1980)." (Emphasis in original.) *Sandel v. Packaging Co. of America*, 211 Neb. 149, 161, 317 N.W.2d 910, 917 (1982). Accord, *Erving v. Tri-Con Industries*, 210 Neb. 339, 314 N.W.2d 253 (1982); *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980). See, also, *Vencil, supra* (Shanahan, J., dissenting); *Maxson, supra* (Grant, J., dissenting). We have

> extended the concept of "suddenly and violently" to recognize the realities of life and the fact that an accident, within the meaning of the Nebraska Workmen's Compensation Act, could be caused by a series of repeated traumas, each of which acting individually may not be sufficient in force to produce a sudden and violent accident but which ultimately produces such a result, and none of which may be observable until disability occurs.

Sandel, 211 Neb. at 159-60, 317 N.W.2d at 916. The nature of the human body being such that it is, not all injuries to the body are caused instantaneously and with force, but may indeed nevertheless occur suddenly and violently, even though they have been building up for a considerable period of time and do not manifest themselves until they cause the employee to be unable to continue his or her employment. *Id.*

Wittrock argues that Dawes did not discontinue his employment within a reasonably limited period of time after the manifestation of his symptoms. Even if this were true, however, Wittrock does not argue, nor would the record support a finding, that Dawes' injury did not occur at an identifiable point in time, October 1999, within the meaning of *Jordan, supra*. Wittrock's final assignment of error is without merit.

CONCLUSION

The review panel correctly determined that this case presents no evidence of an occupational disease and that Dawes' medical expenses resulting from his 1996 injury were time barred by § 48-137. Those determinations are affirmed. The review panel erred, however, in instructing the single judge, on remand, to reconsider her findings regarding Dawes' loss of earning capacity and the end date of Dawes' period of temporary total disability. The judgment of the review panel is reversed with respect to those instructions. The review panel did not err in instructing the single judge, on remand, to explain or amend her disposition of the claimed medical expenses to which the original award did not speak, and that instruction is affirmed.

The review panel erred in instructing the single judge to determine the subrogation interest of Principal, Dawes' health insurance carrier, and the single judge erred in finding that Principal should be reimbursed for payments it made on Dawes' behalf. The Workers' Compensation Court does not have jurisdiction to make those findings. The judgment of the review panel on this issue is reversed, and the review panel is directed to reverse the single judge's order with respect to this issue as well.

Finally, the review panel did not err by finding a reasonable controversy, by not awarding attorney fees at this stage of the proceedings, or by affirming the single judge's determination that Dawes' 1999 injury was the result of an accident within the meaning of the Nebraska Workers' Compensation Act. Those determinations are affirmed. In sum, the judgment of the review panel of the Workers' Compensation Court is affirmed in part, and in part reversed, and the cause is remanded with directions.

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

STATE OF NEBRASKA EX REL. CITY OF ALMA, A NEBRASKA MUNICIPAL CORPORATION, APPELLEE, V. FURNAS COUNTY FARMS, A GENERAL PARTNERSHIP, ET AL., APPELLANTS.

667 N.W.2d 512

Filed August 8, 2003. No. S-01-1313.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
3. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
4. **Appeal and Error.** An issue not presented to or decided by the trial court is not appropriate for consideration on appeal.
5. **Statutes: Ordinances.** Preemption of municipal ordinances by state law is based on the fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state.
6. ____: ____. Where there is a direct conflict between a city ordinance and a state statute, the state statute is the superior law.
7. **Municipal Corporations: Ordinances: Legislature: Intent.** The central question in a preemption case is not whether the Legislature intended to grant authority to municipalities to act concerning a particular matter, but, rather, whether the Legislature intended to deny municipalities the right to legislate on the subject.
8. **Statutes.** In construing a statute for preemption purposes, a court 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.
9. **Statutes: Legislature: Intent.** The purpose and intent of the Legislature must be ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
10. **Courts: Statutes: Ordinances.** When reviewing preemption claims, the court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.
11. **Ordinances.** When an ordinance is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes the ordinance clearly valid will be given.
12. **Ordinances: Statutes: Legislature: Intent.** Municipal ordinances may be preempted by state law when the Legislature expressly declares its intent to preempt such ordinance.
13. ____: ____: ____: ____. In the absence of explicit statutory language, the Legislature's intent to preempt municipal ordinances may be inferred from a comprehensive scheme of legislation.

14. **Ordinances: Statutes.** A municipal ordinance is preempted to the extent that it actually conflicts with state law.
15. **Ordinances: Legislature: Statutes.** Generally, an ordinance cannot prohibit what the Legislature has expressly licensed, authorized, or permitted.
16. **Legislature: Statutes.** The mere fact that the Legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.
17. **Municipal Corporations: Statutes: Legislature: Intent.** In enacting Nebraska's Environmental Protection Act, Neb. Rev. Stat. §§ 81-1501 to 81-1532 (Reissue 1999 & Cum. Supp. 2000), the Legislature did not intend to deny municipalities the right to legislate on the subject of pollution control.
18. **Statutes: Ordinances.** That which is allowed by the general laws of the state cannot be prohibited by ordinance without express grant on the part of the state.
19. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
20. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
21. **Injunction: Statutes.** Injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute and whether or not they constitute a nuisance.
22. **Municipal Corporations: Ordinances: Presumptions.** Irreparable harm to public rights, property, or welfare is presumed to result from actions which by municipal ordinance have been declared unlawful.
23. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Harlan County: TERRI HARDER, Judge. Affirmed as modified.

David A. Jarecke, of Crosby Guenzel, L.L.P., for appellant.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, and Douglas R. Walker, Alma City Attorney, for appellee City of Alma.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, and Julie M. Karavas, of Nebraska Cattlemen, Inc., for amicus curiae Nebraska Cattlemen, Inc.

Arend R. Baack, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for amicus curiae League of Nebraska Municipalities.

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

HENDRY, C.J.

I. INTRODUCTION

In this action, the City of Alma (City), a city of the second class, sought a declaratory judgment with respect to the validity and applicability of certain ordinances pertaining to the construction of livestock confinement facilities utilizing solid and liquid waste storage lagoons. The City further sought an injunction requiring several defendants to comply with the ordinances. Furnas County Farms (FCF), a named defendant in the action, filed a cross-claim seeking a declaration that the ordinances are special class legislation, are arbitrary and unreasonable, and are preempted by state law. The district court for Harlan County declared that the ordinances are not arbitrary or unreasonable, are not preempted by state law, and are valid and binding on FCF. The district court further granted the City's request for injunctive relief. This appeal followed.

II. FACTUAL BACKGROUND

In early 1997, the City learned that FCF and Sand Livestock Systems (SLS) planned to build a large hog confinement facility approximately 8 miles northwest of the Alma city limits in Harlan County, Nebraska. The hog confinement facility was to consist of, inter alia, three solid and liquid waste lagoons. The City hired an environmental engineer to prepare a report on the potential impact of such facility on the City's water supply. On the basis of such report, the City adopted ordinances Nos. 10-217-1, 10-217-3, and 11-047-1 through 11-047-3. In its operative petition, the City alleged it adopted the ordinances pursuant to the authority conferred upon it by Neb. Rev. Stat. §§ 17-536 and 17-537 (Reissue 1997). Section 17-536 provides that "[t]he jurisdiction of such city or village, to prevent any pollution or injury to the stream or source of water for the supply of such waterworks, shall extend fifteen miles beyond its corporate limits." Section 17-537 provides:

> The council or board of trustees of such cities and villages shall have power to make and enforce all needful rules and regulations in the construction, use, and management of such waterworks, mains, portion or extension of any system of waterworks or water supply and for the use of the water therefrom.

Other than within the framework of its preemption analysis, FCF does not challenge the authority of the City to adopt the ordinances pursuant to §§ 17-536 and 17-537. We similarly confine our analysis of the City's authority within that context.

The ordinances detail the process which an entity seeking to build a livestock facility within 15 miles of the City must follow in order to obtain a permit from the City for such purpose. Ordinance No. 10-217-1 provides that a permit must be obtained from the City prior to constructing "[a]ll manufacturing, livestock or other facilities which create liquid or solid waste within fifteen miles of the corporate limits of the City of Alma." Two categories of livestock facilities are exempted from the permit requirement: livestock facilities which were in existence at the time of the "final passage" of ordinance No. 10-217-1 and livestock facilities having a capacity of not more than 2,500 head.

Ordinance No. 10-217-3 provides, in relevant part, that a permit granted by the City may be revoked in the event the livestock facility "is not constructed or operated according to the plan submitted for approval," or in the event approval of the permit was obtained by fraud.

Ordinance No. 11-047-1 details the necessary contents of an application for permit to build a livestock facility. Pursuant to the ordinance, such permit application "shall consist of all written materials required by the Department of Environmental Quality or its successor agency of the State of Nebraska for the operation of such facility." The ordinance further provides for a grievance procedure should the permit application be denied.

Ordinance No. 11-047-2 provides that the City shall issue a permit "if the applicant's proposed facility meets all of the requirements of the Nebraska Department of Environmental Quality," as well as the supplemental requirements imposed by ordinance No. 11-047-3.

Finally, ordinance No. 11-047-3 requires an applicant to comply with certain enumerated requirements in addition to any requirements imposed by the Nebraska Department of Environmental Quality. Such requirements include, inter alia: soil analysis of the proposed site of any waste lagoon, to be gathered by drilling a series of test holes "at least ten feet below the bottom elevation of the lagoon"; any waste lagoon must use "a synthetic,

impermeable liner of at least 60 mil thickness placed over at least one foot thickness of compacted soil with provisions for leachate recovery and leak detection"; the applicant is prohibited from applying any solid or liquid waste to land with a slope greater than 10 percent or in an amount that exceeds "the infiltration capacity of the soil or the nutrient requirements of the crop"; the applicant must install ground water monitoring wells to be used to annually monitor ground water for nitrate and chloride content; and the applicant is required to "submit an acceptable bond or financial guarantee to [en]sure that waste containment facilities are closed in accordance with applicable laws and regulations of the state."

After the ordinances were adopted, the City sent a letter to FCF's attorney informing him that pursuant to the recently enacted ordinances, FCF was required to obtain a permit from the City before building its proposed hog confinement facility. The letter included copies of the ordinances. In response, FCF informed the City by letter that it was "proceeding to build our facility as planned" based on its belief that the ordinances "are of no force and effect." Thereafter, concrete was poured for a number of buildings at the hog confinement facility.

On November 5, 1997, the City filed suit against FCF, a general partnership; SLS, a corporation; Charles W. Sand, Jr.; and Timothy A. Cumberland (collectively defendants). Sand and Cumberland were alleged to be general partners of FCF as well as corporate officers of SLS. In its lawsuit, the City sought a writ of mandamus requiring defendants to comply with the ordinances, as well as a declaratory judgment with respect to the validity and applicability of the ordinances. Construction of the facility ceased at the time the suit was filed.

FCF filed an "Answer and Cross-Petition," denying the allegations in the City's petition. FCF also asserted several affirmative defenses, including, inter alia, that (1) the City's ordinances constitute unconstitutional special legislation; (2) "§ 8[1]-1504(11)" of the Nebraska Revised Statutes "takes precedence over § 17-536 [and t]hat if the Nebraska Department of Environmental Quality issues a permit to Furnas County Farms allowing the erection of its swine facility, the City has no authority to prohibit same through its own regulations"; and (3) the City's ordinances are unreasonable because they "are not reasonably necessary to

prevent any pollution or injury to the stream or source of water of the City of Alma, but are rather calculated to make it unreasonably expensive and burdensome for Furnas County Farms to erect its facility."

The district court issued a peremptory writ of mandamus commanding defendants to comply with the requirements of the ordinances. On appeal, this court reversed and vacated the peremptory writ and remanded the cause for further proceedings with respect to the City's request for declaratory relief. *State ex rel. City of Alma v. Furnas Cty. Farms*, 257 Neb. 189, 595 N.W.2d 551 (1999).

After remand, the City filed an amended petition seeking, inter alia, a judgment pursuant to Neb. Rev. Stat. § 25-21,150 (Reissue 1995), declaring the City's ordinances to be valid and binding upon defendants, as well as a temporary and permanent injunction requiring defendants to comply with the ordinances before resuming construction of the hog confinement facility.

FCF filed an "Amended Cross Petition" seeking damages in the amount of $1,600,000 allegedly incurred as the result of the delay in building the proposed hog confinement facility. FCF further sought a declaratory judgment pursuant to Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Cum. Supp. 2000) that the ordinances violate both federal and state Constitutions in the following particulars: (1) the ordinances constitute local or special laws in violation of Neb. Const. art. III, § 18; (2) the ordinances are preempted by Neb. Rev. Stat. § 81-1504(11) (Reissue 1999) "as set forth in [FCF]'s Answer"; and (3) the ordinances are an unreasonable, unlawful, and improper exercise of the police power delegated to the City by the federal and state Constitutions.

The City filed a motion for summary judgment with respect to FCF's cause of action for damages. The district court granted the motion, determining that the City, as a political subdivision, was immune from such a suit pursuant to Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997).

After a trial on the remaining issues, the district court entered an order determining that the ordinances are not preempted by Nebraska's Environmental Protection Act (NEPA), Neb. Rev. Stat. §§ 81-1501 to 81-1532 (Reissue 1999 & Cum. Supp. 2000). The district court further determined the ordinances were not

arbitrarily and unreasonably enacted and do not create an arbitrary or unreasonable classification. Finally, the court determined the ordinances are not special class legislation. The district court concluded that the ordinances are "valid, enforceable and binding upon [defendants]."

FCF attempted to appeal from the district court's order. In response, this court determined that the district court's order was not a final order, as the district court had not addressed the City's request for injunctive relief. Accordingly, we dismissed the appeal and remanded the matter to the district court for further proceedings. *City of Alma v. Furnas County Farms*, 262 Neb. xxiii (No. S-00-1303, June 28, 2001).

After a subsequent hearing on the issue of injunctive relief, the district court found that the City had a "clear right" to injunctive relief pursuant to its police power to protect the public health, safety, and welfare of its citizens. The district court, noting the dispute between the parties as to whether the City was required to show irreparable harm in order to obtain an injunction, determined that even if the City was required to make a showing of irreparable harm, the City had met that burden. Accordingly, the district court issued an injunction requiring defendants to comply with the ordinances before resuming construction of the hog confinement facility.

This appeal followed. Although the notice of appeal was filed on behalf of all four original defendants, only FCF filed a brief in this court.

III. ASSIGNMENTS OF ERROR

FCF assigns, rephrased and renumbered, that the district court erred in (1) determining that state law does not preempt the ordinances; (2) admitting into evidence over FCF's objections the opinions of the City's expert witnesses as well as exhibit 31, an impact analysis report authored by one of the experts; (3) granting the City injunctive relief; and (4) "fail[ing] to consider the damages suffered by Furnas County Farms as a direct result of the City's adoption of the challenged ordinances."

IV. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation

to resolve the questions independently of the conclusion reached by the trial court. *Longo v. Longo, ante* p. 171, 663 N.W.2d 604 (2003); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

[2] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001); *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001).

[3] An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001).

V. ANALYSIS

1. PREEMPTION

(a) Applicability of Livestock Waste Management Act and Title 130

In its first assignment of error, FCF contends the district court erred in failing to determine that the ordinances are preempted by state law. FCF argues the ordinances are preempted by (1) the NEPA; (2) the Livestock Waste Management Act (LWMA), Neb. Rev. Stat. §§ 54-2401 to 54-2414 (Reissue 1998 & Cum. Supp. 2000); and (3) title 130 of the rules and regulations of the Department of Environmental Quality enacted pursuant to both acts.

The City argues, however, that neither the LWMA nor title 130 is appropriate for consideration by this court in our preemption analysis. According to the City, the only issue presented to, and decided by, the district court was whether the ordinances are preempted by the NEPA. In response, FCF contends that it could not have included the LWMA in its original "Answer and Cross-Petition" because the LWMA became operative only after such pleading was filed. FCF further contends that in any event, it was "impossible" for the district court to evaluate the preemptive effect of the NEPA without examining the LWMA. Reply brief for appellant at 4. We turn first to a consideration of which state enactments are properly before this court in our preemption analysis.

The district court determined that the ordinances are not preempted by state law, concluding:

> Although the pleadings in this matter confine the preemption argument to [Neb Rev. Stat. § 81-1504(11) (Reissue 1999)], the argument in [FCF's] brief is broader and basically argues that the enactment of the Environmental Protection Act preempts Neb. Rev. Stat. Section 17-536 (Reissue 1997), the statute primarily relied on by the City of Alma.
>
> A review of the Environmental Protection Act and the evidence herein, leads this Court to conclude that the field of pollution control has not been preempted by the legislature. Section 81-1504(18) (Reissue 1994 and 1999) directs the Department of Environmental Quality to "encourage local units of government to handle air, land, and water pollution problems within their respective jurisdictions and on a cooperative basis and to provide technical and consultative assistance therefore." This is not language indicating a preemptive intent.

(Emphasis in original.)

The district court's preemption analysis clearly focused exclusively on the NEPA. The district court did not refer to either the LWMA or title 130 in its order, nor did the district court's order discuss any particular provision of either the LWMA or title 130 in its preemption analysis. FCF argues such was error. We disagree.

As the district court noted in its written order, the only state law basis for preemption raised by FCF's operative pleadings was § 81-1504(11) of the NEPA. Furthermore, a review of the bill of exceptions discloses that during the trial of this matter, FCF did not argue or present any evidence with respect to the preemptive effect of either the LWMA or title 130.

FCF contends that it could not have raised the LWMA at the time it filed its original "Answer and Cross-Petition" because the LWMA was not yet in effect. Although this is true, it is not persuasive. The operative date of the LWMA was April 15, 1998. See 1998 Neb. Laws, L.B. 1209. On January 27, 2000, 21 months after the effective date of the LWMA, FCF filed its "Amended Cross Petition." FCF's amended cross-petition did

not contain any allegation that the LWMA or title 130 provided a basis for preemption.

We further find unpersuasive FCF's contention that it was "impossible" for the district court to evaluate the preemptive effect of the NEPA without examining the LWMA. While it is true that the NEPA contains several subsections which refer to the LWMA, the NEPA and the LWMA are distinct and separate legislative enactments containing separate and distinct substantive provisions. Furthermore, having previously concluded that the LWMA was not presented to the district court by the pleadings, we further determine that under the record presented on appeal, it is not only possible but appropriate to analyze the preemptive effect of the NEPA without considering the LWMA.

[4] In sum, the issue of whether the City's ordinances are preempted by the LWMA or title 130 was not presented to or decided by the district court. As such, the district court did not err in failing to consider their preemptive effect, if any, and we do not reach that issue. An issue not presented to or decided by the trial court is not appropriate for consideration on appeal. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003); *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996). Consequently, our preemption analysis is limited to a determination of whether the NEPA preempts the ordinances.

(b) Does NEPA Preempt City's Ordinances?

[5,6] Preemption of municipal ordinances by state law is based on the fundamental principle that "municipal ordinances are inferior in status and subordinate to the laws of the state." 5 Eugene McQuillin, The Law of Municipal Corporations § 15.20 at 106 (3d ed. 1996). Thus, "'[w]here there is a direct conflict between a city ordinance and a state statute, the statute is the superior law.'" *Herman v. Lee*, 210 Neb. 563, 567, 316 N.W.2d 56, 59 (1982) (quoting *Arrow Club, Inc. v. Nebraska Liquor Control Commission*, 177 Neb. 686, 131 N.W.2d 134 (1964)).

[7-11] The touchstone of preemption analysis is legislative intent. "[T]he central question in a preemption case is not whether the legislature intended to grant authority to municipalities to act concerning a particular matter, but rather whether the legislature intended to deny municipalities the right to legislate

on the subject." 5 McQuillin, *supra* at 107. In construing a statute for preemption purposes, a court 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. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). The purpose and intent of the Legislature must be ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.* When reviewing preemption claims, the court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject. *State v. Kubik*, 159 Neb. 509, 67 N.W.2d 755 (1954); *Phelps Inc. v. City of Hastings*, 152 Neb. 651, 42 N.W.2d 300 (1950). When an ordinance is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes the ordinance clearly valid will be given. *Gillis v. City of Madison*, 248 Neb. 873, 540 N.W.2d 114 (1995).

[12] A municipal ordinance may be preempted by state law in three different circumstances. First, the Legislature may expressly declare in explicit statutory language its intent to preempt municipal ordinances. See *Midtown Palace, Inc. v. City of Omaha*, 193 Neb. 785, 229 N.W.2d 56 (1975) (recognizing that in Neb. Rev. Stat. § 28-926.33 (Reissue 1975), Legislature expressly declared in explicit statutory language its intent to preempt all municipal regulation of "obscene" material).

[13] Second, in the absence of explicit statutory language, the Legislature's intent to preempt municipal ordinances may be inferred from a comprehensive scheme of legislation. See *Phelps Inc., supra* (determining that Legislature did not intend to preempt field of liquor regulation); *Bali Hai', Inc. v. Nebraska Liquor Control Commission*, 195 Neb. 1, 236 N.W.2d 614 (1975) (affirming that Legislature did not intend to preempt field of liquor regulation). Often called field preemption, it has been described in the following manner:

> [A]n intent by the state to preempt an entire field of legislation need not be expressly declared. Preemption may be implied from the nature of the subject matter being regulated and the purpose and scope of the state statutory scheme. . . .

. . . .

> . . . [A]n ordinance may cover an authorized field of local laws not occupied by general laws, or may complement a field not exclusively occupied by the general laws. However, where the state has occupied the field of prohibitory legislation on a particular subject, a municipality lacks authority to legislate with respect to it.

5 Eugene McQuillin, The Law of Municipal Corporations § 15.20 at 107-08 (3d ed. 1996).

[14] Third, a municipal ordinance is preempted to the extent that it actually conflicts with state law. *Village of Winside*, 250 Neb. at 854, 553 N.W.2d at 479 (determining local ordinance requiring nonusers of garbage service to pay fee was invalid because of conflict with state statute permitting municipalities to impose fee upon " 'each person whose premises are served by the [garbage] facility or system' " (emphasis omitted)); *Bodkin v. State*, 132 Neb. 535, 536-37, 272 N.W. 547, 548 (1937) (perceiving no conflict between a statute making it unlawful for licensee to sell alcohol to minors " 'knowing them to be such' " and local ordinance providing that " '[n]o person shall, within the city,' sell any alcoholic liquors to minors").

> [T]hat which is allowed by the general laws of the state cannot be prohibited by ordinance, without express grant on the part of the state. Conversely, without express legislative grant, an ordinance cannot authorize what the statutes forbid. . . . [T]he fact that a local ordinance does not expressly conflict with the statute will not save it when the legislative purpose in enacting the statute is frustrated by the ordinance.

5 McQuillin, *supra* at 107.

[15] This court has stated that " '[a] city ordinance is inconsistent with a statute if it is contradictory in a sense that the two legislative provisions cannot coexist. . . . Generally, an ordinance cannot prohibit what the Legislature has expressly licensed, authorized, or permitted.' " *Herman v. Lee*, 210 Neb. 563, 567, 316 N.W.2d 56, 59 (1982) (quoting *Arrow Club, Inc. v. Nebraska Liquor Control Commission*, 177 Neb. 686, 131 N.W.2d 134 (1964)).

In its brief, FCF begins the first section of its preemption argument with the heading "Exclusive Occupation of the Field by

State Law: Express Preemption." Brief for appellant at 14. While in this heading FCF invokes both express and field varieties of preemption, in its argument which follows, FCF does not contend that the NEPA expressly preempts the ordinances. In any event, we are unable to find any language in the NEPA expressly declaring the Legislature's preemptive intent. We therefore consider FCF's specific preemption arguments with respect to field and conflict preemption.

FCF first contends that the district court erred in determining that "the field of pollution control" has not been preempted by the NEPA. According to FCF, the Legislature's intent to preempt the field of pollution control may reasonably be inferred from the following subsections of § 81-1504 of the NEPA:

> The [D]epartment [of Environmental Quality] shall have and may exercise the following powers and duties:
>
> (1) To exercise exclusive general supervision of the administration and enforcement of the Environmental Protection Act, the Integrated Solid Waste Management Act, the Livestock Waste Management Act, and all rules and regulations and orders promulgated under such acts;
>
> . . . .
>
> (10) To require submission of plans, specifications, and other data relative to, and to inspect construction of, disposal systems or any part thereof prior to issuance of such permits or approvals as are required by the Environmental Protection Act, the Integrated Solid Waste Management Act, and the Livestock Waste Management Act;
>
> . . . .
>
> (13) To exercise all incidental powers necessary to carry out the purposes of the Environmental Protection Act, the Integrated Solid Waste Management Act, and the Livestock Waste Management Act;
>
> . . . .
>
> (23) To delegate, by contract with governmental subdivisions which have adopted local air, water, or land pollution control programs approved by the council, the enforcement of state-adopted air, water, or land pollution control regulations within a specified region surrounding the jurisdictional area of the governmental subdivisions.

> Prosecutions commenced under such contracts shall be conducted by the Attorney General or county attorneys as provided in the Environmental Protection Act, the Integrated Solid Waste Management Act, and the Livestock Waste Management Act;
>
> . . . .
>
> (30) Under such conditions as it may prescribe for the review, recommendations, and written approval of the [D]irector [of Environmental Quality], to require the submission of such plans, specifications, and other information as it deems necessary to carry out the Environmental Protection Act, the Integrated Solid Waste Management Act, and the Livestock Waste Management Act or to carry out the rules and regulations adopted pursuant to the acts. When deemed necessary by the director, the plans and specifications shall be prepared and submitted by a professional engineer licensed to practice in Nebraska.

[16] The existence of the foregoing provisions on the subject of pollution control does not per se indicate a preemptive intent on the part of the Legislature. "[T]he mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted." 5 Eugene McQuillin, The Law of Municipal Corporations § 15.20 at 107 (3d ed. 1996). To determine the Legislature's intent, we must consider the foregoing provisions relied upon by FCF in relation to all other provisions of the NEPA. The purpose and intent of the Legislature must be ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

In its brief, FCF does not address the following additional subsections of § 81-1504 which we find relevant in our analysis:

> The [D]epartment [of Environmental Quality] shall have and may exercise the following powers and duties:
>
> . . . .
>
> (18) *To encourage local units of government to handle air, land, and water pollution problems within their respective jurisdictions and on a cooperative basis* and to provide technical and consultative assistance therefore;

> (19) To consult with any person proposing to construct, install, or otherwise acquire an air, land, or water contaminant source or a device or system for control of such source, upon request of such person, concerning the efficacy of such device or system or concerning the air, land, or water pollution problem which may be related to the source, device, or system. Nothing in any such consultation shall be construed to relieve any person from compliance with the Environmental Protection Act, the Integrated Solid Waste Management Act, the Livestock Waste Management Act, rules and regulations in force pursuant to the acts, *or any other provision of law*.

(Emphasis supplied.) Additionally, pursuant to § 81-1506(1)(b), it is unlawful for any person

> [t]o discharge or emit any wastes into any air, waters, or land of the state which reduce the quality of such air, waters, or land below the air, water, or land quality standards established therefor by the council. Any such action is hereby declared to be a public nuisance. *A livestock operation is not a nuisance if . . . [i]t is in compliance with applicable regulations adopted by the council and zoning regulations of the local governing body having jurisdiction.*

(Emphasis supplied.) Further, pursuant to § 81-1528(1),

> *[t]he Environmental Protection Act shall not apply in any political subdivision which provides for the control of air, water, or land pollution by resolution, ordinance, or regulation not inconsistent with the substantive provisions of the Environmental Protection Act or any rule or regulation adopted pursuant to such act . . . .*

(Emphasis supplied.)

[17] In view of the foregoing provisions, the purpose and intent of the Legislature, ascertained from the entire language of the NEPA, does not support FCF's claim of field preemption. To the contrary, considering the NEPA in its plain, ordinary, and popular sense, it is clear that the Legislature contemplated that municipalities would continue to enact ordinances on the subject of pollution control after the enactment of the NEPA. See *Village of Winside, supra*. Consequently, we determine that in enacting the NEPA, the Legislature did not intend to deny municipalities

the right to legislate on the subject of pollution control. FCF's contention that the NEPA preempts the field of pollution control is without merit.

FCF next contends the district court erred in failing to determine that the ordinances are preempted because they conflict with the NEPA. FCF's first argument in this regard is with respect to the following provision of ordinance No. 11-047-3: "The applicant *shall* submit an acceptable bond or financial guarantee to [en]sure that waste containment facilities are closed *in accordance with applicable laws and regulations of the state* without cost to the taxpayers of the country [sic]." (Emphasis supplied.) FCF argues such provision conflicts with the following provision of the NEPA:

> The [Environmental Quality C]ouncil shall adopt and promulgate rules and regulations requiring all new or renewal permit or license applicants regulated under the Environmental Protection Act, the Integrated Solid Waste Management Act, or the Livestock Waste Management Act to establish proof of financial responsibility by providing funds in the event of abandonment, default, or other inability of the permittee or licensee to meet the requirements of its permit or license or other conditions imposed by the department pursuant to the acts. The council may exempt classes of permittees or licensees from the requirements of this subdivision when a finding is made that such exemption will not result in a significant risk to the public health and welfare.

§ 81-1505(21)(a). According to FCF, the possibility of exemption from the bond requirement provided by § 81-1505(21)(a) conflicts with the mandatory bond requirement imposed by the City's ordinance. On this issue, we agree.

[18] The purpose of the mandatory bond requirement imposed by the subject provision of the ordinance is aimed to ensure compliance with "applicable laws and regulations of the state" for closing down waste containment facilities. See ordinance No. 11-047-3. The purpose of "providing funds" pursuant to § 81-1505(21)(a) is also to ensure compliance with the same provisions of state law referred to in the subject provision of the ordinance. The Legislature has determined, however, to permit

an exemption from such requirements under certain circumstances. Consequently, the subject provision of the ordinance in effect prohibits what state law expressly allows. "[T]hat which is allowed by the general laws of the state cannot be prohibited by ordinance, without express grant on the part of the state." 5 Eugene McQuillin, The Law of Municipal Corporations § 15.20 at 107 (3d ed. 1996). Since the subject provision of the ordinance directly conflicts with § 81-1505(21)(a), it is preempted and unenforceable. We therefore determine the district court erred insofar as it failed to conclude that the mandatory bond provision of ordinance No. 11-047-3 is preempted by the NEPA.

Finally, FCF argues that under our holding in *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992), the City's authority to regulate its hog confinement facility is preempted by the NEPA and that as such, § 17-536 provides no authority or jurisdiction permitting the City to enact these ordinances. In *Sarpy County*, this court determined that pursuant to the then-existing provisions of the NEPA, a city of the second class has no authority to regulate solid waste disposal areas located outside that city's zoning jurisdiction.

Sarpy County, supra, is clearly distinguishable. Our holding in *Sarpy County*, was specifically limited to the application of the then-existing provisions of the NEPA to solid waste disposal areas. The result in *Sarpy County* was based on our interpretation of § 81-1518(1) (Reissue 1987), which provided in part:

> "Before the director shall approve a new solid waste disposal area, it shall be approved by the county board of the county, if the area is outside the zoning jurisdiction of a city or village, or by the city council or board of trustees if within the zoning jurisdiction of a city or village."

Sarpy County, 241 Neb. at 984, 492 N.W.2d at 569. Pursuant to this subsection of the NEPA, we determined that notwithstanding § 17-536, the authority of a city of the second class to regulate solid waste disposal areas was limited by the NEPA to that city's "zoning jurisdiction." Given that the zoning jurisdiction of a city of the second class extended only to "within one mile" of the city's corporate limits, Neb. Rev. Stat. § 17-1001 (Reissue 1997), we determined that § 17-536 did not, under this circumstance, provide the city of Springfield authority to enact the ordinances at issue.

The NEPA contains no provision similar to that relied on in *Sarpy County, supra*, limiting the authority of a city of the second class to regulate a livestock confinement facility utilizing solid and liquid waste storage lagoons. Furthermore, FCF's hog confinement facility would not qualify either as a "solid waste disposal area" for purposes of this court's analysis in *Sarpy County*, or as a "solid waste management facility" for purposes of the NEPA. See, *Sarpy County, supra*; §§ 81-1517 and 81-1518 (Reissue 1987). See, also, § 81-1502(26), (37), and (38). For these reasons, we find no merit to FCF's contention.

2. Evidentiary Errors

FCF next assigns as error a number of evidentiary rulings made by the district court. Specifically, FCF asserts that the district court erred in admitting the opinions of the City's two expert witnesses over FCF's foundation and hearsay objections. FCF further asserts the district court erred in admitting exhibit 31, an impact analysis report, over its hearsay objection. To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001); *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001).

[19] In its brief, FCF states that "[w]ithout such evidence the City offered no rational basis for the passage of the Ordinance and its application as to the FCF facility." Brief for appellant at 47. Such sentence, apparently addressed to FCF's claim in the district court that the ordinances are arbitrary and unreasonable, is the only argument made by FCF that even tangentially addresses how it was prejudiced by the admission of such evidence. FCF, however, has not assigned as error the district court's determination that the ordinances are not arbitrary or unreasonable. Errors argued but not assigned will not be considered on appeal. *Forgét v. State*, 265 Neb. 488, 658 N.W.2d 271 (2003); *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). Moreover, FCF has not argued how the district court's evidentiary rulings resulted in undue prejudice with respect to any other issue that is properly before us. Thus, even if the district court's evidentiary rulings were erroneous, we perceive no basis from which to conclude that

a substantial right of FCF was unfairly prejudiced. Consequently, we decline to consider whether the district court's evidentiary rulings were prejudicial. FCF's assignment of error is without merit.

3. Injunction

[20] FCF next assigns that the district court erred in granting the City injunctive relief. An injunction is an extraordinary remedy and ordinarily should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

FCF contends there is no evidence that FCF violated the ordinances and that the City failed to meet its burden of proving irreparable harm:

> The City seeks an injunction to stop the construction of a swine confinement that is not in compliance with the City's ordinances. The City sought to prevent an act that is not occurring. The City offered no evidence of actual or substantial injury. The City failed to offer any evidence that it was suffering or that it would suffer, an irreparable harm. The City could not meet its burden of proof because FCF was not taking any steps to build a swine confinement facility subsequent to the District Court Order finding the Ordinance valid.

Brief for appellant at 47-48.

We first address FCF's contention that there is no evidence that FCF violated the ordinances. Our de novo review of the record reveals that after receiving copies of the recently enacted ordinances, FCF's attorney sent a letter to the City expressing belief that the ordinances are invalid and of its intention to commence construction of its facility without first obtaining a permit from the City:

> We appreciate your sending us copies of the Ordinances .... Please be advised that I have advised my clients that these Ordinances are of no force or effect. In other words, we are of the opinion that [the City does not have the] power under [its charter] from the State of Nebraska to require the applications for permits as shown in your Ordinances.
>
> ....

> Therefore, as you may have noticed, we are proceeding to build our facility as planned.

Furthermore, the record shows that prior to the City's filing suit on November 5, 1997, FCF commenced construction of its facility by pouring concrete at the site "for a number of buildings." FCF made no effort, however, to obtain a permit from the City prior to beginning construction, as required by the ordinances. Therefore, contrary to FCF's contention, upon our de novo review of the record, we find that FCF violated the ordinances and that its contention to the contrary is without merit.

We now turn to FCF's contention that the City failed to carry its burden of proving irreparable harm. This court has expressly recognized that irreparable harm need not be shown to enjoin a breach of a restrictive covenant properly filed of record. *Breeling v. Churchill*, 228 Neb. 596, 423 N.W.2d 469 (1988); *Wessel v. Hillsdale Estates, Inc.*, 200 Neb. 792, 266 N.W.2d 62 (1978). See, also, *Chestnut Real Estate v. Huber*, 148 Md. App. 190, 811 A.2d 389 (2002); *Focus Entertainment v. Partridge Greene*, 253 Ga. App. 121, 558 S.E.2d 440 (2001); *Jack Eckerd v. 17070 Collins A. Shop. C.*, 563 So. 2d 103 (Fla. App. 1990); *DeNina v. Bammel Forest Civic Club, Inc.*, 712 S.W.2d 195 (Tex. App. 1986); 43A C.J.S. *Injunctions* § 195 (1978). While this court has not expressly recognized such an exception where a city seeks to permanently enjoin the violation of an ordinance, we have implicitly abided by such a rule.

[21,22] As such, we have consistently regarded evidence of a violation of a valid statute or ordinance as sufficient to warrant the issuance of a permanent injunction to a municipality or public entity seeking to prevent further violations. *City of Lincoln v. Bruce*, 221 Neb. 61, 375 N.W.2d 118 (1985); *State ex rel. Meyer v. Weiner*, 190 Neb. 30, 205 N.W.2d 649 (1973); *State ex rel. Meyer v. Knutson*, 178 Neb. 375, 133 N.W.2d 577 (1965); *City of Beatrice v. Williams*, 172 Neb. 889, 112 N.W.2d 16 (1961); *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949); *State v. Chicago & N. W. Ry. Co.*, 147 Neb. 970, 25 N.W.2d 824 (1947); *City of Lincoln v. Logan-Jones*, 120 Neb. 827, 235 N.W. 583 (1931). See, also, *City of Omaha v. Cutchall*, 173 Neb. 452, 458, 114 N.W.2d 6, 10 (1962) (stating that defendants may be "enjoined from violating the ordinance . . .

unless the ordinance is clearly shown to be arbitrary and unreasonable with respect to the property involved"). " 'Injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute and whether or not they constitute a nuisance.' " *Knutson*, 178 Neb. at 381, 133 N.W.2d at 582 (quoting *Chicago & N. W. Ry. Co., supra*). Irreparable harm to public rights, property, or welfare is presumed to result from actions which by municipal ordinance have been declared unlawful. See *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991).

Such decisions of this court are consistent with the expressly declared rule in other jurisdictions that a municipality or public entity which shows a violation of a valid statute or ordinance need not show irreparable harm in order to obtain a permanent injunction to prevent further violations. *City of Europa v. Hodges*, 722 So. 2d 695 (Miss. 1998); *Wegner Auto Co., Inc. v. Ballard*, 353 N.W.2d 57 (S.D. 1984); *Joint School v. Wisconsin Rapids Ed. Asso.*, 70 Wis. 2d 292, 234 N.W.2d 289 (1975); *Conway-Bogue v. Bar Assn.*, 135 Colo. 398, 312 P.2d 998 (1957); *Miller v. Knorr*, 553 So. 2d 1043 (La. App. 1989) (determining proof of irreparable injury unnecessary to enjoin violation of valid zoning ordinance). See, also, 43A C.J.S., *supra* at 406-07 (stating that "an allegation of irreparable injury is not necessary as a basis for issuance of a temporary injunction in a suit brought by a city or other public body alleging violation of its ordinances and state statutes"). In such cases, irreparable harm to the public is presumed to result from actions which by statute or ordinance have been declared unlawful. *City of Europa, supra*. As articulated by the Wisconsin Supreme Court, "[t]he express basis for such holdings is that the fact that the activity has been declared unlawful reflects a legislative or judicial determination that it would result in harm which cannot be countenanced by the public." *Joint School*, 70 Wis. 2d at 310-11, 234 N.W.2d at 300 (holding that violation of ban on public employee strikes may be enjoined "without the presentation of evidence of actual harm in a particular case").

In the instant case, our de novo review of the record shows that the City presented sufficient evidence to the district court that

FCF was in violation of the ordinances. Additionally, in rejecting FCF's claim that the ordinances are arbitrary and unreasonable, the district court determined that the ordinances are valid and binding upon FCF. FCF has not assigned as error the district court's determination that the ordinances are not arbitrary and unreasonable. We determine the injunction was properly issued. FCF's assignment of error is without merit.

4. Damages

Finally, FCF assigns as error that "[t]he District Court failed to consider the damages suffered by [FCF] as a direct result of the City's adoption of the challenged ordinances." Such assignment of error is presumably addressed to the district court's grant of summary judgment to the City with respect to FCF's cross-claim for damages. In its brief, FCF claims that

> [t]he District Court further erred in granting Summary Judgment to the City of Alma as to FCF's First Cause of Action of its Cross-Petition. FCF has suffered damages due to its inability to construct and operate the facilities as permitted under Nebraska law. Therefore this Court should declare the Ordinance[s] void and unenforceable and strike the injunction against FCF and remand this matter back to the District Court to determine the amount of FCF's damages.

Brief for appellant at 48. FCF's reply brief states that "FCF further requests that the Court find that the District Court erred in granting summary judgment to the City of Alma as to FCF's first cause of action of its Cross Petition." Reply brief for appellant at 9.

[23] The foregoing constitutes the entirety of any statements which even tangentially relate to FCF's assigned error. Such statements, however, merely restate the assigned error and thus do not constitute the required argument in support of the assigned error. See Neb. Ct. R. of Prac. 9D(1)d and h (rev. 2000). Errors that are assigned but not argued will not be addressed by an appellate court. *Harsh International v. Monfort Indus.*, *ante* p. 82, 662 N.W.2d 574 (2003); *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003). We therefore do not address this assigned error.

VI. CONCLUSION

The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

MICHAEL D. WOOD, APPELLANT AND CROSS-APPELLEE, V. JUDY L. WOOD, APPELLEE AND CROSS-APPELLANT.

667 N.W.2d 235

Filed August 8, 2003. No. S-02-244.

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. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Courts: Jurisdiction: Property Settlement Agreements: Child Support.** Although a district court may not order child support beyond the age of majority, the district court has the authority to enforce the terms of an approved settlement which include an agreement to support a child beyond the age of majority.
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: Intent.** When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
7. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.
8. **Declaratory Judgments: Pleadings: Justiciable Issues.** A court should avoid declaratory judgments unless the pleadings present a justiciable controversy which is ripe for judicial determination.
9. **Contracts: Parties: Intent.** When the parties to an agreement have no intention of benefiting third parties at the time they form the agreement, the third parties do not possess third-party beneficiary status.
10. **Contracts: Intent.** When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.
11. **Colleges and Universities: Words and Phrases.** The plain meaning of the term "college" is an undergraduate institution having a course of study commonly requiring 4 years for completion and leading to a bachelor's degree.
12. **Modification of Decree.** A dissolution decree may be modified only upon a material and substantial change in circumstances.

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

Claude E. Berreckman, Jr., of Berreckman & Berreckman, P.C., for appellant.

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

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

GERRARD, J.

Appellant Michael D. Wood and appellee Judy L. Wood entered into a settlement agreement as part of their 1993 divorce. As part of the agreement, Michael was obligated to pay one-half the educational expenses of their children's post high school education. Judy alleges that Michael failed to pay for some of his obligation under this agreement. Judy applied to the district court for a modification of the decree and for a judgment enforcing the settlement agreement. After a bench trial, the court construed the agreement to obligate Michael to pay for one-half the education of his children, including those children past the age of majority, but for only 4 years of post high school education. Michael appeals, and Judy cross-appeals. With a minor monetary modification, we affirm the judgment of the district court.

FACTUAL BACKGROUND

Michael and Judy were married and had three children: Brandon, born September 3, 1981; Tiffany, born July 28, 1983; and Jeremy, born January 10, 1985. On February 9, 1993, a divorce decree was entered by the district court which incorporated a settlement agreement signed by both parties. After a description of the three children, paragraph B4 of that agreement reads: "In the event, any of said children shall elect to pursue further education after graduation from high school, including college or vocational training, the husband agrees to be responsible for one-half of such expenses for each child, including tuition, books, and room and board." By the time of trial, Brandon had attended the University of Montana and Tiffany

had attended Hastings College, both accruing related expenses. Jeremy was still in high school. Michael has not paid one-half of some of these college expenses which, Judy alleges, is a violation of the settlement agreement. On June 21, 2001, Judy filed an application for modification of decree and judgment, seeking a judgment against Michael regarding these obligations.

The agreement also obligated Michael to maintain health, accident, hospitalization, dental, and optometric insurance for the children and to pay one-half of any amounts not reimbursed by insurance. In her application for modification, Judy also asked the court to order Michael to pay his portion of some unreimbursed medical expenses incurred for the care of Brandon. In the alternative, Judy asked the court to modify the divorce decree by transferring the tax exemption allocation regarding Brandon from Michael to her.

Michael filed an answer asking the court to dismiss the application on the grounds that he had not been sufficiently informed of any of these expenses and that Brandon had already reached the age of majority, resulting in absolute termination of Michael's legal responsibility to pay one-half of Brandon's medical or educational expenses.

After a bench trial, the district court entered an order finding that the post high school education obligations ran past the children's age of majority. The court also found the agreement to be ambiguous in three areas. It construed Judy's obligations vis-à-vis the college expenses as being identical to Michael's, although the agreement was silent on this point. This construction is consistent with Judy's understanding of her obligations. The court also construed the room and board to include only the on-campus rent and food expenses. It further construed the obligation to include only 4 years of education after high school. The court found all the tuition, book, and on-campus room and board expenses already accrued by Brandon and Tiffany to be reasonable. Michael was ordered to pay his obligations within 60 days to the educational institutions attended by his children.

The court found that the children were third-party beneficiaries to the settlement agreement. Lastly, the court found that it did not have the authority to allocate a tax exemption of an adult child to his parent and dismissed the portion of Judy's

application requesting such relief. The court overruled a motion for new trial filed by Michael. A timely appeal was filed by Michael, and Judy cross-appeals.

ASSIGNMENTS OF ERROR

Michael assigns, restated, that the district court erred by (1) finding that Michael was obligated by the settlement agreement to pay educational expenses after the child reaches the age of majority, (2) finding that the children are third-party beneficiaries, (3) overcalculating the amounts owed by Michael, (4) ordering Michael to pay this amount within 60 days, and (5) ordering Michael to pay his obligations directly to the educational institutions.

Judy cross-appeals, assigning, restated, that the district court erred by (1) finding the settlement agreement to be ambiguous, (2) finding the educational obligations to be limited to 4 years, and (3) finding it had no authority to reallocate the tax exemption for their college-bound adult child.

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. *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001).

[2] The meaning of a contract and whether a contract is ambiguous are questions of law. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *K N Energy v. Village of Ansley, ante* p. 164, 663 N.W.2d 119 (2003).

ANALYSIS

Past Age of Majority

Michael's first assignment of error raises two issues: (1) whether a district court has the authority to enforce the terms of an approved settlement which includes an agreement to support an adult child and (2) whether the settlement agreement or decree does in fact obligate Michael to support an adult child.

[4] Michael cites *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986), for the proposition that a court cannot order continuing support for an adult child as part of the divorce decree. Indeed, the law does not force a parent to support his adult child. In *Zetterman v. Zetterman*, 245 Neb. 255, 512 N.W.2d 622 (1994), however, we held that although Neb. Rev. Stat. § 42-364 (Reissue 1988) does not permit a district court in a dissolution action to order child support beyond the age of majority, the district court has the authority to enforce the terms of an approved settlement which may include an agreement to support a child beyond the age of majority. See, *Foster v. Foster, ante* p. 32, 662 N.W.2d 191 (2003); *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999). This is precisely what the district court did—enforce an existing agreement in context of a dissolution action. Therefore, to the extent that the settlement agreement obligates Michael to legal responsibility for his adult children, the district court has the authority to order Michael to comply with those provisions, even after the children reach the age of majority.

[5,6] Whether this settlement agreement does in fact require Michael to contribute to his children's education after they reach the age of majority is the question we now address. The district court interpreted paragraph B4 of the agreement to include such an obligation. It appears that the court did not find this aspect of the agreement to be ambiguous, but, rather, read the contract language to plainly include postminority schooling. We review this determination independently as a matter of law. See *Spanish Oaks, supra*. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Guerrier v. Mid-Century Ins. Co., ante* p. 150, 663 N.W.2d 131 (2003). In our independent review, we ask whether paragraph B4 of the agreement is susceptible of a reasonable interpretation that the obligation to cover expenses of each child's "education after high school, including college or vocational training," ends at the child's 19th birthday. We conclude that this phrase is not susceptible of such an interpretation. When a contract is unambiguous, the intentions of the parties must be determined from the contract itself. *Spanish Oaks, supra*. The plain and ordinary meaning of the terms as an ordinary or reasonable person would

understand them contemplates a college education, which in virtually all cases runs past the student's age of majority. This assignment of error is without merit.

THIRD-PARTY BENEFICIARIES

[7,8] The issue of the children's third-party beneficiary status is not properly before this court. None of the children are seeking to exercise their status as third-party beneficiaries. Until such time as they do, the issue is not ripe for judicial determination. While the district court, in dicta, opined that the children are third-party beneficiaries to the settlement agreement, that finding was not required for the court to determine the case before it. 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. *In re Estate of Reading*, 261 Neb. 897, 626 N.W.2d 595 (2001). Thus, a court should avoid declaratory judgments unless the pleadings present a justiciable controversy which is ripe for judicial determination. *US Ecology v. State*, 258 Neb. 10, 601 N.W.2d 775 (1999). We decline to address this aspect of the district court order.

OVERCALCULATION OF MICHAEL'S OBLIGATION

Michael alleges that he was not properly credited for money he has given to Brandon for his educational expenses. Michael's brief specifically mentions two categories. The record shows that Michael wired Brandon a total of $475 in four installments between November 6 and December 17, 2001. Michael testified that he sent this money after Brandon complained of difficulty paying his off-campus rent while at college. The record also shows that Michael paid $102.07 toward a Stafford loan for Brandon's education. Michael asserts that the trial court erred in withholding from him credit for these expenditures.

The portion of this assignment of error which pertains to the loan payment has merit. The court did not credit Michael for this amount. The court ordered Michael to pay $7,842.30 for Brandon's educational expenses over his first four semesters at the college. This is one-half of the exact sum of tuition plus on-campus room and board for the years 2000 to 2002, as recorded in exhibit 1. Therefore, Michael was not given credit for his

payment into Brandon's loan account. Since neither the agreement nor the divorce decree specified the method Michael was required to pay his one-half of Brandon's educational expenses, this loan payment is properly considered as partial fulfillment of his obligations. It was an abuse of discretion for the district court not to credit Michael for this payment.

However, the portion of this assignment of error which concerns the money transfers into Brandon's checking account is without merit. The court found that Michael was not liable for Brandon's off-campus rent. The court found that the "room and board" language was ambiguous and limited it to on-campus expenses. Neither party has complained about the court's construction of these terms, "room and board," and we find sufficient evidence to support the court's construction. Brandon was living off campus during the two semesters of the 2001-2002 school year, the time Michael supplied Brandon with the $475 for off-campus rent. Since Michael was not obligated by the court order to pay one-half of this amount, any money he supplied to Brandon was voluntary and was not compelled by the settlement agreement or the divorce decree. The Nebraska Court of Appeals recently determined in *Palagi v. Palagi*, 10 Neb. App. 231, 627 N.W.2d 765 (2001), that a father's voluntary payments of his child's college-related expenses did not offset accrued child support payments. Similarly, Michael's voluntary donation of money to Brandon for off-campus rent does not offset Michael's obligations to pay any sums compelled by the settlement agreement or the divorce decree. This portion of Michael's assignment of error is without merit.

60 Days to Pay

Michael also alleges it to be inequitable for the court to order full payment of his obligations, a total of $10,124.61, within 60 days when the identical obligation of Judy is being paid over a longer term. The record indicates that at the time of trial, Judy had paid only about $500 cash for Brandon's college expenses. However, as Michael's brief stresses, Judy is taking full advantage of the federal loan programs, and she is assuming the obligations of these loans. Michael is not precluded from also acquiring a loan for his obligations. The order to pay the required amount

within 60 days is not unreasonable and not an abuse of discretion. See, *Waldbaum v. Waldbaum*, 171 Neb. 625, 107 N.W.2d 407 (1961) (requiring that husband in dissolution proceeding pay $10,000 within 30 days of mandate issuance); *Spencer v. Spencer*, 158 Neb. 629, 64 N.W.2d 348 (1954) (ordering alimony payment of $15,000 within 60 days of mandate issuance). This assignment of error is without merit.

Payment to Educational Institutions

[9] The court ordered that Michael pay his one-half of Brandon's and Tiffany's accrued college tuition expenses directly to the institutions attended. Michael alleges that such an arrangement turns the institutions into third-party beneficiaries. This assertion is unfounded. As Michael admits, the parties to the agreement had no intention of benefiting these educational institutions when they formed their agreement. This precludes any third-party beneficiary status. See *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996).

We also determine that the district court did not abuse its discretion in ordering Michael to pay accrued college tuition expenses directly to the institutions. The court did not explain why it required Michael to pay the educational institutions directly, and the record is unclear regarding the actual amounts presently owed to the institutions, but it is not uncommon for divorce decrees to order one party to pay certain debts directly to the creditor and not through the court or through the other party. See, e.g., *Dennis v. Dennis*, 6 Neb. App. 461, 574 N.W.2d 189 (1998); *Else v. Else*, 5 Neb. App. 319, 558 N.W.2d 594 (1997). Neither Michael nor Judy is deprived of a substantial right by the court's ordering Michael to pay the educational institutions directly. This assignment of error is without merit.

4-Year Limitation

Judy asserts in her cross-appeal that the settlement agreement was not ambiguous and that the proper interpretation of the agreement precludes the court from reading a 4-year post high school education limitation into it.

In order to assess this assignment of error, we must first address the finding of the district court that paragraph B4 of the

agreement was ambiguous. This paragraph (and its identical language in the dissolution decree) reads: "In the event, any of said children shall elect to pursue further education after graduation from high school, including college or vocational training, the husband agrees to be responsible for one-half of such expenses for each child, including tuition, books, and room and board."

[10] 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. *Guerrier v. Mid-Century Ins. Co., ante* p. 150, 663 N.W.2d 131 (2003). Whether a contract is ambiguous and therefore in need of construction is a question of law. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *K N Energy v. Village of Ansley, ante* p. 164, 663 N.W.2d 119 (2003). When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

The language of the agreement does not set out any explicit duration limitation for the educational expenses assistance. However, we must determine whether this paragraph is susceptible of incompatible but reasonable interpretations regarding the presence or absence of durational limits. We find that the phrase "further education after graduation from high school, including college or vocational training," unambiguously means education up to the attainment of a 4-year bachelor's degree. Other jurisdictions that have considered the scope of the term "college" similarly have concluded that it unambiguously means an " 'undergraduate' school . . . having a course of study commonly requiring four years for completion and leading to a bachelor's degree." *Matter of Kelly*, 285 N.Y. 139, 142, 33 N.E.2d 62, 63 (1941). See, also, e.g., *Barnard v. Barnard*, 214 Conn. 99, 570 A.2d 690 (1990); *In re Marriage of Holderrieth*, 181 Ill. App. 3d 199, 203-04, 536 N.E.2d 946,

949-50, 129 Ill. Dec. 896, 899-900 (1989) (stating that "the term 'college or professional' . . . is sufficiently unambiguous . . . [and that] college refers to undergraduate study in the liberal arts or sciences leading, usually after four years, to a bachelor's degree").

In a case cited frequently for its holding that "college," commonly understood, refers to undergraduate education, the court was called upon to decide whether a will which provided for contribution " 'toward the expense of a college education . . . until [the devisee] completes his college education' " included a contribution toward a postgraduate medical education. *Epstein v. Kuvin*, 25 N.J. Super. 210, 211, 95 A.2d 753 (1953). After concluding that "the meaning commonly attached to the term, 'a college education,' [is] a four-year course [which] leads to a bachelor's degree in liberal arts or science, or to an engineering degree," the court explained its holding:

> We are aware, of course, of many variations in the scheme and in the use of the word "college." Yet we believe that the great majority of people, when they say that this member of the family or that acquaintance had a college education or has a college degree, mean that he has taken a regular course of study on the undergraduate level that is open to students coming directly from high school; and that he has been awarded the bachelor's degree to which the course leads, and so completed his college education.

Id. at 213-14, 95 A.2d at 754.

[11] We adopt the same commonsense, plain meaning approach that several other courts have employed. The term "college," as used in this context, can only mean an undergraduate institution having a course of study commonly requiring 4 years for completion and leading to a bachelor's degree. Even though a growing number of young adults are extending their college "careers" to 5 years and beyond, the common and accepted course of study leading to a bachelor's degree remains at 4 years. The district court did not err as a matter of law in construing the settlement agreement to include a maximum of 4 years' post high school education.

Michael and Judy are each obligated by the plain meaning of the settlement agreement and the divorce decree to supply one-half

of the costs of tuition, books, and on-campus room and board for each of their children's post high school education in pursuit of vocational training or a 4-year bachelor's degree.

Tax Claim Allocation

In her application to the district court, Judy asked the court to either award her one-half the unreimbursed medical expenses she paid for Brandon's medical care or, in the alternative, to be given the right, now allotted to Michael, to claim Brandon as her dependent on her tax form. This would preclude Michael (and Brandon) from claiming Brandon on any other tax return. At trial, Judy's counsel clarified that Judy understands these medical expenses occurred after Brandon turned 19, and therefore, Michael is not legally obligated to pay for any portion of them. However, Judy still asks the court that if she is going to incur these costs on behalf of Brandon, she should be able to claim him on her tax return, in contradistinction to the agreement and the release she signed.

[12] The district court found that it did not have the authority to award a tax exemption for an adult child. It found that it could not preclude Brandon from claiming himself. Furthermore, the tax exemption allotment was part of the dissolution decree and, therefore, can be modified only upon a material and substantial change in circumstances. See, *Bowers v. Scherbring*, 259 Neb. 595, 611 N.W.2d 592 (2000); Neb. Rev. Stat. § 42-365 (Reissue 1998). The district court did not abuse its discretion in finding that no such material change had occurred. This assignment of error is without merit.

CONCLUSION

In conclusion, we affirm, as modified, the judgment of the district court. We affirm the court's finding that Michael and Judy are both obligated to pay one-half the tuition, books, and on-campus room and board for each of their children's pursuit of a 4-year bachelor's degree or of vocational training, including those expenses incurred after the recipient child attains the age of majority. However, we modify the judgment so as to give Michael credit for his $102.07 payment into Brandon's Stafford loan account. Paragraph 3 of the judgment is modified to reflect

that Michael is ordered to pay the University of Montana the total sum of $7,740.23, representing the remaining one-half of Brandon's tuition and room and board for the first and second semesters of the 2000-2001 school year, and one-half of tuition only for the first and second semesters of the 2001-2002 school year. In all other respects, the judgment is affirmed.

AFFIRMED AS MODIFIED.

DOUGLAS A. KINNEY, APPELLEE AND CROSS-APPELLANT, V. H.P. SMITH FORD, L.L.C., APPELLANT AND CROSS-APPELLEE.
667 N.W.2d 529

Filed August 8, 2003. No. S-02-689.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **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.
3. ____. A renewed motion for directed verdict need not restate with precision every basis asserted in the initial motion for directed verdict. The two should be considered together.
4. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
5. **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.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Joseph E. Jones and Heidi L. Evatt, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., and Jerome T. Wolf and David S. Ladwig, of Sonnenschein, Nath & Rosenthal, for appellant.

Gregory C. Scaglione, of Koley Jessen, P.C., for appellee.

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

PER CURIAM.

NATURE OF CASE

Douglas A. Kinney, who served as the managing partner of H.P. Smith Ford, L.L.C. (H.P. Smith), for approximately 18 months, brought this action against H.P. Smith after his employment was terminated. In his petition, Kinney alleged that H.P. Smith owed him unpaid wages, including bonuses, and the value of his 10-percent ownership in the dealership. He also requested replevin of personal items. H.P. Smith filed a counterclaim, alleging that Kinney had breached his fiduciary duty during the time he managed the dealership. The jury returned verdicts in favor of Kinney on the claims asserted in his petition and found against H.P. Smith on its counterclaim.

FACTS

From 1983 to 1994, Kinney worked at various automobile dealerships in the capacity of controller or head of the accounting department. Prior to 1997, he worked for Wolfe Automotive Group (WAG) in Kansas City, Missouri, as the controller, internal auditor, and chief financial officer. While Kinney worked for WAG in Kansas City, he was paid a salary of $8,500 per month plus a bonus equal to 1 percent of the net profits of the 13 dealerships owned by WAG.

In 1997, Kinney was given the opportunity to purchase a 10-percent equity interest in H.P. Smith, located in Omaha, Nebraska. Kinney, Jeffrey Wolfe, Cynthia Tucci, and David Gatchell then entered into an operating agreement which governed the operations of H.P. Smith and the relationship between the owners. Kinney made an initial investment of $10,000 which constituted the opening balance of his capital account. Effective July 1, Kinney became the managing partner of H.P. Smith and received a salary of $10,000 per month plus a bonus equal to 10 percent of H.P. Smith's net profits. He also received a relocation bonus of $40,000.

In early 1998, Robert Priest, Jr., WAG's chief financial officer, prepared an accounting of bonuses due Kinney for his 1997 employment with WAG and H.P. Smith. The accounting indicated a bonus of $56,500 for work in Omaha and a bonus of $19,455 for "Pre-Omaha" employment. Kinney subsequently prepared his

own reconciliation because he disagreed with Priest's calculations. Kinney's calculations indicated an Omaha bonus of $68,478 and a bonus for pre-Omaha employment of $41,797.56.

Throughout 1998, Kinney continued receiving a monthly salary of $10,000 plus benefits and a 10-percent bonus on H.P. Smith's net profits. He was also offered certain bonuses as a performance incentive plan. H.P. Smith subsequently prepared an accounting of Kinney's 1998 bonuses which showed that he had earned a bonus of $90,064. Subtracting advances Kinney had received, H.P. Smith's calculations reflected that Kinney owed the dealership $2,980. Kinney disputed these figures and prepared his own reconciliation, which indicated that he had earned a bonus of $142,712, of which he had received only $19,804.83. Kinney claimed he was owed $122,907.17 for 1998. His employment was terminated on January 20, 1999.

On March 2, 1999, Kinney commenced this action against H.P. Smith for replevin; unpaid wages, including bonuses, under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1998); and breach of contract for failure to pay him the balance of his capital account. In its answer, H.P. Smith denied liability and filed a counterclaim asserting that Kinney had breached his fiduciary duty and that as a result, H.P. Smith had been damaged.

At trial, Kinney testified as to the increase of his capital account since his initial capital investment. He stated that following his termination of employment, H.P. Smith transferred his 10-percent ownership interest to Tom Fitzgerald and Larry Villines without paying him for his interest. Kinney alleged that as of December 31, 1998, the balance of his capital account was $126,150.60.

The jury returned verdicts in favor of Kinney in the following amounts: $132,500 on his claim for unpaid wages; $116,645 on his claim for the value of his capital account; and $560 for his replevin action. The jury found against H.P. Smith on the counterclaim for breach of fiduciary duty.

The trial court entered judgment in favor of Kinney in the amount of $249,705 plus prejudgment interest in the amount of $32,037.78. The court also awarded attorney fees of $40,000 and costs of $4,081.28 pursuant to § 48-1231. Pursuant to § 48-1232,

the court ordered H.P. Smith to pay $1,000 into a fund to be distributed to the common schools of the State of Nebraska.

H.P. Smith filed a motion for judgment notwithstanding the verdict or, in the alternative, for new trial. The motion was denied, and H.P. Smith appeals.

ASSIGNMENTS OF ERROR

H.P. Smith assigns as error that the trial court erred in (1) submitting Kinney's unpaid bonus and breach of contract claims to the jury because Kinney failed to offer any testimony that his damages were calculated in compliance with (a) generally accepted accounting principles (GAAP), as required by the operating agreement, and (b) the strict terms of the operating agreement governing the calculation of capital account balances; (2) overruling H.P. Smith's objection to Kinney's testimony concerning his alleged damages because he failed to lay a foundation qualifying himself as an expert on GAAP; (3) overruling H.P. Smith's objection that Kinney failed to lay an adequate foundation for his damages testimony and exhibits because expert testimony on GAAP was required; and (4) submitting Kinney's unpaid bonus and breach of contract claims to the jury because it permitted the jury to award damages to him based on speculation and conjecture, to H.P. Smith's prejudice.

On cross-appeal, Kinney claims that the trial court erred when it ordered H.P. Smith to pay $1,000 into a fund for the common schools of the state pursuant to § 48-1232. Kinney asserts that the court should have assessed an amount equal to the judgment on his claim for unpaid wages or double that amount.

STANDARD OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Green Tree Fin. Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002).

ANALYSIS

H.P. Smith argues that the trial court should not have submitted Kinney's claims concerning an unpaid bonus and the amount in his capital account to the jury because he failed to show that

his damages were calculated in compliance with GAAP and that the capital account balance was calculated in compliance with the terms of the operating agreement. H.P. Smith asserts that Kinney was not qualified to testify as to the calculation of the bonuses due him because he failed to lay a foundation qualifying himself as an expert on GAAP and that he failed to lay adequate foundation for his damages because expert testimony on GAAP was required. In its brief, H.P. Smith defines GAAP as including " 'broad statements of accounting principles amounting to aspirational norms as well as more specific guidelines and illustrations,' " quoting *Bily v. Arthur Young and Co.*, 3 Cal. 4th 370, 834 P.2d 745, 11 Cal. Rptr. 2d 51 (1992). See brief for appellant at 20. It argues that the failure to provide qualified expert testimony regarding Kinney's damages was prejudicial error.

At trial, H.P. Smith objected to certain exhibits offered by Kinney based on a lack of foundation and claimed that the exhibits specifically required expert testimony. The trial court overruled the objection based upon *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997), which dealt with demonstrative evidence. Kinney then continued to testify regarding his computation of his bonus income for 1998 and the calculation of his 1998 yearend capital account balance.

H.P. Smith argues that the trial court failed to determine whether a proper foundation was laid for Kinney's opinion testimony concerning his damages and therefore erred in admitting the evidence. It also argues that Kinney failed to testify how his calculations complied with or were derived from GAAP. H.P. Smith therefore asserts that Kinney failed to supply the requisite expert testimony for the figures underlying his calculations and that, as a result, the court erred in submitting such evidence to the jury.

We first address whether the trial court erred in admitting evidence relating to Kinney's claims regarding his bonus and capital account. The objections made by H.P. Smith relate to the admissibility of demonstrative exhibits offered by Kinney during the course of his testimony.

It was incumbent upon H.P. Smith to make a specific objection to the evidence offered by Kinney. It is obvious from the record that the trial court did not consider the objections to the

evidence that H.P. Smith now argues on appeal. The trial court was not advised that H.P. Smith objected to certain evidence because it did not conform to GAAP or did not comply with the requirements of the operating agreement. The objections in the record relate specifically to the offer of exhibits which the court considered to be demonstrative evidence. There were no objections to Kinney's testimony except general objections to foundation, e.g., "calls for expert testimony."

A general foundational objection fails to provide adequate specificity to object to the qualifications of an expert witness, and thus, such general objection is insufficient to challenge the expert's qualifications. See *Bernadt v. Suburban Air, Inc.*, 221 Neb. 537, 378 N.W.2d 852 (1985). Without a more specific objection, neither the court nor the proponent of the evidence can properly address the reason for the party's objection to the admission of such evidence.

The record does not establish that H.P. Smith objected to the evidence on the basis that Kinney had not shown that such evidence was prepared in accordance with GAAP. H.P. Smith failed to specifically identify in its objection how the evidence lacked foundation or that Kinney was not competent to testify as to the amount of the damages he claimed were owed to him. The record showed that Kinney had been the controller, internal auditor, and chief financial officer of WAG. The objection was not specific enough to permit Kinney to counter the objection with additional evidence regarding foundation or expertise.

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Green Tree Fin. Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002). We conclude that the trial court did not abuse its discretion in overruling H.P. Smith's objections to the evidence offered by Kinney.

We next address whether the trial court erred in submitting Kinney's unpaid bonus and capital account claims to the jury. At the close of Kinney's case, H.P. Smith asked the trial court to direct a verdict on the capital account, arguing that the plain language of the operating agreement stated that H.P. Smith had "the right, but not the obligation, to repurchase" Kinney's interest "for

a purchase price equal to the positive balance" of the capital account when his employment was terminated. The motion for directed verdict was overruled by the court.

H.P. Smith then presented evidence and, at the close of its case, renewed its motion as to the language of the operating agreement. It also moved for a directed verdict on Kinney's claim for 1997 wages because he had reviewed the calculations made by H.P. Smith and had not raised any issues at that time. As another basis for its motion for directed verdict, H.P. Smith asserted that there was no credible evidence of damages because Kinney's evidence was based on a financial statement that was erroneous in that he had offered no expert testimony to support his damage claim. This motion was also overruled. H.P. Smith again renewed its motion after Kinney had presented his case in rebuttal.

[2] 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. *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003). By proceeding with trial and introducing evidence, H.P. Smith waived any error in the trial court's initial ruling on the motion for directed verdict made at the close of Kinney's case. See *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002).

[3,4] We next consider whether the trial court erred in overruling the motion for directed verdict at the close of H.P. Smith's case and after Kinney had presented his rebuttal evidence. "A renewed motion for directed verdict need not restate with precision every basis asserted in the initial motion for directed verdict. The two should be considered together." *Id.* at 959, 653 N.W.2d at 819. A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002).

[5] 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. *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000). At trial, Kinney testified that in preparing his bonus reconciliation, he analyzed H.P. Smith's 1998 financial statements

and calculated what he believed was the dealership's net profit. He testified without objection that he used this information to calculate his 1998 bonus. Kinney also testified without objection that H.P. Smith's net income in 1998 was about $1.4 million. Additional testimony was offered by a former new car and truck manager of H.P. Smith, who testified that based on management meetings in which he participated and upon a review of H.P. Smith's business records, he believed that the bonus pool upon which Kinney's percentage of wages was based was about $1.5 million. There was no objection to this testimony.

We conclude that there was sufficient evidence to submit Kinney's bonus claim to the jury. The record shows that the jury had sufficient evidence upon which to make its determination as to the bonus due Kinney. Evidence was properly admitted upon which reasonable minds could draw different conclusions as to the bonuses owed to Kinney and the amount of the capital account. The trial court did not err in submitting Kinney's claims to the jury, as the damages were not based on speculation or conjecture.

With regard to Kinney's capital account, the operating agreement provided that an owner's capital account was to be increased or decreased based on income, gains, losses, and deductions of H.P. Smith. Upon termination of Kinney's employment, H.P. Smith had the right, but not the obligation, to repurchase Kinney's interest in the amount of the positive balance of the capital account as of the termination date.

At trial, Kinney testified that his capital account had increased since his initial capital investment. Kinney testified that as of December 31, 1998, his capital account balance was $126,150.60. Kinney testified that after his employment was terminated, H.P. Smith transferred his capital account to Fitzgerald and Villines without paying him. We conclude that when H.P. Smith transferred this capital account, it exercised its right to repurchase Kinney's ownership interest. There was sufficient competent evidence to submit this issue to the jury.

H.P. Smith's assignments of error are without merit, and we therefore affirm the judgment of the trial court.

We next address Kinney's cross-appeal that the trial court erred when it ordered H.P. Smith to pay $1,000 into a fund to be

distributed to the common schools of the state in accordance with § 48-1232. Kinney asserts that the amount assessed should have been equal to the judgment on his claim for unpaid wages ($132,500), or double that amount.

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.

The trial court found that there was not a reasonable dispute as to Kinney's wage claim. However, in view of the fact that it had awarded more than 25 percent of the judgment in attorney fees, the court declined to award more than $1,000 payable to a fund to be distributed to the common schools of the state.

Kinney argues that the trial court correctly exercised its discretion in imposing a penalty, but that once it exercised such discretion, it was required to impose the penalty in an amount equal to the judgment for unpaid wages ($132,500), or double that amount. The question for this court is: If a court exercises its discretion to order an employer to make payment to a fund to be distributed to the common schools of the state, must the court order payment of an amount equal to the judgment for the wage claim, or double that amount, as set forth in § 48-1232?

In *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988), we stated that under § 48-1232, it is in the court's discretion whether to order the employer to pay to the common school fund an amount equal to the judgment. We stated that since this provision was in the nature of a penalty, discretion should be exercised only in those cases in which there is no reasonable dispute as to whether wages are owed or as to the amount of the wages. At that time, § 48-1232 stated: " '[A]n amount equal to the judgment shall be recovered from the employer, if ordered by the court . . . .' " *Suess*, 229 Neb. at 768, 428 N.W.2d at 907.

In the case at bar, since the trial court found that there was not a reasonable dispute as to the wage claim, the court properly exercised its discretion to order the penalty. The next question is whether the court was required to order a penalty in the full amount of the judgment or whether it had discretion to order payment of only $1,000, as it did.

Statutory interpretation presents a question of law. *Wolfe v. Becton Dickinson & Co.*, *ante* p. 53, 662 N.W.2d 599 (2003). Subsequent to *Suess*, the Legislature amended § 48-1232 by replacing the word "shall" with the word "may." Section 48-1232 now 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 . . . ." (Emphasis supplied.) This amendment evidences a legislative intent to allow the courts to exercise discretion in determining the amount that may be awarded under § 48-1232.

The amount of penalty ordered to be paid to a fund to be distributed to the common schools of the state is a matter left to the discretion of the trial court. Given that the court has discretion whether to order the penalty, it must also have discretion to determine the amount. Section 48-1232 limits the discretionary amount that may be ordered. If we were to interpret § 48-1232 as requiring the trial court to order an all-or-nothing penalty, this would have a chilling effect on the exercise of such discretion in the first instance. We therefore conclude that trial courts have discretion to order such penalties and that having exercised such discretion, the court also has the discretion to determine the amount of the penalty, subject to the limitations prescribed by statute. We therefore deny Kinney's cross-appeal.

CONCLUSION

For the reasons set forth herein, the judgment of the trial court is affirmed. As prescribed by § 48-1231, we tax as costs in this court an attorney fee equal to 25 percent of the judgment on Kinney's claim for unpaid wages, which costs shall be paid by H.P. Smith.

AFFIRMED.

SUSAN STAHLECKER AND DALE STAHLECKER, INDIVIDUALLY AND AS SPECIAL ADMINISTRATORS OF THE ESTATE OF AMY M. STAHLECKER, DECEASED, APPELLANTS, V. FORD MOTOR COMPANY ET AL., APPELLEES.

667 N.W.2d 244

Filed August 8, 2003. No. S-02-1004.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a 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.
2. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
3. **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.
4. **Negligence.** Res ipsa loquitur is a qualification of the general rule that negligence is not to be presumed.
5. ____. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable.
6. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
7. **Negligence: Proximate Cause.** The concept of "foreseeability" is a component of both duty and proximate cause, although its meaning is somewhat different in each context.
8. **Products Liability: Negligence.** In a products liability action premised upon negligence, the issue is whether a manufacturer's conduct was reasonable in view of the foreseeable risk of injury.
9. ____: ____. A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.
10. ____: ____. A manufacturer or other seller of a product has a duty to adequately warn about a risk or hazard inherent in the way a product is designed that is related to the intended uses as well as the reasonably foreseeable uses that may be made of the products it sells.
11. **Negligence: Proximate Cause: Words and Phrases.** The proximate cause of an injury is that cause which, in a natural and continuous sequence, without any efficient, intervening cause, produces the injury, and without which the injury would not have occurred.
12. **Negligence: Proximate Cause: Proof.** A plaintiff must meet three basic requirements in establishing proximate cause: (1) that without the negligent action, the injury

would not have occurred, commonly known as the "but for" rule; (2) that the injury was a natural and probable result of the negligence; and (3) that there was no efficient intervening cause.

13. **Negligence: Proximate Cause.** A defendant's conduct is the cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.
14. **Negligence: Words and Phrases.** An efficient intervening cause is a new, independent force intervening between the defendant's negligent act and the plaintiff's injury.
15. **Negligence.** An efficient intervening cause must break the causal connection between the original wrong and the injury.
16. ____. Whether a duty exists at all is a question of law. Defining the scope of an existing duty is likewise a question of law.
17. **Products Liability: Actions: Negligence.** In a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.
18. **Products Liability: Proof.** To recover on a claim of strict liability, a plaintiff must prove by a preponderance of the evidence: (1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) plaintiff's damages were a direct and proximate result of the alleged defect.
19. **Trial: Negligence: Proximate Cause.** Although the determination of causation is ordinarily a question of fact, where only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. Affirmed.

Richard J. Rensch, of Raynor, Rensch & Pfeiffer, P.C., for appellants.

Daniel P. Chesire and Raymond E. Walden, of Lamson, Dugan & Murray, L.L.P., for appellee Bridgestone/Firestone, Inc.

John A. Svoboda, of Gross & Welch, P.C., and George E. Wolf and Paul A. Williams, of Shook, Hardy & Bacon, L.L.P., for appellee Ford Motor Company.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for amicus curiae Nebraska Association of Trial Attorneys.

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

STEPHAN, J.

This is a civil action for damages resulting from the injury and wrongful death of Amy M. Stahlecker (Amy). Appellants, Susan Stahlecker and Dale Stahlecker, parents of the deceased and special administrators of her estate, alleged that during the early morning hours of April 29, 2000, Amy was driving a 1997 Ford Explorer equipped with Firestone Wilderness AT radial tires in a remote area of western Douglas County, Nebraska, when one of the tires failed, rendering the vehicle inoperable. They further alleged that Richard Cook encountered Amy "alone and stranded" as a direct result of the tire failure and that he assaulted and murdered her. The Stahleckers brought this action against Ford Motor Company (Ford), the manufacturer of the vehicle; Bridgestone/Firestone, Inc. (Firestone), the manufacturer of the tire; and Cook. The district court for Dodge County sustained demurrers filed on behalf of Ford and Firestone and dismissed the action as to those parties. We affirm.

BACKGROUND

In their operative petition, the Stahleckers alleged that on the date of her death, Amy had been driving the Ford Explorer with the permission of its owner when one of the Firestone tires mounted on the vehicle "failed . . . causing the components of the tire to separate causing the Ford Explorer to be inoperable." There is no allegation that Amy sustained any injury as a result of the tire failure itself. Rather, the Stahleckers alleged that immediately after the vehicle became inoperable, Cook "found Amy alone and stranded as a direct result of the failure of the [t]ire and proceeded to abduct, terrorize, rape and murder" her.

The Stahleckers alleged that the failure of the tire "was caused by a defect in the design and/or manufacturing process and/or recommended tire air pressure use" and that Ford and Firestone, as the manufacturers of the vehicle and tire, knew or should have known that their products would be used without close expert testing or inspection. The Stahleckers further alleged that "long before April 29, 2000," Ford and Firestone had actual knowledge of "the defective nature of the Ford Explorer's Firestone tires and

their propensity to unexpectedly blow out causing wide-ranging results that included stranding and rollovers." The Stahleckers alleged that Ford and Firestone withheld this knowledge from consumers and the general public and advertised the Ford Explorer equipped with Firestone tires as "dependable when used under similar circumstances as Amy was using them during the early morning hours of April 29, 2000." They alleged:

> [I]t was further promoted and generally understood that the vehicle and tires would help protect its consumers, such as Amy, from encountering dangerous situations which could invite criminal behavior, such as might be encountered in dark parking lots at night or during breakdowns in remote areas and from weather related acts of God, such as blizzards, heavy rain or extreme heat in arid country.

The Stahleckers alleged:

> While the specific act of rape and murder of Amy Stahlecker by . . . Cook may not necessarily have been foreseeable by Defendants Ford and Firestone, the potential for similar dangerous situations arising as a result of a breakdown of a Ford Explorer and/or its tires resulting in danger to its consumers and users from criminal activity, adverse weather conditions, inability to communicate with others or any combination thereof, were known and/or should have been known to Defendants Ford and Firestone. This knowledge is evidenced by some of their promotions, advertisements and incorporated design features.

They further alleged:

> [The Stahleckers] have reason to believe that at all times material hereto Defendant Ford and Defendant Firestone knew, or, in the exercise of sound safety engineering and marketing of its products knew or should have known that people similarly situated to Amy would rely upon the Ford Explorer and its Firestone tires dependability when those consumers and users would make decisions regarding encountering circumstances of travel in incl[ement] weather or other dangerous circumstances and locations such as those locations and circumstances encountered by Amy Stahlecker on April 29, 2000. Further, [the Stahleckers] have reason to believe that Defendant Ford and Defendant

> Firestone had or should have had knowledge, to include statistical information, regarding the likelihood of criminal conduct and/or sexual assault against auto and tire industry consumers as a result of unexpected auto and/or tire failures in general.

The Stahleckers alleged four separate theories of recovery against Firestone and Ford, including negligence, res ipsa loquitur, strict liability, and breach of implied warranty. They also sought recovery from Cook on an intentional tort theory, but no aspect of that claim is before us in this appeal. The damages claimed against all defendants included compensation for

> the mental and physical suffering experienced by Amy prior to her death as a result of being abducted, terrorized, raped and murdered and the damages sustained by the [the Stahleckers] for their deprivation of Amy's aid, advice, affection, comfort, assistance, society, companionship and love along with their deprivation of Amy's future contribution to their care, support and maintenance.

The Stahleckers also claimed unspecified general damages and costs.

The district court sustained demurrers filed by Ford and Firestone in response to the Stahleckers' original petition, focusing upon "the issue of whether or not the tortious and criminal acts of Cook were reasonably foreseeable by Ford and . . . Firestone." The court reasoned that while Cook's actions were "independent and intervening and operated upon a situation" allegedly created by the tire failure, that "if Ford and . . . Firestone had no reason to expect intentional tortious or criminal acts by a third person, they are not liable under Nebraska law for the harm caused thereby, even though their negligence afforded the opportunity for such conduct to occur." The court held that a "general awareness on the part of Ford and . . . Firestone . . . that there are bad people in society who do bad things" was insufficient to establish foreseeability. The Stahleckers were granted leave to amend.

The Stahleckers filed an amended petition, which included the allegations we have quoted and paraphrased above. Ford and Firestone again filed demurrers asserting that the amended petition failed to state facts sufficient to constitute a cause of action

against them. The district court sustained these demurrers and dismissed the causes of action against Ford and Firestone without leave to amend, reasoning that the amended petition failed to state causes of action against Ford and Firestone "due to the lack of foreseeability of the actions of [Cook]." In a subsequent order, the district court directed entry of final judgments in favor of Ford and Firestone. The Stahleckers perfected this timely appeal from those judgments and successfully petitioned to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

The Stahleckers assign, restated, that the district court erred in sustaining the demurrers filed by Ford and Firestone and in dismissing the action as to those parties without leave to amend.

STANDARD OF REVIEW

[1] In an appellate court's review of a ruling on a 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. *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002); *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002).

ANALYSIS

[2,3] In order to withstand a demurrer, a plaintiff must plead a statement of "facts sufficient to constitute a cause of action." Neb. Rev. Stat. § 25-806(6) (Reissue 1995). We have interpreted this phrase to mean "a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff." *Regier v. Good Samaritan Hosp.*, 264 Neb. at 664, 651 N.W.2d at 213. 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. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002); *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). The petition alleges that both Ford and Firestone are liable for the injury and wrongful death of Amy under alternative theories of negligence, res ipsa loquitur, strict liability, and breach of implied warranty.

[4,5] Res ipsa loquitur is a qualification of the general rule that negligence is not to be presumed. *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998); *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995). However, it is clear that if specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable. *Bargmann v. Soll Oil Co., supra*; *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). Because the Stahleckers have alleged specific acts of negligence on the part of both Ford and Firestone, the doctrine of res ipsa loquitur is inapplicable to this case.

In *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000), we noted the developing trend in products liability law of merging the contract theory of breach of implied warranty with tort theories based upon defects in design and manufacturing and failure to warn. We found the underlying reasoning of this trend to be persuasive and therefore considered allegations of breach of implied warranty as falling under the accompanying allegations of design and manufacturing defect. We take the same approach here. Accordingly, we focus our consideration upon whether the pleadings state a cause of action against either Ford or Firestone under negligence and/or strict liability theories. Both of these theories rest upon the allegation that the Firestone tire mounted on the Ford Explorer driven by Amy failed as the result of "a defect in the design and/or manufacturing process and/or recommended tire air pressure use."

NEGLIGENCE

The Stahleckers alleged that Firestone was negligent in failing to design, manufacture, and assemble the tires in question so as to prevent the tread from separating while in operation, in failing to properly and adequately test and inspect the tires after manufacture, in failing to warn and notify users and consumers of the tires of the propensity and potential danger of tread separation, and in failing to promptly recall the defective tires. They further alleged that Firestone knew or should have known of the "dangerous propensities" of the subject tire and that the defect in the tire "was likely to cause the vehicle being driven to be suddenly and unexpectedly incapacitated and inoperable."

The Stahleckers alleged that Ford negligently failed to design, test, and manufacture tires selected for use on its Explorer vehicles or failed to properly oversee and monitor such design, testing, and manufacturing. In addition, they alleged that Ford was negligent in failing to warn consumers of known dangers, failure rates, and defects in tires mounted on Explorer vehicles; in failing to warn of the consequences of the unexpected tire failure; and in failing to recall the tire. The Stahleckers alleged that as the "direct and proximate result" of the negligence of Ford and Firestone, "the subject Ford Explorer was rendered unusable as a result of the failed tire leaving Amy in a foreseeably dangerous situation, which ultimately led to Amy's abduction, rape and murder."

[6,7] In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000). The concept of "foreseeability" is a component of both duty and proximate cause, although its meaning is somewhat different in each context. We have noted this distinction in recent cases:

> " 'Foreseeability as a determinant of a business owner's duty of care to its customers is to be distinguished from foreseeability as a determinant of whether a breach of duty is a proximate cause of an ultimate injury. Foreseeability as it impacts duty determinations refers to " 'the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.' " . . . Foreseeability that affects proximate cause, on the other hand, relates to "the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff" reasonably flowed from defendant's breach of duty. . . . Foreseeability in the proximate cause context relates to remoteness rather than the existence of a duty.' "

Sharkey v. Board of Regents, 260 Neb. at 179, 615 N.W.2d at 900, quoting *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999).

[8-10] In a products liability action premised upon negligence, the issue is whether a manufacturer's conduct was reasonable in view of the foreseeable risk of injury. *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). We have endorsed the following principle set forth in Restatement (Second) of Torts § 395 at 325 (1965):

> A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

Accord *Morris v. Chrysler Corp.*, 208 Neb. 341, 303 N.W.2d 500 (1981). See, also, *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979); *Rose v. Buffalo Air Service*, 170 Neb. 806, 104 N.W.2d 431 (1960). Likewise, we have recognized a duty on the part of the manufacturer or other seller of a product to adequately warn " ' "about a risk or hazard inherent in the way a product is designed that is related to the intended uses as well as the reasonably foreseeable uses that may be made of the products it sells." ' " *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 570, 618 N.W.2d 827, 841 (2000), quoting *Rahmig v. Mosley Machinery Co., supra*. Thus, by alleging that Ford and Firestone failed to exercise reasonable care in designing and manufacturing their tires, and failed to warn users of potential tire defects, the Stahleckers have alleged the existence of a legal duty and a breach thereof by both Ford and Firestone. The remaining issue is whether the breach of this duty was the proximate cause of Amy's harm.

[11,12] The proximate cause of an injury is "that cause which, in a natural and continuous sequence, without any efficient, intervening cause, produces the injury, and without which the injury would not have occurred." *Haselhorst v. State*, 240 Neb. 891, 899, 485 N.W.2d 180, 187 (1992). Stated another way, a plaintiff must meet three basic requirements in establishing proximate

cause: (1) that without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) that the injury was a natural and probable result of the negligence; and (3) that there was no efficient intervening cause. *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995); *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994).

[13] As to the first requirement, a defendant's conduct is the cause of the event if "the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it." *Haselhorst v. State*, 240 Neb. at 899, 485 N.W.2d at 187. In this case, accepting as true the allegations of the operative amended petition, the first element of proximate causation is established. The petition alleges that Cook "found Amy alone and stranded as a direct result of the failure of the Firestone Wilderness AT Radial Tire and proceeded to abduct, terrorize, rape and murder Amy." Firestone concedes that under the factual allegations of the Stahleckers' petition, that " 'but for' " the failure of its tire, Amy would not have been at the place where she was assaulted and murdered. Brief for appellee Firestone at 21.

[14,15] The second and third components of proximate causation are somewhat interrelated. Was the criminal assault and murder the "natural and probable" result of the failure to warn of potential tire failure, or did the criminal acts constitute an effective intervening cause which would preclude any causal link between the failure to warn and the injuries and wrongful death for which damages are claimed in this action? An efficient intervening cause is a new, independent force intervening between the defendant's negligent act and the plaintiff's injury. *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003). This force may be the conduct of a third person who had full control of the situation, whose conduct the defendant could not anticipate or contemplate, and whose conduct resulted directly in the plaintiff's injury. See *id.* An efficient intervening cause must break the causal connection between the original wrong and the injury. *Id.*; *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997). In *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982), we

considered whether criminal conduct constituted an intervening cause. *Shelton* involved wrongful death claims brought on behalf of persons who were poisoned by a former employee of the Eugene C. Eppley Institute for Research in Cancer and Allied Diseases (the Institute). In their actions against the Institute and related entities, the plaintiffs alleged that despite the fact that the former employee had a prior criminal conviction involving an attempted homicide, the Institute hired him as a research technologist and gave him access to the poisonous substance which he subsequently used to commit the murders. The plaintiffs alleged that the Institute was negligent in hiring the employee, in allowing him to have access to the poisonous substance, and in failing to monitor its inventory of the substance. The plaintiffs further alleged that the Institute's negligence was the proximate cause of the injuries and deaths of the victims. The district court sustained a demurrer filed by the Institute and dismissed the actions. This court affirmed, holding as a matter of law that the criminal acts of stealing the drug and administering it to the victims "were of such nature as to constitute an efficient intervening cause which destroys any claim that the alleged negligence of the [Institute] was the proximate cause of the appellants' injuries and damage." *Id.* at 826, 320 N.W.2d at 752. In reaching this conclusion, we relied upon Restatement (Second) of Torts § 448 at 480 (1965), which states the following rule:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Accord *Shelton v. Board of Regents, supra.* We held that the employee's criminal acts were the cause of the injuries for which damages were claimed and that "[n]othing which the [plaintiffs] claim the . . . Institute failed to do was in any manner related to those acts, nor could they have been reasonably contemplated by the . . . Institute." *Id.* at 827, 320 N.W.2d at 753.

We have, however, determined in certain premises liability cases and in cases involving negligent custodial entrustment that the criminal act of a third person does not constitute an efficient intervening cause. For example, in *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997), a patron of a bar was seriously injured by another patron in the parking lot after the two were instructed by the bartender to take their argument "outside." The injured patron sued the owner of the bar, alleging that the owner negligently failed to contact law enforcement, maintain proper security on the premises, and properly train his personnel. We reversed a judgment on a jury verdict in favor of the owner because of error in giving an intervening cause instruction. We reasoned that

> [b]ecause the harm resulting from a fight is precisely the harm against which [the owner] is alleged to have had a duty to protect [the patron], the "intervention" of [the other patron] cannot be said to be an independent act that would break the causal connection between [the owner's] negligence and [the patron's] injuries.

Id. at 15, 567 N.W.2d at 305. We employed similar reasoning in *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995), and *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992), both of which involved negligent placement of juvenile wards of the state in foster homes without disclosure of their known histories of violent acts. In each of those cases, we held that criminal acts of foster children perpetrated upon members of the foster parents' households could not be asserted as intervening causes to defeat liability for the negligent placement. Similarly, we recently held that a psychiatric patient's criminal assault upon a nurse was not an intervening cause as to the negligence of a state agency which breached its duty to disclose the violent propensities of the patient at the time of his admission to the hospital where the assault occurred. *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003). These decisions were based upon the principle articulated in *Anderson/Couvillon* that "[o]nce it is shown that a defendant had a duty to anticipate an intervening criminal act and guard against it, the criminal act cannot supersede the defendant's liability." 248 Neb. at 660, 538 N.W.2d at 739.

[16] This principle requires that we determine whether the duty owed to Amy by Ford and Firestone, as manufacturers and sellers of the allegedly defective tires, included a duty to anticipate and guard against criminal acts perpetrated against the users of such tires. The question of whether a duty exists at all is a question of law. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001). It necessarily follows that defining the scope of an existing duty is likewise a question of law. See, *id.*; Dan B. Dobbs, The Law of Torts § 230 (2000).

Generally, we have recognized a duty to anticipate and protect another against criminal acts where the party charged with the duty has some right of control over the perpetrator of such acts or the physical premises upon which the crime occurs. In *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, *supra*, and *Haselhorst v. State*, *supra*, the state agency responsible for foster placement of the juvenile wards had a duty to warn foster parents of the wards' known histories of violent and abusive behavior. Similarly, in *State v. Fuhrman*, *supra*, a state agency which placed a ward in a psychiatric hospital had a duty to make disclosures regarding the ward's known violent and dangerous propensities for the benefit of the hospital's employees. In *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999), we recognized a duty on the part of the owner of business premises to protect invitees from criminal assault where there had been documented criminal activity in the immediate vicinity of the premises. In *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999), we held that a university had a duty to protect a student from physical hazing conducted in a fraternity house where similar incidents were known to have occurred previously. Similarly, in *Sharkey v. Board of Regents*, 260 Neb. 166, 182, 615 N.W.2d 889, 902 (2000), we held that a university "owes a landowner-invitee duty to its students to take reasonable steps to protect against foreseeable acts of violence on its campus and the harm that naturally flows therefrom." However, we have adopted Restatement (Second) of Torts § 315 at 122 (1965), which provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

See, *Bartunek v. State, ante* p. 455, 666 N.W.2d 435 (2003); *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998); *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993).

We have found no authority recognizing a duty on the part of the manufacturer of a product to protect a consumer from criminal activity at the scene of a product failure where no physical harm is caused by the product itself. One court has specifically held that a product failure which furnishes an opportunity for an intentional act resulting in harm is not, as a matter of law, the proximate cause of such harm. *Kleen v. Homak Mfg. Co., Inc.*, 321 Ill. App. 3d 639, 749 N.E.2d 26, 255 Ill. Dec. 246 (2001). *Kleen* was a wrongful death action against the manufacturer and retailer of a firearm safe. The plaintiff, whose adult child committed suicide using a weapon removed from the safe, alleged that the safe was defective because it incorporated a weak lock which could be easily broken and that the defect was therefore the proximate cause of the death. In rejecting this claim under both negligence and strict liability theories, the court determined that the alleged defect was only a passive condition which allowed the injury to occur and that the deceased's voluntary act of removing the weapon from the safe and using it to end his life was an independent intervening act which was the sole proximate cause of his death.

The Stahleckers argue that a duty to anticipate criminal acts associated with product failure arises from their allegations that Ford and Firestone knew or should have known of "the potential for similar dangerous situations arising as a result of a breakdown of a Ford Explorer and/or its tires resulting in danger to its consumers and users from criminal activity, adverse weather conditions, inability to communicate with others or any combination thereof." They also allege that Ford and Firestone had or should have had "knowledge, to include statistical information, regarding the likelihood of criminal conduct and/or sexual assault against auto and tire industry consumers as a result of

unexpected auto and/or tire failures in general." Assuming the truth of these allegations, the most that can be inferred is that Ford and Firestone had general knowledge that criminal assaults can occur at the scene of a vehicular product failure. However, it is generally known that violent crime can and does occur in a variety of settings, including the relative safety of a victim's home. The facts alleged do not present the type of knowledge concerning a specific individual's criminal propensity, or right of control over premises known to have been the scene of prior criminal activity, upon which we have recognized a tort duty to protect another from criminal acts. The Stahleckers have not and could not allege any special relationship between Ford and Firestone and the criminal actor (Cook) or the victim of his crime (Amy) which would extend their duty, as manufacturers and sellers of products, to protect a consumer from harm caused by a criminal act perpetrated at the scene of a product failure. In the absence of such a duty, *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982), controls and requires us to conclude as a matter of law that the criminal assault constituted an efficient intervening cause which precludes a determination that negligence on the part of Ford and Firestone was the proximate cause of the harm which occurred.

Strict Liability

[17,18] In a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous. *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). To recover on a claim of strict liability, a plaintiff must prove by a preponderance of the evidence:

> "(1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) *the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for*

> *the general purpose for which it was designed and intended*; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) *plaintiff's damages were a direct and proximate result of the alleged defect*."

(Emphasis supplied.) *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 829, 509 N.W.2d 603, 610 (1994). This theory of recovery has been adopted by this court from Restatement (Second) of Torts § 402 A (1965). See, *Freeman v. Hoffman-La Roche, Inc.*, *supra*; *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971).

While the operative petition in this case alleges facts which, if proved, would establish that both Ford and Firestone breached their duty not to place defective products on the market, we do not regard that duty as generally encompassing an obligation on the part of a manufacturer of a passenger vehicle or tire to anticipate and guard against criminal acts of third parties. As we have noted above, the injuries and death for which damages are sought in this action were not caused by a defective product itself, but, rather, by a criminal who encountered the victim at the scene of a vehicular product failure. These circumstances are analogous to the facts in *Williams v. RCA Corp.*, 59 Ill. App. 3d 229, 376 N.E.2d 37, 17 Ill. Dec. 144 (1978), in which a security guard was shot during a robbery after the malfunction of a two-way radio receiver prevented him from summoning assistance. The guard brought an action against the manufacturer of the receiver under a strict liability theory, alleging that the defect in the receiver was the proximate cause of his having been shot by the robber he was attempting to apprehend. In holding, as a matter of law, that the defect was not the proximate cause of the injury, the court reasoned that "[w]hile it might be said that the manufacturer of the two-way receiver could have foreseen that the shooting might conceivably occur," the criminal act which caused the injury was not objectively foreseeable as a consequence of product failure. *Id.* at 232, 376 N.E.2d at 39, 17 Ill. Dec. at 146. See, also, *Kleen v. Homak Mfg. Co., Inc.*, 321 Ill. App. 3d 639, 749 N.E.2d 26, 255 Ill. Dec. 246 (2001) (holding as matter of law that defective lock on firearm safe not proximate cause of death by suicide under either negligence or strict products liability theories).

For these reasons, we conclude as a matter of law that the intervening criminal acts of Amy's assailant, Cook, negate any causal relationship between the alleged product defects and the injuries and death for which damages are claimed under the theory of strict liability in tort.

CONCLUSION

Although the operative amended petition alleges sufficient facts to establish that Ford and Firestone negligently placed defective products on the market which caused Amy to become stranded at night in a remote location, it alleges no facts upon which either Ford or Firestone would have a legal duty to anticipate and guard against the criminal acts which were committed at that location by another party. Therefore, the criminal acts constitute an efficient intervening cause which necessarily defeats proof of the essential element of proximate cause.

[19] Although the determination of causation is ordinarily a question of fact, where only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998); *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982). Because the only reasonable inference which can be drawn from the facts alleged in this case is that Cook's criminal acts constituted an efficient intervening cause, the district court did not err in sustaining the demurrers of Ford and Firestone without leave to amend and in dismissing the action as to them.

AFFIRMED.

CYNTHIA H. GILROY, APPELLANT, V. DANIEL W. RYBERG, SUCCESSOR TRUSTEE, ET AL., APPELLEES.

667 N.W.2d 544

Filed August 15, 2003. No. S-02-487.

1. **Trusts: Quiet Title: Equity.** An action to set aside a trustee's sale and to quiet title sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of

the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

3. **Trusts: Deeds: Contracts.** Deeds of trust are subject to the principles of interpretation and construction that govern contracts generally.
4. **Trusts: Deeds: Appeal and Error.** The construction of a trust deed is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
5. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **Actions: Trusts: Deeds: Equity: Sales.** Although the Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 1996 & Cum. Supp. 2000), does not provide a remedy for a defective trustee's sale, the trustor can sue in equity to set the sale aside.
7. **Trusts: Deeds: Sales.** Defects in a trustee's sale conducted under a power of sale in a trust deed fall into one of three categories: (1) those that render the sale void, (2) those that render the sale voidable, and (3) those that are inconsequential.
8. **Trusts: Sales.** When a trustee's sale is void, no title, legal or equitable, passes to the sale purchaser or subsequent grantees.
9. ____: ____. When a trustee's sale is void, no title passes, and adversely affected parties may have the sale set aside even though the property has passed into the hands of a bona fide purchaser.
10. ____: ____. Defects that render a trustee's sale void are rare and generally occur when the trustee conducted the sale, but no right to exercise the power of sale existed.
11. ____: ____. Even if there is a right to exercise the power of sale, an egregious failure to comply with fundamental procedural requirements while exercising the power of sale will render the sale void.
12. **Trusts: Sales: Title.** When a defect renders a sale voidable, bare legal title passes to the sale purchaser. An injured party can have the sale set aside only so long as legal title has not moved to a bona fide purchaser.
13. **Trusts: Sales: Equity.** When the party seeking to set aside the sale establishes only an inconsequential defect, equity will not set aside the sale.
14. **Trusts: Sales.** To establish a defect that renders the trustee's sale voidable, the party seeking to set aside the sale must show not only the defect, but also that the defect caused the party prejudice.
15. **Trusts: Deeds: Sales: Notice.** Neb. Rev. Stat. § 76-1010(1) (Reissue 1996) allows for an affirmative defense whereby bona fide purchasers and encumbrancers for value and without notice can use the recitals in the trustee's deed to defeat any claim that the trustee's sale did not comply with the requirements of Neb. Rev. Stat. §§ 76-1001 to 76-1018 (Reissue 1996 & Cum. Supp. 2000) relating to the exercise of the power of sale and sale of the property described therein.
16. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
17. ____. It is the role of the court, to the extent possible, to give effect to the entire language of a statute, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible.

18. **Statutes: Trusts: Deeds: Notice.** The phrase "the nature of such breach" as used in Neb. Rev. Stat. § 76-1006(1) (Reissue 1996) requires the notice of default to describe the event that has triggered the use of the power of sale in the trust deed.
19. **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.
20. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
21. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
22. **Statutes: Trusts: Deeds: Sales: Words and Phrases.** The term "forthwith" as used in Neb. Rev. Stat. § 76-1010(1) (Reissue 1996) requires the purchaser at a trustee's sale to pay the amount of its bid within a reasonable time under the circumstances of the case.
23. **Contracts.** The terms of an instrument are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
24. **Words and Phrases.** "Cash" is a fluid term, the meaning of which turns on the context in which it is used.
25. **Foreclosure: Words and Phrases.** Within the context of foreclosure sales and analogous situations, the term "cash" includes coins, currency, cashier's checks, or certified funds, but not personal checks.
26. **Trusts: Sales.** When a defect in the trustee's management of a trustee's sale "chilled the bidding," i.e., deterred bidders from coming to the sale or deterred those bidders at the sale from bidding, the defect renders the sale voidable.
27. **Trusts: Sales: Proof.** In attempting to show that a defect in the trustee's management of a trustee's sale "chilled the bidding," a party seeking to set aside the sale may meet its burden by establishing that (1) the defect, by its nature, would have a tendency to result in a reduced sales price and (2) the sale price was inadequate.
28. **Trusts: Deeds: Sales.** A trustee's decision allowing the winning bidder at a trustee's sale to pay the balance of its bid by personal check, despite a cash-only requirement in the trust deed, was not the type of defect which, by its nature, would have had a tendency to reduce the sale price.
29. **Motions for Continuance: Appeal and Error.** A motion for a continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

John A. Sellers for appellant.

Duane M. Katz for appellees Robert L. Cummins and Frank L. Huber.

Daniel W. Ryberg, pro se.

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

CONNOLLY, J.

This case presents us with our first opportunity to examine when a trial court should invoke equity to set aside a foreclosure sale conducted under a power of sale in a trust deed.

After Cynthia H. Gilroy and John M. Gilroy failed to make payments on a note secured by a trust deed, Daniel W. Ryberg, the successor trustee, conducted a sale.

Cynthia appeals from the district court's decision refusing to set aside the sale. She argues that the notice of default did not comply with the Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 1996 & Cum. Supp. 2000) (the Act). She also claims that Ryberg failed to comply with the Act and terms of the trust deed in conducting the trustee's sale.

We determine that the notice of default met the requirements of the Act. Although we agree that Ryberg did not conduct the sale in compliance with the terms of the trust deed, we affirm the district court's decision because Cynthia failed to show that she was prejudiced by Ryberg's errors.

I. FACTUAL BACKGROUND

On July 11, 2000, John and Cynthia executed and delivered to Robert L. Cummins a promissory note for $80,000. At the time, Cynthia owned improved property, described as "Lot 139, Riverside Lakes, a Subdivision, as surveyed, platted and recorded, in Douglas County, Nebraska, commonly known as 440 Shorewood Lane, Waterloo, Nebraska 68069" (the property). To secure the note, John and Cynthia executed and delivered to Cummins a trust deed. The trust deed conferred a power of sale upon the trustee.

Cummins executed a substitution of trustee that named Ryberg as the successor trustee. On June 27, 2001, Cummins instructed Ryberg to foreclose by using the power of sale in the trust deed. Ryberg then prepared a notice of default and filed it with the register of deeds. The notice of default stated that "a

breach of the obligation of the Trustor for which such Deed of Trust was made has occurred, to wit: non-payment."

Afterward, Ryberg prepared and filed a notice of trustee's sale with the register of deeds. The notice of trustee's sale stated that the property would "be sold at public auction to the highest bidder for cash on the first floor, Jury Assembly Room, Hall of Justice, 17th & Farnam, Omaha, Nebraska on the 8th day of November, 2001, at 1:30 P.M."

On November 8, 2001, Ryberg conducted the trustee's sale. Frank L. Huber and a junior lienholder submitted bids, but Huber submitted the highest bid at $128,500. Later that day, Huber gave Ryberg a cashier's check for 10 percent of the winning bid. Nine days after the sale, Huber paid the balance by personal check. After receiving payment, Ryberg executed and delivered a trustee's deed to Huber and Huber's wife, and on November 19, Ryberg filed the trustee's deed with the register of deeds.

II. PROCEDURAL BACKGROUND

Cynthia filed a declaratory judgment action naming Ryberg, Cummins, and Huber as defendants. John was neither named as a plaintiff, nor has he been made a party to the action. In her petition, Cynthia sought an order (1) setting aside the sale because it did not comply with either the Act or the terms of the trust deed and (2) quieting title to the property in her.

The court set March 7, 2002, as the date for trial, but before trial, Cynthia moved for a continuance. She complained that she had planned to take Huber's deposition on March 4, but that she could not because Huber was hospitalized. The judge did not expressly overrule the motion; instead, he told Cynthia to let him know if she had been able to secure Huber's deposition and that then he would rule on the motion. Apparently, Cynthia was able to take Huber's deposition, and the court overruled the motion for a continuance.

After a trial on March 7, 2002, the court denied Cynthia relief.

III. ASSIGNMENTS OF ERROR

Cynthia's brief contains eleven assignments of error. Assignments of error Nos. 2, 3, and 4 address the court's decision denying her motion for partial summary judgment. We will not

consider these three assignments of error because the question whether summary judgment should have been granted generally becomes moot after a full trial on the merits. See *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000).

Assignments of error No. 5 (which refers to the notice of default) and No. 8 (which refers to the Uniform Commercial Code's duty of good faith and fair dealing) are so confusing that we will not consider them. See *McLain*, 259 Neb. at 758-59, 612 N.W.2d at 224 (holding that "a generalized and vague assignment of error does not advise the appellate court of the issue submitted for decision and will not be considered").

In assignment of error No. 10, Cynthia complains that the court erred in failing to quiet title in her because Ryberg refused payment in full, which was tendered before commencement of the sale. No such argument, however, is made in her brief, and we will not consider this assignment of error. See *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003).

Also, Cynthia argues that the trust deed required that she be notified by certified mail of the appointment of Ryberg as the successor trustee. She argues that the sale should be set aside because she was sent notice of Ryberg's appointment by first class mail instead of certified mail. Cynthia does not, however, assign as error the court's rejection of this argument. Errors argued but not assigned will not be considered on appeal. *Forgét v. State*, 265 Neb. 488, 658 N.W.2d 271 (2003). Accordingly, we will not consider this argument.

We will consider the remainder of Cynthia's assignments of error, which, restated and consolidated, contend that the court erred in (1) failing to set aside the sale and to order title quieted in her because the notice of default failed to set forth the nature of the breach, (2) failing to set aside the sale and to order title quieted in her because Ryberg allowed Huber to pay the balance of his bid 9 days after the sale, (3) failing to set aside the sale and to order title quieted in her because Ryberg allowed Huber to pay the balance of his bid by personal check, and (4) overruling her motion for a continuance.

IV. STANDARD OF REVIEW

[1,2] An action to set aside a trustee's sale and to quiet title sounds in equity. See, *Burk v. Demaray*, 264 Neb. 257, 646

N.W.2d 635 (2002); 1 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.22 (3d ed. 1993). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003).

[3,4] Deeds of trust are subject to the principles of interpretation and construction that govern contracts generally. See, *Cache Nat. Bank v. Lusher*, 882 P.2d 952 (Col. 1994); *Starcrest Trust v. Berry*, 926 S.W.2d 343 (Tex. App. 1996). Accordingly, the construction of a trust deed is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. Cf. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002) (stating same rule for construction of contracts).

[5] Statutory interpretation presents a question of law, on 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 J.K.*, 265 Neb. 253, 656 N.W.2d 253 (2003).

V. ANALYSIS

1. Setting Aside Trustee's Sale

Before 1965, Nebraska did not allow power of sale foreclosure, and any attempted extrajudicial sale of real property, for the satisfaction of a mortgage, was absolutely void. *Cullen v. Casey*, 1 Neb. (Unoff.) 344, 95 N.W. 605 (1901). Because trust deeds were treated as mortgages, the same rule applies to them, even if the trust deed in question contained a power of sale. See *Comstock v. Michael*, 17 Neb. 288, 22 N.W. 549 (1885).

In 1965, the Legislature altered the landscape of real estate financing when it passed the Act. The Act specifically authorized the use of power of sale foreclosure for trust deeds. See § 76-1005. We stated:

> [The Act] authorizes the use of trust deeds to secure the performance of obligations and prescribes, generally, the

> procedures for their execution and enforcement. The [A]ct provides that a trust deed may confer a power of sale upon the trustee. In the event of a default, the trust property may be sold by the trustee to satisfy the obligation secured. The [A]ct also provides for the substitution of trustees, reinstatement after default, and the procedure for the sale and conveyance of the trust property by the trustee.
>
> . . . .
>
> The . . . Act authorizes the use of a security device which was not available prior to its enactment. The [A]ct permits the use of an instrument which may be foreclosed by sale without the necessity of judicial proceedings. It authorizes and permits a method of financing which was not formerly available, since trust deeds have been considered to be subject to the same rules and restrictions as mortgages.

Blair Co. v. American Savings Co., 184 Neb. 557, 558-59, 169 N.W.2d 292, 293-94 (1969). By authorizing the use of power of sale foreclosure, the Legislature provided lenders with a remedy for recovering their collateral that is quicker and less expensive than judicial foreclosure.

[6] Here, however, Cynthia claims that the trustee's sale should be set aside because it did not comply with the Act and the terms of the trust deed. Although the Act does not provide a remedy for a defective trustee's sale, the trustor can sue in equity to set the sale aside. See 1 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.22 (3d ed. 1993). This is our first opportunity to determine when equity will grant such relief.

Cynthia argues that the use of the power of sale in a trust deed must strictly adhere to both the requirements of the Act and the trust deed's terms and that failure to do so renders the sale void. We disagree. The Act provides lenders with a remedy for recovering collateral that is quicker and less expensive than judicial foreclosure. The rule advanced by Cynthia would render that remedy unworkable; any error by the trustee, no matter how trivial, would void the sale. The resulting uncertainty and increased chance of litigation would deter bidders from participating at sales and lead lenders to choose judicial foreclosure. See *Rosenberg v. Smidt*, 727 P.2d 778 (Alaska 1986) (Moore, J., dissenting).

Not surprisingly, other jurisdictions that allow power of sale foreclosure have refused to adopt a rule that would set aside every sale that does not strictly comply with the requirements of the trust deed or relevant statutes. See, e.g., *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.*, 85 Cal. App. 4th 1279, 102 Cal. Rptr. 2d 711 (2001); *J. Ashley v. Burson*, 131 Md. App. 576, 750 A.2d 618 (2000); *Coventry Credit Union v. Trafford*, 764 A.2d 179 (R.I. 2000); *VHDA v. Fox Run*, 255 Va. 356, 497 S.E.2d 747 (1998); *Manard v. Williams*, 952 S.W.2d 387 (Mo. App. 1997); *Garris v. Federal Land Bank of Jackson*, 584 So. 2d 791 (Ala. 1991); *Occidental/Nebraska Fed. Sav. v. Mehr*, 791 P.2d 217 (Utah App. 1990). See, also, 1 Nelson & Whitman, *supra*; 12 Thompson on Real Property § 101.04(c)(2) (David A. Thomas ed. 1994).

[7] Instead, courts and commentators have recognized three categories of defects in a trustee's sale conducted under a power of sale in a trust deed: (1) those that render the sale void, (2) those that render the sale voidable, and (3) those that are inconsequential. See, *Manard, supra*; 1 Nelson & Whitman, *supra*; 12 Thompson on Real Property, *supra*.

[8,9] The first category consists of those defects that render a sale void. When a sale is void, "no title, legal or equitable, passes to the sale purchaser or subsequent grantees." 1 Nelson & Whitman, *supra*, § 7.20 at 613. In other words, "adversely affected parties may have the sale set aside even though the property has passed into the hands of a bona fide purchaser." 12 Thompson on Real Property, *supra*, § 101.04(c)(2)(i) at 402.

[10,11] Defects that render a sale void are rare and generally occur when the trustee conducted the sale, but no right to exercise the power of sale existed. See, *Williams v. Kimes*, 996 S.W.2d 43 (Mo. 1999); 1 Nelson & Whitman, *supra*; 12 Thompson on Real Property, *supra*. Typical examples include situations when (1) no default on the underlying obligation has occurred, (2) the trust deed is a forgery, and (3) the trust deed requires the beneficiary to request that the trustee commence foreclosure proceedings and no request has been made. See *Manard, supra*. Further, even if there is a right to exercise the power of sale, an egregious failure to comply with fundamental procedural requirements

while exercising the power of sale will render the sale void. See *Graham v. Oliver*, 659 S.W.2d 601 (Mo. App. 1983).

[12] The second category of defects consists of those that render the sale voidable. See *Manard, supra*. When a defect renders a sale voidable, "bare legal title passes to the sale purchaser." 1 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.20 at 614 (3d ed. 1993). See *Graham, supra*. An injured party can have the sale set aside only so long "as the legal title has not moved to a bona fide purchaser." 12 Thompson on Real Property, *supra*, § 101.04(c)(2)(ii) at 403.

[13] The final category consists of those defects that are so inconsequential as to render the sale neither void nor voidable. 1 Nelson & Whitman, *supra*; 12 Thompson on Real Property, *supra*. See, also, *Manard, supra*; *Rosenberg v. Smidt*, 727 P.2d 778 (Alaska 1986). When the party seeking to set aside the sale establishes only an inconsequential defect, equity will not set aside the sale.

Courts have offered a variety of tests for determining when a defect becomes more than inconsequential and renders a sale voidable. See, e.g., *J. Ashley v. Burson*, 131 Md. App. 576, 750 A.2d 618 (2000) (requiring party attacking sale to show error was harmful or affected substantial rights); *Manard v. Williams*, 952 S.W.2d 387, 392 (Mo. App. 1997) (stating that " '[a]n irregularity in the execution of a foreclosure sale must be substantial or result in a probable unfairness to suffice as a reason for setting aside a voidable trustee's deed' ") (quoting *Kennon v. Camp*, 353 S.W.2d 693 (Mo. 1962)); *Occidental/Nebraska Fed. Sav. v. Mehr*, 791 P.2d 217, 221 (Utah App. 1990) (stating that "[a] sale once made will not be set aside unless the interests of the debtor were sacrificed or there was some fraud or unfair dealing"); *Concepts, Inc. v. First Sec. Realty Serv.*, 743 P.2d 1158, 1159 (Utah 1987) (stating that "remedy of setting aside the sale will be applied only in cases which reach unjust extremes"). *Farmers' Sav. Bank v. Murphree*, 200 Ala. 574, 575, 76 So. 932, 933 (1917) (stating that "[e]quity does not set aside foreclosure sales merely for trifling irregularities in notice or procedure, which do not appear capable of prejudice to the mortgagor, or those claiming under him"). A review of these cases, however, reveals a common theme: Courts will view a defect as voidable

if the party seeking to set aside the sale shows that prejudice was suffered because of the defect.

[14] We agree with this reasoning and hold that to establish a defect that renders the trustee's sale voidable, the party seeking to set aside the sale must show not only the defect, but also that the defect caused the party prejudice. If the party did not suffer any harm from the alleged defect, there is no justification for imposing the additional costs associated with setting aside the sale.

[15] We note that in addition to the analysis we have set out above, the Act allows the trustee's deed to confer additional protection against attacks on the sale. Section 76-1010(1) provides in part:

> The trustee's deed may contain recitals of compliance with the requirements of sections 76-1001 to 76-1018 relating to the exercise of the power of sale and sale of the property described therein, including recitals concerning any mailing, personal delivery and publication of the notice of default, any mailing and the publication and posting of notice of sale, and the conduct of sale; and such recitals shall constitute prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

Section 76-1010(1) allows for an affirmative defense whereby bona fide purchasers and encumbrancers for value and without notice can use the recitals in the trustee's deed to defeat any claim that the sale did not comply with "the requirements of sections 76-1001 to 76-1018 relating to the exercise of the power of sale and sale of the property described therein." Here, however, Ryberg, Cummins, and Huber have not raised the recitals as a defense, and we need not consider the implications of § 76-1010(1).

We now address whether Cynthia established a defect in the sale that warrants setting the sale aside. In the proceedings below, Cynthia claimed several defects in the sale, but she has only preserved three of those claims on appeal. We analyze each of these claims separately.

(a) Notice of Default

Cynthia argues that the notice of default failed to comply with the requirements of the Act because it did not adequately set forth

the nature of the underlying breach that triggered the use of the power of sale. To exercise the power of sale in a trust deed, the trustee must first file a notice of default with the register of deeds in each county where "the trust property or some part or parcel thereof is situated." § 76-1006(1). This section sets out what the notice of default must contain. Every notice of default, regardless of the type of property secured by the trust deed, must identify

> the trust deed by stating the name of the trustor named therein and giving the book and page or computer system reference where the same is recorded and a description of the trust property, containing a statement that a breach of an obligation for which the trust property was conveyed as security has occurred, and *setting forth the nature of such breach* and of [the trustee's] election to sell or cause to be sold such property to satisfy the obligation.

(Emphasis supplied.) *Id.* Cynthia argues that the notice of default filed by Ryberg did not sufficiently set forth the " 'nature of such breach' " because the only description it gave was " 'non-payment.' " Brief for appellant at 16.

Subsection 76-1006(1) is silent on what specificity is required in setting out the nature of the breach. Cynthia contends that § 76-1006(1), when read in pari materia with the other provisions of the Act, requires "the trustor to have notice of the nature of the default sufficient to advise the trustor of the amount of money that must be paid, or the necessary actions that must be taken, to give the trustor meaningful opportunity to cure the default." Brief for appellant at 18. Cynthia contends that the notice of default must contain information on how to cure the default. Section 76-1006(1), however, demonstrates that the Legislature considered the "nature of such breach" and how to cure the breach as different concepts.

[16,17] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002). It is the role of the court, to the extent possible, to give effect to the entire language of a statute, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible. *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999).

In drafting the Act, the Legislature set up additional procedural requirements for foreclosure by trustee's sale on trust property used in farming operations by the borrower outside of any incorporated city or village (which, for ease of reference, we will call agricultural property). Among these requirements is that the notice of default must set forth additional information. Section 76-1006(2) provides in part:

> If the trust property is used in farming operations carried on by the trustor, not in any incorporated city or village, the notice of default also sets forth:
>
> (a) A statement that the default may be cured within two months of the filing for record of the notice of default and the obligation and trust deed may be thereby reinstated as provided in section 76-1012.

Thus, a notice of default for agricultural property must contain information on how to cure the default. If the Legislature believed, as Cynthia argues, that information on how to cure a default was subsumed in the phrase "the nature of such breach," it would have been unnecessary for it to set out the additional requirements in § 76-1006(2) for trust deeds on agricultural property.

[18] We determine that for nonagricultural property, the notice of default need not contain information on how to cure the default. Rather, we interpret the phrase "the nature of such breach" to require the notice of default to describe the event that has triggered the use of the power of sale in the trust deed. Here, Cynthia failed to make the required payments under the note, and this failure authorized the use of the power of sale. The notice of default provided that "a breach of the obligation of the Trustor for which such Deed of Trust was made has occurred, to wit: non-payment." The notice of default provided sufficient information to notify interested parties of the event authorizing the use of the power of sale, and therefore, the notice of default satisfied § 76-1006(1).

(b) Delay in Receiving Payment

On the day of the sale, Huber paid 10 percent of his winning bid by cashier's check. He paid the balance 9 days later. Cynthia claims that by allowing Huber 9 days to make payment, Ryberg violated the trust deed which required the trustee to sell the

property to "*the highest bidder for cash in lawful money of the United States payable at the time of sale.*" She also claims Ryberg violated § 76-1010(1) which provides that "the purchaser at the sale shall *forthwith* pay the price bid." (Emphasis supplied.)

[19] 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. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002). "Forthwith" has been given several meanings. Black's Law Dictionary 654 (6th ed. 1990) provides the following definitions:

> Immediately; without delay; directly; within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch. . . . Within such time as to permit that which is to be done, to be done lawfully and according to the practical and ordinary course of things to be performed or accomplished. The first opportunity offered.

Similarly, Webster's Third International Dictionary, Unabridged 895 (1993) provides: "1: with dispatch: without delay: within a reasonable time . . . . IMMEDIATELY 2: immediately after some preceding event: THEREUPON." Cynthia equates "forthwith," as used in § 76-1010(1), with "immediately." We conclude, however, that "within a reasonable time under the circumstances of the case" is more consistent with the underlying purpose of § 76-1010. See Black's Law Dictionary, *supra* at 654.

[20,21] In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Newman, supra*. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Galaxy Telecom v. J.P. Theisen & Sons*, 265 Neb. 270, 656 N.W.2d 444 (2003).

Most of the provisions of the Act are designed to ensure that the trustor's interest in the property is not unfairly foreclosed. But by using the term "forthwith" in § 76-1010(1), the Legislature meant to protect the beneficiary, not the trustor. The use of the term was meant to ensure that the winning bidder could be compelled to promptly pay the bid. If there were no time provision,

the winning bidder could indefinitely frustrate the foreclosure by claiming that they were gathering the necessary funds.

[22] The use of "forthwith" in § 76-1010(1) does not contemplate the rigidity of immediate payment. In some circumstances, the beneficiary will not be concerned with the ability of the winning bidder to pay. In other situations, a short delay will enable a bidder to secure additional funds and cover a higher bid—something that may benefit both the beneficiary and the trustor. We conclude that while the Legislature meant to impose a time limit by using "forthwith" in § 76-1010(1), that time limit was not as definite as Cynthia claims. Rather, the term requires the purchaser to pay the amount of its bid within a reasonable time under the circumstances of the case. Further, we construe the phrase "at the time of sale" as used in the trust deed as being consistent with the construction that we have given "forthwith."

Here, Cummins and Huber were closely aligned. At oral argument, Cummins conceded that Huber was a straw man for Cummins. We conclude that Huber, consistent with the Act and the terms of the trust deed, paid the amount of his bid within a reasonable time under the circumstances of the case.

(c) Payment by Personal Check

The trust deed required Ryberg to sell the property to the highest bidder "for cash in lawful money of the United States." Cynthia argues that this provision precluded Ryberg from allowing Huber to pay by personal check. We agree that Ryberg erred in allowing Huber to pay by personal check, but we refuse to set aside the sale because Cynthia failed to show that the error caused her prejudice.

[23] Trust deeds are subject to the principles of interpretation and construction that govern contracts generally. See, *Starcrest Trust v. Berry*, 926 S.W.2d 343 (Tex. App. 1996); *Cache Nat. Bank v. Lusher*, 882 P.2d 952 (Col. 1994). Cf. *County of Keith v. Fuller*, 234 Neb. 518, 526, 452 N.W.2d 25, 31 (1990) (stating that "rules governing the interpretation of contracts are applicable to mortgages"). The terms of an instrument are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *County of Keith, supra.*

[24,25] "Cash" is a fluid term, the meaning of which turns on the context in which it is used. See, e.g., *Kutche Chevrolet v. Anderson Banking*, 597 N.E.2d 1307 (Ind. App. 1992) (remanding for extrinsic fact finding to determine whether personal check was "cash down payment" as that term was used in installment contract on automobile); *National Diamond Syndicate, Inc. v. UPS*, 897 F.2d 253 (7th Cir. 1990) (holding that extrinsic evidence showed that "cash only" c.o.d. delivery contract allowed shipper to accept certified checks); *Perry v. West*, 110 N.H. 351, 266 A.2d 849 (1970) (holding that certified check was not "cash" as that term was used in notice of sale for municipal sale of property for failure to pay taxes). Within the context of foreclosure sales and analogous situations, courts have generally treated the term "cash" as including coins, currency, cashier's checks, or certified funds, but not personal checks. See, *Boatman's Bank v. Community Interiors, Inc.*, 721 S.W.2d 72 (Mo. App. 1986); *Greenberg v. Alter Company*, 255 Iowa 899, 124 N.W.2d 438 (1963).

This interpretation of "cash" balances the needs of the beneficiary and the trustor. It ensures that bidders are required to make payment in a manner that provides some guarantee of their ability to pay, which is advantageous to beneficiaries. But also, it does not require bidders to show up at the sale with a suitcase full of $20 bills—an impractical limitation which would deter potential bidders from participating in the sale.

Here, it is undisputed that Ryberg allowed Huber to pay the balance of his bid by personal check, and we agree with the district court that the sale did not strictly comply with the terms of the trust deed. But as we have set out above, and as the district court recognized, that does not end the inquiry. We must determine whether the error rendered the sale void or voidable.

The error that Ryberg committed does not rise to the level of a fundamental procedural defect that would render a trustee's sale void. The question then is whether the error caused prejudice to Cynthia, thereby rendering the sale voidable.

[26] The prejudice which a party must show in seeking to establish a voidable defect in a trustee's sale varies depending upon the alleged defect. Here, the alleged error was how Ryberg managed the sale. Generally, when the defect was in the trustee's

management of the sale, courts have focused on the effect that the defect had on the bidding. See, *Coventry Credit Union v. Trafford*, 764 A.2d 179 (R.I. 2000); *Country Express Stores v. Sims*, 87 Wash. App. 741, 943 P.2d 374 (1997). If the defect did not result in a reduced sales price, courts have refused to set aside the sale. But when the defect "chilled the bidding," i.e., deterred bidders from coming to the sale or deterred those bidders at the sale from bidding, courts have granted relief from the sale. See 12 Thompson on Real Property § 101.04(c)(2)(ii) at 404 (David A. Thomas ed. 1994).

[27] Cynthia presented no direct evidence that Ryberg's decision allowing Huber to pay by personal check deterred bidders from coming to the sale or deterred those bidders at the sale from bidding. We recognize, however, that often it will be difficult to identify credible witnesses willing to testify that but for the trustee's error, they would have come to the sale and bid higher than the sale price. Thus, we conclude that the party seeking to set aside the sale need not necessarily present such direct evidence. Rather, the party may meet its burden by establishing that (1) the defect, by its nature, would have a tendency to result in a reduced sale price and (2) the sale price was inadequate.

[28] Here, Cynthia failed to show that Ryberg's decision allowing Huber to pay the balance of his bid by personal check was the type of defect which would have had a tendency to reduce the sale price. Requiring that the high bidder pay in cash protects the beneficiary by ensuring that "a winning bidder is able to pay the purchase price so that a debtor cannot indefinitely frustrate a foreclosure sale." *Boatmen's Bank v. Community Interiors, Inc.*, 721 S.W.2d 72, 77 (Mo. App. 1986). But such restrictions on the method of payment tend to limit the amount of bidding, because as the terms of payment become less flexible, the field of potential bidders becomes smaller. Thus, when the trustee violates a cash-only requirement and allows bidders to pay by personal check or credit, the number of potential bidders grows, thereby increasing the possibility for a higher sale price. Thus, there is a greater chance that junior lienholders will be paid off or that the trustor will recover at least some of its equity in the property. See, *Martin v. Lorren*, 890 S.W.2d 352 (Mo. App. 1994) (refusing to set aside sale when notice of sale called for

cash sale, but successful bidder paid partly by check and partly by funds borrowed from creditor-beneficiary); *Boatmen's Bank, supra*; *Farmers' Sav. Bank v. Murphree*, 200 Ala. 574, 575-76, 76 So. 932, 933-34 (1917) (stating that "it is fully settled by our decisions, since the extension of credit to the purchaser rather tends to increase the number of bidders and enhance the price, that even a sale on credit, though expressly authorized for cash, is no ground for setting aside the sale"). See, also, *Adcock v. Berry*, 194 Ga. 243, 21 S.E.2d 605 (1942). Having failed to show that Ryberg's decision allowing Huber to pay by personal check caused Cynthia any prejudice, she was not entitled to have the sale set aside.

2. Motion for Continuance

[29] Cynthia also argues that the trial court erred in denying her motion for a continuance. Generally, a motion for a continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Weiss v. Weiss*, 260 Neb. 1015, 620 N.W.2d 744 (2001). See, also, Neb. Rev. Stat. § 25-1148 (Reissue 1995).

Based on the sparse record Cynthia presents to us, we determine the court did not abuse its discretion in denying her motion for a continuance. Neither the motion for a continuance nor the supporting affidavits appear in the record. It appears that at the hearing, the only arguments Cynthia made focused on discovery difficulties that had arisen because Huber had become ill. The record, however, suggests that those issues were resolved before trial.

Cynthia now argues that the court moved the litigation along at a hurried pace, forcing her to withdraw two claims for damages because she was unable to secure expert testimony. Before testimony began on the day of the trial, Cynthia's counsel asked the court to clarify if her motion for a continuance had been overruled. The court stated, "Well, as I understand it, counsel have agreed that . . . Huber's deposition can be taken. . . . Ryberg's deposition was taken. What else do you need?" In response, Cynthia withdrew two causes of action, one for breach of fiduciary duty and one for unjust enrichment. But the record does not support Cynthia's contention that she withdrew the

causes of action because she was unable to obtain expert testimony; instead, it suggests that Cynthia believed the March 7, 2002, trial would address only how title should be quieted and that the issues in the two causes of action she was withdrawing would arise only if the court quieted title in her.

We also note that the record suggests that Cynthia engaged in questionable delaying tactics: She was noncooperative in scheduling depositions, and when Ryberg did schedule the depositions, she failed to appear, resulting in the imposition of sanctions. Given this pattern of delay and Cynthia's failure to adequately explain to the district court why she needed more time to prepare for trial, we determine that the court did not abuse its discretion in denying her motion for a continuance.

VI. CONCLUSION

Cynthia failed to establish a prejudicial defect in the trustee's sale, and the district court correctly refused to set aside the sale. Further, the district court did not abuse its discretion in refusing to grant a continuance.

AFFIRMED.

CUMMINS MANAGEMENT, L.P., A TEXAS LIMITED PARTNERSHIP, APPELLEE, V. JOHN M. GILROY AND CYNTHIA H. GILROY, APPELLANTS.

667 N.W.2d 538

Filed August 15, 2003. No. S-02-785.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. ____: ____. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
3. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
4. **Forcible Entry and Detainer: Property: Words and Phrases.** The forcible entry and detainer action is a special statutory proceeding designed to provide a speedy and summary method by which the owner of real estate might regain possession of it from

one who had unlawfully and forcibly entered into and detained possession thereof, or one who, having lawfully entered, then unlawfully and forcibly detained possession.

5. **Forcible Entry and Detainer: Legislature.** Because of its summary nature, the Legislature, under Neb. Rev. Stat. § 25-21,219 (Reissue 1995), has narrowed the issues that can be tried in a forcible entry and detainer action to the right of possession and statutorily designated incidents thereto.
6. **Forcible Entry and Detainer: Title.** A forcible entry and detainer action does not try the question of title, but only the immediate right of possession.
7. **Forcible Entry and Detainer: Legislature.** A forcible entry and detainer action is a creature of the Legislature, and did not exist at common law.
8. **Forcible Entry and Detainer: Courts: Jurisdiction.** A district court's jurisdiction over forcible entry and detainer actions arises out of legislative grant, and it is inherently limited by that grant.
9. ____: ____: ____. Because of the limited scope of a forcible entry and detainer action, when a district court hears such an action, it sits as a special statutory tribunal to summarily decide the issues authorized by the statute, and not as a court of general jurisdiction with the power to hear and determine other issues.
10. **Forcible Entry and Detainer: Title: Courts: Jurisdiction.** If the resolution of a forcible entry and detainer action requires a district court to determine a title dispute, it must dismiss the case for lack of jurisdiction.
11. ____: ____: ____: ____. The mere filing of an answer asserting a title claim by the defendant in a forcible entry and detainer action is not enough to deprive a court of jurisdiction. If, however, on trial, it should appear that the action is not for the recovery of the possession of the premises but to determine a question of title, the court will have no authority to proceed.
12. ____: ____: ____: ____. When a forcible entry and detainer action is ongoing, the mere averment that title is in dispute in another action involving the same property does not automatically divest the court hearing the forcible entry and detainer action of jurisdiction. Instead, the court may proceed until the evidence discloses that the question involved is one of title.
13. **Actions: Plea in Abatement.** A plea in abatement does not go to the merits of the action, but, by presentation of facts extrinsic to the merits of the action, demonstrates irregularities or circumstances which preclude further prosecution of the action or require suspension of the proceedings.
14. **Courts: Actions: Plea in Abatement.** A trial court has discretion whether to dismiss a case after it grants a plea in abatement, thereby precluding further prosecution of the action, or to not dismiss the action and suspend the proceedings pending the outcome of the other case.
15. **Courts: Actions: Plea in Abatement: Jurisdiction.** When the basis for a plea in abatement is the court's lack of subject matter jurisdiction, the court is obligated to dismiss without prejudice, rather than to suspend the action.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Order vacated, and appeal dismissed.

John A. Sellers for appellants.

Duane M. Katz for appellee.

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

CONNOLLY, J.

The dispositive issue in this case is whether a district court has subject matter jurisdiction over a forcible entry and detainer action when, to resolve the action, the court must determine a title dispute. Because we conclude that the district court lacked subject matter jurisdiction, we dismiss this appeal.

BACKGROUND

To secure a note, appellants, John M. Gilroy and Cynthia H. Gilroy, executed and delivered to Robert L. Cummins a trust deed encumbering property owned by the Gilroys. After the Gilroys failed to make payments on the note, the trustee conducted a trustee's sale, where Frank L. Huber submitted the high bid.

The trustee delivered a deed to Huber, but the Gilroys refused to surrender the property. Instead, the Gilroys filed an action seeking to set aside the trustee's sale and quiet title. Shortly thereafter, Huber filed a petition for forcible entry and detainer against the Gilroys. The Gilroys then filed a demurrer to Huber's petition. In it, they claimed that the court lacked subject matter jurisdiction because there was a dispute over who had title to the property. The court treated the demurrer as a plea in abatement and suspended the action until the determination of the Gilroys' quiet title action.

The court entered an order in the quiet title action refusing to set aside the sale. Cynthia Gilroy appealed that decision, and we affirmed the court's order in *Gilroy v. Ryberg, ante* p. 617, 667 N.W.2d 544 (2003). After it had decided the quiet title action, the court reopened the forcible entry and detainer action and found for Huber's successor-in-interest, Cummins Management, L.P., which is the appellee here.

ASSIGNMENTS OF ERROR

The Gilroys assign that the trial court erred in failing to dismiss the action because (1) it lacked subject matter jurisdiction and (2) Cummins Management lacked legal standing to maintain the action.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002).

ANALYSIS

[2,3] Cummins Management argues that because the Gilroys failed to argue on appeal that the court lacked subject matter jurisdiction, they waived their first assignment of error. Usually an appellate court will ignore an error unless it is both argued and assigned in the appellant's brief. See *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003). The rule, however, does not apply here because the assignment of error raises the question whether the district court had subject matter jurisdiction. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002). Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). Thus, we consider whether the district court lacked subject matter jurisdiction, even though the Gilroys failed to argue the issue in their brief.

For well over a century, we have held that a court cannot determine a question of title in a forcible entry and detainer action; if the resolution of the case would require the court to determine a title dispute, it must dismiss the case for lack of jurisdiction. See, e.g., *Hogan v. Pelton*, 210 Neb. 530, 315 N.W.2d 644 (1982); *Jones v. Schmidt*, 163 Neb. 508, 80 N.W.2d 289 (1957); *Miller v. Maust*, 128 Neb. 453, 259 N.W. 181 (1935); *Lipp v. Hunt*, 25 Neb. 91, 41 N.W. 143 (1888); *Pettit v. Black*, 13 Neb. 142, 12 N.W. 841 (1882). Cummins Management, however, claims that this rule is no longer in effect. It argues that the rule existed because only courts that lacked the authority to try title—i.e.,

county courts, municipal courts, and justices of the peace—had original jurisdiction over forcible entry and detainer actions. In 1984, the Legislature extended original jurisdiction over forcible entry and detainer actions to district courts. See Neb. Rev. Stat. § 25-21,219 (Reissue 1995). Cummins Management contends that because a district court has the authority to resolve title disputes, it retains jurisdiction over a forcible entry and detainer action even if it must resolve a title question. This argument, however, misconstrues the effect of the changes to § 25-21,219 and the limited scope of forcible entry and detainer.

[4-6] Cummins Management incorrectly suggests above that there is only one reason for the rule ousting a court of jurisdiction in a forcible entry and detainer action when it determines a title controversy. There was also a second reason—the limited scope of the action. Forcible entry and detainer is a special statutory proceeding designed to provide a speedy and summary method " 'by which the owner of real estate might regain possession of it from one who had unlawfully and forcibly entered into and detained possession thereof, or one who, having lawfully entered, then unlawfully and forcibly detained possession.' " *Sporer v. Herlik*, 158 Neb. 644, 649, 64 N.W.2d 342, 346 (1954) (quoting *Blachford v. Frenzer*, 44 Neb. 829, 62 N.W. 1101 (1895)). Because of its summary nature, the Legislature has narrowed the issues that can be tried in a forcible entry and detainer action to the right of possession and statutorily designated incidents thereto. See § 25-21,219. The action does not try the question of title, but only the immediate right of possession. *Hogan v. Pelton, supra*. See, also, *Tarpenning v. King*, 60 Neb. 213, 82 N.W. 621 (1900). Thus, when a party attempts to interject a title dispute into a forcible entry and detainer action, thereby transforming the proceedings into an equitable action to determine title, the court is divested of jurisdiction. See, *Pettit v. Black, supra*; *Pence v. Uhl*, 11 Neb. 320, 322, 9 N.W. 40, 41 (1881) (forcible entry and detainer action "had nothing to do with titles [a]nd where titles are relied upon to establish the right to possess real estate, resort must be had not only to another tribunal *but also to a different form of action*" (emphasis supplied)).

[7-10] Because district courts can now hear a forcible entry and detainer action does not, as Cummins Management argues,

enlarge the scope of the action when it is brought in such a court. The action is a creature of the Legislature, and did not exist at common law. See *Armstrong v. Mayer*, 60 Neb. 423, 83 N.W. 401 (1900). As a result, a district court's jurisdiction over forcible entry and detainer actions does not arise out of its general jurisdiction. See *id.* Rather, the district court's jurisdiction arises out of legislative grant, and it is inherently limited by that grant. See Neb. Const. art. V., § 9. Thus, because of the limited scope of forcible entry and detainer, when a district court hears such an action, it "sits as a special statutory tribunal to summarily decide the issues authorized by the statute, and not as a court of general jurisdiction with the power to hear and determine other issues." 35A Am. Jur. 2d *Forcible Entry and Detainer* § 36 at 1060-61 (2001). See, also, *Lees v. Wardell*, 16 Wash. App. 233, 554 P.2d 1076 (1976); *Schroeder v. Woody*, 166 Or. 93, 109 P.2d 597 (1941). Thus, if the resolution of the forcible entry and detainer action requires a district court to determine a title dispute, it must dismiss the case for lack of jurisdiction.

[11,12] Because a district court lacks jurisdiction when a forcible entry and detainer involves a title dispute, we must determine if the rule applies here. The mere filing of an answer asserting a title claim by the defendant in a forcible entry and detainer action is not enough to deprive a court of jurisdiction. See, *Jones v. Schmidt*, 163 Neb. 508, 80 N.W.2d 289 (1957); *Stone v. Blanchard*, 87 Neb. 1, 126 N.W. 766 (1910). If, however, on trial, it should appear that the action is not for the recovery of the possession of the premises but to determine a question of title, the court will have no authority to proceed. *Jones v. Schmidt, supra*; *Pettit v. Black*, 13 Neb. 142, 12 N.W. 841 (1882). Similarly, when a forcible entry and detainer action is ongoing, the mere averment that title is in dispute in another action involving the same property does not automatically divest the court hearing the forcible entry and detainer action of jurisdiction. See *Green v. Morse*, 57 Neb. 391, 77 N.W. 925 (1899). Instead, the court may proceed until the evidence discloses that the question involved is one of title. See *id.*

[13] Here, the court did not dismiss the action when the Gilroys alleged in their demurrer that the parties were disputing title in a separate case. Instead, it treated the demurrer as a plea

in abatement. A plea in abatement does not go to the merits of the action, but, by presentation of facts extrinsic to the merits of the action, demonstrates irregularities or circumstances which preclude further prosecution of the action or require suspension of the proceedings. *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000). The record fails to show what evidence the Gilroys offered in support of their plea in abatement, but the court granted it. From this, we conclude that the court determined that title to the property was in dispute, which is consistent with the later proceedings in the quiet title action. See *Gilroy v. Ryberg, ante* p. 617, 667 N.W.2d 544 (2003).

[14,15] However, instead of dismissing the case, the court suspended the proceedings. Generally, a court has discretion whether to dismiss a case after it grants a plea in abatement, thereby precluding further prosecution of the action, or to not dismiss the action and suspend the proceedings pending the outcome of the other case. *Kinsey v. Colfer, Lyons, supra*. When, however, the basis for the plea in abatement is the court's lack of subject matter jurisdiction, the court is obligated to dismiss without prejudice, rather than to suspend the action. Thus, the district court should have dismissed the action for lack of subject matter jurisdiction.

CONCLUSION

We conclude that the district court erred in failing to dismiss the action for lack of subject matter jurisdiction. Any order following the time when the court determined that title was in dispute was a nullity. Because the district court lacked subject matter jurisdiction, so do we.

ORDER VACATED, AND APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
BILLY JACK REED, APPELLANT.
668 N.W.2d 245

Filed August 22, 2003. No. S-02-839.

1. **Extradition and Detainer: Pretrial Procedure: Motions to Dismiss.** In a ruling on a motion to dismiss with prejudice based on alleged violations of the interstate Agreement

on Detainers, a trial court's pretrial factual findings regarding the application of provisions of the agreement will not be disturbed on appeal unless clearly wrong.

2. **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.
3. **Extradition and Detainer.** In order to avoid prolonged interference with rehabilitation programs, the interstate Agreement on Detainers provides the procedure whereby persons who are imprisoned in one state or by the United States, and who are also charged with crimes in another state or by the United States, can be tried expeditiously for the pending charges while they are serving their current sentences.
4. **Federal Acts: Extradition and Detainer: Courts.** Because the interstate Agreement on Detainers is a congressionally sanctioned interstate compact, it is a federal law subject to federal construction, and, thus, U.S. Supreme Court interpretations of the Agreement on Detainers are binding on state courts.
5. **Extradition and Detainer: Words and Phrases.** A detainer is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he is wanted to face criminal charges pending in another jurisdiction.
6. **Extradition and Detainer.** If one jurisdiction is actively prosecuting a defendant on current and pending charges, a defendant cannot be allowed to avoid pending charges in another jurisdiction simply by filing a request for final disposition under the interstate Agreement on Detainers, as clearly the defendant cannot stand trial in both jurisdictions at the same time. In such a situation, the defendant is unable to stand trial in the state in which he requested final disposition until resolution of the pending charges in the sending state.
7. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Robert P. Lindemeier, Lincoln County Public Defender, for appellant.

Jon Bruning, Attorney General, William L. Howland, and Lisa M. Hinrichsen, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

Billy Jack Reed appeals from an order of the district court for Lincoln County overruling his two motions to discharge. Reed contends that the court erred in interpreting specific provisions

of the interstate Agreement on Detainers (Agreement), codified at Neb. Rev. Stat. § 29-759 (Reissue 1995). We affirm.

FACTS

On July 6, 2001, Reed was arrested in Illinois on charges of committing two murders in that state. He was initially held in Adams County, Illinois, awaiting trial. Various proceedings relating to the pending charges were held in Adams County beginning in July and continuing thereafter. On September 4, pursuant to an agreement of the State of Illinois and the defense, Reed was transferred from Adams County to the Illinois Department of Corrections facility at Menard, Illinois, to serve a custodial sentence for a parole violation. Thereafter, the State of Illinois would "writ" Reed from the Menard facility for his scheduled court appearances in Adams County, and then remand him back to the Menard facility following each appearance. This process continued until approximately the beginning of October 2001, at which time Reed remained in Adams County to face the pending charges. Reed has not been back to the Menard facility since that time.

On or about September 12, 2001, while he was incarcerated in the Menard facility, Reed was notified of a detainer filed against him by Lincoln County, Nebraska, on pending charges of first degree murder and use of a firearm to commit a felony. Pursuant to the Agreement, Reed subsequently delivered his request for speedy disposition of the pending Nebraska charges to the warden at the Menard facility. On October 31, the Lincoln County Court in Nebraska acknowledged receipt of the request.

Reed's request for speedy disposition, prepared pursuant to the requirements of the Agreement, included a certificate of inmate status completed by the warden of the Menard facility indicating that Reed was not eligible for parole from that facility until July 2002 and that a detainer had also been lodged against him by Adams County, Illinois. Also pursuant to the Agreement, the request included the warden's offer to deliver temporary custody of Reed to Lincoln County officials in order that prosecution of the Nebraska charges could commence.

After Reed submitted his request for speedy disposition of the Nebraska charges, but before it was received by Nebraska

authorities, Reed was removed from the Menard facility and returned to Adams County, Illinois, to await trial of the charges pending there. On October 25, 2001, the Lincoln County Attorney wrote letters to the Menard facility and to the Illinois prosecutor stating his understanding that Adams County was unwilling to allow Reed to be transferred to Nebraska pursuant to the detainer until resolution of the pending charges in Adams County. The Lincoln County Attorney nevertheless returned the necessary forms required by the Agreement to the Menard facility. The county attorney agreed to accept temporary custody of Reed, but specifically noted:

> Inmate Billy J. Reed is currently facing charges of two (2) counts of First Degree Murder in Adams County, Illinois. State's attorney, Barney Bier, who is prosecuting . . . Reed stated he would not release him to the State of Nebraska, Lincoln County, until the disposition of the Adams County, Illinois case. We will accept custody of . . . Reed as soon as he is available to the State of Nebraska, Lincoln County.

On February 14, 2002, Reed appeared for a status hearing in Adams County. At this hearing, the prosecutor outlined a plea agreement which had been negotiated. Under the agreement, Reed would plead guilty in Adams County to one count of first degree murder and one count of arson, and the sentence for his crimes would be no more than 50 years' incarceration. The plea was further predicated upon Reed's being charged with and pleading guilty to "second degree aiding and abetting in Nebraska, as well as robbery." Under the proposed agreement, the Illinois and Nebraska sentences were to be concurrent and sentencing in Illinois was to be delayed in order to permit Reed's transfer to Nebraska for disposition of his case here. Reed was to serve his sentence in Illinois. After discussion of the plea agreement during the status hearing, Reed entered guilty pleas to the two Illinois charges specified in the agreement. Sentencing was scheduled for March 25.

Reed subsequently waived extradition and was transported to Nebraska by the Lincoln County sheriff on March 7, 2002. On April 2, Reed was charged by information in Lincoln County with one count of first degree murder and one count of use of a firearm to commit a felony in connection with the death of Joyce

Boyer on or about July 3, 2001. At his arraignment, Reed entered pleas of not guilty, and a jury trial was scheduled for July 16, 2002. In a letter to Reed's attorney dated April 30, 2002, the Lincoln County Attorney offered to amend the charges against Reed to aiding and abetting second degree murder and aiding and abetting robbery in exchange for a plea of guilty. On June 5, with Lincoln County's permission, Illinois officials transported Reed from Nebraska to Adams County, Illinois, to enable him to attend the previously scheduled sentencing hearing, which had apparently been postponed. Reed's Nebraska attorney objected to this transfer on grounds that it "makes communication with his attorney difficult" and causes an "undue hardship on him in trying to prepare for trial."

During the Adams County hearing on June 7, 2002, Reed informed the Illinois court that he had received an offer from Nebraska consistent with the negotiated plea agreement and wished to proceed with the agreement. He requested that he be returned to Nebraska, and the Illinois court authorized such return and set the Illinois sentencing for August 21. Reed was returned to Nebraska on June 13.

On June 19, 2002, Reed filed two separate motions to discharge the Lincoln County charges, both based upon alleged violations of the Agreement. One motion alleged that Nebraska failed to bring him to trial within the 180-day period mandated by the Agreement, and the other alleged that his return to Illinois for the sentencing hearing violated the antishuttling provisions of the Agreement. After conducting an evidentiary hearing, the district court entered an order denying both motions. The court held that Reed was " 'unable to stand trial' " in Nebraska within the meaning of the Agreement during the period he was facing charges in Adams County, thereby tolling the 180-day period to bring Reed to trial in Nebraska. See § 29-759, art. VI(a). The court further found that Reed's return to Illinois for the sentencing hearing did not violate the antishuttling provisions of the Agreement, as Reed was never returned to the Menard facility, his place of original imprisonment. Reed filed this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Reed assigns, restated, that the district court erred in (1) finding the time to bring him to trial was tolled while he was facing pending charges in Illinois, (2) not finding that Nebraska failed to accept temporary custody of him, and (3) finding that the antishuttling provisions of the Agreement were not violated by his return from Nebraska to Illinois.

STANDARD OF REVIEW

[1] In a ruling on a motion to dismiss with prejudice based on alleged violations of the Agreement, a trial court's pretrial factual findings regarding the application of provisions of the Agreement will not be disturbed on appeal unless clearly wrong. See *State v. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997).

[2] 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. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002); *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

ANALYSIS

BACKGROUND

[3,4] In order to avoid prolonged interference with rehabilitation programs, the Agreement provides the procedure whereby persons who are imprisoned in one state or by the United States, and who are also charged with crimes in another state or by the United States, can be tried expeditiously for the pending charges while they are serving their current sentences. § 29-759, art. I; *Williams, supra*. Because the Agreement is a congressionally sanctioned interstate compact, it is a federal law subject to federal construction. *Cuyler v. Adams*, 449 U.S. 433, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981); *Williams, supra*. U.S. Supreme Court interpretations of the Agreement are thus binding on state courts. *Williams, supra*.

[5] Although the Agreement does not define detainer, we have noted that a detainer is "a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he is wanted to face criminal charges pending in another jurisdiction." *Williams*, 253 Neb. at 626, 573 N.W.2d at

111. Accord *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984). Because a detainer remains lodged against a prisoner without any action being taken on it, the Agreement sets forth two procedures designed to effectuate its purpose of expeditious prosecution. *Reynolds, supra.* The machinery of the Agreement may be activated by either the prisoner or the receiving state. *Reynolds, supra.*

Article III of the Agreement prescribes the procedure by which a prisoner against whom a detainer has been lodged may demand a speedy disposition of outstanding charges. *Reynolds, supra.* Specifically, article III(a) provides:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint . . . . The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

Article III(c) requires the warden or official having custody of the prisoner to promptly inform the prisoner of the source and contents of any untried complaint and of his right to request its final disposition. See *Reynolds, supra.* Upon receipt of a proper request for disposition under article III, the receiving state must bring the prisoner to trial within 180 days. *Reynolds, supra.* Article III(d), commonly referred to as the "antishuttling provision" of the Agreement, provides that if trial is not had on any indictment or information prior to the return of the prisoner "to

the original place of imprisonment," such indictment or information shall be dismissed with prejudice.

Article IV of the Agreement sets forth the procedures by which the authorities in the state where the charges are pending, the receiving state, may initiate the process whereby a prisoner is returned to that state for trial. *Reynolds, supra.* Under article IV(a), the appropriate officer of the receiving state must present a written request for temporary custody to the appropriate authorities of the custodial or sending state. *Reynolds, supra.* The sending state may not act on the request for a 30-day period, during which time the governor of the sending state may disapprove the request either on his or her own motion or upon motion of the prisoner. § 29-759, art. IV(a). If the proceedings are triggered under article IV, trial in the receiving state must be commenced 120 days after the arrival of the prisoner in that state. § 29-759, art. IV(c).

Article V(a) provides that in response to a request made under either article III or IV, "the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending." It further provides that if the request for final disposition is made by the prisoner under article III, then "the offer of temporary custody shall accompany the written notice provided for in Article III." § 29-759, art. V(a). If the appropriate authority refuses to accept temporary custody or if an action is not brought to trial within the time periods authorized by articles III and IV, then the action shall be dismissed with prejudice. § 29-759, art. V(c).

Article VI(a) provides:

> In determining the duration and expiration dates of the time periods provided in Articles III and IV of this Agreement, the running of said time periods shall be tolled *whenever and for as long as the prisoner is unable to stand trial*, as determined by the court having jurisdiction of the matter.

(Emphasis supplied.)

UNABLE TO STAND TRIAL

This case presents the unusual circumstance of a defendant whose incarceration status in the sending state alternated between

that of a pretrial detainee and that of a prisoner serving a custodial sentence. As noted, Reed was facing pending charges in Adams County, Illinois, prior to his incarceration at the Menard, Illinois, facility. The record indicates that Reed was moved back and forth between Adams County and the Menard facility by agreement of the parties during the early stages of the Adams County proceedings so that he could serve time on a sentence of imprisonment in the Menard facility. No sentence of imprisonment had been entered in Adams County. The Nebraska detainer was lodged against Reed while he was at the Menard facility.

If the detainer had been lodged against Reed while he was being held in Adams County, the Agreement would not apply, as it is not applicable to pretrial detainers. See, e.g., *U.S. v. Muniz*, 1 F.3d 1018 (10th Cir. 1993); *U.S. v. Bayless*, 940 F.2d 300 (8th Cir. 1991); *State v. Hargrove*, 273 Kan. 314, 45 P.3d 376 (2002); *State v. Smith*, 115 N.M. 749, 858 P.2d 416 (N.M. App. 1993); *People v Wilden*, 197 Mich. App. 533, 496 N.W.2d 801 (1992). The Agreement applies solely to persons who have entered upon a term of imprisonment and therefore does not include pretrial detainees. See, *Muniz, supra*; *Bayless, supra*; *Hargrove, supra*; *Smith, supra*; *Wilden, supra*. Pretrial detainees are not serving a sentence at the time the detainer is filed, and thus they have no vested interest in programs of treatment and rehabilitation available to prisoners who are serving sentences. Pretrial detainees are therefore not under the protection of the Agreement. See, *Muniz, supra*; *Bayless, supra*; *Hargrove, supra*; *Smith, supra*; *Wilden, supra*. However, because the Nebraska detainer was filed at a time that Reed happened to be lodged at the Menard facility where he was serving a sentence, the Agreement is applicable to this case.

In his first assignment of error, Reed contends that the district court erred in finding that the 180-day time period in which to try him in Nebraska did not expire because he was "unable to stand trial" in Nebraska while charges were pending against him in Adams County. In this respect, Reed does not challenge the factual findings of the district court, but merely its interpretation of the statutory language of the Agreement.

The parties agree that the 180-day period in which to bring Reed to trial in Nebraska began running on October 31, 2001, the

day on which both the Lincoln County Attorney and the Lincoln County Court had received notice of Reed's request for final disposition of the pending Nebraska charges. See *Fex v. Michigan*, 507 U.S. 43, 113 S. Ct. 1085, 122 L. Ed. 2d 406 (1993) (holding 180-day period in article III(a) of Agreement commences when request for final disposition is received by prosecutor and appropriate court of jurisdiction that lodged detainer). The issue presented is whether the 180-day time period was tolled while the Adams County charges remained pending.

Reed argues in his brief that he was not "unable to stand trial" in Nebraska because "Nebraska could have taken custody of him at any time to meet their [sic] responsibilities under the [Agreement]." Brief for appellant at 13. He argues that his request for final disposition of the Nebraska charges is deemed a waiver of extradition and a consent to the production of his person in Nebraska pursuant to article III(e). He further argues that the warden at the Menard facility offered to deliver temporary custody of Reed to Nebraska and that although the Lincoln County Attorney had complete authorization thereafter to seek custody, he failed to do so simply because the Adams County Attorney expressed a preference that the charges against Reed in Illinois proceed first. Reed contends that pursuant to article IV(a), only the governor of a sending state, in this case Illinois, can refuse a transfer of a prisoner once a request for temporary custody is made by a receiving State and that therefore, the wishes of the Adams County Attorney were completely immaterial and did not affect Nebraska's right under the Agreement to take custody of him.

Reed's reliance on article IV(a) is misplaced. As noted, article IV provisions are invoked in situations in which the receiving state initiates the process of proceeding on a lodged detainer. In this case, Reed initiated the process by filing a request for final disposition under article III. As required by the Agreement, his request included an offer of temporary custody made by the Menard facility. Although Nebraska *responded* to this offer of temporary custody pursuant to article III, Nebraska did not *initiate* a request for temporary custody under article IV. Therefore, the provisions of article IV are not applicable in this proceeding. Because the provision that only the governor of a sending state may deny a request for temporary custody is contained in article

IV, there is no merit to Reed's contention that the wishes of Adams County officials to keep him in Illinois to face pending charges could not render him "unable to stand trial" in Nebraska. Moreover, because article V(a) requires that at the time a request for final disposition is made by a prisoner, the sending state *shall* offer to deliver temporary custody to the receiving state, Reed's reliance on the fact that the Menard facility offered temporary custody is also without significance.

In support of his argument that the 180-day period was not tolled, Reed relies on *State v. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001), and *State v. Meyer*, 7 Neb. App. 963, 588 N.W.2d 200 (1998). We find these cases to be distinguishable. *Steele* does not address the "unable to stand trial" language of the Agreement. In *Steele*, the defendant was charged in Lancaster County on April 16, 1999, trial was set, and he was released on bond. Subsequently, Colorado filed a fugitive complaint against the defendant. On May 24, he waived extradition and was returned to Colorado. Nebraska authorities were aware of the extradition and took no steps to oppose it. The defendant subsequently brought a motion to discharge the Nebraska charges, alleging his statutory right to a speedy trial under Neb. Rev. Stat. § 29-1207 (Reissue 1995) had been violated. The State argued that the provisions of the Agreement were applicable and that under those provisions, the defendant's rights had not been violated.

We concluded that once Nebraska filed the information and charged the defendant with the crime in April 1999, his statutory speedy trial rights under § 29-1207 were invoked and the provisions of the Agreement were not applicable. We further held that the defendant's voluntary waiver of extradition did not prevent Nebraska from refusing to surrender him to Colorado when Nebraska charges remained pending. We therefore concluded that the time period during which the defendant was in Colorado was not excluded and that the defendant's right to a speedy trial was violated. *Steele* is factually distinguishable from the instant case and provides no guidance on the issue of interpreting the "unable to stand trial" language of the Agreement.

The only reported Nebraska appellate opinion interpreting the "unable to stand trial" language of the Agreement is *Meyer, supra*. In that case, the defendant was charged in Sarpy County on April

20, 1995, with burglary, theft by unlawful taking, and criminal mischief. At that time, the defendant was incarcerated in Iowa. On July 27, Sarpy County lodged a detainer against the defendant at the Iowa facility in which he was incarcerated. On March 24, 1997, the defendant filed an article III pro se notice of place of imprisonment and request for final disposition of the Sarpy County charges.

The very next day, the defendant was granted parole in Iowa and released to the custody of Sarpy County on the detainer. A preliminary hearing was set for April 10, 1997, and the defendant was released on bond. He failed to appear at the preliminary hearing because, unbeknownst to Sarpy County officials, he had been taken into custody in Iowa on new charges on March 28. The defendant was sentenced on the Iowa charges on October 15 and incarcerated in Oakdale, Iowa. The defendant remained incarcerated until February 3, 1998. On that date, he was then arrested by the Sarpy County sheriff and brought back to Nebraska for arraignment on the April 20, 1995, complaint. On April 8, 1998, the defendant filed a motion to dismiss the charges due to an alleged violation of the 180-day period in the Agreement.

The Nebraska Court of Appeals found that the 180-day period to bring the defendant to trial was triggered by his March 24, 1997, request for final disposition. Then, adopting the view of the majority of federal courts, it held that a defendant is "unable to stand trial" within the meaning of the Agreement during all those periods of delay occasioned by the defendant. *State v. Meyer*, 7 Neb. App. 963, 588 N.W.2d 200 (1998). The Court of Appeals determined that the defendant's reincarceration in Iowa was clearly a delay caused by him and that thus, the 180-day period was tolled either until he reappeared in Nebraska court or until he fully and completely advised Sarpy County of his exact whereabouts so that they could " 'go get him' " pursuant to his request for final disposition. *Id.* at 971, 588 N.W.2d at 205. The court reasoned that a contrary holding would allow a defendant to seek final disposition of pending charges and then disappear for 180 days and cause the charges to be dismissed.

Relying on *Meyer*, Reed argues that as long as Nebraska officials were aware of Reed's whereabouts in Adams County, they could "go get him" and that thus, the 180-day time period was

not tolled because he was not unable to stand trial. *Meyer*, however, did not address what effect pending charges in the other jurisdiction would have on the rule announced, as the defendant in that case was simply incarcerated and not facing new charges in Iowa. Therefore, *Meyer* is not instructive in this case.

Other state courts have addressed the "unable to stand trial" language of the Agreement in situations that are factually analogous to the instant case. In *Johnson v. Commissioner of Correction*, 60 Conn. App. 1, 758 A.2d 442 (2000), a prisoner filed a petition for a writ of habeas corpus in which he sought to quash a detainer lodged against him by Massachusetts. The detainer was lodged while the prisoner was serving a burglary sentence in Connecticut, and the prisoner requested final disposition of the charge on July 5, 1996. Pursuant to the provisions of article III of the Agreement, the prisoner's request included an offer by Connecticut authorities to deliver temporary custody of the prisoner to Massachusetts. This offer was received by Massachusetts authorities on August 8.

On August 16, 1996, however, while still incarcerated in Connecticut, the prisoner was charged with another Connecticut crime. Trial on this charge began on September 5, and the charge was finally resolved nearly a year later. In the meantime, however, on December 17, Massachusetts authorities had attempted to obtain temporary custody of the prisoner. Although it was not clear from the record, the district court found that it could be inferred that Massachusetts was denied custody at that time and that conversations between the respective prosecutors made it clear to Massachusetts officials that further efforts to obtain custody of the prisoner would not be fruitful until resolution of the new Connecticut charges. The court found that Connecticut's refusal to transfer the prisoner until the pending charges were resolved was justified and thus that while the prisoner was facing the pending charges in Connecticut, he was "unable to stand trial" in Massachusetts. It thus denied the prisoner's request for habeas relief.

In *State v. Cook*, 330 N.J. Super. 395, 750 A.2d 91 (2000), New Jersey lodged a detainer against a defendant incarcerated in Pennsylvania. On April 7, 1988, New Jersey requested temporary custody of the defendant. At that time, the defendant had been

sentenced on one of three Pennsylvania murder charges and was incarcerated pending disposition of the remaining charges. Pennsylvania authorities thus declined to offer temporary custody. On March 30, 1994, all proceedings in Pennsylvania concluded.

The defendant was finally transported to New Jersey on June 8, 1994, and filed a motion to dismiss the charges based on violation of the Agreement. The court held that the defendant was not entitled to a dismissal of the charges because "[o]utstanding charges pending in a sending state renders a defendant 'unable to stand trial' in the receiving state under the [Agreement]." *Cook*, 330 N.J. Super. at 413, 750 A.2d at 101.

In *People v. Whitely*, 143 Misc. 2d 83, 539 N.Y.S.2d 652 (1989), New York lodged a detainer against a defendant serving a 2-year prison term in Connecticut. The defendant was simultaneously facing four separate charges then pending in Connecticut. The court held that the defendant was unable to stand trial in New York during the proceedings on the pending Connecticut charges, reasoning that the Agreement was never intended to benefit one who still had outstanding charges against him in the sending state, and that pending proceedings in the sending state can therefore be the basis for a tolling of the 180-day requirement under article III.

In *State v. Binn*, 196 N.J. Super. 102, 481 A.2d 599 (1984), New Jersey filed a detainer against a prisoner incarcerated in New York. The prisoner requested speedy disposition of the New Jersey charges. New York, however, refused to offer temporary custody until pending charges in that state were resolved. The court rejected the prisoner's contention that "because New York was expeditiously moving other pending charges against him after he served his request for final disposition of the New Jersey charges that those New Jersey charges must be dismissed," finding that the Agreement "intended no such irrational result." *Binn*, 196 N.J. Super. at 108, 481 A.2d at 601-02. The court concluded that the prisoner was unable to stand trial in New Jersey because of the legitimate claim of New York to hold him to dispose of remaining New York charges.

[6] We find these authorities persuasive. Moreover, we note that other courts have held that while a prisoner is in the custody of one jurisdiction facing charges which he requested be speedily resolved under the Agreement, he is unable to stand trial in

another jurisdiction in which he has also requested speedy resolution of pending charges. See, *United States v. Mason*, 372 F. Supp. 651 (N.D. Ohio 1973); *Vaden v. State*, 712 N.E.2d 522 (Ind. App. 1999); *State v. Maggard*, 16 Kan. App. 2d 743, 829 P.2d 591 (1992); *State v. Wood*, 241 N.W.2d 8 (Iowa 1976). These jurisdictions reason that a prisoner should not be able to manipulate the detainer process to his advantage and that his own actions in this regard make him unable to stand trial in both jurisdictions at the same time. *Id.* Although the instant case does not involve a simultaneous request for speedy disposition of charges in two jurisdictions, we find that the rationale articulated by these cases is applicable to the unique circumstances of this case. Thus, if one jurisdiction is actively prosecuting a defendant on current and pending charges, a defendant cannot be allowed to avoid pending charges in another jurisdiction simply by filing a request for final disposition under the Agreement, as clearly the defendant cannot stand trial in both jurisdictions at the same time. In such a situation, the defendant is unable to stand trial in the state in which he requested final disposition until resolution of the pending charges in the sending state.

Based upon the cases cited above, we conclude that the district court did not err in finding that Reed was unable to stand trial in Nebraska during the time period he was facing pending charges in Illinois.

"Refusal" of Temporary Custody

[7] In his second assignment of error, Reed argues that Nebraska's "conditional" acceptance of temporary custody amounted to a refusal of or a failure to accept temporary custody under the Agreement. Notably, this argument was not presented in either of Reed's motions to discharge that were filed with the district court. This argument was also not raised during the evidentiary hearing held on the motions. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003); *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). We therefore decline to address this assignment in this appeal.

ANTISHUTTLING PROVISIONS

Reed asserts in his third assignment of error that the antishuttling provisions of the Agreement were violated in this case when he was transferred from Lincoln County, Nebraska, to Adams County, Illinois. In this respect, article III(d) provides in relevant part:

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner *to the original place of imprisonment*, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(Emphasis supplied.) Similarly, article IV(e) provides:

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned *to the original place of imprisonment pursuant to Article V(e) hereof*, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(Emphasis supplied.) Article V(e) provides: "At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state."

Reed argues that he was imprisoned in Illinois at the time he filed his request for speedy disposition and that he was transported back to Illinois on March 5, 2002, to attend the Illinois sentencing proceedings prior to trial on his Nebraska charges. He contends that such transport violates the antishuttling provisions of articles III and IV.

The district court found that "it could be argued" that by its "demand" on the State of Illinois and Reed's subsequent waiver of extradition, the State of Nebraska took steps under article IV to have Reed returned to Nebraska. Reed contends in his brief that Nebraska took such steps and that therefore, the provisions of both articles III and IV are applicable to this proceeding. However, the record reveals that all action taken under the Agreement was initiated by Reed. If article IV were invoked, Nebraska would have presented a written *request* for temporary custody to the appropriate Illinois authorities. See § 29-759, art. IV(a). No such request appears in the record. The only

correspondence with respect to the issue of temporary custody is Nebraska's *acceptance* of the Menard facility's offer of temporary custody that was made under article III. Therefore, only the antishuttling provisions of article III, and not the provisions of article IV, are applicable to our analysis of this issue.

Reed relies heavily upon *Alabama v. Bozeman*, 533 U.S. 146, 121 S. Ct. 2079, 150 L. Ed. 2d 188 (2001). In that case, the defendant was serving a sentence at a federal prison in Florida when Alabama lodged a detainer against him. Alabama then invoked the provisions of article IV and sought temporary custody of the defendant. Temporary custody was granted, and the defendant was released to Alabama officials. The officials transported him approximately 80 miles to Alabama, where he spent the night in county jail, appeared in court the next morning, and was then transported back to the federal prison in Florida. Approximately 1 month later, the defendant was returned to Alabama to stand trial.

The defendant filed a motion to dismiss the Alabama charges, arguing that the antishuttling provision of article IV had been violated by his return to the federal prison prior to trial in Alabama. Alabama did not contest that the Agreement was literally violated, but argued that the violation was de minimus because it did not prejudice the defendant or affect his rehabilitation program. The U.S. Supreme Court, however, found that the terms of article IV had been violated, and dismissed the Alabama charges. Reed contends that *Bozeman* stands for the proposition that the antishuttling provisions of the Agreement must be strictly construed in favor of the prisoner.

Bozeman, supra, however, did not address the factual situation present in the instant case, because in that case, the prisoner was clearly returned to the original institution in which he was serving a validly imposed custodial sentence and was not returned to the sending state for the purpose of facing pending charges. Moreover, *Bozeman* clearly interpreted and applied the antishuttling provision in article IV of the Agreement. As noted, the State of Nebraska never invoked the provision of article IV in this case, and thus the only antishuttling provision at issue in this case is that of article III(d). Although the provisions in each article are similar, they contain one striking difference. Article III(d) provides that the prisoner may not be returned to the "original place

of imprisonment," while article IV(e) provides that the prisoner may not be returned to the "original place of imprisonment *pursuant to Article V(e) hereof*." (Emphasis supplied.) Article V(e) provides: "At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state."

The difference in the statutory language of articles III(d) and IV(e) was addressed by the Supreme Court of Wyoming in *Merchant v. State*, 4 P.3d 184 (Wyo. 2000). In that case, a prisoner was serving a sentence in Canon City, Colorado, when he requested final disposition of outstanding Wyoming charges. He was subsequently transferred to Wyoming, based on this request. However, prior to being tried in Wyoming, the prisoner was returned to Weld County, Colorado, on two occasions to face pending charges. The prisoner was never returned to Canon City. He contended that the returns to Colorado violated the antishuttling provisions of the Agreement and required dismissal of the Wyoming charges.

The Wyoming Supreme Court found that it was the prisoner who requested final disposition of the Wyoming charges and that thus, the remedy for a violation of the antishuttling provision was found only in article III(d). The court noted the distinction between the language in articles III(d) and IV(e) and concluded:

> Absent modifying language in Article III, similar to that in Article IV, Article III's definition of "original place of imprisonment" is more precise and restrictive than that of Article IV. Article III requires that the prisoner be returned to his "original place of imprisonment," the Colorado Territorial Correction Facility in Canon City, Colorado, while under Article IV, it appears to suffice if the prisoner is returned to the sending state.

Merchant, 4 P.3d at 189. The court concluded that because the prisoner was never returned to Canon City, even though he was returned to another location in Colorado, the antishuttling provision of article III was not violated.

As Reed correctly notes, *Merchant* was decided prior to *Alabama v. Bozeman*, 533 U.S. 146, 121 S. Ct. 2079, 150 L. Ed. 2d 188 (2001). *Bozeman*, however, while holding that the provisions of article IV must be strictly applied, did not address the

statutory language of article III. Literally interpreting the statutory language of the Agreement, as we must under *Bozeman*, we conclude that there is a difference between the "original place of imprisonment" language in article III and the "original place of imprisonment pursuant to Article V(e) hereof" language in article IV. Under the article III "original place of imprisonment" language, it is not enough that a prisoner is returned to the sending state simply to face pending charges. In the instant case, we deem it particularly significant that Reed was never returned to *any* facility in Illinois in order to serve a term of imprisonment, but, rather, was returned to Illinois only to face pending charges. He was therefore never returned to his "original place of imprisonment," and the district court did not err in concluding that the antishuttling provisions of the Agreement were not violated.

CONCLUSION

The district court properly determined that the 180-day period in which to bring Reed to trial under article III of the Agreement was tolled during the time Reed was in Adams County, Illinois, facing pending charges, as he was at that time "unable to stand trial" in Nebraska. Reed's contention that Nebraska failed to accept temporary custody is not properly before us in this appeal. Because Reed was never returned to Illinois to serve a sentence of imprisonment, the antishuttling provision of article III of the Agreement was not violated. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOHNNY L. RAY, APPELLANT.
668 N.W.2d 52

Filed August 22, 2003. No. S-02-1081.

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.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.

3. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution or article I, § 11, of the Nebraska Constitution, 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.
4. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
5. **Confessions: Tape Recordings.** As a matter of law, a taped confession is not required to be suppressed solely because it is given subsequently to a suppressed unwarned statement.
6. **Confessions.** Whether a confession or statement was voluntary depends on the totality of the circumstances.
7. **Confessions: Police Officers and Sheriffs.** In assessing the totality of the circumstances, the court will examine the tactics used by the police, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne.
8. **Confessions.** A list of a defendant's personal characteristics does not in and of itself demonstrate characteristics of an individual whose will is easily overborne.
9. **Postconviction: Effectiveness of Counsel: Proof.** In a postconviction proceeding, the defendant has the burden of demonstrating ineffectiveness of counsel, and the record must affirmatively support the claim.
10. **Criminal Law: Effectiveness of Counsel: Proof.** It is the criminal defendant's burden to demonstrate that he or she was prejudiced by the alleged deficiencies of counsel.
11. **Effectiveness of Counsel: Proof: Words and Phrases.** To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

James J. Regan for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Johnny L. Ray appeals the order of the district court for Douglas County denying his motion for postconviction relief after

an evidentiary hearing. In its order, the district court rejected Ray's claims based on ineffective assistance of counsel. We affirm.

STATEMENT OF FACTS

Ray was convicted of one count of first degree murder, one count of attempted first degree murder, and two counts of use of a firearm in the commission of a felony. He was sentenced to life imprisonment for murder, 16⅔ to 50 years' imprisonment for attempted murder, and 6⅔ to 20 years' imprisonment for each use of a firearm count. The use of a firearm counts were ordered to be served consecutively to the murder counts.

A tape-recorded confession Ray gave to police was admitted at the trial. The failure of trial counsel to have the taped confession suppressed and the failure of the same counsel to obtain a reversal on appeal based on the receipt of the confession into evidence are the focus of this postconviction case.

The record from the trial shows that Ray was taken into custody hours after a shooting incident on the evening of September 18, 1990, in which one individual was killed and another injured. This incident was 2 days before Ray turned 18 years of age. After Ray had been in custody for approximately 4 hours, the police interviewed Ray and elicited certain exculpatory statements from him without advising him of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). There is no dispute that these exculpatory statements were deemed by the district court to be inadmissible and were excluded from evidence during Ray's trial. Shortly after making the exculpatory remarks, Ray was told he was a suspect and given his *Miranda* warnings. The police interrogation continued. It was during this continued interrogation that Ray incriminated himself and thereafter gave a tape-recorded confession.

Prior to trial, Ray's counsel filed a motion to suppress, challenging, inter alia, the admissibility of the taped confession as " 'involuntary and the product of threats, coercion and inducements of leniency made by members of the Omaha Police Division.' " *State v. Ray*, 241 Neb. 551, 555, 489 N.W.2d 558, 561 (1992). Following an evidentiary hearing, at which Ray did not testify, the motion was overruled. After the taped confession was admitted into evidence and played for the jury, Ray's counsel

cross-examined the police officer who recorded the statement. Thereafter, Ray's counsel renewed the suppression motion, and again the motion was overruled. Later during the trial, Ray testified, and his testimony addressed, in part, the substance of his taped confession. Ray was convicted and sentenced.

Ray's trial counsel filed an appeal, claiming as the sole assignment of error that the trial court erred in finding Ray's taped confession was not the product of improper inducement and in refusing to suppress that inculpatory statement. In *State v. Ray, supra*, we affirmed Ray's convictions and sentences.

On December 19, 2000, Ray filed a motion for postconviction relief. Ray is represented by new counsel in these postconviction proceedings. In the motion, Ray asserted, inter alia, that his constitutional rights had been violated due to ineffective assistance of original counsel in connection with counsel's inability to have Ray's confession suppressed. A postconviction evidentiary hearing was held February 27, 2002. Ray was the only "live" witness who testified at his postconviction evidentiary hearing. The only exhibit offered and received into evidence was the deposition of Ray's trial counsel, who indicated that he focused on the coercion aspect of the confession at trial and on appeal. The district court took judicial notice of the "records of the Nebraska Supreme Court in the case of State v. Johnny Ray, reported at 241 Neb. 551."

In an order entered on August 28, 2002, the district court denied Ray's motion for postconviction relief. We note that the district court determined that although Ray had raised "numerous grounds" for relief in his postconviction motion, during the February 27 evidentiary hearing, the request for relief was "limited to ineffective assistance of counsel in connection with trial counsel's inability to suppress [Ray's] confession." On appeal to this court, Ray has not challenged the district court's interpretation of the basis for the requested relief in his postconviction motion, and our analysis is similarly circumscribed.

The focus of the postconviction evidence corresponded to Ray's assertion that his original counsel was deficient by failing to impart to the court a list of Ray's personal characteristics, which characteristics would have shown that Ray's will was easily overborne and that the confession was involuntary. Ray

does not assert that the circumstances of the pre-*Miranda* custody were inherently coercive. In its August 28, 2002, order, the district court determined that the record of the postconviction hearing did not establish ineffective assistance of counsel and, thus, denied Ray's motion for postconviction relief. Ray appeals.

ASSIGNMENT OF ERROR

On appeal, Ray sets forth one assignment of error. Ray claims that the district court erred in overruling his motion for postconviction relief and in determining that Ray's original counsel was not ineffective as a matter of law.

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. Gonzalez-Faguaga, ante* p. 72, 662 N.W.2d 581 (2003).

ANALYSIS

In his motion for postconviction relief, Ray asserts generally that his constitutional rights have been violated due to ineffective assistance of counsel. Specifically, Ray claims that (1) because the pre-*Miranda* statements were suppressed, the post-*Miranda* confession was tainted and should have been suppressed, and (2) original counsel failed to impart a list of Ray's personal characteristics which would have demonstrated the confession was not voluntarily given.

[2-4] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002). To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution or article I, § 11, of the Nebraska Constitution, 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. Gonzalez-Faguaga, supra*; *State v. Harrison, supra*. The two prongs of the

ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *State v. Harrison, supra.*

IMPACT OF SUPPRESSION OF PRE-*MIRANDA* STATEMENTS ON POST-*MIRANDA* CONFESSION

Ray argues that his post-*Miranda* confession could not be considered voluntary because it followed his pre-*Miranda* custodial statements, the latter of which were suppressed. Ray claims that his original counsel was ineffective for failing to argue that Ray's pre-*Miranda* statements "impermissibly tainted [Ray's] subsequent confession." Brief for appellant at 10. Ray's argument presumes that a Mirandized statement made subsequent to unwarned suppressed statements must invariably be suppressed. This presumption is incorrect as a matter of law, and we reject Ray's argument.

Ray asserts, and the State does not dispute, that Ray was in custody during the time both the statements and the confession were made. The record reflects that at the onset of police questioning, prior to being given his *Miranda* warnings, Ray made statements essentially disavowing any involvement in the crimes. At trial, these statements were suppressed. Following these exculpatory statements, the police advised Ray that he was a suspect, and he was given his *Miranda* warnings. Thereafter, Ray confessed, which confession was tape-recorded and played to the jury at trial.

In arguing that the taped confession was "tainted" by the pre-*Miranda* statements, Ray invokes the "tainted fruit of the poisonous tree" language taken from cases such as *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), in which Fourth Amendment violations have led to the suppression of evidence, including the suppression of confessions. See *Taylor v. Alabama*, 457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982). Ray's argument confuses the role of the Fourth Amendment exclusionary rule designed to deter unreasonable searches, no matter how probative their fruits, and the function of *Miranda* in guarding against the prosecutorial use of

compelled statements as prohibited by the Fifth Amendment. See *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985).

The U.S. Supreme Court has recognized that " 'a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized [and that] the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give.' " *United States v. Ceccolini*, 435 U.S. 268, 277, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978) (quoting *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963)). It is an unwarranted extension of *Miranda* to say that an unwarned statement "so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." *Oregon v. Elstad*, 470 U.S. at 309. Thus, although "*Miranda* requires that the unwarned [statement] must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Id.* See, also, *State v. Escamilla*, 245 Neb. 13, 511 N.W.2d 58 (1994).

[5] We therefore conclude that the taped confession was not required to be suppressed solely because it was given subsequently to the suppressed unwarned statements. Accordingly, where original counsel made no such legal argument urging suppression, which argument would have been unavailing, counsel's performance was not deficient on this basis.

KNOWINGLY AND VOLUNTARILY MADE CONFESSION

[6] We proceed to Ray's assertion before us on appeal that he is entitled to postconviction relief, because his original counsel, "while raising the question of voluntariness of [Ray's] confession at . . . pretrial, trial and appellate proceedings, failed to adequately develop a record, argue and appeal all of the grounds that would have supported a judicial determination that [Ray's] confession was not voluntary." Brief for appellant at 7. Whether a confession or statement was voluntary depends on the totality of the circumstances. *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000); *State v. Ray*, 241 Neb. 551, 489 N.W.2d 558 (1992).

[7] It has been stated that in assessing the totality of the circumstances, the court will examine the tactics used by the police,

the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne. *U.S. v. Rohrbach*, 813 F.2d 142 (8th Cir. 1987), *cert. denied* 482 U.S. 909, 107 S. Ct. 2490, 96 L. Ed. 2d 381. With respect to the Due Process Clause of the 14th Amendment, we have observed that "[w]hile circumstances surrounding the statement and the characteristics of the individual defendant at the time of the statement are potentially material considerations, coercive police activity is a necessary predicate to the finding that a confession is not voluntary . . . ." *State v. Garner*, 260 Neb. at 49, 614 N.W.2d at 327. For the reasons outlined below, even if we were to assume that coercive police activity occurred prior to Ray's making the initial statements, the list of personal characteristics standing alone, which Ray claims his original counsel failed to impart, would not have led to a finding that Ray's post-*Miranda* confession was involuntary and that, thus, original counsel's performance was not deficient for failing to impart the list. Compare, e.g., *Oregon v. Elstad*, 470 U.S. 298, 312 n.3, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) (citing cases collected).

Ray argues that original counsel's performance was deficient and that he was prejudiced by original counsel's failure to offer evidence regarding Ray's age, his lack of education, his detention, and his unfamiliarity with police interrogation. However, in his brief on postconviction appeal, Ray acknowledges that at the pretrial suppression hearing, trial counsel "elicited the fact that . . . Ray was a juvenile at the time of his arrest, and had been kept in solitary for four hours before any contact by police, without any effort to contact his parents." Brief for appellant at 8. Ray's brief on direct appeal also included these facts (see case No. S-91-478). Thus, it cannot be said that original counsel was deficient by failing to bring these facts to the court's attention.

We have reviewed the evidence adduced during the postconviction hearing regarding the other personal characteristics that Ray claims are significant: lack of education and unfamiliarity with police questioning. Given his age, Ray's educational background was apparent. With respect to police questioning, Ray admitted to his experience involving his juvenile record. The postconviction record does not explore these facts further.

[8] On the record before us and the postconviction court, the personal characteristics and facts surrounding the taped confession do not in and of themselves demonstrate characteristics of an individual whose will is easily overborne. In this regard, we have noted that factors such as age or limited time in custody, standing alone, are not determinative of voluntariness. *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000); *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997). We have also rejected a claim that within limits, lack of sleep makes a confession involuntary. *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978). In the instant postconviction case, Ray has given us a list of personal characteristics which are not determinative of the issue of voluntariness. Furthermore, Ray has not shown how these characteristics were exploited by the police in the case at bar. The postconviction record does not show a will overborne.

[9-11] In a postconviction proceeding, the defendant has the burden of demonstrating ineffectiveness of counsel, and the record must affirmatively support the claim. *State v. Wiemer*, 3 Neb. App. 821, 533 N.W.2d 122 (1995). It is the criminal defendant's burden to demonstrate that he or she was prejudiced by the alleged deficiencies of counsel. *State v. Gonzalez-Faguaga, ante* p. 72, 662 N.W.2d 581 (2003). To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

A review of the postconviction record indicates that Ray has failed to show that his confession was involuntary or to demonstrate that he was prejudiced by the alleged deficiencies of his original counsel. See *State v. Gonzalez-Faguaga, supra*. The determinations of the postconviction court denying relief were not clearly erroneous.

CONCLUSION

The district court did not err in rejecting Ray's claim of ineffective assistance of counsel and in denying Ray's motion for

postconviction relief. We therefore affirm the district court's denial of Ray's motion for postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RAYMOND MATA, JR., APPELLANT.
668 N.W.2d 448

Filed September 5, 2003. No. S-00-600.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, will be upheld unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Criminal Law: Motions to Dismiss: Evidence.** In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor.
3. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
4. **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. ____. 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.
6. **Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In reviewing a sentence of death on appeal, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.
7. **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 v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), findings of fact as to the circumstances surrounding the interrogation are reviewed for clear error, and the determination 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.
8. **Constitutional Law: Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution

demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

9. **Miranda Rights.** *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.
10. **Constitutional Law: Miranda Rights.** *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one in custody.
11. **Constitutional Law: Arrests: Miranda Rights: Words and Phrases.** One is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest.
12. **Constitutional Law: Miranda Rights: Police Officers and Sheriffs.** Two inquiries are essential to the determination whether an individual is in custody for *Miranda* purposes: (1) an assessment of the circumstances surrounding the interrogation and (2) whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave.
13. **Constitutional Law: Self-Incrimination: Police Officers and Sheriffs.** Once an accused invokes his or her constitutional rights to remain silent and to the services of an attorney, the authorities must refrain from initiating further conversations and must scrupulously honor the accused's request.
14. **Constitutional Law: Miranda Rights: Self-Incrimination: Police Officers and Sheriffs.** Although *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), does not require an absolute halt to all conversations by the police with an accused once the right to silence is asserted, observance of the constitutional right is tested by the circumstances to determine whether the right was scrupulously honored.
15. **Miranda Rights: Police Officers and Sheriffs.** The police are not required to accept as conclusive any statement or act, no matter how ambiguous, as a sign that a suspect desires to cut off questioning.
16. **Constitutional Law: Self-Incrimination.** Resolution of ambiguity in the invocation of the constitutional right to remain silent is a question of fact.
17. **Constitutional Law: Miranda Rights: Right to Counsel.** Invocation of a defendant's Sixth Amendment right to counsel does not operate as a *Miranda* invocation of the right to counsel.
18. **Miranda Rights: Right to Counsel.** *Miranda* rights cannot be anticipatorily invoked prior to or outside the context of custodial interrogation.
19. **Constitutional Law: Search and Seizure: Waiver.** The right to be free from an unreasonable search and seizure, as guaranteed by the 4th and 14th Amendments to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen.
20. **Constitutional Law: Search and Seizure: Duress.** To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice and not the product of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.
21. **Search and Seizure.** Voluntariness of consent to search is a question of fact to be determined from all the circumstances.
22. **Constitutional Law: Animals.** Privately owned animals are "effects" subject to the protections of the Fourth Amendment.

23. **Warrantless Searches: Standing.** Before one may challenge a nonconsensual search without a warrant, one must have standing in a legal controversy.
24. **Constitutional Law: Search and Seizure: Standing.** A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment to the U.S. Constitution.
25. **Constitutional Law: Search and Seizure.** To determine whether an individual has an interest protected by the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, one must determine whether the individual has a legitimate or justifiable expectation of privacy in the invaded place. Ordinarily, two inquiries are required. First, the individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.
26. **Trial: Appeal and Error.** An issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.
27. **Police Officers and Sheriffs.** Resolution of whether an individual is acting as an agent of law enforcement is a question of fact determined by the totality of the circumstances.
28. **Police Officers and Sheriffs: Proof.** The defendant has the burden of establishing that a private individual acted as an agent of law enforcement.
29. **Search and Seizure: Property: Police Officers and Sheriffs.** If a private citizen has the right to search in a particular place or seize certain property by virtue of his or her own personal relationship to the premises or property in question, that right is not diminished by the individual's relationship with law enforcement.
30. **Animals.** Animals are personal property under Nebraska law.
31. **Search and Seizure: Proof.** When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.
32. **Search and Seizure.** The consent to search given by one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.
33. **Constitutional Law: Criminal Law: Trial.** The general rule is that a defendant should be free from shackles unless they are necessary to prevent violence or escape, because it is central to the right to a fair trial, guaranteed by the 6th and 14th Amendments, that one accused of a crime is entitled to have his or her guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. Certain practices pose such a threat to the fairness of the factfinding process that they must be subjected to close judicial scrutiny.
34. **Jury Instructions: Appeal and Error.** Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous.
35. **Criminal Law: Appeal and Error.** A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit.
36. **Kidnapping: Sentences.** Neb. Rev. Stat. § 28-313 (Reissue 1995) creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim.

37. ____: ____. The factors which determine which of the two penalties under Neb. Rev. Stat. § 28-313 (Reissue 1995) is to be imposed are not elements of the offense of kidnapping, and their existence or nonexistence should properly be determined by the trial judge.
38. **Kidnapping: Sentences: Statutes.** *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), is concerned only with cases involving an increase in penalty beyond the statutory maximum and does not apply to the mitigating factors in Neb. Rev. Stat. § 28-313 (Reissue 1995).
39. **Criminal Law: Homicide: Lesser-Included Offenses.** A predicate felony is a lesser-included offense of felony murder for sentencing purposes, such that a defendant cannot be convicted and sentenced for both felony murder and the underlying felony without violating the Double Jeopardy Clause.
40. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
41. **Double Jeopardy: Proof.** The test to be used in determining whether two distinct statutory provisions penalize the same offense is whether each provision requires proof of a fact which the other does not.
42. **Criminal Law: Statutes: Double Jeopardy.** In the context of a successive prosecution, when applying the "same elements" test of *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), to separately codified criminal statutes which may be violated in alternative ways, only the elements charged in the case at hand should be compared in determining whether the offenses under consideration are separate or the same for purposes of double jeopardy.
43. ____: ____: ____. When applying the test from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), to separately codified criminal statutes which may be violated in alternative ways, only the elements for which the defendant has been punished should be compared to determine if multiple punishments have been imposed for the same offense.
44. **Kidnapping: Homicide: Lesser-Included Offenses.** Kidnapping is not a lesser-included offense of first degree premeditated murder.
45. **Criminal Law: Double Jeopardy: Homicide: Verdicts: Convictions: Sentences.** While two sentences cannot be imposed for the killing of one person, where only one conviction is possible, the trial court may, in its discretion, select either of the clear alternative verdicts upon which the conviction and sentence may be predicated.
46. **Constitutional Law: Death Penalty: Aggravating and Mitigating Circumstances: Juries.** In order to fulfill the guarantee of rights conferred by the Sixth Amendment, the existence of any aggravating circumstance utilized in the imposition of a sentence of death, other than a prior criminal conviction, must be determined by a jury.
47. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
48. ____. An appellate court always reserves the right to note plain error which was not complained of at trial.

49. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which 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.
50. **Appeal and Error.** For purposes of determining plain error, where the law at the time of trial was settled and clearly contrary to the law at the time of appeal, it is enough that an error be "plain" at the time of appellate consideration.
51. **Verdicts: Sentences: Appeal and Error.** A violation under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), for purposes of plain error review, affects a substantial right of the defendant when the outcome of the trial court proceedings has been prejudicially influenced, i.e., the sentence imposed has been increased beyond that authorized by the jury's verdict.
52. **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.
53. **Double Jeopardy: Trial: Sentences: Death Penalty.** Nebraska's capital sentencing procedures have the characteristics which the U.S. Supreme Court found to resemble a trial in *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), and double jeopardy concerns attach at a capital sentencing hearing in Nebraska. A defendant who has been impliedly acquitted of the death penalty cannot again be placed in jeopardy of a capital sentence.
54. **Double Jeopardy: Appeal and Error.** While the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction.
55. **Appeal and Error.** Ordinarily, to be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.

Appeal from the District Court for Keith County: ROBERT O. HIPPE, Judge. Affirmed in part, and in part vacated and remanded with directions for new penalty phase hearing and resentencing on count I.

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

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

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

GERRARD, J.

Raymond Mata, Jr., was found guilty by jury verdict of first degree premeditated murder, first degree felony murder, and kidnapping, in association with the death of Adam Gomez (Adam), the 3-year-old son of a woman with whom Mata had had an intimate relationship. Mata was convicted and sentenced to life imprisonment for kidnapping and convicted and sentenced to death for the first degree premeditated murder.

I. BACKGROUND

Adam was the son of Patricia Gomez (Patricia) and Robert Billie, who had lived together for 5 years before Billie moved out of their Scottsbluff, Nebraska, residence in September 1998. Adam remained with Patricia, although there was no legal custody arrangement. Patricia and Mata began dating shortly thereafter, and Mata moved in with Patricia and Adam in October or November. Patricia later told police that although Mata did not treat Adam badly, Mata consistently expressed resentment of Adam and thought that Adam was "in the way all the time."

Mata moved out of Patricia's residence on February 10, 1999, and moved in with his sister, Monica Mata (Monica). Monica was also Patricia's best friend. That evening, Patricia and Billie spent the night together and had sexual relations. Patricia obtained a restraining order against Mata on February 11, but continued to see Mata, and on February 14, Patricia and Mata had sexual relations.

In late February, Patricia found out that she was pregnant. She told Monica, who in turn told Mata. Mata instructed Monica to accompany Patricia to Patricia's doctor's appointment, to find out when the child was conceived. Patricia was told that the child was conceived between February 7 and 10. Monica told Mata, who told Monica that the child was not his. On March 8, Mata confronted Billie at a party regarding Billie's relationship with Patricia, and on the next afternoon, Mata confronted Patricia, who told Mata about her sexual encounter with Billie.

On March 11, 1999, Patricia and Billie took Adam to a doctor's appointment; they were seen by an acquaintance of Mata who told Mata that the three had been together. Mata made repeated attempts that day to compel Patricia to come to

Monica's residence to visit him. Patricia refused, so that evening, Mata went to Patricia's residence. Adam was watching television until Mata sent him to bed. According to Patricia's testimony, she fell asleep on the loveseat in the living room while Mata watched television. Patricia said that when she woke up, Adam and Mata were gone, as was the sleeping bag that Adam had been using as a blanket.

Patricia telephoned Mata on his cellular telephone at 3:37 a.m. Mata told Patricia that he did not know where Adam was. Mata came to Patricia's residence immediately. According to Patricia, Mata told her that Adam was probably with Billie or Patricia's mother. Patricia went back to sleep, and Mata spent the night. Patricia testified that she attempted to contact Billie and her mother the next day, but was unable to do so immediately. When Patricia's mother called her and asked how Adam was, Patricia told her mother that Adam was fine. Patricia later spoke to Billie, and Billie said that Adam was not with him. Patricia also asked Monica if she knew where Adam was, and Monica said she did not know. Patricia said that at this point, she still thought Adam was with Billie, because Billie had been complaining about not having enough time with Adam. Patricia testified that Mata told her not to call the police, "because they couldn't do anything anyways 'til after 24 hours."

On the following day, Saturday, March 13, 1999, Mata took Patricia to Grand Island, Nebraska, and the two did not return to Scottsbluff until Sunday morning. Sunday night, Mata asked Monica to go to Cheyenne, Wyoming, accompanied by Jesse Lopez, who was the father of Monica's son and who was staying with Monica at the time. They agreed and departed at about 11 p.m., leaving Mata alone in the residence. Monica was unable to locate the person Mata asked her to meet in Cheyenne, and she and Lopez returned home at about 4:30 on the morning of Monday, March 15. After returning, Monica found that the sewerline from the residence was clogged.

That afternoon, Patricia spoke with her sister, who came to Patricia's residence. Mata was there when Patricia's sister arrived. Patricia decided to call the police and report Adam's disappearance. Patricia testified that Mata insisted that she not call the police until after Mata had left "because how I knew he had

a warrant for his arrest, just for me to wait 'til he left." Scottsbluff police were finally notified that Adam was missing at approximately 4 p.m. on March 15, 1999.

Police searching for Adam went to Monica's residence to speak to Mata, but the occupants refused to answer the door. Monica testified that Mata told her not to answer the door because there were warrants out for his arrest. Police discovered a sealed garbage bag in a dumpster behind Monica's residence. When the bag was torn open, police found Adam's sleeping bag and the clothing Adam had been wearing when he was last seen by Patricia. The bag also contained trash identified as being from Monica's residence, including a towel and a boning knife that Monica had not thrown away.

A search warrant was obtained for Monica's residence and executed on March 16, 1999. (The residence had been searched pursuant to a warrant earlier that morning, but the results of the search were suppressed by the district court; the first search is not pertinent to this appeal.) Mata went to the police station to answer questions while the warrant was executed. Mata's mother, Ynez Cruz, picked him up from the police station, dropped him off at a friend's house, and went with Monica to retrieve some of Monica's clothing. The home was still being searched, and the police asked Monica to remove a dog from the residence. Monica and Cruz took the dog and also picked up Mata from the friend's house. Cruz testified that en route to a nearby town, Mata was talking to the dog, telling the dog that it "was being well taken care of and [Mata] was feeding [it] and that he was [its] friend."

Police searching Monica's residence found human remains in the basement room occupied by Mata. Hidden in the ceiling was a package wrapped in plastic and duct tape, which contained a crushed human skull. The skull was fractured in several places by blunt force trauma that had occurred at or near the time of death. The head had been severed from the body by a sharp object, at or near the time of death. No evidence of strangulation could be found, although strangulation, smothering, and blunt force trauma could be neither ruled in nor ruled out as the cause of death.

In the kitchen refrigerator of the residence, police found a foil-wrapped package of human flesh. Mata's fingerprint was

found on the foil. Human remains were also found on a toilet plunger and were found to be clogging the sewerline from the residence. Human flesh, both cooked and raw, was found in the dogfood bowl and in a bag of dogfood. Human bone fragments were recovered from the dog's digestive tract.

All of the recovered remains were later identified, by DNA analysis, as those of Adam. Adam's blood was also found on Mata's boots. No blood was found on Adam's clothing, or the sheets of Adam's bed at Patricia's residence.

At trial, the defense did not deny Mata's attempt to dispose of Adam's body. The defense's theory of the case was that Adam had been killed by Patricia at Patricia's home on Friday, March 12, 1999, and that Mata only attempted to help Patricia dispose of Adam's body and explain his disappearance. Mata did not testify.

The jury found Mata guilty of first degree premeditated murder, first degree felony murder, and kidnapping. A three-judge sentencing panel was convened. The sentencing panel found one statutory aggravating circumstance: that the murder was " 'especially heinous, atrocious, cruel, *or* manifested exceptional depravity by ordinary standards of morality and intelligence.' " See Neb. Rev. Stat. § 29-2523(1)(d) (Cum. Supp. 2002). The panel found no statutory mitigating circumstances to exist, but considered four nonstatutory mitigating circumstances: Mata's ability to adapt to prison conditions, Mata's IQ of 85, Mata's history of substance abuse, and Mata's relationship with his parents.

The panel sentenced Mata to death on the conviction for first degree premeditated murder. The presiding district judge also sentenced Mata to life imprisonment for kidnapping. However, the panel determined that because only one murder was committed, only one sentence for murder could be pronounced, and Mata was neither convicted nor sentenced for felony murder. An appeal was perfected directly to this court. See Neb. Rev. Stat. § 29-2525 (Cum. Supp. 2002). Further factual details will be set forth below as necessary for our discussion of Mata's assignments of error.

II. ASSIGNMENTS OF ERROR

Mata's operative replacement brief assigns, consolidated and restated, the following as errors:

(1) The trial court failed to suppress all of Mata's statements made during his March 16, 1999, interrogation.

(2) The trial court failed to suppress evidence from Mata's boots, seized following the March 16, 1999, interrogation.

(3) The trial court failed to suppress the necropsy of the dog.

(4) The trial court forced Mata to wear shackles at trial.

(5) The trial court overruled Mata's motions to dismiss the charges of felony murder and kidnapping, although there was insufficient evidence as a matter of law.

(6) The trial court failed to instruct the jury on the essential elements of kidnapping and felony murder, as required by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

(7) The district court imposed a consecutive life sentence for kidnapping in addition to a death sentence for felony murder in violation of the Double Jeopardy Clause.

(8) There was plain error in the imposition of the death sentence under *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

(9) The Nebraska death penalty statutes are unconstitutional in that (a) they fail to provide adequate direction to the sentencer so as to avoid the arbitrary and capricious application of death in violation of the 8th and 14th Amendments to the U.S. Constitution and (b) the assignment of a " 'risk of nonpersuasion' " to the defendant regarding nonstatutory mitigating factors violates the separation of powers provision of the Nebraska Constitution and the 8th and 14th Amendments to the U.S. Constitution.

(10) The Nebraska death penalty statutes are unconstitutional as applied in violation of the 8th and 14th Amendments to the U.S. Constitution.

(11) The " 'exceptional depravity' " aggravating circumstance is unconstitutionally vague, and the acts of dismembering Adam's body were not " 'at or near the time of the murder' " as required by the aggravator.

(12) The Nebraska death penalty statutes are unconstitutional because proportionality review violates the separation of powers provisions of the Nebraska Constitution and are not severable from the Nebraska death penalty scheme.

(13) The sentencing panel did not correctly perform the comparative analysis required by Neb. Rev. Stat. § 29-2519 et seq. (Reissue 1995 & Cum. Supp. 2002).

(14) Judicial electrocution is unconstitutional under the U.S. and Nebraska Constitutions.

(15) The sentence of death was excessive and disproportionate under the facts of this case.

III. STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, will be upheld unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001).

[2] In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002).

[3,4] Whether jury instructions given by a trial court are correct is a question of law. *State v. Putz, ante* p. 37, 662 N.W.2d 606 (2003). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002).

[5] 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. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

[6] In reviewing a sentence of death on appeal, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances

support the imposition of the death penalty. *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001), *cert. denied* 535 U.S. 908, 122 S. Ct. 1210, 152 L. Ed. 2d 147 (2002).

[7] At oral argument before this court, the State argued there is a conflict in our cases regarding the appropriate standard of review of a determination whether an individual is "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). See, *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000); *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). Compare, *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003); *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002); *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). In this opinion, we reaffirm that 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 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. *Dallmann, supra*; *Burdette, supra*. Accord, *U.S. v. Deaton*, 328 F.3d 454 (8th Cir. 2003); *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002) (collecting cases).

IV. ANALYSIS

1. Motions to Suppress

Mata's first three assignments of error are based on his pretrial motions to suppress evidence, which were in part sustained, and in part overruled by the district court. Mata's first argument is that the district court should have suppressed the entirety of the statements Mata made during his March 16, 1999, interrogation.

(a) Interview

As previously noted, police executed a search warrant at Monica's residence during the evening of March 16, 1999. When police entered the residence, Mata was restrained and handcuffed. The handcuffs were removed, and Mata was asked to come to the police station to be interviewed regarding Adam's disappearance. Mata was interviewed by Robert Kinsey of the Scottsbluff police department and Ronald Rawalt of the Federal Bureau of

Investigation. Both Rawalt and Kinsey testified that Mata was asked to come to the police station voluntarily and was told that he was not under arrest. Rawalt testified that they explained to Mata that they "needed to interview" Mata and that they

> needed a place to talk to him, to conduct the interview, and that we could not do it at the house, because the search warrant was being served, and that he was not under arrest, and that he did not have to accompany us, but we wanted him to go with us and speak to us at the police station.

Mata was not given *Miranda* warnings at this time, or at any subsequent time relevant to the March 16 interview.

Rawalt testified that once at the police station, the door to the interview room was left unlocked, and that he explained to Mata that the door was unlocked and that Mata was free to leave at any time. Rawalt and Kinsey questioned Mata regarding the sequence of events prior to Adam's disappearance and about what Mata thought might have happened to Adam. Mata became increasingly evasive during the interview, refusing to answer certain questions, and stating at one point that he did not "want to answer no more questions." Rawalt and Kinsey continued to question Mata, until Mata specifically said, "hey man, I will plead the fifth right now man, right now." Nonetheless, Mata was further questioned.

The district court sustained Mata's motion to suppress in part. The court determined that the interrogation was not custodial. The court noted that both the testimony of Rawalt and Kinsey, and the transcript of the interview with Mata, demonstrated that Mata was repeatedly informed that he was free to leave. The court found that Mata's initial refusals to answer questions were not indications that Mata was trying to stop the interview. However, the court found that the tone of the questioning changed and became more accusatory, and then Mata specifically invoked the Fifth Amendment. The court determined that at that point, Rawalt and Kinsey should have known that Mata was no longer submitting to questioning. The court suppressed the statements made by Mata after that point. Mata's appellate argument is that the entire interview should have been suppressed, because it was custodial interrogation prior to Mata's being advised of his *Miranda* rights. The State did not appeal,

nor has the State cross-appealed, from the suppression of the remainder of the interview.

[8-12] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody." *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003). One is in custody for purposes of *Miranda* when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest. *Brouillette, supra.* Two inquiries are essential to the determination whether an individual is in custody for *Miranda* purposes: (1) an assessment of the circumstances surrounding the interrogation and (2) whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave. *Dallmann, supra.*

The record in this case supports the district court's finding that Mata was informed, more than once, that he was not under arrest and was free to leave at any time. What is dispositive in determining whether *Miranda* warnings should have been given is whether a reasonable person would have felt free to leave under the circumstances. See *Dallmann, supra.* Here, Mata was repeatedly told, expressly, that he was free to leave, and he in fact did leave at the conclusion of the interview.

Mata argues on appeal that the actions of the officers who entered Monica's residence and handcuffed him amounted to a functional "arrest," which rendered the subsequent interrogation custodial. However, the record also reflects that prior to transportation to the police station, Mata was told that he did not have to go, and that he was told at the police station that he could leave at any time. Mata "came voluntarily to the police station, where he was immediately informed that he was not under arrest." See

Oregon v. Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977).

> Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

(Emphasis in original.) *Mathiason*, 429 U.S. at 495.

In *U.S. v. Axsom*, 289 F.3d 496, 500 (8th Cir. 2002), the U.S. Court of Appeals for the Eighth Circuit applied "six common indicia of custody which tend either to mitigate or aggravate the atmosphere of custodial interrogation." The Eighth Circuit described three indicia as mitigating, militating against the existence of custody at the time of questioning: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; or (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions. *Id.* The Eighth Circuit described the remaining three indicia as aggravating the existence of custody if present: (1) whether strong-arm tactics or deceptive stratagems were used during questioning, (2) whether the atmosphere of the questioning was police dominated, or

(3) whether the suspect was placed under arrest at the termination of the proceeding. *Id.*

We find these indicia to be helpful in our de novo review of the record in the instant case. As described above, it is evident that all three mitigating indicia are present in the facts of this case. Mata was repeatedly told that he was free to leave and was not considered to be under arrest. There is no evidence of restrictions placed on Mata's movement during questioning. Mata also went, voluntarily, to the police station to be interviewed. Furthermore, only one of the aggravating indicia is present. Given that the interview was conducted at the police station, it is reasonable to conclude that the atmosphere was "police dominated." See *id.* at 500. However, the record reveals no strong-arm tactics or deception on the part of the officers, and Mata was allowed to leave at the termination of the questioning. On our de novo review of the record, we conclude, as did the district court, that a reasonable person, under the circumstances given, would have been aware that he was free to leave. The court correctly concluded that Mata's interrogation was not custodial for *Miranda* purposes.

[13,14] Mata also argues that the interrogating officers failed to "'scrupulously honor'" his invocation of the Fifth Amendment and that Mata indicated a desire to remain silent prior to his literal taking of "'the fifth.'" Brief for appellant at 41-42. Once an accused invokes his or her constitutional rights to remain silent and to the services of an attorney, the authorities must refrain from initiating further conversations and must scrupulously honor the accused's request. *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). The requirement that law enforcement authorities must respect a person's exercise of the right to cut off questioning counteracts the coercive pressures of the custodial setting. *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). Therefore, although *Miranda* does not require an absolute halt to all conversations by the police with an accused once the right to silence is asserted, observance of the constitutional right is tested by the circumstances to determine whether the right was scrupulously honored. See *State v. Pettit*, 227 Neb. 218, 417 N.W.2d 3 (1987). See, also, *Mosley, supra.*

[15,16] We note, initially, that the police are not required to accept as conclusive any statement or act, no matter how

ambiguous, as a sign that a suspect desires to cut off questioning. *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986). See, also, *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). Resolution of ambiguity in the invocation of the constitutional right to remain silent is a question of fact, see *LaChappell, supra*, and given the context in which the statements were made, we cannot say the district court's conclusion was clearly erroneous. Generally, Mata's answers to questions, while voluntary, were evasive and unclear, and taken in context, Mata's statements can be read as frustration with particular questions rather than clearly stated intent to end the interview. Certainly, had Mata really wished to terminate the interview, he could have walked out the door.

[17] More significantly, however, because Mata's alleged invocation of the Fifth Amendment was not made in the context of a custodial interrogation, the police were under no obligation to "scrupulously honor" Mata's ambiguous statements purporting to cut off questioning. The U.S. Supreme Court stated in *Miranda v. Arizona*, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966):

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

In *McNeil v. Wisconsin*, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), the defendant argued that an invocation of his Sixth Amendment right to counsel also acted as an invocation of his *Miranda* right to counsel. The Court held that invocation of a defendant's Sixth Amendment right to counsel does not operate as a *Miranda* invocation of the right to counsel, stating:

> We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than

> "custodial interrogation"—which a preliminary hearing will not always, or even usually, involve . . . . If the *Miranda* right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

McNeil, 501 U.S. at 182 n.3.

Based on *McNeil*, state and federal courts to have confronted the question have concluded that *Miranda* rights cannot be invoked outside the context of custodial interrogation. See *State v. Relford*, 9 Neb. App. 985, 623 N.W.2d 343 (2001) (collecting cases). See, e.g., *U.S. v. Bautista*, 145 F.3d 1140 (10th Cir. 1998); *U.S. v. Grimes*, 142 F.3d 1342 (11th Cir. 1998); *Springer v. Com.*, 998 S.W.2d 439 (Ky. 1999); *Sapp v. State*, 690 So. 2d 581 (Fla. 1997); *State v. Carroll*, 138 N.H. 687, 645 A.2d 82 (1994); *State v. Lang*, 176 Ariz. 475, 862 P.2d 235 (Ariz. App. 1993).

[18] We agree. As the above-cited courts have noted, allowing anticipatory invocation of *Miranda* rights stretches *Miranda* far beyond its boundaries and the balance between individual rights and effective law enforcement that it sought to protect. *Miranda* is specifically based upon, and limited to, the coercive context of custodial interrogation. We hold that *Miranda* rights cannot be anticipatorily invoked prior to or outside the context of custodial interrogation.

With this principle established, it is clear that Rawalt and Kinsey could not have failed to scrupulously honor Mata's *Miranda* rights, because absent custodial interrogation, *Miranda* was not implicated. Mata's unwillingness to answer questions, ambiguous or otherwise, could not have been an effective invocation of *Miranda* rights. Mata's argument is without merit, as is his first assignment of error.

(b) Seizure of Boots

At the conclusion of the March 16, 1999, interview, Mata was asked to remove his boots. Rawalt had told Mata to "go ahead and take off," and Mata had asked if he could make a call for someone to come and pick him up. Rawalt and Kinsey then asked for Mata's boots, and Kinsey offered to give Mata a ride or allow Mata to call for a ride. Kinsey testified that Mata "had no problem with" the request for his boots "and immediately took the boots off and gave them to me." Adam's blood was found on Mata's boots.

[19-21] The district court concluded that Mata gave consent to the seizure of the boots. The right to be free from an unreasonable search and seizure, as guaranteed by the 4th and 14th Amendments to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen. *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice and not the product of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). Voluntariness of consent to search is a question of fact to be determined from all the circumstances. *Id.*

Mata argues that his consent was not voluntary, because it was given at the conclusion of an involuntary interrogation. This argument is without merit. First, we note that Mata's contention that he was subjected to custodial interrogation was rejected above. Furthermore, as noted by the district court, Mata surrendered his boots after he had been told that the interview was over and that he should go. The record supports the court's factual determination that given all the circumstances, Mata gave voluntary consent to the seizure of his boots. Mata's second assignment of error is without merit.

(c) Necropsy of Dog

As previously noted, during the execution of the search warrant on the evening of March 16, 1999, Monica was asked to remove a dog from the residence. The next day, Rawalt spoke to Monica and told her that police had decided to x-ray the dog and that the

dog might be euthanized. Monica told Rawalt that the dog was at Cruz' house. Monica testified that Rawalt told her why police wanted to check the dog, and Monica told Rawalt to "[g]o ahead" and check the dog, and that she did not want the dog back. The dog was seized from Cruz' residence without a warrant. Police took the dog to be x-rayed, and a bone was seen in the digestive tract of the dog. It was determined that the only way to retrieve the bone was to euthanize the dog.

Kinsey testified that he had been uncertain whether the dog belonged to Monica or to her son and that he had learned that the dog belonged to Monica's son. The transcript of Monica's interview with Kinsey contains references to her son's feeding "his" dog. Monica testified expressly that Mata had given the dog to her son and that Mata fed the dog "now and then, but he really didn't pay attention to it."

[22] The district court found that Mata had purchased the dog, but had given the dog to Monica's son, and that Monica, as the mother of her son, had the legal right to dispose of the dog. The court also determined that because Mata neither owned the dog nor had an expectation of privacy regarding the dog, Mata had no standing to contest its seizure. We note, although it is not contested by the State, that privately owned animals are "effects" subject to the protections of the Fourth Amendment. See *Altman v. City of High Point, N.C.*, 330 F.3d 194 (4th Cir. 2003) (collecting cases).

[23-25] Before one may challenge a nonconsensual search without a warrant, one must have standing in a legal controversy. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996). A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment to the U.S. Constitution. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). To determine whether an individual has an interest protected by the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, one must determine whether the individual has a legitimate or justifiable expectation of privacy in the invaded place. Ordinarily, two inquiries are required. First, the individual must have exhibited an actual (subjective) expectation

of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable. *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000).

[26] The premise of Mata's argument on appeal is that because the dog was originally located at Monica's residence, which Mata shared, he had a reasonable expectation of privacy in the contents of the residence. Mata then argues that when Monica removed the dog from the residence, at the direction of law enforcement, she was doing so as an agent of law enforcement. Mata then concludes by arguing that when the dog was taken from Cruz' residence the next day, it was a warrantless seizure. We first note that this argument differs from that made to the district court, where Mata contended that he actually owned the dog. An issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

[27,28] Even if we consider Mata's argument, however, it is without merit. Although police asked Monica to remove the dog from the home, Monica had the legal right to do so. Mata argues that this made Monica an agent of the police, such that they were engaged in a "joint endeavor" subject to the constitutional safeguard against an unreasonable search or seizure. See *State v. Abdouch*, 230 Neb. 929, 941, 434 N.W.2d 317, 325 (1989). Resolution of whether an individual is acting as an agent of law enforcement is a question of fact determined by the totality of the circumstances. See, *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989); *People in Interest of P.E.A.*, 754 P.2d 382 (Colo. 1988) (en banc). The defendant has the burden of establishing that a private individual acted as an agent of law enforcement. *People v. P.E.A., supra.* Cf. *Sardeson, supra.*

There is no factual basis in the record to support Mata's assertion that Monica was acting as an agent of law enforcement. There is a difference between acting as an agent of law enforcement and simply cooperating with a reasonable request made by law enforcement during a legal search. On the record before us, there is no suggestion that Monica's removal of the dog from the residence was intended to facilitate its seizure by law enforcement, as opposed to being in Monica's self-interest to recover

her child's property. See *Gundlach v. Janing*, 401 F. Supp. 1089 (D. Neb. 1975), *aff'd* 536 F.2d 754 (8th Cir. 1976).

[29] Just as significant is the fact that even if an agency relationship had been established, Monica engaged in no conduct that would violate the Fourth Amendment. If a private citizen has the right to search in a particular place or seize certain property by virtue of his or her own personal relationship to the premises or property in question, that right is not diminished by the individual's relationship with law enforcement. See, e.g., *U.S. v. Jenkins*, 46 F.3d 447 (5th Cir. 1995); *United States v. West*, 453 F.2d 1351 (3d Cir. 1972); *People v. Heflin*, 71 Ill. 2d 525, 376 N.E.2d 1367, 17 Ill. Dec. 786 (1978); *People v. Thompson*, 25 Cal. App. 3d 132, 101 Cal. Rptr. 683 (1972). Cf. *Coolidge, supra*. The district court concluded, as a factual matter, that the dog legally belonged to Monica. Obviously, even if an agency relationship existed between Monica and the police, it could not encroach on Monica's right to enter her own residence and seize her own property. See *West, supra*.

The record supports the conclusion, based on the facts set forth above, that Monica was the legal owner of the dog and had the right to remove her personal property from her own residence. The dog, when it was seized by law enforcement the next day, was at Cruz' residence, where Mata had no reasonable expectation of privacy and, thus, no standing to object to the seizure. Mata essentially asks this court to conclude that he had a reasonable expectation of privacy regarding someone else's personal property, kept in someone else's home. There is no foundation in law or logic for such a conclusion.

[30-32] Furthermore, the record supports the district court's findings that Monica, as the legal owner of the dog, had authority to consent to the seizure of the dog the next day and that she did so. Animals are personal property under Nebraska law. *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999). When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. *State v. Konfrst*, 251

Neb. 214, 556 N.W.2d 250 (1996), citing *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). The consent to search given by one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared. *Matlock, supra*. As previously noted, the warrant requirement of the Fourth Amendment can be waived by the consent of the citizen. See *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). The State sufficiently established that this exception to the warrant requirement was met in this case.

For the foregoing reasons, Mata's third assignment of error is without merit.

2. Shackles

Prior to trial, Mata filed, and renewed, a motion to not have Mata restrained during the trial. Mata's counsel contended that if Mata was to be restrained, such restraint should be nonvisible. The court suggested that Mata's arms, wrists, and hands would be free, but his legs would be restrained with ankle bracelets, and Mata would be seated in the courtroom before the jury came in. The court concluded that those restraints would not be visible to the jury. Mata's counsel asked if skirting could be placed on the table, presumably to ensure that Mata's feet were hidden, and the court replied that "[i]f you think that is important, that could be done. It wouldn't hurt anything."

Nonetheless, during the jury selection process, the record reflects that Mata was brought into the courtroom after the jury panel was present, that Mata had to walk 15 to 20 feet through the courtroom, and that the shackles would have been visible to the jury panel at that time. However, the shackles, while visible, did not impede Mata's gait while he was walking. Mata was otherwise unrestrained and was in plain clothes, as were the officers in charge of his security. Mata made an in-chambers motion for mistrial shortly thereafter, based on the visibility of the leg restraints, and an alternative motion, absent a mistrial, for the restraints to be removed. The only basis proffered by the State for Mata's restraints was that the charges were severe and that due to a change of venue, Mata's jailers were in "somewhat unfamiliar territory." The court overruled Mata's motions. Mata argues that he was deprived of a constitutionally fair trial.

[33] The general rule is that a defendant should be free from shackles unless they are necessary to prevent violence or escape. *State v. Heathman*, 224 Neb. 19, 395 N.W.2d 538 (1986). This is because it is central to the right to a fair trial, guaranteed by the 6th and 14th Amendments, that one accused of a crime is entitled to have his or her guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. *Holbrook v. Flynn*, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

> This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence. When defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained.

475 U.S. at 567-68. Certain practices, however, pose such a threat to the fairness of the factfinding process that they must be subjected to close judicial scrutiny. *Id.*

Thus, in *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), the Court held that where a defendant is forced to wear prison clothes when appearing before the jury, the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment, and since no essential state policy was served by compelling a defendant to dress in that manner, the Court concluded that the practice was unconstitutional. However, in *Holbrook, supra*, the Court applied that principle to a situation in which the defendant

objected to the presence of several armed security personnel in the courtroom. The Court stated:

> To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." . . . However, "reason, principle, and common human experience," . . . counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate.

475 U.S. at 569. The Court determined that the presence of armed guards in the courtroom did not tend to brand the defendant in such a way as to prejudice his trial. *Id.*

Mata argues that since restraints were not shown to be necessary to prevent his escape, or other breaches of security, the prejudice resulting from the use of visible restraints violated Mata's right to a fair trial. However, the record does not support this conclusion. The record shows that Mata was placed in leg restraints that did not impair his walking and that the restraints, while potentially visible, were not obtrusive in a way that would have drawn the jury's attention. Mata was dressed in ordinary clothing of his own choosing, and the security detail was dressed in civilian clothing as well.

Moreover—stated bluntly—given the evidence adduced at trial, it is difficult to imagine how seeing Mata in leg restraints would have led the jury to believe Mata more likely to be guilty. Even had the jury believed Mata's theory of the case, the defense conceded that Mata participated in the dismemberment of the body of a 3-year-old child and fed that child's remains to a dog. Mata was charged with the murder of that same child. Viewed objectively, given the nature of the charges and Mata's uncontested actions, it could not have surprised the jury that Mata was wearing unobtrusive leg restraints. The restraints could serve only to call the jury's attention to what it already knew—that Mata was charged with a serious crime. When considering the proceedings in their entirety, it is evident that Mata was not additionally stigmatized by the use of leg restraints and was not prejudiced by those restraints in a way

that deprived him of a fair trial. Mata's fourth assignment of error is without merit.

3. MOTIONS TO DISMISS/ELEMENTS OF KIDNAPPING

Neb. Rev. Stat. § 28-313 (Reissue 1995) provides:

> (1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:
>
> (a) Hold him for ransom or reward; or
>
> (b) Use him as a shield or hostage; or
>
> (c) Terrorize him or a third person; or
>
> (d) Commit a felony; or
>
> (e) Interfere with the performance of any government or political function.
>
> (2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.
>
> (3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

Mata's fifth and sixth assignments of error relate to this statute. First, Mata argues, somewhat unclearly, that the evidence was insufficient to establish that Mata had kidnapped Adam. However, the evidence shows that Adam's remains, his clothing, and the sleeping bag he had been using as a blanket were all found at Mata's residence. The evidence also shows that although blood was found on Mata's boots, none of Adam's blood was found at Patricia's residence or in Adam's bedroom there. Giving the State the benefit of every inference that reasonably can be drawn from the evidence, see *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002), the evidence supports the inference that Adam was taken from his bedroom alive and transported to Mata's residence for the purpose of killing him there. This satisfies the statutory requirement that Mata "abduct[ed] another . . . with intent to . . . [c]ommit a felony." See § 28-313(1)(d).

Mata also argues that he was like a parent to Adam. Although the purpose of this argument is not clearly stated by Mata, we assume he is implying that he could not kidnap "his" child. This argument is meritless. While there may be evidence in the

record to support a conclusion that Mata had some sort of parentlike relationship with Adam, there is also evidence to support a conclusion to the contrary, and this dispute is resolved in favor of the State. See *Canady, supra.* Therefore, we reject Mata's fifth assignment of error.

[34,35] Mata's next assignment of error is that the jury should have been instructed to determine whether Adam was "voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury prior to trial," brief for appellant at 53, because, according to Mata, § 28-313(3) is an essential element of the offense that must be submitted to the jury pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Initially, we note the absurdity inherent in Mata's argument, given the logical impossibility of concluding that Adam had been released or liberated alive. We also note that Mata failed to object, at the jury instruction conference, to the court's instruction defining the elements of kidnapping. Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). Moreover, Mata's own proposed instruction on the elements of kidnapping was, with respect to the complaint he now raises, effectively identical to that given by the court. A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[36-38] However, even if we consider Mata's argument, an identical argument was rejected by this court in *State v. Becerra*, 263 Neb. 753, 758-59, 642 N.W.2d 143, 148 (2002), wherein we stated:

> In *Apprendi v. New Jersey, supra*, the U.S. Supreme Court held that other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The Court stressed that the fact must increase the penalty. The Court made a distinction between facts in aggravation of punishment and facts in mitigation of punishment. The Court stated that when the issue involves mitigating facts under which the defendant can

> escape the statutory maximum, core concerns involving the jury and burden of proof requirements are absent. See *id.*
>
> *Apprendi* is inapplicable to [this] case. We have held that § 28-313 creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping. The factors are simply mitigating factors which may reduce the sentence of those charged under § 28-313, and their existence or nonexistence should properly be determined by the trial judge. *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993); *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981). Under § 28-313, any factual finding about whether the person kidnapped was voluntarily released affects whether the defendant will receive a lesser penalty instead of an increased penalty. *Apprendi* made clear that it was concerned only with cases involving an increase in penalty beyond the statutory maximum and does not apply to the mitigating factors in § 28-313.

Accord *Garza v. Kenney*, 264 Neb. 146, 646 N.W.2d 579 (2002), *cert. denied* 537 U.S. 1207, 123 S. Ct. 1284, 154 L. Ed. 2d 1051 (2003). We decline to reconsider our holdings in *Becerra* and *Garza*, and reject Mata's assignment of error.

4. Double Jeopardy

[39] The next assignment of error we consider is that the district court erred in sentencing Mata to life imprisonment for kidnapping, and on the conviction for felony murder—in other words, sentencing Mata both on felony murder and the predicate felony. Mata correctly states that a predicate felony is a lesser-included offense of felony murder for sentencing purposes, such that a defendant cannot be convicted and sentenced for both felony murder and the underlying felony without violating the Double Jeopardy Clause. See, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). See, also, *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977).

However, the premise of Mata's argument is a misstatement of the record. In fact, the sentencing order acknowledged that Mata was found guilty of both first degree felony murder and first degree premeditated murder, and that Mata could not be sentenced twice for the same murder. Therefore, the sentencing panel sentenced Mata for first degree premeditated murder, but neither sentenced nor convicted him for the felony murder.

[40] The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002). Since Mata is not being subjected to a successive prosecution, the issue here is whether Mata has been sentenced to multiple punishments for the same offense. It is evident that he has not.

[41-43] The test to be used in determining whether two distinct statutory provisions penalize the same offense is whether each provision requires proof of a fact which the other does not. See *State v. Winkler, ante* p. 155, 663 N.W.2d 102 (2003), citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). In the context of a successive prosecution, we have stated that when applying this test to separately codified criminal statutes which may be violated in alternative ways, only the elements charged in the case at hand should be compared in determining whether the offenses under consideration are separate or the same for purposes of double jeopardy. *Winkler, supra.* Here, the same principle dictates that only the elements for which the defendant has been punished should be compared to determine if multiple punishments have been imposed for the same offense. See *id.*

[44,45] Applying that principle to the instant case, it is evident that kidnapping is not a lesser-included offense of first degree premeditated murder, and Mata does not contend that it is. Compare Neb. Rev. Stat. §§ 28-303 (Reissue 1995) and 28-313. The verdict forms clearly reflected the distinction between the two charged theories of first degree murder, and it is apparent that the jury found the State had carried its burden with respect to both of these theories. See, *State v. Walker*, 188 W. Va. 661,

425 S.E.2d 616 (1992); *State v. Villani*, 491 A.2d 976 (R.I. 1985) (explaining importance of clear jury verdict). Compare *Nissen, supra* (theory of first degree murder on which jury relied not clear from record). While two sentences cannot be imposed for the killing of one person, see *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998), where only one conviction is possible, the trial court may, in its discretion, select either of the clear alternative verdicts upon which the conviction and sentence may be predicated. See *Bonhart v. U.S.*, 691 A.2d 160 (D.C. 1997). Here, Mata was convicted and sentenced only for first degree premeditated murder and kidnapping. See, *Foster v. State*, 810 So. 2d 910 (Fla. 2002); *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), *overruled on other grounds, State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991) (no double jeopardy violation where defendant sentenced on only one theory of murder).

Mata, by the express terms of the sentencing order, was convicted and sentenced only for first degree premeditated murder and kidnapping, which are not the same offense under *Blockburger* and *Winkler*. Therefore, the Double Jeopardy Clause is not implicated. Mata's assignment of error is without merit.

5. Death Penalty Issues

(a) Jury Determination of Aggravating Factors—Plain Error

We now turn to Mata's claim that there was plain error in the imposition of the death sentence under *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). We first addressed the effect of *Ring* on Nebraska's capital sentencing scheme in *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003), a direct appeal in a capital case, in which the defendant assigned as error the trial court's denial of his motion challenging the constitutionality of Nebraska's capital sentencing statutes and requesting a jury determination of sentencing issues. After the defendant's appeal was perfected, but before it was decided, the U.S. Supreme Court held in *Ring* that its prior decisions in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled, Ring, supra*, and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), were irreconcilable and that *Walton* should therefore be overruled to

the extent that it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for the imposition of the death penalty. The Court concluded that because Arizona's enumerated aggravating factors operate as " 'the functional equivalent of an element of a greater offense,' " the Sixth Amendment requires that the factors be found by a jury. *Ring*, 536 U.S. at 609.

[46] In *Gales, supra*, we held that under *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), the new constitutional rule announced in *Ring* was applicable because, due to the pending direct appeal, the defendant's conviction and sentence were not final when *Ring* was decided. We held that *Ring* required, in order to fulfill the guarantee of rights conferred by the Sixth Amendment, that the existence of any aggravating circumstance utilized in the imposition of a sentence of death, other than a prior criminal conviction, must be determined by a jury. *Gales, supra*. We further concluded that in that case, as in the instant case, the jury made no explicit determination that any of the statutory aggravating circumstances existed. See *id.* Consequently, the procedure violated the constitutional principle articulated in *Ring*, and the defendant's death sentences were vacated. *Gales, supra.*

We again addressed the effect of *Ring* in *State v. Lotter, ante* p. 245, 664 N.W.2d 892 (2003). In *Lotter*, however, the defendant's death sentences had become final, and the defendant sought to challenge those sentences in postconviction proceedings. We denied the defendant's motions to vacate his death sentences, based upon our determination that *Ring* did not apply to collateral challenges to sentences which were final when *Ring* was decided. We held that *Ring* announced a new rule of constitutional procedure which did not fall within either of the exceptions set forth in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), to the principle that such changes in the law do not apply retroactively to final judgments. *Lotter, supra*. Accordingly, we declined to apply *Ring* to the final judgments collaterally attacked in *Lotter*.

[47] The present case comes before us in yet another procedural posture. Unlike *Lotter*, the judgment in the instant case was not yet final at the time that *Ring* was decided, and pursuant to

Griffith, the constitutional rule announced in *Ring* and applied to Nebraska law in *Gales* is also applicable to this case. As in *Gales*, the sentencing procedure in the instant case did not comport with the rule announced in *Ring*. However, unlike the defendant in *Gales*, Mata did not argue to the trial court that he was entitled to a jury determination of aggravating circumstances. In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). Consequently, the issue before us in the instant case is whether the violation of the constitutional principle articulated in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), constitutes plain error.

[48,49] An appellate court always reserves the right to note plain error which was not complained of at trial. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). Plain error exists where there is error, plainly evident from the record but not complained of at trial, which 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. *Id.*

[50] The error in the instant case is plainly evident from the record under the current state of the law, if not at the time of trial. In *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997), the U.S. Supreme Court explained that "in a case such as this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." The Court observed that to hold otherwise "would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." 520 U.S. at 468. In this case, the settled law at the time of trial was that a jury was not required to find the aggravating circumstances underlying a capital sentence. See, *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled, Ring, supra*; *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). In fact, Mata was sentenced even prior to the decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct.

2348, 147 L. Ed. 2d 435 (2000), the "jurisprudential source of the Sixth Amendment principle" established by *Ring*. *Lotter, ante* p. 245, 260, 664 N.W.2d 892, 907 (2003). Nonetheless, pursuant to *Ring* and *Johnson*, the error committed was plain for purposes of this appeal.

[51] We also have little difficulty in concluding that a substantial right of Mata's has been prejudicially affected, given the prevailing view that an *Apprendi* violation, for purposes of plain error review, affects a substantial right of the defendant when the outcome of the trial court proceedings has been prejudicially influenced, i.e., the sentence imposed has been increased beyond that authorized by the jury's verdict. See, e.g., *U.S. v. Doe*, 297 F.3d 76 (2d Cir. 2002), *cert. denied* 537 U.S. 1078, 123 S. Ct. 680, 154 L. Ed. 2d 578; *U.S. v. Martinez*, 253 F.3d 251 (6th Cir. 2001); *U.S. v. Robinson*, 250 F.3d 527 (7th Cir. 2001); *U.S. v. Miranda*, 248 F.3d 434 (5th Cir. 2001); *U.S. v. Butler*, 238 F.3d 1001 (8th Cir. 2001). Nor can it be said that the evidence of aggravating circumstances presented in this case is "overwhelming" and "essentially uncontroverted," such that the trier of fact would surely have made the same finding as the sentencing panel. Compare *United States v. Cotton*, 535 U.S. 625, 633, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) (finding *Apprendi* violation was not plain error because evidence of fact increasing penalty was overwhelming and uncontroverted).

We have recently applied the plain error doctrine to correct errors that are, viewed objectively, less threatening to the integrity, reputation, and fairness of the judicial process than the error presented in the instant case. For example, we have held that the use of a defendant's prior convictions to enhance the defendant's sentence absent proof in the record that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right is plain error. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), *cert. denied* 537 U.S. 918, 123 S. Ct. 303, 154 L. Ed. 2d 203; *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001). In *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001), we found plain error where a defendant was sentenced to life imprisonment for first degree murder and a consecutive term of years for a weapons charge, but his time served was erroneously

credited to the life sentence rather than to the consecutive sentence. We also found plain error where a defendant convicted of driving under the influence of alcohol was erroneously ordered to participate in alcohol assessment as part of the sentencing order, instead of during the presentencing proceedings. *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000). We found plain error where a defendant was erroneously sentenced to a term of 2 to 4 years in prison, where the statutory minimum sentence could not exceed 20 months' imprisonment. *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999).

When compared with the foregoing instances of plain error, it is evident that to ignore the error evident from the record in the instant case would result in damage to the integrity, reputation, and fairness of the judicial process. See *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). We are not at liberty to ignore the clear instruction of the U.S. Supreme Court. In *State v. Burlison*, 255 Neb. 190, 193, 583 N.W.2d 31, 34 (1998), we stated that " '[t]o use a . . . waiver as a means of ignoring a plain error that results in an unconstitutional incarceration would place form over substance; would damage the integrity, reputation, and fairness of the judicial process; and would render the plain error doctrine . . . meaningless.' " Here, where the unconstitutionally imposed sentence is execution instead of incarceration, this principle is even more compelling. For the foregoing reasons, we conclude that the violation of the constitutional principle articulated in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and applied to Nebraska law in *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003), was plain error that we cannot leave uncorrected. Consequently, we must vacate Mata's death sentence due to reversible error in the sentencing proceedings, and remand the cause to the district court for resentencing. See *Gales, supra*, citing *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

(b) Remaining Assignments of Error—Sufficiency of Evidence

[52] Because our decision in *Gales* requires that Mata's death sentence be vacated, and the cause remanded for resentencing on the count of first degree premeditated murder, we need not

consider Mata's remaining assignments of error directed at Nebraska's capital sentencing statutes, or his complaints about the particular deficiencies of the procedures followed by the sentencing panel in this case. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003).

We note, in particular, that Mata has presented this court with a record containing a considerable amount of evidence intended to show that electrocution, as a mode of execution, violates the Eighth Amendment's prohibition on cruel and unusual punishments. We are aware that recent events at the U.S. Supreme Court may cast doubt upon whether that Court will continue to regard electrocution as consistent with the Eighth Amendment. See, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); *Bryan v. Moore*, 528 U.S. 960, 120 S. Ct. 394, 145 L. Ed. 2d 306 (1999) (granting certiorari on question), *cert. dismissed as improvidently granted* 528 U.S. 1133, 120 S. Ct. 1003, 145 L. Ed. 2d 927 (2000) (dismissing certiorari due to legislative enactment of lethal injection); *Campbell v. Wood*, 511 U.S. 1119, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994) (Blackmun, J., dissenting from denial of certiorari; Stevens and Ginsburg, JJ., voting to grant stay of execution); *Poyner v. Murray*, 508 U.S. 931, 113 S. Ct. 2397, 124 L. Ed. 2d 299 (1993) (Souter, J., joined by Blackmun and Stevens, JJ., respecting denial of petition for writ of certiorari). However, the possibility remains that Mata will not be resentenced to death, or that the Nebraska Legislature will address this issue prior to the conclusion of Mata's resentencing. See, e.g., L.B. 526, 98th Leg., 1st Sess. Therefore, we do not address Mata's assignment of error regarding electrocution at this time.

[53,54] Before we discuss the proceedings for Mata's resentencing, however, we do consider Mata's final assignment of error: that the sentence of death was excessive. Nebraska's capital sentencing procedures have the characteristics which the U.S. Supreme Court found to resemble a trial in *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), and double jeopardy concerns attach at a capital sentencing hearing in Nebraska. *State v. Palmer*, 257 Neb. 702, 600

N.W.2d 756 (1999). Under *Bullington*, a defendant who has been impliedly acquitted of the death penalty cannot again be placed in jeopardy of a capital sentence. While the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction. *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995). Therefore, before the cause is remanded for resentencing, we determine whether the evidence presented by the State was sufficient to sustain the conviction. See *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000).

A lengthy reexamination of the evidence set forth above is not necessary to dispose of this assignment of error. The evidence indicates that the blunt force trauma inflicted on Adam, and his dismemberment, occurred at or near the time of his death. It suffices to say that based on our de novo review of the record made in this proceeding, we conclude that the evidence was sufficient to conclude that Adam's murder was "especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence" within the meaning of § 29-2523(1)(d), and that this aggravating factor outweighed the mitigating factors supported by the record. Mata has not been "acquitted" of the death penalty under *Bullington*. Mata's final assignment of error is without merit.

(c) Resentencing Proceedings

After the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Nebraska Legislature enacted 2002 Neb. Laws, L.B. 1, of the 97th Legislature, Third Special Session, " 'to satisfy the new 6th Amendment requirements articulated in *Ring*.' " *State v. Gales*, 265 Neb. 598, 626, 658 N.W.2d 604, 625 (2003). In *Gales*, we determined that the L.B. 1 amendments to the capital sentencing statutes which reassigned responsibility for determining the existence of any aggravating circumstance from judges to juries affected a procedural change in the law which applied to all proceedings which occur on or after November 23, 2002, the effective date of the amendment. Thus, we held that the capital

sentencing procedures as amended by L.B. 1 applied to the new penalty phase proceeding necessitated in that case. *Gales, supra.* We determined, however, that the provision of L.B. 1 which amended the penalty for a Class 1A felony from " 'Life imprisonment' " to " 'Life imprisonment without parole' " was a substantive change that could not be applied to the defendant upon resentencing. *Gales*, 265 Neb. at 633, 658 N.W.2d at 629. Our holding in *Gales* is controlling in the instant case.

[55] We issued our decision in *Gales* after the briefs had been filed, but prior to oral argument in the instant case. Consequently, at oral argument, Mata advanced two arguments with respect to our decision in *Gales* that are not present in his appellate brief. Ordinarily, to be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). However, an appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997). Because Mata's appearance at oral argument was his only opportunity to address our decision in *Gales*, we choose to consider and respond to Mata's arguments in that regard.

Mata's first argument with respect to our decision in *Gales* is that we failed to properly consider the decision of the U.S. Supreme Court in *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). In that double jeopardy case, a plurality of the Court opined that under *Ring*, since aggravating circumstances " 'operate as "the functional equivalent of an element of a *greater offense*," ' " for Sixth Amendment purposes, "the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.' " (Emphasis in original.) *Sattazahn*, 537 U.S. at 111, quoting *Ring, supra.* Although Mata's argument is not entirely clear, he seems to be arguing that under *Sattazahn*, he has been convicted of the "lesser offense" of noncapital murder and cannot now be "convicted" of a "greater offense" via a capital resentencing proceeding.

We do not find this argument persuasive. First, we note that the section of *Sattazahn* relied upon by Mata was joined by only

three Justices, and the views expressed by the plurality have not been endorsed by a majority of the Court. See *id.* (O'Connor, J., concurring in part and concurring in the judgment). Furthermore, even if we assume that the plurality's above-quoted discussion in *Sattazahn* is a correct statement of the law, it does not conflict with our decision in *Gales* and does not support the conclusion urged by Mata. Mata stands convicted of capital murder as defined by the *Sattazahn* plurality; but error in the sentencing proceeding resulted in reversible error of the sentencing portion of Mata's final judgment. However, Mata can be resentenced, because he has not been "acquitted" of capital murder as defined by the *Sattazahn* plurality. There is no support in *Ring* or the *Sattazahn* plurality discussion for the proposition that a separate capital resentencing proceeding following a successful appeal violates the Sixth Amendment or the Double Jeopardy Clause.

Mata's second argument with respect to *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003), is that we erred in concluding that the notice provisions of L.B. 1, which require the State to file a "notice of aggravation" alleging the aggravating circumstances on which the State intends to rely, were not applicable to the resentencing proceedings. We stated:

> The filing of a notice of aggravation is a new procedure established by L.B. 1. There was no such requirement at the time the information in this case was filed, or at any time prior to [the defendant's] trial and original sentencing. Under the former statute, the State was not constitutionally required to provide a defendant with notice as to which particular aggravating circumstance or circumstances it would rely upon in pursuing the death penalty. . . . While procedural statutes do apply to pending litigation, it is a general proposition of law that new procedural statutes have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. . . . All things performed and completed under the old law must stand. . . . We conclude that because the pretrial and trial "steps" of [the defendant's] litigation were completed and became final at a time when the law did not require the State to file a notice of aggravation in order to

> seek the death penalty, this new procedural requirement is not applicable to [the defendant].

(Citations omitted.) *Gales*, 265 Neb. at 635, 658 N.W.2d at 631.

Mata argues that this determination amounts to "overruling" the Legislature with respect to the L.B. 1 notice requirements. This argument is without merit. In fact, our opinion in *Gales* specifically set forth a procedure for resentencing to ensure that although the State could not, as a practical matter, have filed a notice of aggravation prior to a trial that had already taken place, the Legislature's intent, that the defendant be notified prior to sentencing regarding the aggravating factors the State would seek to prove, would be effectuated. We determined that at resentencing, the State could seek to prove only the aggravating circumstances which were determined to exist in the first trial, and of which the defendant was on notice. *Id.*

We are not persuaded by Mata's arguments with respect to our decision in *Gales*; we reaffirm that holding and therefore conclude that our disposition of *Gales* controls our disposition of the instant case as well. Consequently, upon remand for resentencing, the district court is directed to conduct proceedings pursuant to § 29-2520, as amended by L.B. 1, in order to determine whether aggravating circumstances exist with respect to the murder of Adam. See *Gales, supra*. Such determination will be made by a jury impaneled for this purpose, unless waived by Mata. See *id.* The scope of such proceedings will be limited in that the State may seek to prove only the aggravating circumstance which was determined to exist in the first trial. See *id.* Upon completion of this proceeding, the district court is directed to resentence Mata, pursuant to L.B. 1, § 11 (to be codified as § 29-2520(h)), or L.B. 1, §§ 12 and 14 (to be codified as §§ 29-2521 and 29-2522), to a minimum sentence of life imprisonment or a maximum penalty of death.

V. CONCLUSION

For the foregoing reasons, we affirm Mata's convictions for first degree premeditated murder and kidnapping. We also affirm the sentence of life imprisonment imposed for the kidnapping. However, based on *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), Mata's death sentence is

vacated, and the cause is remanded for resentencing on the charge of first degree premeditated murder, as consistent with this opinion and our opinion in *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS FOR NEW PENALTY PHASE HEARING AND RESENTENCING ON COUNT I.

STATE OF NEBRASKA, APPELLEE, V.
NICOLE M. SMITH, APPELLANT.
668 N.W.2d 482

Filed September 5, 2003. No. S-02-1203.

1. **Pleas: Appeal and Error.** A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Pleas.** In order to accept a defendant's plea of guilty, the trial court must determine that the plea is voluntarily and intelligently made by the defendant.
4. **Constitutional Law: Pleas: Proof: Waiver.** A guilty plea is valid only if the record affirmatively shows that a defendant understands that by pleading guilty, the defendant waives the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, or otherwise affirmatively shows an express waiver of said rights.
5. **Pleas.** To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.

Appeal from the District Court for Boone County, MICHAEL OWENS, Judge, on appeal thereto from the County Court for Boone County, CURTIS H. EVANS, Judge. Judgment of District Court affirmed.

Mark A. Keenan, of Moyer, Moyer, Egley, Fullner & Warnmunde, for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

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

WRIGHT, J.

NATURE OF CASE

Nicole M. Smith pled guilty to charges of driving under suspension and speeding. The Boone County Court sentenced Smith to 30 days in jail, with credit for time served, and revoked her operator's license for a period of 1 year for driving under suspension. The county court fined her $25 for speeding. Smith appealed her convictions and sentences to the Boone County District Court, which affirmed.

SCOPE OF REVIEW

[1] A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999).

[2] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

FACTS

On June 3, 2002, Smith appeared pro se before the Boone County Court for arraignment on charges of driving under suspension and speeding. The county court conducted a group arraignment, advising the defendants of their constitutional rights as follows:

> And I would ask all parties present to listen carefully as I proceed to the rights and the pleas that will be available to you.
>
> If you've been charged with a violation of a misdemeanor or city ordinance, you have the following rights; you have the right at all stages of these proceedings to hire and be represented by an attorney of your own choice at your own expense. You have a right to a court appointed attorney if you're found to be indigent under the law, unable to afford

an attorney and if you're charged with an offense which has a possible jail sentence. You have a right to have a trial. You have a right to have a trial by jury if you're charged with a misdemeanor. . . .

. . . You may waive your right to a jury trial. You have a right to be presumed innocent and the state or city has a burden of proving you guilty beyond a reasonable doubt. You have a right to confront and cross-examine witnesses that testify against you. You have a right to compulsory process under the law to call witnesses to court to testify on your behalf. You have a right to remain silent and that would not be held against you. You have a right to testify at your trial, but anything you say may be used against you. You have a right, if under age 18 at the time of the alleged offense, to request a transfer to the juvenile court. You have a right to appeal any final order or decision of the court and have a transcript of the proceedings made for that purpose. You have a right to bond pending further proceedings for your possible release and have it reviewed by the court. . . .

The following pleas are available to you. A plea of guilty or no contest waives or gives up the following rights; the right to have a trial, if appropriate, a trial by jury. Your right to confront and cross-examine the witnesses who would testify against you. You have a right to remain silent. [The right to raise a]ny defenses you may have had. If you plead guilty or no contest to a misdemeanor or ordinance, you may be found guilty and you will then be subject to any or all penalties allowed pursuant to laws to said misdemeanor or ordinance. . . .

. . . .

The following procedures will be followed. When you come forward, you'll be asked to give your correct name and your current mailing [address] and state if you're under age 18. You'll be asked if you understand the rights and the pleas that have been explained to you. If you have no questions, you'll be presumed to understand the rights and pleas that have been explained to you.

The county court also explained that a not guilty plea preserves certain rights.

When the county court called Smith's case, she stated her name and address, and the following dialog occurred: "THE COURT: And at this time, do you understand the rights and pleas that I've explained? [Smith]: Yes. THE COURT: Any questions about them? [Smith]: No."

Smith was then advised that she was charged with driving under suspension and speeding. The county court explained the possible penalties for each offense, and thereafter, Smith pled guilty to both charges. The State provided a factual basis for the charges, and the county court accepted Smith's pleas. The county court then granted Smith allocution and sentenced her. She received a sentence of 30 days in jail, her operator's license was revoked for 1 year for driving under suspension, and she was fined $25 for speeding.

Smith appealed her convictions and sentences to the Boone County District Court, setting forth the following issues for the court's review: (1) whether Smith's guilty pleas were valid in accordance with *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997); (2) whether the county court abused its discretion in sentencing Smith; and (3) whether the sentences were excessive. The district court affirmed the judgment of the county court in all respects. Smith timely appealed.

The State filed a motion for summary affirmance, which was overruled by the Nebraska Court of Appeals. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Court of Appeals.

ASSIGNMENTS OF ERROR

Smith makes the following assignments of error: (1) The Boone County Court erred in failing to comply with the requirements of *Hays*, thereby invalidating her guilty pleas, and (2) the Boone County District Court erred in finding that the county court had complied with *Hays* and, as a result, erred in affirming the county court's judgment.

ANALYSIS

Smith argues that the record does not affirmatively disclose a waiver of her right to confront witnesses against her, her right to a jury trial, and her privilege against self-incrimination, and she

asserts that as a consequence, her guilty pleas are invalid. While Smith acknowledges that the county court asked her, "[D]o you understand the rights and pleas that I've explained," she argues that the court failed to ask her whether she understood the effects of pleading guilty. Smith contends there is a difference between understanding one's constitutional rights and understanding that pleading guilty constitutes a waiver of such rights. She argues that in the absence of an express waiver of her rights, the county court should have examined her to determine whether, in fact, she understood that by pleading guilty, she waived her rights to confrontation and a jury trial and the privilege against self-incrimination.

Smith also argues that the county court incorrectly advised her that by pleading guilty, she would continue to have the right to remain silent. She asserts that it was the county court's responsibility to make this right clear, particularly when she appeared pro se. She contends that she could not be expected to understand the constitutional rights that she was waiving if the rights were not properly explained to her. She asserts that she could not waive rights of which she had no knowledge. Smith also argues that the arraignment checklist completed by the county court is not supported by what occurred in the courtroom.

The State argues that the record, read as a whole, establishes that Smith understood that by pleading guilty she was waiving her privilege against self-incrimination, right to confront witnesses, and right to a jury trial. The State contends that an express waiver of rights is not required where the record establishes that a defendant understood that certain rights were being waived by pleading guilty.

The State argues that the county court's statement, "[y]ou have a right to remain silent . . . ," read in context, was intended to be one item in a list of rights which would be waived upon pleading guilty. The State asserts that the county court's statement was not ambiguous and that the colloquy between the court and Smith clearly establishes that she understood that she was waiving her right to remain silent by pleading guilty.

The district court concluded that the county court had advised the group of defendants of their right to counsel, their right to trial by jury, their right to a presumption of innocence, their right to

confrontation, their right to compulsory process, their right to remain silent or to testify at trial, and their right of appeal. The district court found that the group was advised that a plea of guilty or no contest waived the rights to trial by jury, to confrontation, and to remain silent. The district court also found (1) that while the county court did not specifically make a finding at the arraignment that Smith understood her rights, the court did personally examine Smith regarding her understanding, and (2) that she answered affirmatively when asked if she understood the rights and pleas explained by the court. The district court further noted the content of the county court's arraignment checklist.

In its order, the district court quoted *State v. Hays*, 253 Neb. 467, 476, 570 N.W.2d 823, 829 (1997), for the proposition that "in every case, the colloquy or the checklist should affirmatively show that the defendant understands that by pleading guilty, he waives his right to confront witnesses against him, his right to a jury trial, and his privilege against self-incrimination, or that the defendant expressly waives said rights." The district court found that the county court's colloquy with Smith, together with the arraignment checklist, complied with the requirements of *Hays*.

A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

[3,4] The issue before us is the validity of Smith's guilty pleas. In order to accept a defendant's plea of guilty, the trial court must determine that the plea is voluntarily and intelligently made by the defendant. *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000). To make this determination, the court must question the defendant about certain facts and must also advise the defendant of certain rights to which the defendant is entitled. *Id.* A guilty plea is valid only if the record affirmatively shows that a defendant understands that by pleading guilty, the defendant waives the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, or otherwise

affirmatively shows an express waiver of said rights. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

[5] We have held that to support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002). The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged. *Id.*

The county court conducted a group arraignment, advising all the defendants of their rights, including their right to the assistance of counsel, their right to confront witnesses against them, their right to a jury trial, and their privilege against self-incrimination. The county court also informed the group of their plea options and the results of each plea. The county court stated:

> The following pleas are available to you. A plea of guilty or no contest waives or gives up the following rights; the right to have a trial, if appropriate, a trial by jury. Your right to confront and cross-examine the witnesses who would testify against you. You have a right to remain silent. [The right to raise a]ny defenses you may have had.

The county court's statement, "[y]ou have a right to remain silent . . . ," in the context of the court's explanation, indicates that the right to remain silent was one in a list of rights the defendants would be giving up if they pled guilty. Following the county court's recitation of the rights which are waived upon a plea of guilty, the court advised the group concerning the rights which are preserved upon a plea of not guilty, including the right to a trial, the right to confront and cross-examine witnesses, and the right to remain silent.

The county court then explained to the group of defendants that they would be asked if they understood the rights and pleas the court had explained to them. The county court informed the group that if they did not have questions, it would be presumed that they understood the rights and pleas that had been explained to them. The record does not establish that Smith voiced any questions about her rights.

Following the county court's explanation, the court called the defendants' cases individually. When Smith's case was called, the following colloquy occurred: "THE COURT: And at this time, do you understand the rights and pleas that I've explained? [Smith]: Yes. THE COURT: Any questions about them? [Smith]: No." Smith also stated that she wished to proceed without an attorney.

The county court informed Smith of the charges against her, and she stated that she understood the charges and waived the reading of the complaint. The county court informed her of the possible penalties for each offense. Smith then pled guilty to charges of driving under suspension and speeding. The State then provided the factual basis for each charge.

A checklist was completed by the county court which indicated that the following rights and pleas were explained to Smith:

> [The] right to counsel, retained or appointed, at all stages of the proceedings; right to trial by jury if charged with a misdemeanor; right to require State to prove guilty beyond a reasonable doubt; right to confront & cross examine witnesses; right to subpoena witnesses on own behalf[;] right to remain silent; right to testify in own behalf; right to appeal any final order or decision of the Court; right if juvenile to request transfer to Juvenile Court jurisdiction; right to bond pending further proceedings. Explained pleas of not guilty, guilty and no contest including that a plea of guilty or no contest waives rights to a jury trial, privilege against self incrimination; right to confront witnesses against him/her.

The checklist also indicated that Smith waived the reading of the complaint and was advised of the nature of the proceedings, the possible penalties, and enhanced penalties on subsequent offenses. Furthermore, the checklist indicated that Smith made a knowing, voluntary, and intelligent waiver of her right to counsel.

In addition, the checklist indicated the following

> On [Smith's] plea(s) of GUILTY . . . and after personal colloquy with [Smith], the Court finds that [Smith] is competent, understands the nature of the pending charges and possible penalties which may be imposed, both minimum & maximum: that [Smith] understands the consequences of such plea(s) and that said plea(s) waive rights to counsel, confrontation, privilege against self incrimination and

> right to jury trial on misdemeanors. Further, the Court find[s] that [Smith's] plea(s) was/were entered voluntarily and not as a result of threats or coercion and that there is factual basis for each count. Therefore, [Smith's] plea(s) is/are accepted and [Smith] is FOUND GUILTY as charged on [counts I and II].

The record establishes that there was a factual basis for Smith's pleas and that Smith knew the range of penalties for the crimes with which she was charged.

After allowing Smith to speak, the county court sentenced her on the charge of driving under suspension to 30 days in jail, revoked her privilege to drive for 1 year from the date of discharge from jail, and ordered her not to operate a motor vehicle for the same amount of time. As to the speeding charge, the county court fined Smith $25 and notified her that points would be deducted from her operator's license.

We conclude that Smith's guilty pleas were voluntarily and intelligently made. The record affirmatively shows that Smith understood that by pleading guilty, she waived the right to confront witnesses against her, the right to a jury trial, and the privilege against self-incrimination. See *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999). The district court did not err in finding that the county court had complied with *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997).

CONCLUSION

For the reasons set forth herein, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DONNA McPHERSON, APPELLANT.
668 N.W.2d 488

Filed September 12, 2003. No. S-02-186.

1. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.

2. **Trial: Words and Phrases.** Judicial abuse of discretion means that the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Trial: Joinder: Proof: Appeal and Error.** The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.
4. **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 discretion.
5. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
6. **Trial: Joinder.** There is no constitutional right to a separate trial. The right is statutory and depends upon a showing that prejudice will result from a joint trial.
7. **Trial: Joinder: Indictments and Informations.** The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.
8. **Trial: Joinder.** Consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated.
9. **Trial: Joinder: Evidence: Appeal and Error.** Joinder is not prejudicial error where evidence relating to both offenses would be admissible in a trial of either offense separately.
10. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
11. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
12. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, the 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.
13. **Aiding and Abetting.** Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.
14. **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.

15. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.
16. ____: ____. Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
17. ____: ____. Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
18. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
19. **Witnesses: Appeal and Error.** Witness credibility is not to be reassessed on appellate review.
20. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

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

Mary C. Wickenkamp for appellant.

Don Stenberg, Attorney General, and Mark D. Raffety for appellee.

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

McCORMACK, J.

NATURE OF CASE

Donna McPherson appeals her convictions and sentences of the Lancaster County District Court. In a joint trial with her husband, Roger McPherson, Donna was convicted of one count of aiding and abetting first degree sexual assault on a child and two counts of child abuse. She was sentenced to an aggregate term of 12 to 20 years' imprisonment. Roger was convicted of two counts of first degree sexual assault on a child and two counts of child abuse. He was sentenced to 25 to 40 years' imprisonment for each sexual assault conviction and 5 years' imprisonment for

each child abuse conviction. Roger also appealed his convictions and sentences. The opinion in Roger's appeal can be found at *State v. McPherson, post* p. 734, 668 N.W.2d 504 (2003). The victims in both cases are the two minor daughters of Roger and Donna, S.M. and M.M., ages 12 and 11 respectively at the time of the joint trial.

BACKGROUND

Some background is useful for context. Roger, Donna, and the two girls lived in a house consisting of two bedrooms—one for Roger and Donna and one for the girls. Roger and Donna's bedroom and main bathroom did not have doors. Donna was not home on most weekday evenings because she usually worked from 4 to 11 o'clock. Roger is disabled and was unemployed at the time the offenses took place.

In February 2001, M.M. approached school officials concerning her situation at home. She told officials that Roger had recently announced a new rule which would require the girls to "go around the house" naked on the weekends. She also alleged that Roger made her engage in fellatio with him. After talking with both girls, officials called the police to report the incidents of sexual abuse. The police took the girls to the Child Advocacy Center to be interviewed. The girls were placed in protective custody after the interviews.

As part of the investigation, the police went to the McPherson home where they obtained consent from the McPhersons to search their home. Upon obtaining a warrant, a subsequent search was conducted. Among other items, the police seized sexual devices and numerous sexually explicit videos. The sexual devices were found in the girls' bedroom and Roger and Donna's bedroom. Roger and Donna were subsequently arrested.

Following his arrest, Roger agreed to speak with the police. Before making his statement, Roger was read his *Miranda* rights and subsequently signed a *Miranda* warning and waiver form. Roger admitted he had "inspected" the girls' vaginas for hygienic purposes, but denied touching the girls in a sexual manner. Roger also admitted that on at least one occasion, the girls witnessed Roger and Donna having oral sex. He also admitted to knowing that sexual devices were kept in the home, but denied

ever using the devices on the girls or ever showing the girls how to use the devices. The statement was tape-recorded and later transcribed.

PRIOR TO TRIAL

The State filed a motion to consolidate Roger's and Donna's cases for trial. The State alleged that the offenses were of the same or similar character; that the offenses were based on the same act or transaction; and that the same witnesses, evidence, and testimony would be offered against each defendant with one exception: Roger's statement. Roger did not oppose consolidation, but Donna opposed it on two grounds. First, she alleged that Roger's statement to the police contained incriminating statements about Donna and, if introduced at trial, would abridge her right of confrontation. Donna also alleged that she would be prejudiced at trial by association with Roger. In granting the State's motion to consolidate, the district court determined that all the charges arose from a factually related transaction or series of events in which both defendants participated. The court further determined that those portions of Roger's statement implicating Donna could be addressed by a motion in limine to test whether the confrontation issue could be overcome by the State. The court factored into account the girls' ages and possible psychological damage to them if they were required to testify at separate trials. Based on the evidence presented on the motion to consolidate, the court ultimately concluded that Donna failed in her requisite burden to establish that she would be prejudiced in a joint trial with Roger.

Donna filed three motions in limine. She objected, inter alia, to the admissibility of the sexual devices and sexually explicit videos seized at the McPherson home. Donna also filed a motion to redact, alleging that portions of Roger's statement violated her right of confrontation. She also claimed that some portions of the statement violated the rules of evidence.

We limit our review of the court's order on the admissibility of evidence to the evidence at issue in Donna's appeal. The district court found that Donna's motions presented two issues: (1) whether the evidence of sexual devices and sexually explicit videos were prohibited as rule 404(2) character evidence, see

Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), and (2) whether Roger's statement was admissible at trial. In reviewing the first issue, the court divided the evidence at issue into two categories: (1) *material seized* which included the sexual devices and sexually explicit videos and (2) *Roger's conduct* which included Roger's viewing a sexually explicit film with the girls on New Year's Eve (New Year's Eve video).

As to the child abuse charges, the district court determined that the evidence of sexual devices, sexually explicit videos, and the New Year's Eve video were direct evidence of child abuse and not rule 404(2) evidence. As to aiding and abetting first degree sexual assault on a child, the district court determined that the evidence of sexual devices and sexually explicit videos were direct evidence of aiding and abetting first degree sexual assault on a child. The court also determined that the evidence of the New Year's Eve video was not evidence of any element of aiding and abetting unless the State could first establish that Donna had knowledge of the video. The court concluded that the New Year's Eve video was inadmissible rule 404(2) evidence and that if offered at trial for other purposes, a limiting instruction to the jury would be required.

As to the admissibility of Roger's statement, the court granted Donna's motion to redact in part, listing the portions to be redacted in its order. The court overruled the motion to redact as to all other portions not listed in its order.

After the court's ruling on the evidentiary issues, Donna filed a motion to sever her trial from that of Roger. She claimed that a joint trial violated her due process rights and that a joint trial would confuse the jury. In overruling the motion to sever, the court determined that limiting instructions given to the jury during the joint trial would address the issues raised by the motion to sever.

TRIAL

Both girls testified at trial. Each testified that they had engaged in fellatio with Roger and that Donna had watched and participated on some occasions. They also testified that Roger sexually touched their vaginas. According to S.M., on at least one occasion, Donna actively participated in the sexual activity when

Roger sexually touched S.M.'s vagina. Both girls further testified that they had watched Donna engage in fellatio with Roger. According to the girls, Donna often went about the house nude and Roger went about the house partially nude. Their testimony also revealed that Roger took nude photographs of both girls.

Each girl testified about the material seized from the home, including the sexual devices and sexually explicit videos. S.M. testified that she had taken two sexual devices from her parents' bedroom without her parents' knowledge, but she also remembered asking Donna how to use them. Both girls testified that they had used the sexual devices. M.M. kept her device under her pillow, and S.M. kept her device on top of her dresser next to the bed.

As to the sexually explicit videos found in the house, each girl testified that the videos were stored in an unlocked video cabinet near the television. They testified that they had watched some of the videos. According to M.M., Donna had caught them watching a sexually explicit video and had told them not to watch it again.

Both girls also testified about Roger's conduct. They each testified that they watched the New Year's Eve video with Roger, but said that Donna was not home when they watched it. In addition, the girls testified concerning the new rule announced by Roger which would have required them to go around the house naked on the weekends.

Also called to testify were the two police officers who took Roger's statement at the police station. Both officers testified about portions of the statement, but the statement itself was not admitted into evidence. According to the officers, Roger admitted to knowing that the girls had watched some adult videos. Roger further admitted that due to his disability, he required assistance in using the bathroom, and that the girls, in assisting him, had seen him nude on occasion. The officers also testified that Roger admitted to inspecting the girls' vaginas for hygienic purposes, but denied ever touching the girls in a sexual manner. No reference was made to Donna by either officer while testifying about Roger's statement.

At the conclusion of the trial, the jury found Donna guilty of all charges.

ASSIGNMENTS OF ERROR

Donna assigns, rephrased and renumbered, that (1) the district court erred in joining Roger's case and her case for trial, (2) the district court erred in admitting the statement of Roger at trial, (3) the district court erred in admitting evidence of sexual devices at trial, (4) the district court erred in admitting sexually explicit videos at trial, and (5) the evidence was insufficient to sustain the verdicts.

STANDARD OF REVIEW

[1-3] A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). Judicial abuse of discretion means that the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Irons*, 254 Neb. 18, 574 N.W.2d 144 (1998). The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced. *State v. Brunzo, supra.*

[4] 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 discretion. *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002).

[5] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003).

ANALYSIS

CONSOLIDATION

In her first assignment of error, Donna alleges that it was error to consolidate Roger's case and her case for trial. The

consolidation of separate cases is governed by Neb. Rev. Stat. § 29-2002 (Reissue 1995), which provides:

> (2) The court may order two or more indictments, informations, or complaints . . . *if the defendants, if there is more than one, are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.* The procedure shall be the same as if the prosecution were under such single indictment, information, or complaint.

(Emphasis supplied.)

[6,7] There is no constitutional right to a separate trial. The right is statutory and depends upon a showing that prejudice will result from a joint trial. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced. *Id.* A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *Id.* The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial. *Id.*

[8] We first consider whether consolidation was proper. Consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated. *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982). Joinder was proper in the present case. The information against Roger and Donna charged both of them with child abuse and with related offenses; Roger with first degree sexual assault on a child, and Donna with aiding and abetting first degree sexual assault on a child. All of the charges arose out of the incidents and environment at the home in which Roger and Donna placed the girls and, therefore, are part of a factually related transaction or series of events in which both Roger and Donna participated.

Next, we consider whether Donna was prejudiced by the otherwise proper consolidation. Donna's first claim of prejudice is that the joint trial violated her right to confrontation. She contends that portions of Roger's statement admitted at trial inculpated her

and that she was unable to cross-examine Roger because he did not testify at trial. In claiming that she was prejudiced, Donna relies on *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). In *Bruton*, the codefendant's confession expressly implicated the defendant as his accomplice. The U.S. Supreme Court held that the admission of a codefendant's statement inculpating another defendant at a joint trial constitutes error where the declarant codefendant does not testify in the trial, regardless of the fact that the trial court gave instructions that the incriminating statement could be considered only against the declarant codefendant. The scope of *Bruton* was limited by *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). The U.S. Supreme Court in *Richardson* determined that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence. Such confession does not violate the right to confrontation because it is not incriminating on its face, but becomes so only when linked with evidence introduced later at trial. *Id.*

Prior to trial, the court redacted 26 of the 28 portions of Roger's statement which Donna requested in her motion to redact. We also note that Roger's statement was not admitted into evidence, nor was the tape played for the jury. However, two police officers who were present during Roger's statement did testify about portions of Roger's statement. We, therefore, consider whether Donna's right to confrontation was violated.

Prior to each officer's testifying about the statement, the court gave the following limiting instruction: "Ladies and Gentlemen of the Jury, you are about to hear evidence of a statement made by Roger McPherson. You may consider the statement only regarding the charges pending against Roger McPherson and you may not consider it in connection with any charges pending against Donna McPherson." No objection was made to the limiting instruction. The only portions of the statement which the officers testified about included Roger's knowledge that the girls had watched some sexually explicit videos, that the girls had seen him nude when they helped him to the bathroom because of his disability, and that he had inspected the girls' vaginas for hygienic

purposes. The officers' testimony did not inculpate Donna. Donna's name was not used, nor was any reference made to Donna by counsel or the officers while they testified about portions of Roger's statement. No reference was made to the two portions of the statement not redacted by the court but requested in Donna's motion to redact. The prosecution, in its closing argument, reiterated that Roger's statement could not be considered in Donna's case. Because the statement was not incriminating on its face, as required by the *Bruton* rule, we determine that Donna's right to confrontation was not violated. The record establishes that the district court adhered to the safeguards established in *Richardson v. Marsh, supra.*

[9,10] Donna's second claim of prejudice is that the joint trial violated her due process rights. She asserts that the complexity of the evidence confused the jury despite the court's limiting instructions. We disagree. Donna's counsel conceded at oral argument that the overwhelming majority of evidence introduced at the joint trial would have been used to prove the charges against Donna in a separate trial. Joinder is not prejudicial error where evidence relating to both offenses would be admissible in a trial of either offense separately. *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). Moreover, the jury was cautioned about using evidence, specifically Roger's statement and the New Year's Eve video, against one defendant or offense and not against the other defendant or offense. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999); *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). For these reasons, we determine that Donna has failed in her burden to establish that the joint trial violated her due process rights.

[11] Donna also claims that she was prejudiced by the joint trial because the trial strategy and tactics of Roger's counsel conflicted with the trial strategy and tactics of Donna's counsel. This claim is not supported by the facts. Roger and Donna maintained their innocence throughout the proceedings. Furthermore, this issue was not presented to the district court. The different

strategies used by Roger's counsel, including not opposing the prosecution's motion for joinder, his motion to sequester the jurors, and his objection to Donna's motion to allow jury note-taking, were all considered and ruled upon by the court prior to trial. The court's order on the motion to consolidate was filed July 9, 2001, and the court's order on the other pretrial motions at issue was filed September 24. Donna did not claim that she would be prejudiced by these different strategies in her opposition to the prosecution's motion to consolidate. She also did not raise this issue in her motion to sever filed on September 28, which was after the court's order on the pretrial motions. Donna did not file a motion for new trial, whereby she could have raised this issue. Because Donna did not present this issue before the district court, we do not consider it on appeal. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).

Donna also claims that she was prejudiced by the cross-examination of S.M. by Roger's counsel because Roger's counsel elicited more damaging testimony against Donna than was elicited by the prosecution on direct examination. "In one poorly executed and senseless question, co-defendant's counsel managed to do what the prosecution could not - place [Donna] as a witness to first degree sexual assault of the alleged victim [S.M.] in Count One of the Information." Brief for appellant at 12. This claim is contrary to the evidence adduced at trial and therefore is without merit. As the following testimony reveals, S.M. did testify on direct examination that Donna was a participant on at least one occasion when Roger sexually penetrated her, which is sufficient evidence that Donna aided and abetted the first degree sexual assault on a child.

> Q. [Direct examination by prosecution] Why would you jump?
>
> A. [S.M.] Because my nerves would jiggle and that would cause me to jump.
>
> Q. Well, what made your nerves jiggle?
>
> A. My dad playing around with my button [vagina] with his finger.

Q. And was that happening while your mom [performed fellatio] on your dad's penis?

A. Yes.

Q. And after that happened did, ah, anybody do anything else?

A. I cannot remember.

Q. And did your mom say anything to you while this was going on?

A. I think she might have, but I can't recall it.

Q. Okay. Do you think she knew you were there?

A. Yes.

Q. You were all [Roger, Donna, M.M., and S.M.] on the bed together?

A. Yes.

For the above-stated reasons, we conclude that the district court did not abuse its discretion in consolidating the cases for trial. Donna has failed in her requisite burden to establish that she was prejudiced by the joint trial. Her first assignment of error is without merit.

ROGER'S STATEMENT

In her second assigned error, Donna alleges that it was error to admit Roger's statement into evidence at trial because it violated her right of confrontation. We addressed this assigned error in the preceding section and concluded that Donna's right of confrontation was not violated. This assigned error is without merit.

EVIDENCE

In her third and fourth assignments of error, Donna alleges it was error to admit the evidence of sexual devices and sexually explicit videos at trial. Donna claims that this evidence is irrelevant to the crimes charged (rule 401 objection) and that even if this evidence is relevant, its probative value is outweighed by its prejudicial effect (rule 403 objection). She also claims that its admissibility is prohibited as character evidence pursuant to rule 404(2). She contends that such erroneous admission necessitates a new trial.

[12] In all proceedings where the Nebraska Evidence Rules apply, the 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. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002). Because the exercise of judicial discretion is implicit in rule 401, it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 401, 403, and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion. *State v. Aguilar, supra.*

As to the child abuse charges, the district court, in its ruling on the admissibility of evidence, determined that the evidence of sexual devices and sexually explicit videos was direct evidence of child abuse and not rule 404(2) evidence. Implicit in the court's finding as to the sexual devices and sexually explicit videos is a finding that the evidence was relevant under rule 401, and further that its probative value was not outweighed by the danger of unfair prejudice under rule 403. The court found that this evidence tended to prove Donna's knowledge of the situation in which she placed the girls and that Donna intentionally placed or permitted the girls to be in a situation that endangered their physical or mental health. The court also determined the New Year's Eve video was direct evidence of child abuse even though there was no evidence that Donna knew of this specific event. The court held that it was for the jury to determine whether a particular danger was within the scope of possible dangers which could be reasonably presented by Donna's placing or permitting her girls to be in a situation, given the knowledge Donna did have.

As to aiding and abetting first degree sexual assault on a child, the district court determined that the evidence of sexual devices and sexually explicit videos was direct evidence of aiding and abetting first degree sexual assault on a child. The court also determined that the evidence of the New Year's Eve video was not evidence of any element of aiding and abetting unless the State could first establish that Donna had knowledge of it. The court concluded that the New Year's Eve video was inadmissible rule 404(2) evidence and, if offered at trial for other purposes, a limiting instruction to the jury would be required.

On appeal, Donna asserts that the testimony given at trial does not support the district court's ruling on the admissibility

of evidence. She claims that M.M.'s testimony regarding possession and use of a sexual device was irrelevant to the aiding and abetting charge because there was no testimony that Donna knew M.M. had a sexual device and that the victim of the offense was S.M. and not M.M. She further contends that the sexual devices constitute inadmissible character evidence under rule 404(2). The State argues that the sexual devices and sexually explicit videos are direct evidence of the crimes charged. It contends that this evidence is intertwined with the charged crimes and is not extrinsic evidence as defined under rule 404(2).

[13] In this case, Donna was charged with two counts of child abuse, which requires the State to prove that Donna knowingly, intentionally, or negligently caused or permitted the girls to be placed in a situation that endangered their physical or mental health. See Neb. Rev. Stat. § 28-707 (Cum. Supp. 2002). Donna was also charged with aiding and abetting first degree sexual assault on a child. First degree sexual assault on a child is committed by "[a]ny person who subjects another person to sexual penetration . . . when the actor is nineteen years of age or older and the victim is less than sixteen years of age." Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995). Pursuant to Neb. Rev. Stat. § 28-318(6) (Reissue 1995), sexual penetration means

> 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.

Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

[14] We first consider whether evidence of sexual devices and sexually explicit videos is relevant. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence. *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003). We determine that sexual devices and sexually explicit videos, which were in the home and accessible to the girls, are relevant evidence of child abuse. This evidence would have some tendency to prove a pattern of child abuse regardless of whether Donna did or did not have knowledge of certain facts.

[15-17] We next consider whether the evidence is prohibited by rule 404(2). Rule 404(2) 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.

Stated another way, rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2). *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002); *State v. Sanchez, supra.* In deciding whether evidence under rule 404(2) is evidence of the crime charged, we have determined that bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the rule 404(2) coverage. *State v. Aguilar, supra.*

We conclude that the evidence of sexual devices and sexually explicit videos is not evidence of prior unrelated bad acts under rule 404(2), but is relevant evidence that forms the factual setting of the crimes charged. The State is allowed to present a coherent picture of the facts of the crimes charged. The State did not introduce the evidence to prove that Donna had the propensity or the character to act in a certain way. Instead, the evidence explains the circumstances of the McPherson home where the alleged crimes took place. The sexual devices were found in Roger and Donna's bedroom and in the girls' bedroom. S.M. kept her sexual device in plain view on her dresser. The sexually explicit videos were stored in an unlocked video cabinet near the television,

which was easily accessible by the girls. There is testimony that Donna knew that the girls had watched at least one of the sexually explicit videos. The evidence is so closely intertwined with both crimes charged that it cannot be considered extrinsic and therefore is not governed by rule 404(2). The evidence tends to prove Donna's knowledge of the situation in which she placed the girls. It also proves that a situation existed that endangered the girls' physical or mental health. Because the evidence is so closely intertwined with the crimes charged, we determine that evidence of sexual devices and other sexually explicit videos was properly admitted at trial. The evidence is not rule 404(2) evidence. We also conclude that the sexual devices and sexually explicit videos do not violate rule 403 because the probative value of describing the McPherson home and living conditions is not substantially outweighed by any prejudice to Donna. The trial testimony establishes that the sexual devices and sexually explicit videos were easily accessible to the girls and were often kept in plain view of Roger and Donna. From this record, it can be inferred that Donna had knowledge of the situation in which she placed the girls, and thus Donna is precluded from claiming that this evidence is unduly prejudicial.

Donna also alleges that it was error for the court to admit evidence of Roger's conduct. Donna specifically contends that the New Year's Eve video was not direct evidence of child abuse against Donna because there was no evidence establishing that Donna had knowledge of the event. We agree and conclude that the district court abused its discretion in admitting the New Year's Eve video as direct evidence of child abuse against Donna. At trial, both girls testified about watching the New Year's Eve video. Roger's and Donna's counsel timely objected on the grounds of relevancy, improper uncharged misconduct, and as being unduly prejudicial. The State argued that it was offering the evidence in accordance with the court's order on the motions in limine. The State claimed that the New Year's Eve video was direct evidence of child abuse against both Roger and Donna. It also claimed it was evidence of planned preparation for rule 404(2) purposes of the first degree sexual assault charges against Roger. The court overruled counsels' objections, but prior to the girls' testimony, gave the following limiting instruction:

> Ladies and Gentlemen of the Jury, you are about to hear evidence that Roger McPherson viewed a sexually explicit film with his daughters . . . . Any evidence relating to these matters will be received regarding:
>
> One, the two charges of child abuse against Roger and Donna McPherson; and
>
> Two, you may consider this evidence for the limited purpose of addressing the issues of plan and preparation regarding the two charges of [first degree] sexual assault o[n] a child pending against Roger McPherson.
>
> It is not to be considered by you with regard to the charge of aiding and abetting pending against Donna McPherson.
>
> It is not to be used by you as proof of character of either Roger or Donna McPherson or to prove the propensity of either of them to act in a certain way.

[18] There is no evidence in the record to support that Donna had any knowledge of the New Year's Eve event. If Donna did not have knowledge of the event, the evidence cannot be direct evidence of child abuse because that would require that she knowingly or intentionally placed the girls in a situation to be sexually abused. Although we conclude that the district court abused its discretion in admitting the New Year's Eve video in violation of rule 401 as direct evidence of child abuse against Donna, we consider this error harmless. Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003). Based upon our review of the entire record, including the undisputed testimony that Donna knew that the girls had performed fellatio on Roger, we have no difficulty in concluding that the guilty verdict was surely unattributable to the admission of the New Year's Eve event.

Sufficiency of Evidence

[19,20] In her final assignment of error, Donna alleges that there is insufficient evidence to support the convictions for child

abuse and aiding and abetting first degree sexual assault on a child. Donna bases this argument on the girls' inconsistent testimony at trial which she claims make the allegations unbelievable. In essence, Donna's assignment of error attacks the credibility of the witnesses. Witness credibility, however, is not to be reassessed on appellate review. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Jackson, supra.*

Viewed in a light most favorable to the State, we determine that there is sufficient evidence beyond a reasonable doubt to support the convictions for child abuse. Both girls testified that they performed fellatio on Roger while Donna was present. It is also uncontroverted that the girls had access to sexual devices and sexually explicit videos. Some of this evidence was kept in plain view of Roger and Donna. It is also undisputed that Roger and Donna often went around the house nude. Although the girls' testimony was inconsistent at times, it was rational for the trier of fact to have concluded that Donna knowingly and intentionally permitted the girls to be placed in a situation that endangered their physical or mental health.

There is also sufficient evidence in the record to support Donna's conviction for aiding and abetting first degree sexual assault on a child. There is evidence in the record that Roger digitally penetrated S.M. while simultaneously having Donna perform fellatio on him. There is also evidence in the record that Roger had the girls perform fellatio on him. This evidence is sufficient to sustain a finding that Donna aided and abetted the first degree sexual assault on S.M. This assigned error is without merit.

CONCLUSION

The district court did not abuse its discretion in consolidating the cases for trial. In addition, we conclude that it was not error to admit evidence of sexual devices and sexually explicit videos, and we also conclude that it was harmless error to admit evidence of the New Year's Eve video. Furthermore, there is sufficient evidence in the record to support the convictions. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER MCPHERSON, APPELLANT.

668 N.W.2d 504

Filed September 12, 2003. No. S-02-242.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress will be upheld unless its findings are clearly erroneous.
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 discretion.
3. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Confessions: Appeal and Error.** In making the determination of whether a statement is voluntary, a totality of the circumstances test is applied, and the determination reached by the trial court will not be disturbed on appeal unless clearly wrong.
5. **Confessions: Evidence: Proof.** A statement of a suspect, to be admissible, must be shown by the State to have been given freely and voluntarily and not to have been the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made.
6. **Trial: Evidence: Appeal and Error.** Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review, a question concerning the admissibility of evidence which is the

subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial.

7. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, the 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.
8. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
9. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.
10. ____: ____. Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
11. ____: ____. Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
12. **Witnesses: Appeal and Error.** Witness credibility is not to be reassessed on appellate review.
13. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

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

Mary C. Wickenkamp for appellant.

Don Stenberg, Attorney General, and Mark D. Raffety for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Roger McPherson appeals his convictions and sentences of the Lancaster County District Court. In a joint trial with his wife, Donna McPherson, Roger was convicted of two counts of first degree sexual assault on a child and two counts of child

abuse. He was sentenced to 25 to 40 years' imprisonment for each sexual assault conviction and 5 years' imprisonment for each child abuse conviction. Donna was convicted of one count of aiding and abetting first degree sexual assault on a child and two counts of child abuse. She was sentenced to an aggregate term of 12 to 20 years' imprisonment. Donna also appealed her convictions and sentences. The opinion in Donna's appeal can be found at *State v. McPherson, ante* p. 715, 668 N.W.2d 488 (2003). The victims in both cases are the two minor daughters of Roger and Donna, S.M. and M.M., ages 12 and 11 respectively at the time of the joint trial.

BACKGROUND

Some background is useful for context. Roger, Donna, and the two girls lived in a house consisting of two bedrooms—one for Roger and Donna and one for the girls. Roger and Donna's bedroom and main bathroom did not have doors. Donna was not home on most weekday evenings because she usually worked from 4 to 11 o'clock. Roger is disabled and was unemployed at the time the offenses took place.

In February 2001, M.M. approached school officials concerning her situation at home. She told officials that Roger had recently announced a new rule which would require the girls to "go around the house" naked on the weekends. She also alleged that Roger made her engage in fellatio with him. After talking with both girls, officials called the police to report the incidents of sexual abuse. The police took the girls to the Child Advocacy Center to be interviewed. The girls were placed in protective custody after the interviews.

As part of the investigation, the police went to the McPherson home where they obtained consent from the McPhersons to search their home. Upon obtaining a warrant, a subsequent search was conducted. Among other items, the police seized sexual devices and numerous sexually explicit videos. The sexual devices were found in the girls' bedroom and Roger and Donna's bedroom. Roger and Donna were subsequently arrested.

Following his arrest, Roger agreed to speak with the police. Before making his statement, Roger was read his *Miranda* rights and subsequently signed a *Miranda* warning and waiver form.

Roger admitted he had "inspected" the girls' vaginas for hygienic purposes, but denied touching the girls in a sexual manner. Roger also admitted that on at least one occasion, the girls witnessed Roger and Donna having oral sex. He also admitted to knowing that sexual devices were kept in the home, but denied ever using the devices on the girls or ever showing the girls how to use the devices. The statement was tape-recorded and later transcribed.

Prior to Trial

Roger filed a motion to suppress, claiming that the statement he gave to the police was not given voluntarily. Although it found portions of the tape inaudible, the district court denied the motion to suppress, concluding that the statement was given freely, voluntarily, and intelligently. The court found that Roger was given his *Miranda* rights orally and in writing prior to giving his statement.

Roger filed two motions in limine before trial. In the first motion, Roger objected to the admissibility of all the evidence seized at his house, claiming that it was irrelevant to the charges filed in his case and that to the extent any such evidence was relevant, its probative value was outweighed by its prejudicial effect. In his second motion, Roger objected to the admissibility of the statement he made to the police. Roger claimed that the quality of the recording was poor, that the recording consisted primarily of police accusations denied by Roger, and that the probative value of the tape was outweighed by its prejudicial effect. In his motion to redact, Roger alleged that portions of his statement were inadmissible, including all accusations made by the police, all references to uncharged misconduct, and all irrelevant comments made by the police or Roger.

We limit our review of the court's order on the admissibility of evidence to the evidence at issue in Roger's appeal. The court found that the motions presented two issues: (1) whether the evidence seized was prohibited as rule 404(2) character evidence, see Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), and (2) whether Roger's statement was admissible at trial. In reviewing the first issue, the court divided the evidence at issue into two categories: (1) *material seized* which included the sexual devices and sexually explicit videos and (2) *Roger's conduct*

which included Roger's viewing a sexually explicit film with the girls on New Year's Eve (New Year's Eve video).

As to the child abuse charges, the district court determined that the evidence of sexual devices, sexually explicit videos, and the New Year's Eve video were direct evidence of child abuse and not rule 404(2) evidence. As to the first degree sexual assault on a child, the district court determined that the evidence of sexual devices and sexually explicit videos were not prior conduct under rule 404(2). The court determined that this evidence made up a relevant description of the crime scene which, according to the court, the State was entitled to present. As to the New Year's Eve video, the court determined that it was not evidence of an element of first degree sexual assault on a child. However, the court held that the New Year's Eve video had a proper purpose under rule 404(2). It determined that it was admissible as evidence of plan and preparation for sexual assault and thus was not barred as rule 404(2) evidence.

As to the admissibility of Roger's statement, the district court overruled Roger's motion in limine, but granted in part Roger's motions to redact, listing the portions to be redacted in its order. The court overruled the motions to redact as to all other portions not listed in its order.

TRIAL

Both girls testified at trial. Each testified that they had engaged in fellatio with Roger and that Donna had watched and participated on some occasions. They also testified that Roger sexually touched their vaginas. According to S.M., on at least one occasion, Donna actively participated in the sexual activity when Roger sexually touched S.M.'s vagina. Both girls further testified that they had watched Donna engage in fellatio with Roger. According to the girls, Donna often went about the house nude and Roger went about the house partially nude. Their testimony also revealed that Roger took nude photographs of both girls.

Each girl testified about the material seized from the home, including the sexual devices and sexually explicit videos. S.M. testified that she had taken two sexual devices from her parents' bedroom without her parents' knowledge. She also remembered asking Donna how to use them. Both girls testified that they had

used the sexual devices. M.M. kept her device under her pillow, and S.M. kept her device on top of her dresser next to the bed.

As to the sexually explicit videos found in the house, each girl testified that the videos were stored in an unlocked video cabinet near the television. They testified that they had watched some of the videos. According to M.M., Donna had once caught them watching a sexually explicit video and had told them not to watch it again.

Both girls also testified about Roger's conduct. They each testified about watching the New Year's Eve video with Roger, but said that Donna was not home when they watched it. In addition, the girls testified about the new rule announced by Roger which would have required them to go around the house naked on the weekends.

Also called to testify were the two police officers who took Roger's statement at the police station. Both officers testified about portions of the statement, but the statement itself was not admitted into evidence. According to the officers, Roger admitted to knowing that the girls had watched some adult videos. Roger further admitted that due to his disability, he required assistance in using the bathroom, and that the girls, in assisting him, had seen him nude on occasion. The officers also testified that Roger admitted to inspecting the girls' vaginas for hygienic purposes only, but denied ever touching the girls in a sexual manner. No reference was made to Donna by either officer while testifying about Roger's statement.

At the conclusion of the trial, the jury found Roger guilty of all charges.

ASSIGNMENTS OF ERROR

Roger assigns, rephrased, that the district court erred (1) in failing to suppress his statement to police, (2) in admitting evidence of sexual devices at trial, (3) in admitting sexually explicit videos at trial, and (4) in determining that the evidence was insufficient to sustain the verdicts.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress will be upheld unless its findings are clearly erroneous. *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999).

[2] 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 discretion. *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002).

[3] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003).

ANALYSIS

STATEMENT

Roger argues in his first assignment of error that the district court erred in overruling his motion to suppress the statement he made to the police. Roger claims that he was continually hounded by the police to tell the truth, thereby rendering the statement involuntary. We first note that Roger's statement was not admitted into evidence at trial nor was the tape played for the jury. However, two police officers, who were present during Roger's statement, did testify about portions of Roger's statement. Thus, we consider whether the statement was voluntary.

[4,5] In making the determination of whether a statement is voluntary, a totality of the circumstances test is applied, and the determination reached by the trial court will not be disturbed on appeal unless clearly wrong. *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000). A statement of a suspect, to be admissible, must be shown by the State to have been given freely and voluntarily and not to have been the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the

occurrence when the statement is made. *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991).

The record reveals that Roger agreed to talk with the police after being advised of his *Miranda* rights, both orally and in writing. He never exercised his right to an attorney during the interview. In addition, there is no evidence that Roger was coerced or induced into making the statement. Despite the alleged improper "hounding" by the police to "tell the truth," Roger maintained, throughout the interview, that he was innocent of all the charges. He generally denied the allegations made against him and never changed his story. After considering the nature and extent of the interview, we conclude that the district court was not clearly wrong in concluding that Roger's statement was given freely, intelligently, and voluntarily.

[6] Roger also argues that portions of the tape are inaudible and thus make the entire statement suspect and inadmissible. This argument was made in Roger's motion in limine prior to trial. At trial, Roger's counsel objected to the admissibility of the statement on the basis of the *motion to suppress*, which did not raise the issue of the tape's quality. He did not object on the basis of the motion in limine. Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). Because the objection at trial was not on the specific grounds alleged in the motion in limine, we conclude that the issue raised by the motion in limine is not properly preserved on appeal.

EVIDENCE

In his second and third assignments of error, Roger alleges it was error to admit the evidence of sexual devices and sexually explicit videos at trial. He claims that the trial testimony does not support the court's ruling on the admissibility of evidence made prior to trial.

[7] In all proceedings where the Nebraska Evidence Rules apply, the 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. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002). Because the exercise of judicial discretion is implicit in rule 401, it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 401, 403, and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion. *State v. Aguilar, supra.*

Prior to trial, in its ruling on the admissibility of evidence, the district court determined that the evidence of sexual devices and other sexually explicit videos was not rule 404(2) evidence. The court concluded that this evidence was offered to describe the crime scene and that its probative value to establish the crime scene was not substantially outweighed by any potential unfair prejudice under rule 403. Implicit in the court's ruling was a finding that the evidence was relevant under rule 401.

On appeal, Roger asserts that there was no evidence adduced at trial which establishes that he had any knowledge that the girls possessed or used sexual devices and that thus, it was error to admit the evidence of sexual devices. He also claims that the evidence of sexually explicit videos is inadmissible because it is irrelevant to the crimes charged, is unfairly prejudicial, and is propensity-type evidence.

In this case, Roger was charged with two counts of child abuse, which requires the State to prove that Roger knowingly, intentionally, or negligently caused or permitted the girls to be placed in a situation that endangered their physical or mental health. See Neb. Rev. Stat. § 28-707 (Cum. Supp. 2002). Roger was also charged with first degree sexual assault on a child. First degree sexual assault on a child is committed by "[a]ny person who subjects another person to sexual penetration . . . when the actor is nineteen years of age or older and the victim is less than sixteen years of age." Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995). Pursuant to Neb. Rev. Stat. § 28-318(6) (Reissue 1995), sexual penetration means

> 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.

[8] We first consider whether the evidence of sexual devices and sexually explicit videos is relevant. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003). We determine that the evidence of sexual devices and sexually explicit videos, which were in the home and accessible to the girls, is relevant evidence of child abuse. This evidence would have some tendency to prove a pattern of child abuse regardless of whether Roger did or did not have knowledge of certain facts.

[9-11] We next consider whether the evidence is prohibited by rule 404(2). Rule 404(2) 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.

Stated another way, rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2). *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002); *State v. Sanchez, supra.* In deciding whether evidence under rule 404(2) is evidence of the crime charged, we have determined that bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the rule 404(2) coverage. *State v. Aguilar, supra.*

We conclude that the evidence of sexual devices and sexually explicit videos is not evidence of prior unrelated bad acts under rule 404(2), but is relevant evidence that forms the factual setting of the crimes charged. The State is allowed to present a coherent picture of the facts of the crimes charged. The State did

not introduce the evidence to prove that Roger had the propensity or the character to act in a certain way. Instead, the evidence explains the circumstances of the McPherson home where the alleged crimes took place. The sexual devices were found in Roger and Donna's bedroom and in the girls' bedroom. S.M. kept her sexual device in plain view on her dresser. The sexually explicit videos were stored in an unlocked video cabinet near the television, which was easily accessible by the girls. There is also testimony that Roger had knowledge that the girls had watched the New Year's Eve video. The evidence is so closely intertwined with both crimes charged that it cannot be considered extrinsic and therefore is not governed by rule 404(2). The evidence tends to prove Roger's knowledge of the situation in which he placed the girls. It also proves that a situation existed that endangered the girls' physical or mental health. Because the evidence is so closely intertwined with the crimes charged, we determine that the evidence of sexual devices and sexually explicit videos was properly admitted at trial. The evidence is not rule 404(2) evidence. We also conclude that the sexual devices and sexually explicit videos do not violate rule 403 because the probative value of describing the McPherson home and living conditions is not substantially outweighed by any prejudice to Roger. The trial testimony establishes that the sexual devices and sexually explicit videos were easily accessible to the girls and were often kept in plain view of Roger and Donna.

Sufficiency of Evidence

[12,13] In his final assignment of error, Roger alleges that there is insufficient evidence to support the convictions for child abuse and first degree sexual assault on a child. Roger bases this argument on the girls' inconsistent testimonies at trial. In essence, Roger's assignment of error attacks the credibility of the witnesses. Witness credibility, however, is not to be reassessed on appellate review. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and

construed most favorably to the State, is sufficient to support the conviction. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Jackson, supra.*

Viewed in a light most favorable to the State, we determine there is sufficient evidence beyond a reasonable doubt to support Roger's convictions for child abuse. Both girls testified that they performed fellatio on Roger. It is also uncontroverted that the girls had access to sexual devices and sexually explicit videos. Some of this evidence was kept in plain view of Roger. Both girls also testified that they had watched the New Year's Eve video with Roger. It is also undisputed that Roger and Donna often went around the house nude or partially nude. Although the girls' testimony was inconsistent at times, it was rational for the trier of fact to have concluded that Roger knowingly and intentionally permitted the girls to be placed in a situation that endangered their physical or mental health.

There is also sufficient evidence in the record to support Roger's convictions for first degree sexual assault on a child. S.M. testified that Roger digitally penetrated her vagina and that both girls had performed fellatio on Roger, which is evidence that Roger sexually penetrated S.M. and M.M. Viewing the evidence in the light most favorable to the prosecution, we determine there is sufficient evidence to sustain a finding that Roger sexually assaulted S.M. and M.M. This assigned error is without merit.

CONCLUSION

The district court did not err in concluding that Roger's statement to the police was voluntary. We also conclude that it was not error to admit the evidence of sexual devices and sexually explicit videos. Furthermore, there is sufficient evidence in the record to support the convictions. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JAMES E. MITCHELL, RESPONDENT.

670 N.W.2d 768

Filed September 19, 2003. No. S-02-1507.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

On December 31, 2002, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, James E. Mitchell. Respondent's answer disputed certain of the allegations. A referee was appointed and heard evidence. The referee filed a report on August 1, 2003. With respect to the single count in the formal charges, the referee concluded that respondent's conduct had breached disciplinary rules of the Code of Professional Responsibility and his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended the respondent be publicly reprimanded. Neither relator nor respondent filed exceptions to the referee's report. Relator filed a motion for judgment on the pleadings under Neb. Ct. R. of Discipline 10(L) (rev. 2001).

FACTS

Respondent was admitted to the practice of law in the State of Nebraska in 1995. He has practiced in Douglas County.

The substance of the referee's findings may be summarized as follows: The single count of the formal charges surrounds respondent's handling of a case involving a client who was charged with violating a protection order. The detailed facts as found by the referee are not disputed by the parties and are not repeated here. In sum, respondent was engaged to represent Miguel Ramos in Douglas County Court. Ramos was charged with violating the protection order. Because Ramos was a non-U.S. citizen, the referee found that the charges could affect Ramos' immigration status with the Immigration and Naturalization Service (INS). Trial

on the charges was scheduled for April 25, 2001. Respondent sought a continuance because he felt that he needed a third-party witness to testify on behalf of Ramos and the witness was unavailable on the scheduled trial date. On April 20, the county court judge denied respondent's request for a continuance. On the same day, respondent filed a "Notice of Intent to Prosecute Appeal" of the county court's order denying his requested continuance. The referee found that respondent believed the filing of the notice would deprive the county court of jurisdiction.

The referee further found that on April 25, 2001, the respondent was "summarily summoned to [the county court judge's] Courtroom and informed in no uncertain terms by [the judge] that the trial would proceed on that date." The referee found that respondent was not prepared for trial. The trial proceeded, and the referee further found that respondent "chose not to represent . . . Ramos at the trial." According to the referee's report, respondent elected to stand on his notice of intent to appeal and to take the position that the county court had no jurisdiction to proceed with the trial. Ramos was convicted by the county court.

Respondent appealed the convictions to the Douglas County District Court, and the referee found that respondent "fully perfected that appeal and in fact filed a Brief with [the district court]." The district court upheld Ramos' convictions.

The referee found that respondent then filed an appeal with the Nebraska Court of Appeals. Respondent failed to file a brief with the Court of Appeals, and the appeal was dismissed due to respondent's failure to file a brief. See *State v. Ramos*, 10 Neb. App. lv (Nos. A-01-1095, A-01-1096, Feb. 4, 2002).

The referee found that during the entirety of the pendency of the county court proceedings, Ramos was incarcerated and "was under a cloud concerning his resident alien status by the INS at all times material hereto." The referee further found that Ramos wanted to challenge his convictions on the protection order charges and "wanted to stay in the country as long as possible (even though that might have been in jail)." In August 2001, subsequent to his convictions by the county court on the violation of protection order charges, Ramos was deported.

The referee found by clear and convincing evidence that as a result of respondent's failure to fully or adequately represent

Ramos at trial or on appeal, respondent had violated Canon 1, DR 1-102(A)(1) (disciplinary rule violation), and DR 1-102(A)(6) (conduct adversely reflecting on fitness to practice law); Canon 6, DR 6-101(A)(2) (inadequate preparation), and DR 6-101(A)(3) (neglect); Canon 7, DR 7-101(A)(1) (failure to seek client's lawful objectives), DR 7-101(A)(2) (failure to carry out contract of employment with client for professional services), and DR 7-101(A)(3) (prejudice or damage to client during professional relationship). The referee also found that respondent had violated his oath of office as an attorney.

With respect to the sanction which ought to be imposed for the foregoing violations, and considering the mitigating factors the referee found present in the case, the referee recommended the respondent should be publicly reprimanded.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings under rule 10(L). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Hart*, 265 Neb. 649, 658 N.W.2d 632 (2003). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude that the formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted.

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Sipple*, 265 Neb. 890, 660 N.W.2d 502 (2003). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Hart, supra.*

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1) and (6), DR 6-101(A)(2) and (3), and DR 7-101(A)(1), (2), and (3). We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Hart, supra*; *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Id.*

The evidence in the present case establishes, inter alia, that respondent neglected a legal matter entrusted to him, failed to pursue Ramos' legal objectives, and acted in a manner which prejudiced Ramos. As mitigating factors, we note the isolated nature of respondent's misconduct, his cooperation during the disciplinary proceedings, and his lack of any prior disciplinary

record. Specifically, the referee found that the respondent had "learned a lesson in this whole matter . . . and seems willing to reform and be more diligent in the future."

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court agrees with the referee's recommendation and finds that respondent should be publicly reprimanded.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that respondent should be and is hereby publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF PUBLIC REPRIMAND.

WALLACE JOSEPH BIG CROW, FATHER OF DECEASED AND AS ADMINISTRATOR OF THE ESTATE OF RICHARD LEE BIG CROW, DECEASED, APPELLANT, V. CITY OF RUSHVILLE, NEBRASKA, APPELLEE.

669 N.W.2d 63

Filed September 26, 2003. No. S-01-1055.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Political Subdivisions Tort Claims Act: Notice: Time.** Because compliance with statutory time limits such as that set forth in Neb. Rev. Stat. § 13-906 (Reissue 1997) can be determined with precision, the doctrine of substantial compliance has no application in these circumstances.
4. **Political Subdivisions Tort Claims Act: Notice: Pleadings.** Noncompliance with Neb. Rev. Stat. § 13-906 (Reissue 1997) must be pled as an affirmative defense.
5. **Political Subdivisions Tort Claims Act: Tort Claims Act.** Generally, provisions in the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act.

6. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pleaded.
7. **Supreme Court: Courts: Appeal and Error.** Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Sheridan County, PAUL D. EMPSON, Judge. Judgment of Court of Appeals affirmed.

Rena M. Atchison, of Abourezk & Zephier, P.C., for appellant.

Terrance O. Waite and Keith A. Harvat, of Waite, McWha & Harvat, for appellee.

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

STEPHAN, J.

This appeal presents procedural issues arising under Nebraska's Political Subdivisions Tort Claims Act. The Nebraska Court of Appeals reversed a summary judgment entered by the district court for Sheridan County in favor of the City of Rushville (the City) and remanded the cause for further proceedings in the district court. *Big Crow v. City of Rushville*, 11 Neb. App. 498, 654 N.W.2d 383 (2002). We granted the City's petition for further review and now affirm the judgment on appeal, although our reasoning differs in some respects from that of the Court of Appeals.

FACTS

The uncontroverted facts upon which the district court entered summary judgment are fully set forth in the opinion of the Court of Appeals, and we therefore include only those most relevant to the resolution of this appeal. See *Big Crow v. City of Rushville, supra.* In the early morning hours of November 1, 1998, Richard Lee Big Crow (Richard) was killed in a motor vehicle-pedestrian accident approximately one-half mile outside the City. Wallace Joseph Big Crow (Big Crow), the administrator of Richard's estate, served written notice of a claim against

the City pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997), on October 26, 1999. The City did not respond to the claim, and on April 21, 2000, Big Crow filed suit in the district court for Sheridan County. Section 13-906 provides:

> No suit shall be permitted under the Political Subdivisions Tort Claims Act . . . unless the governing body of the political subdivision has made final disposition of the claim, except that if the governing body does not make final disposition of a claim within six months after it is filed, the claimant may, by notice in writing, withdraw the claim from consideration of the governing body and begin suit . . . .

It is undisputed that Big Crow filed suit 7 days prior to the end of the 6-month period prescribed in § 13-906 without first withdrawing his claim from the City.

After filing an answer, the City filed a motion for summary judgment on the ground that "[t]he pleadings, discovery responses, depositions and affidavits show that there is no genuine issue as to any material fact regarding issues raised in the Plaintiff's Amended Petition and that the Defendant is therefore entitled to judgment as a matter of law." Big Crow filed responsive briefs in which he essentially acknowledged that the only issue to be resolved on summary judgment was whether the suit was timely filed, but specifically objected to the issue's being addressed on summary judgment when it was not raised in the City's answer. The trial court sustained the City's motion for summary judgment, finding that Big Crow failed to comply with the time requirements of § 13-906.

Big Crow appealed, arguing both that the trial court erred in addressing the affirmative defense of noncompliance with the act when the City did not raise the defense in its answer and that he had substantially complied with the requirements of the act. *Big Crow v. City of Rushville, supra.* The Court of Appeals determined that noncompliance with § 13-906 is an affirmative defense that must be raised by a party. It further determined that the defense was not pled in the City's answer, but that the right to have the defense specifically pled was waived because Big Crow's counsel was aware that the issue was being asserted by the City as a basis for summary judgment. The Court of Appeals

further concluded that Big Crow's filing of suit in the district court 7 days prior to the expiration of the 6-month period set forth in § 13-906 substantially complied with the act, and thus it reversed the judgment of the district court.

ASSIGNMENTS OF ERROR

In its petition for further review, the City assigns, restated, that the Court of Appeals erred in (1) interpreting the Political Subdivisions Tort Claims Act, (2) determining that filing suit before the 6-month period has expired is substantial compliance with the act, (3) determining that the City was not prejudiced by the early filing, and (4) reversing the district court's order granting the City summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003); *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Borley Storage & Transfer Co. v. Whitted*, 265 Neb. 533, 657 N.W.2d 911 (2003); *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003).

ANALYSIS

The City's primary argument is that the Court of Appeals erred in concluding that filing suit 7 days prior to the expiration of the 6-month period prescribed by § 13-906 is substantial compliance with the act. The Court of Appeals relied upon *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988). In that case, we addressed whether a letter sent by the plaintiff to a political subdivision " 'set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant' " when it failed to give the exact time and precise location of the occurrence. *Id.* at 361, 417

N.W.2d at 761. See § 13-905 (previously codified at Neb. Rev. Stat. § 23-2404 (Reissue 1983)). We held that the "claim" required by this section was intended to give a political subdivision notice of possible liability for its recent act or omission and that the notice requirements of the Political Subdivisions Tort Claims Act should be liberally construed so as to not deny relief to a meritorious claim. Because the written claim gave general notice of the time and place of the occurrence, we held that it substantially complied with the requirements of the act.

[3] Unlike the statutory notice provision at issue in *Chicago Lumber Co., supra*, § 13-906 does not state general requirements. Rather, it explicitly states that no suit can be brought in district court unless 6 months have passed without a resolution of a properly filed claim by the political subdivision. 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. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003); *In re Estate of Pfeiffer*, 265 Neb. 498, 658 N.W.2d 14 (2003). Because compliance with statutory time limits such as that set forth in § 13-906 can be determined with precision, the doctrine of substantial compliance has no application in these circumstances. We therefore specifically disapprove the holding of the Court of Appeals in this regard.

[4,5] There remains, however, the question of whether noncompliance with § 13-906 was properly raised as an issue before the district court. As a starting point for this analysis, we agree with the Court of Appeals that "[n]oncompliance with § 13-906 must . . . be pled as an affirmative defense." *Big Crow v. City of Rushville*, 11 Neb. App. 498, 503, 654 N.W.2d 383, 388 (2002). In *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002), released within days of the Court of Appeals' opinion in this case, we addressed the effect of a plaintiff's failure to comply with Neb. Rev. Stat. § 81-8,213 (Reissue 1996), a provision of the State Tort Claims Act. Section 81-8,213 provides in relevant part that a claim filed with the State Claims Board may be withdrawn and suit initiated in district court only if the board has not acted on the claim within 6 months. This provision in the State

Tort Claims Act is the functional equivalent of § 13-906. *Cole* held that a plaintiff's failure to comply with the provisions of § 81-8,213 was an affirmative defense that must be raised by a defendant in an answer or demurrer. Generally, provisions in the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act. *Cole v. Isherwood, supra*; *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994). Because the 6-month requirement in § 13-906 is substantially similar to the 6-month requirement in § 81-8,213, we conclude, as did the Court of Appeals, that noncompliance with § 13-906 is an affirmative defense.

While not disputing this point, the City argues that the Court of Appeals erred in determining that it failed to plead the defense in its answer and requests that we reverse this determination on further review. In his brief on further review, Big Crow argues that the Court of Appeals correctly determined that the City failed to plead noncompliance with § 13-906 as an affirmative defense, but erred in concluding that this failure did not constitute a waiver of the defense. We consider these arguments as relating to a single issue which is properly before us on further review, namely, whether the City waived the affirmative defense of noncompliance with § 13-906 by failing to plead it.

In its answer, the City generally admitted that it did not make final disposition of the claim after receiving notice pursuant to the act. It generally denied all allegations not admitted, and alleged that the operative amended petition "fails to state a cause of action against this Defendant, a political subdivision of the State of Nebraska." Although the answer asserts the affirmative defenses of comparative negligence and assumption of risk, there is no affirmative allegation that the claim is barred by Big Crow's noncompliance with § 13-906.

In *Millman v. County of Butler*, 235 Neb. 915, 932, 458 N.W.2d 207, 217 (1990), we held that a general denial included in the answer filed by a political subdivision did not raise the issue of noncompliance with the notice provision of the act which, we said, "must be raised as an affirmative defense specifically expressing the plaintiff's noncompliance with the notice requirement of § 13-905." Applying the same reasoning, we conclude that the general admissions and denial set forth in the

City's answer in this case do not expressly raise an affirmative defense based upon noncompliance with § 13-906. For the same reason, this defense was not raised by the City's general allegation that the petition failed to state a cause of action. See *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002). Thus, we agree with the Court of Appeals' determination that the City did not raise the affirmative defense of noncompliance in its answer.

We disagree, however, with the Court of Appeals' determination that the City's failure to plead the defense was in some manner excused or waived by the fact that Big Crow's attorney was aware that the City was asserting it as a basis for summary judgment. In this regard, the Court of Appeals relied upon a document filed by Big Crow's counsel in the district court expressing her understanding, after conferring with counsel for the City, that the only issue to be addressed in the summary judgment proceeding was "the legal issue of sufficient notice to the City of Rushville." Neither this document nor the City's previously filed motion for summary judgment make any reference to a defense based upon noncompliance with § 13-906. Moreover, in a document subsequently filed with the district court entitled "Plaintiff's Final Response in Opposition to Defendant's Motion for Summary Judgment," Big Crow's counsel argued that any claim of noncompliance with the notice provisions of the act "is an affirmative defense which must be specifically plead in the answer or a demurrer," and that the City failed to do so. This statement is directly contrary to the Court of Appeals' conclusion that "Big Crow waived any right to avoid, by relying on the City's failure to specifically plead the defense, the defense of noncompliance with the [Political Subdivisions Tort Claims] Act." *Big Crow v. City of Rushville*, 11 Neb. App. 498, 505, 654 N.W.2d 383, 389 (2002).

Of greater concern, however, is the legal premise upon which the Court of Appeals based this factual conclusion; namely, that "[i]f a defendant can waive a defense by not asserting it, it logically follows that a plaintiff can waive the right to have a defense specifically pled." *Id.* at 504-05, 654 N.W.2d at 389. The Court of Appeals found support for this proposition in *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982), where we held that a res judicata defense

specifically raised in a defendant's motion for summary judgment filed *prior* to answer was sufficient to afford the plaintiff notice of the defense. The instant case is distinguishable in that the motion for summary judgment was filed *subsequent* to the answer, and *neither* document made specific reference to a defense based upon noncompliance with § 13-906.

The circumstances of this case more closely resemble those before us in *Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998). There, a patient brought a professional negligence action against a substance abuse treatment center and a counselor. The defendants did not demur to the petition and did not assert a statute of limitations defense in their answer. Instead, they asserted the defense for the first time in a motion for summary judgment filed after their answer. We held that a statute of limitations defense is waived unless asserted by demurrer or answer, reasoning that a court may not enter summary judgment on an issue not presented by the pleadings, and that the only pleadings allowed in Nebraska are the petition, the answer or demurrer by the defendant, the demurrer or reply by the plaintiff, and the demurrer to the reply by the defendant. *Id.*, citing *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997), and Neb. Rev. Stat. § 25-803 (Reissue 1995).

[6] The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pleaded. *Welsch v. Graves, supra*; *Buffalo County v. Kizzier*, 250 Neb. 180, 548 N.W.2d 757 (1996). This principle, as applied in *Welsch*, controls this case. The City waived the issue of noncompliance with § 13-906 by not affirmatively alleging it in its answer, and the issue was therefore not presented by the pleadings when the City's motion for summary judgment was submitted to the district court. We need not consider whether the defense could have been asserted by amended answer prior to submission of the motion for summary judgment because there is no indication in the record that the City ever sought to do so.

CONCLUSION

[7] Because noncompliance with § 13-906 is an affirmative defense which the City did not plead and therefore waived, the

district court erred in entering summary judgment in favor of the City on the ground that Big Crow had not complied with the time limitations imposed by that statute. Upon further review from a judgment of the Court of Appeals, this court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). For reasons different from those stated by the Court of Appeals, we conclude that the summary judgment entered by the district court should be reversed, and we affirm the judgment of the Court of Appeals to that effect.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. JOHN L. LOTTER, APPELLANT AND CROSS-APPELLEE.

669 N.W.2d 438

Filed September 26, 2003. Nos. S-02-1072 through S-02-1074.

1. **Motions for New Trial: Evidence: Appeal and Error.** A motion for DNA testing is similar to a motion for new trial based on newly discovered evidence. Therefore, a motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **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.
3. **Trial: Evidence: Appeal and Error.** In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
4. **Motions for New Trial: Prisoners: Homicide.** A prisoner cannot insist as a matter of right that he be personally present at a hearing on a motion for new trial following a first degree murder conviction.
5. **Due Process.** The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.
6. **Motions for New Trial.** A person convicted of a felony who was represented by counsel cannot, as a matter of right, insist on being present at the time of filing, the argument, or the ruling upon his motion for new trial.
7. **Statutes.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.

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

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

Jon Bruning, Attorney General, and Marie Colleen Clarke for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

John L. Lotter appeals from an order of the district court for Richardson County which overruled his amended motion for DNA testing pursuant to the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002).

II. SCOPE OF REVIEW

[1] A motion for DNA testing is similar to a motion for new trial based on newly discovered evidence. Therefore, a motion for DNA testing 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. See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

[2] 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. *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002).

[3] In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Poe, ante* p. 437, 665 N.W.2d 654 (2003).

III. FACTS

1. BACKGROUND

Lotter was convicted of three counts of first degree murder, three counts of use of a weapon to commit a felony, and one count of burglary. He was sentenced to death for each count of first degree murder and to incarceration on the burglary and use of a weapon convictions. We vacated the sentence on the burglary

conviction but affirmed the convictions and sentences on all other charges in *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999). A thorough recitation of the facts in the underlying case is set forth in that opinion. In *State v. Lotter, ante* p. 245, 664 N.W.2d 892 (2003), we affirmed the district court's denial of Lotter's motions for postconviction relief, new trial, and writ of error coram nobis.

2. Case at Bar

On December 20, 2001, Lotter filed a pro se motion for DNA testing pursuant to the DNA Testing Act. At the direction of the district court, the State filed an inventory listing several items containing biological evidence. In response to a motion for summary dismissal filed by the State, counsel for Lotter filed an amended motion for DNA testing. The State's motion for summary dismissal was overruled, and Lotter was granted a hearing on his amended motion.

In Lotter's amended motion for DNA testing, he alleged that he intended to utilize the "PowerPlex 16" amplification and multiplex identification system with the "ABI Prism 310 Genetic Analyzer" to test items containing biological evidence, including a pair of yellow work gloves; cuttings taken from the gloves; shoes and clothing of his accomplice, Thomas M. Nissen, also known as Marvin T. Nissen; and known comparison blood samples from the murder victims, Teena Brandon, Lisa Lambert, and Phillip DeVine. Lotter alleged that evidence of high-velocity blood spatter from Brandon or the presence of DNA from Lambert and/or DeVine on Nissen's gloves, shoes, or clothing would establish that Nissen was not in the locations that he described in his trial testimony. Lotter further alleged that DNA tests would establish that Nissen lied during his testimony and that Nissen, not Lotter, was holding the gun at the time all three victims were murdered.

Evidence at Lotter's trial indicated that the yellow work gloves worn by Nissen at the time of the crime contained two areas that tested positive for blood. The serologist did not conduct additional tests because further testing would have consumed the sample and the serologist had been instructed by defense counsel to preserve the evidence for independent analysis.

Prior to the hearing on Lotter's amended motion for DNA testing, he filed an application for writ of habeas corpus ad prosequendum, requesting that he be allowed to attend the hearing. The district court denied the application, and the hearing proceeded in Lotter's absence.

At the hearing on his amended motion for DNA testing, Lotter submitted the affidavit of Ronald Rubocki, Ph.D., and portions of the trial record relevant to his motion. The State submitted the affidavit of Charlotte Word, Ph.D., and the bill of exceptions from Lotter's trial and postconviction proceedings. The district court denied Lotter's amended motion for DNA testing, concluding that such testing would not result in noncumulative, exculpatory evidence relevant to any claim that Lotter was wrongfully convicted or sentenced.

Lotter timely appealed, and the district court granted his motion to proceed in forma pauperis on appeal to this court.

IV. ASSIGNMENTS OF ERROR

Lotter assigns that the district court erred (1) in refusing to allow DNA testing of evidence in the possession of the State, as required by the DNA Testing Act, and (2) in refusing to allow Lotter to attend the hearing on his amended motion for DNA testing, in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution.

On cross-appeal, the State assigns, restated, that the district court erred in its conclusions of law and fact pertaining to whether DNA testing was "effectively not available at the time of trial." See § 29-4120(5).

V. ANALYSIS

1. DNA Testing Act

Section 29-4120, which sets forth the procedure for obtaining postconviction DNA testing, provides in relevant part:

> (1) Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material that:

> (a) Is related to the investigation or prosecution that resulted in such judgment;
>
> (b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and
>
> (c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.
>
> . . . .
>
> (5) Upon consideration of affidavits or after a hearing, the court shall order DNA testing pursuant to a motion filed under subsection (1) of this section upon a determination that such testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

Section 29-4119 defines exculpatory evidence as "evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody."

2. Denial of Request for DNA Testing

Lotter assigns as error that the district court should have allowed DNA testing of evidence in possession of the State. In the case at bar, the issue to be determined is whether DNA testing requested by Lotter in his amended motion "may produce noncumulative, exculpatory evidence relevant to [his] claim that [he] was wrongfully convicted or sentenced." See § 29-4120(5).

We will first examine the arguments made by Lotter and the State and the district court's order. We will then analyze whether the DNA testing requested by Lotter would affect his convictions or sentences.

(a) Lotter's Argument

Lotter claims that the requested DNA testing may produce noncumulative, exculpatory evidence in his favor. He argues that the district court was simply wrong in its interpretation of what

is required before DNA testing must be ordered. He asserts that under the court's logic, a videotape of Nissen shooting all three victims would likewise fail to change Lotter's guilty verdicts or death sentences.

Lotter also argues that favorable DNA evidence may support the theory that he was innocent of all three murders. He contends that because there was only circumstantial evidence placing him with Nissen hours before the shootings and with Nissen after the murders, the only evidence that Lotter caused harm to anyone came from Nissen's testimony. Lotter claims that blood spatter from the victims on Nissen's gloves, shoes, or clothing would establish that Nissen was very close to the victims when they were shot and that Nissen was not at the locations he described in his trial testimony. Lotter asserts that such DNA test results would aid in establishing that Nissen lied at trial and would prove that Nissen shot all three victims.

Lotter further argues that favorable DNA evidence may support the admissibility of Nissen's admissions to Jeff Haley, which were excluded as evidence at Lotter's postconviction hearing, by providing additional circumstantial guarantees of trustworthiness. Haley testified via deposition that he was Nissen's cellmate at the Lincoln Correctional Center in 1997. Nissen was reading a book at that time about the Brandon murder and was upset because he felt it contained lies. According to Haley, Nissen showed him the autopsy photographs of the victims and explained and demonstrated in detail how he shot and killed all three victims. Nissen told Haley that while Nissen was shooting the victims, Lotter was "freaking out and running around," saying, "What are you doing? What are you doing?" According to Haley, Nissen stated that he should have shot Lotter as well, and then there would have been no witnesses. Lotter contends that DNA evidence of the victims' blood on the gloves, shoes, or clothing worn by Nissen would enhance the trustworthiness of Nissen's alleged statements.

We note that on Lotter's postconviction appeal, we concluded that the district court did not err in determining that these statements were inadmissible under Neb. Rev. Stat. § 27-804(2)(c) (Reissue 1995) "[b]ecause there [were] no circumstances which 'clearly indicate[d] the trustworthiness' of Nissen's statements

to Haley." See *State v. Lotter, ante* p. 245, 266, 664 N.W.2d 892, 911-12 (2003).

Lotter also argues that favorable DNA evidence may exclude him from being "death eligible." He asserts that the district court failed to recognize the importance of determining who the shooter was when the death penalty is at issue. Lotter contends that under the 8th and 14th Amendments to the U.S. Constitution, there must be a finding that the defendant killed, attempted to kill, or intended that a killing take place or a finding that the defendant was a major participant in the felony and exhibited reckless indifference to human life. See, *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987); *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). Lotter argues that if the sentencing panel or jury had DNA test results indicating that one or more of the victims' blood was on Nissen's gloves, shoes, or clothing, then it would not have decided beyond a reasonable doubt that Lotter shot all three victims. Lotter asserts that without a finding that he shot all three victims, he could not have been sentenced to death.

Lotter next asserts that favorable DNA evidence may preclude the application of aggravating circumstance (1)(e) to his case. See Neb. Rev. Stat. § 29-2523 (Reissue 1995) (version of law in effect at time of Lotter's sentencing). He contends that the plain language of aggravating circumstance (1)(e) is only applicable when a defendant was the "actual 'triggerman.'" See brief for appellant at 27. He asserts that aggravating circumstance (1)(e) does not allow for its application to one found guilty as an accomplice or one who aided and abetted a felony murder.

Lotter also argues that favorable DNA evidence may exclude the application of aggravating circumstances (1)(b) and (1)(h). He argues that these aggravating circumstances can be applied only if the evidence establishes that Lotter was the shooter. He contends that the determination by the sentencing panel that these aggravating circumstances applied to Lotter was based solely on Nissen's testimony.

Finally, Lotter argues that the district court should not, and indeed cannot, under the terms of the DNA Testing Act, prejudge how exculpatory or mitigating results may theoretically be applied to a case before the results are known. He asserts that

only after obtaining the results will the court be confronted with the question of whether the results are sufficient to warrant vacating the convictions, vacating the sentences, granting a new trial, or granting a new sentencing hearing.

(b) State's Argument

The State argues that DNA evidence would not establish that Lotter was wrongfully convicted. The State first points out that Lotter was charged on three theories of first degree murder: premeditated murder, felony murder, and aiding and abetting. It asserts that the evidence was overwhelming that Lotter and Nissen shared the motive to silence Brandon, who had accused the two of sexually assaulting her. It also asserts the evidence showed that Lotter and Nissen planned Brandon's murder together and that together they murdered her and two witnesses to her murder.

The State argues that the evidence demonstrating these assertions includes, but is not limited to, testimony regarding (1) Lotter's theft of the gun used to murder the victims that same evening; (2) Lotter's successful efforts to obtain gloves from his family home, as well as a knife (with "Lotter" printed on the sheath) used by Nissen to stab Brandon; (3) the appearance of Lotter and Nissen together just prior to the murders at the home of Linda Gutierres, where both were seen wearing gloves; (4) statements attributed to Lotter by witnesses the evening of the murders, including a statement regarding his desire to kill someone; (5) the appearance of Lotter and Nissen together after the murders seeking alibi assistance from Rhonda McKenzie and Kandi Nissen (Kandi); and (6) observations by McKenzie and Kandi about a series of private discussions between Lotter and Nissen in Nissen's home the week preceding the murders.

The State also argues that Lotter is mistaken to presume that if blood from any of the victims is on the gloves, shoes, or clothing confiscated from Nissen, then somehow this would establish that Nissen, not Lotter, was the shooter. It argues that Lotter incorrectly assumes that only the shooter could possibly have blood from the victims on his gloves, shoes, or clothing. The State asserts that there was no evidence before the district court to support this illogical assumption given the number of other

plausible scenarios for how blood evidence may have come to be on the gloves, shoes, or clothing of someone present, participating in, and witnessing murders in small rooms at close range. It argues that such a conclusion ignores the fact that either direct or high-velocity transfers of blood could have occurred in several other ways.

The State contends that blood could have been transferred to Nissen's gloves, shoes, or clothing when he stood next to Brandon as she was shot by Lotter; when Nissen grabbed Brandon and stabbed her after she had been shot by Lotter; when Nissen stood near the bed as Lambert was shot in the abdomen; when Nissen took Lambert's baby from her arms after she had been shot in the abdomen by Lotter; when Nissen stood in the bedroom while Lotter shot Lambert in the head; when Nissen was in the living room, moving toward Lotter, as Lotter shot DeVine twice; and when Nissen was in physical contact with Lotter during or after the murders, including when Nissen was directed to hand his gloves to Lotter, who placed the gloves "end-over-end" over a box containing the bloody knife and the gun, and threw the bundle onto the frozen Nemaha River.

The State further argues that evidence adduced at the hearing on Lotter's amended motion for DNA testing further indicated that such evidence cannot establish how a particular DNA sample was deposited on a specific piece of evidence but may only assist in determining who is, or is not, the source of the DNA. The State asserts, therefore, that DNA testing could not establish Lotter's theory that Nissen shot and killed all three victims even if one or more of the victims' DNA is found on the gloves, shoes, or clothing worn by Nissen. The State also notes that Lotter had an opportunity to refute Nissen's account of what occurred at the crime scene when Lotter took the stand at his trial. Lotter testified at trial that he was not present when the murders took place.

The State contends that even if Lotter could establish through DNA testing that Nissen was the shooter, this would not demonstrate that Lotter was wrongfully convicted. It asserts DNA testing cannot establish that Lotter did not take part in the planning of the murders, that Lotter did not travel to Lincoln looking for Brandon in order to murder her, that Lotter did not steal the gun

or obtain the knife and gloves used in the murders, that Lotter did not take part in the burglary of the farmhouse, or that he was not present at the scene of the murders.

The State also asserts that DNA testing would not lead to noncumulative, exculpatory evidence relevant to Lotter's claim that he was wrongfully sentenced even if such testing were to convince a trier of fact that Nissen, rather than Lotter, was the shooter of all three victims. The State argues that Lotter's assumption that he would not have been sentenced to death if the sentencing panel had concluded that he was not the shooter is directly contrary to the sentencing order.

The State points out that the sentencing panel concluded that there was no appreciable difference in degree of culpability between Lotter or Nissen during the planning and preparation stages of their crimes, nor during the actual commission of the murders. The State notes that the panel stated that the difference in the penalties given Lotter and Nissen was justified, not by which defendant was the shooter but by Nissen's agreement to testify at Lotter's trial and by the fact that Nissen's cooperation provided both the initial information and the physical evidence which led to the successful prosecutions of both defendants.

(c) District Court's Order

The district court found that Lotter's goal in requesting DNA testing was to establish that Nissen was the shooter. The court noted that the jury found Lotter guilty of three counts of first degree murder and that it could have reached those verdicts by any one of three theories: premeditated murder, felony murder, or aiding and abetting first degree murder. The jury was not required to indicate upon which of the three theories it based its guilty verdicts. The court found that there was considerable circumstantial evidence against Lotter without Nissen's trial testimony and that even if DNA evidence established that Nissen was the shooter, this would not be exculpatory evidence that Lotter was wrongfully convicted.

Furthermore, the district court found that a determination that Nissen was the shooter would not change the result of Lotter's sentencing. It noted that the sentencing panel found that during the planning and preparation stages in the days leading up to the

murders, there was no appreciable difference in the degree of culpability between Lotter and Nissen. The panel also found, based on Nissen's account, that there was no appreciable difference in the degree of culpability between Lotter and Nissen during the actual commission of the murders or after they were committed. It concluded that Nissen's statement to the police after his arrest and his testimony for the State at Lotter's trial sufficiently distinguished his conduct from Lotter's for purposes of imposing different penalties.

The district court also found that DNA testing could not provide exculpatory evidence on Lotter's behalf. The court opined that it is a "leap in logic" given the facts submitted at trial for Lotter to assume that if the blood of one or more of the victims is on Nissen's gloves, shoes, or clothing, this would establish Nissen as the shooter. In its order denying Lotter's amended motion for DNA testing, the court asked, Why would Nissen not have blood on his clothing when he claimed to have stabbed Brandon in the abdomen while pulling her toward him? The court determined that the presence of blood on Nissen's gloves, shoes, or clothing would only support his testimony and that the absence of blood would prove nothing for Lotter. It concluded that DNA testing alone could never establish Lotter's claims because such testing could never establish how a particular DNA sample was deposited on a specific piece of evidence.

The district court distinguished this case from one in which the identity of a single perpetrator is at issue or the evidence against the defendant is so weak as to cast real doubt about guilt. It concluded that DNA testing would not result in noncumulative, exculpatory evidence relevant to any claim that Lotter was wrongfully convicted or sentenced.

(d) Would DNA Testing Affect Lotter's Convictions?

The DNA testing requested by Lotter might show that DNA from any or all of the three victims is present on Nissen's gloves, shoes, or clothing. However, such testing could not establish exculpatory evidence that Lotter was wrongfully convicted. Furthermore, the presence of the victims' DNA on these items would not support the admissibility of Nissen's statements to Haley, his cellmate, because such evidence would not constitute

corroborating circumstances that clearly indicate the trustworthiness of those statements. See *State v. Lotter, ante* p. 245, 664 N.W.2d 892 (2003). The victims' blood on Nissen's gloves, shoes, or clothing would not be inconsistent with his trial testimony.

Nissen testified that he followed Lotter into Lambert's bedroom, where they found her lying on the bed. Brandon was on the floor hiding under a blanket, and Lambert's baby was in a crib. Nissen stated that he grabbed Brandon's arm, told her to stand up, and turned around to try to quiet the baby. The evidence established that Lotter then shot Brandon. When Nissen saw Brandon still twitching, he asked Lotter for a knife, grabbed Brandon's shoulder with his left hand, and pulled her toward him at the same time he pushed the knife into her abdominal area. Brandon fell back onto the bed and was no longer moving. At some point, Nissen handed the knife back to Lotter.

Nissen said that after he handed the baby to Lambert and stepped away from the bed, Lotter shot Lambert in the stomach. Lambert jumped and screamed, and Nissen put the baby back in the crib. Nissen stated that only about 10 seconds elapsed from the time he stabbed Brandon to the time Lambert was shot.

Nissen testified that Lotter then spent 4 to 5 seconds trying to move the sliding mechanism on the gun, which appeared to be jammed. Nissen asked Lambert if there was anyone else in the house, and she told him that DeVine was in another room. Lotter went to locate DeVine, and in 5 to 8 seconds, he came back into the bedroom with DeVine. Lambert was bleeding and appeared to be in pain. Nissen stated that Lotter raised his pistol and shot Lambert in the eye. Her head jerked back, and she went limp on the bed.

Nissen, Lotter, and DeVine left the bedroom and went into the living room. Lotter stopped in the middle of the room, while Nissen and DeVine walked past Lotter. Nissen told DeVine to sit down on the couch. Nissen then moved back toward Lotter, and Lotter raised his pistol and shot DeVine. DeVine slumped back onto the couch, and Lotter shot him again.

Lotter then went back into Lambert's bedroom, with Nissen following 2 or 3 seconds behind. Nissen heard two or three more shots just before he entered the bedroom. After Nissen and Lotter left the house and were in Lotter's car, Lotter asked Nissen for

his gloves. Lotter put the gloves "end-over-end" over a box containing the gun and the knife.

The function of testing DNA evidence is to determine whether the sample being examined contains genetic characteristics similar to a sample from a known individual. There are two possible outcomes when comparing the samples. If the DNA test results from the samples match, i.e., the same DNA types are found at all loci tested from both samples, then the conclusion is that the sample from the known individual cannot be excluded as a possible source of the sample in question. If, on the other hand, the genetic information present in the DNA from the known individual is not present in the DNA from the sample being tested, then the DNA profiles do not match and the known individual is excluded as the source of the DNA sample in question.

In the case at bar, the victims could be the source of the blood samples in question. DNA testing could establish that the blood came from one or more of the victims, but it could not determine how the blood was deposited upon the items being tested. Since the results of DNA testing could not establish how the blood was deposited on Nissen's gloves, shoes, or clothing, the results could not establish that Nissen shot the victims. Therefore, the results of such testing could not be exculpatory.

Contrary to Lotter's argument, DNA evidence is not a videotape of a crime. In this case, such testing could show only whose blood is on the items in question, not how the blood was deposited on the items. It would be mere speculation to conclude that blood was on Nissen's gloves, shoes, or clothing because he was the shooter. Therefore, the record does not support a conclusion that the DNA testing requested by Lotter may produce noncumulative, exculpatory evidence relevant to the claim that he was wrongfully convicted.

A motion for DNA testing is similar to a motion for new trial based on newly discovered evidence. Therefore, a motion for DNA testing 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. See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). Today, we hold that a motion for DNA testing under the DNA Testing Act is addressed to the discretion

of the trial court, and unless an abuse of discretion is shown, the determination of the trial court will not be disturbed on appeal. We conclude that the district court did not abuse its discretion in refusing DNA testing because such testing could not establish exculpatory evidence that Lotter was wrongfully convicted.

(e) Would DNA Testing Affect Lotter's Sentences?

As to whether DNA testing could produce noncumulative, exculpatory evidence relevant to the claim that Lotter was wrongfully sentenced, we note that the presence of the victims' DNA on Nissen's gloves, shoes, or clothing would not be inconsistent with any evidence the sentencing panel relied upon in determining Lotter's sentence. Therefore, the aggravating and mitigating circumstances found by the panel would remain unaffected, and Lotter's sentence of death would stand.

As to the murder of Lambert, the sentencing panel found the following aggravating circumstances to be applicable: the second prong of (1)(b) ("[t]he murder was committed in an apparent effort . . . to conceal the identity of the perpetrator of a crime") and (1)(e) ("[a]t the time the murder was committed, the offender also committed another murder"). See § 29-2523. As to the murder of DeVine, the panel found the following aggravating circumstances to be applicable: the second prong of (1)(b) and (1)(e). As to the murder of Brandon, the panel found the following aggravating circumstances to be applicable: (1)(e) and the second prong of (1)(h) ("[t]he crime was committed to disrupt or hinder . . . the enforcement of the laws"). See *id.*

The sentencing panel also found mitigating circumstance (2)(g) to be applicable ("[a]t the time of the crime, the capacity of the defendant . . . to conform his conduct to the requirements of law was impaired as a result of mental illness"). See *id.* The panel also found the existence of nonstatutory mitigating circumstances with respect to Lotter's childhood, family history, and history of mental disorder.

The sentencing panel relied in part upon Nissen's trial testimony and made a finding that Lotter shot all three victims. The presence of the victims' DNA on the items sought to be tested would not be inconsistent with Nissen's testimony and could not show that Lotter was not the shooter.

When comparing Lotter's and Nissen's participation in the homicides, the sentencing panel stated:

> At the time of the actual commission of these three homicides, the evidence, based largely upon Marvin Nissen's testimony, is that Defendant-Lotter fired all shots at all three victims resulting in their deaths. . . .
>
> . . . .
>
> Nissen did admit during his testimony at Lotter's trial that he had, in fact, been the one who stabbed Teena Brandon, but claimed that he did so after Lotter had finished shooting her.

Despite its finding that Lotter "fired all shots at all three victims resulting in their deaths," the sentencing panel made the following statement: "Suffice it to say that under either version of when Nissen stabbed Teena Brandon, we find that there is no appreciable difference in degree of culpability between these Co-Defendants during the actual commission of the homicides."

In addition, the evidence also established that Lotter stole the gun used to murder the victims. He also obtained the knife and the gloves worn during the crimes. Just prior to the killings, both Nissen and Lotter were seen wearing gloves. The evening of the murders, Lotter told a witness he desired to kill someone. After the murders, Nissen and Lotter sought to obtain alibis from Kandi and McKenzie. There was evidence indicating that Lotter had traveled to Lincoln looking for Brandon in order to murder her. Thus, the evidence clearly established that Lotter actively participated in the planning and execution of these murders.

In comparing the actions of Lotter and Nissen following the murders, the sentencing panel stated:

> Nissen's statement to Investigator [Roger] Chrans does distinguish his conduct from Defendant Lotter after commission of the crimes.
>
> . . . .
>
> . . . We further find that Nissen's testimony against Lotter at his trial does distinguish his conduct from Defendant-Lotter after commission of the crime.
>
> In conclusion the panel finds beyond a reasonable doubt that Marvin Nissen's statement to the police after his arrest, and his testimony for the State at John Lotter's trial, does

sufficiently distinguish his conduct from Lotter's after commission of these homicides, and does support imposition of different penalties for each Co-Defendant.

We conclude that the results of DNA testing could not produce noncumulative, exculpatory evidence relevant to the claim that Lotter was wrongfully sentenced. As the sentencing panel correctly concluded, the record is barren of any evidence that Lotter was merely an accomplice or that his participation was relatively minor. There was no appreciable difference in the degree of culpability between Nissen and Lotter during the actual commission of the murders. We conclude that the district court did not abuse its discretion in denying DNA testing because the testing could not produce noncumulative, exculpatory evidence relevant to the claim that Lotter was wrongfully sentenced.

3. Denial of Request to Attend Hearing

Lotter next assigns as error that the district court erred in refusing to allow him to attend the hearing on his amended motion for DNA testing. A week prior to the hearing on his amended motion, Lotter filed an application for writ of habeas corpus ad prosequendum, requesting that he be allowed to attend the hearing. No hearing on the application was requested by Lotter. The district court denied the application, and the hearing on the amended motion proceeded in Lotter's absence. The court noted that it had reviewed the application but denied the request because there was no specific reason offered to justify granting the writ. The court explained that it did not see any reason to have Lotter at the hearing.

Lotter argues that as a matter of due process, he had the right to attend the hearing on his amended motion for DNA testing. He argues that Neb. Rev. Stat. § 29-2001 (Reissue 1995) requires that a person indicted for a felony be present at trial. He also quotes *State v. Bear Runner*, 198 Neb. 368, 370, 252 N.W.2d 638, 640 (1977), for the proposition that "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." He argues that this court has recognized that an even stricter standard applies in capital cases.

[4] Lotter notes that in *State v. Woods*, 180 Neb. 282, 142 N.W.2d 339 (1966), this court held that in a civil motion for

postconviction relief, a prisoner has no right to be personally present at the evidentiary hearing on the motion unless the prisoner is going to testify. He also points out that as early as *Davis v. State*, 51 Neb. 301, 70 N.W. 984 (1897), we held that a prisoner cannot insist as a matter of right that he be personally present at a hearing on a motion for new trial following a first degree murder conviction.

[5] Lotter then argues, however, that subsequent to *Davis*, the U.S. Supreme Court held that a defendant has a due process right to be present at a proceeding

> whenever his presence has a relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge. . . .
>
> . . . .
>
> . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.

Snyder v. Massachusetts, 291 U.S. 97, 105-08, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part, Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

Lotter asserts that only in minor, nonsubstantive proceedings has the U.S. Supreme Court allowed matters to be conducted without the defendant. He claims he was denied his right to attend a hearing in which evidence was presented in support of and in opposition to a motion that might prove instrumental in obtaining his release from a conviction and sentence.

Although in *State v. Bjorklund*, 258 Neb. 432, 468, 604 N.W.2d 169, 205 (2000), we stated that "[a] defendant has a constitutionally protected right to be present at all critical stages of his or her trial," it is apparent that Lotter's trial has long since been concluded. Lotter has exhausted his direct appeal. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999). His motions for postconviction relief have been subsequently denied. See *State v. Lotter, ante* p. 245, 664 N.W.2d 892 (2003).

[6] A motion for DNA testing is similar to a motion for new trial, as opposed to a collateral postconviction attack on a final judgment. However, Lotter still has no constitutional right to be present at any hearing concerning a motion filed under the act.

In *State v. Wells*, 197 Neb. 584, 249 N.W.2d 904 (1977), we noted that it had long been the rule in Nebraska that a person convicted of a felony who was represented by counsel could not, as a matter of right, insist on being present at the time of filing, the argument, or the ruling upon his motion for new trial.

In addition, there is no language in the DNA Testing Act to suggest that a convicted defendant has the right to be present for any proceeding conducted under the act. This court acknowledges that an exception might apply if the defendant were to offer testimony for the court's consideration. However, such circumstances are not present in this case.

In *Wells*, 197 Neb. at 591-92, 249 N.W.2d at 909, we adopted the following from *Council v. Clemmer*, 177 F.2d 22 (D.C. Cir. 1949):

> "Appellant says he was not present when the motion for new trial was argued by his counsel, and that his absence was a violation of his constitutional right to be present. The argument upon that motion was not a part of the trial; it was an effort to get another trial. It dealt with questions of law and alleged errors in the trial. There was no constitutional requirement that the defendant be present."

We conclude that the district court did not err in denying Lotter's application for writ of habeas corpus ad prosequendum, in which he requested that he be present at the hearing on his amended motion for DNA testing.

4. Cross-Appeal

On cross-appeal, the State argues that the district court erred when it determined that DNA testing was effectively not available at the time of Lotter's trial in 1995. The statutory language in question is "such testing was effectively not available at the time of trial." See § 29-4120(5). The State asserts that the court erred in focusing on the continuing sophistication of DNA technology rather than focusing on what was available in 1994 and 1995 and whether such testing would have served the purpose for which Lotter sought the testing. It claims that DNA test results proving that the victims' blood was on the gloves, shoes, or clothing worn by Nissen could have been obtained at the time of Lotter's trial and that, therefore, DNA testing was effectively available.

Relying on the language of § 29-4120(1)(c), the district court found that based upon the affidavits submitted by the parties, present DNA techniques would provide a reasonable likelihood of more accurate and probative results than the techniques existing in May 1995. In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Poe, ante* p. 437, 665 N.W.2d 654 (2003). The court therefore concluded that present DNA techniques were effectively not available at the time of Lotter's trial in May 1995.

At the hearing on Lotter's amended motion for DNA testing, the State submitted the affidavit of Charlotte Word, Ph.D., of Orchid Cellmark (Cellmark), formerly Cellmark Diagnostics. Word's affidavit stated that restriction fragment length polymorphism (RFLP) DNA testing has been available in the U.S. and widely used by private and public crime laboratories since the late 1980's. The affidavit stated that RFLP testing using four to five probes has a high degree of discrimination.

Word's affidavit also stated that DNA polymerase chain reaction (PCR) testing has been used widely by private and public crime laboratories in the U.S. and worldwide since the early to mid-1990's. Several different PCR-based test systems have been developed for use in forensic cases since the early 1990's. The affidavit stated that testing using the "AmpliType™ HLA DQα Forensic PCR Amplification and Typing Kit" (DQα) was offered by major laboratories in the U.S., including Cellmark, for forensic cases by the summer of 1992. By 1994, the DQα was in wide use. There are 21 possible genotypes at the DQα locus. Using the DQα alone, it is estimated that individuals will be distinguished about 93 percent of the time.

The affidavit further stated that for any DNA test used in crime laboratories, if interpretable test results are obtained from an evidence sample and those results are compared to the results obtained from a known individual using the same test system, then there are two possible outcomes of the comparison. If the DNA test results from two samples match, that is, the same DNA types are obtained at all loci tested for both samples, then the conclusion is that the tested individual cannot be excluded as a possible source of the sample. That individual is included as a

possible source of the DNA sample. Alternatively, if there are results present in the DNA from the known individual that are not present in the DNA from the evidence sample, then the profiles do not match and the individual is excluded as, or cannot be, the source of the DNA sample. Word's affidavit stated that to obtain a greater level of discrimination, the DQα test has been used in combination with other PCR-based tests to obtain a more detailed DNA profile.

Word's affidavit stated that the next form of PCR testing to become available was the "AmpliType® PM Amplification and Typing Kit" (PM). The affidavit explained that the PM test allowed for the typing of five regions of DNA and that using the PM test alone, 972 distinct genotypic combinations were possible. The kit became commercially available in late fall of 1993. Cellmark and other major laboratories in the U.S. began offering PM testing in January 1994. Word's affidavit noted that by mid-1995, Cellmark alone had performed PCR-based testing in over 800 cases.

The affidavit stated that the DQα and PM tests were combined, and Cellmark was offering the combination by January 1994. When combined, DQα and PM testing offered results with a power of discrimination of over .999. Word's affidavit stated that if there was a mixture of DNA on a particular evidence sample, it was highly probable that either test used alone or the combined testing would reveal the presence of a mixture. The affidavit explained that the combination of DQα and PM testing offered an extremely high exclusionary rate. As an example, the affidavit explained that bloodstained clothing seized from a suspect could be tested and compared to the DNA profile from a victim to determine whether the victim was included or excluded as the source of the DNA. If a victim was not the source, there was a greater than 99 percent probability that combined DQα and PM testing would exclude the victim as the source.

Word's affidavit stated that short tandem repeat (STR) testing became commercially available in 1994 and that Cellmark began offering this type of PCR testing in the fall of 1994. The first STR kit commercially available was the "CTT STR" kit, and used alone, CTT STR testing could detect a minimum of 36, 15, and 36 separate genotypes, respectively, for each of three

loci. The affidavit stated that the CTT STR kit was also used in combination with previous PCR kits. It stated that frequencies of the DNA profiles obtained from casework samples using DQα, PM, and CTT STR in combination were generally more rare than 1 in 1 million individuals. Word's affidavit stated that by May 1995, Cellmark had completed testing in approximately 20 criminal cases nationwide using CTT STR, DQα, and PM tests in combination, analyzing nine separate loci. The CTT STR kit was replaced in 1999 by testing using the 13 core STR CODIS (Combined DNA Index System) loci.

Word's affidavit stated that the difference between DNA testing available prior to May 1995 and current DNA testing is the ongoing discovery and validation of additional loci for analysis in a single or combined test. As more loci are validated and tested, the discriminating power of the DNA test results continues to increase. The affidavit stated that all available PCR-based DNA tests developed for DNA identification testing in criminal cases in 1994 and 1995 had a high power of discrimination and a high probability of excluding someone who was not the source of the biological sample.

Word explained as an example that if a victim was not the source of a bloodstain on a suspect's clothing, it is highly likely that the victim would be excluded as the source of the sample using any one of the tests alone, and certainly more likely as more tests are used. She also explained that on the contrary, if the victim is the source of the DNA, the victim will never be excluded as the source no matter how many additional loci are tested using any number of additional tests. The affidavit stated that it would be the extremely rare exception that an individual would be excluded as a source of a sample by testing with the remaining 9 of the 13 core STR loci if that individual was not excluded by CTT STR, DQα, and PM testing.

Word's affidavit also stated that in 1994 and 1995, at the request of the Nebraska Assistant Attorney General James Elworth, Cellmark conducted RFLP DNA testing on a blood swatch from Brandon and compared it to blood on the knife in evidence. The approximate frequencies of the DNA banding pattern obtained from the stained knife swab and the blood swatch from Brandon were reported as approximately 1 in 2.3 billion in

the Caucasian population, 1 in 18 billion in the African American population, and 1 in 1.8 billion in the Western Hispanic population. Cellmark also conducted RFLP DNA testing on samples of blood from Lotter and Nissen and compared the results to biological material from pieces of evidence related to the alleged sexual assault of Brandon.

Lotter argues that under the DNA Testing Act, the issue should be phrased as whether STR testing using the PowerPlex 16 system and the ABI Prism 310 genetic analyzer was effectively available at the time of his trial. He asserts that the court's focus should be on the specific DNA testing requested and that the court should not engage in speculation regarding what other DNA tests might have been available at the time of trial. He argues that the State appears to view DNA testing in some sort of generic fashion, equating RFLP testing with STR testing. He asserts that the State's arguments ignored the technical problem presented by small mixed samples of biological material and the value in obtaining results over multiple loci through PCR amplification. Accordingly, Lotter argues that multiloci PCR technology was simply not available in 1994 and 1995.

At the hearing on his amended motion for DNA testing, Lotter submitted the affidavit of Ronald Rubocki, Ph.D. Rubocki's affidavit stated that RFLP DNA testing has the capability of being very discriminating in identifying the source of particular samples of DNA but that it will work well only with a large sample of DNA. The affidavit also stated that RFLP testing requires that the DNA not be degraded as a result of time or environmental factors and that problems can occur when there is a mixed sample.

Rubocki's affidavit stated that PCR testing is effective even if the sample of DNA contains only a few copies of the allele because the polymerase induces a chain reaction that increases the target number several millionfold. The affidavit stated that the advantage of PCR testing is that it requires very little biological material.

According to Rubocki's affidavit, DNA testing was being performed at that time using STR loci. In November 1997, the Federal Bureau of Investigation announced the selection of 13 core STR loci to constitute the U.S. national database called CODIS. The affidavit stated that the PowerPlex 16 system had

recently been developed and that this system contained all the 13 core STR loci in a single amplification reaction.

Rubocki's affidavit stated that in 1995, there was no capacity for forensic DNA testing within the State of Nebraska. In 1996, the first forensic DNA testing in Nebraska was performed at the University of Nebraska Medical Center's human DNA identification laboratory using DQα, PM, and a total of six STR loci. The affidavit stated that the current PowerPlex 16 system has numerous advantages over earlier DNA testing systems. It stated that amplification of minute samples of DNA can be accomplished that was not possible with RFLP DNA techniques. Amplification is now possible even if the DNA has been moderately degraded, whereas the RFLP analysis requires a nondegraded sample. The affidavit stated that "the identification of alleles at 15 STR loci provides a tremendous advantage for discrimination and identification of contributors, particularly when dealing with a potentially mixed sample."

The DNA Testing Act provides in part:

> While DNA testing is increasingly commonplace in pretrial investigations currently, it was not widely available in cases prior to 1994. Moreover, new forensic DNA testing procedures, such as polymerase chain reaction amplification, DNA short tandem repeat analysis, and mitochondrial DNA analysis, make it possible to obtain results from minute samples that previously could not be tested and to obtain more informative and accurate results than earlier forms of forensic DNA testing could produce. As a result, in some cases, convicted inmates have been exonerated by new DNA tests after earlier tests had failed to produce definitive results.

§ 29-4118(3).

[7] 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. *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.* If it can be avoided, no word, clause, or sentence of a statute should be rejected as

superfluous or meaningless. *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001).

The question before us is whether DNA testing requested pursuant to a motion filed under § 29-4120(1) was effectively not available at the time of Lotter's trial. See § 29-4120(5). Thus, we must determine whether the Legislature intended § 29-4120(5) to refer to the effective availability of DNA testing in general or the effective availability of the specific type of DNA testing requested in Lotter's motion.

Section 29-4120(1)(c) provides that a person in custody, at any time after his or her conviction, may file a motion requesting forensic DNA testing of any biological material that, among other things, "[w]as not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results."

In Lotter's amended motion for DNA testing, it was alleged that he intended to utilize the PowerPlex 16 amplification and multiplex identification system with the ABI Prism 310 genetic analyzer to test items containing biological evidence, including a pair of yellow work gloves; cuttings taken from the gloves; Nissen's shoes and clothing; and known comparison blood samples from Brandon, Lambert, and DeVine. Lotter alleged that the PowerPlex 16 system first became available in May 2000 and that the ABI Prism 310 genetic analyzer was first used by the University of Nebraska Medical Center's human DNA identification laboratory in September 1998. He further alleged that Nissen's gloves, shoes, and clothing have not been subject to any DNA testing.

We interpret § 29-4120(5) to require that the DNA testing requested in the motion was effectively not available at the time of trial. The State does not dispute the fact that the PowerPlex 16 system was not available at the time of Lotter's trial in May 1995. Nor does it dispute that such testing would provide a reasonable likelihood of more accurate and probative results. Therefore, we conclude that the DNA technique requested by Lotter was effectively not available at the time of his trial.

This conclusion is supported by our consideration of the DNA Testing Act in pari materia. Section 29-4118(3) specifically

recognizes that advances in DNA procedures have and will occur and that such advances make it possible to obtain more informative and accurate results. We are required to give effect to the purpose and intent of the Legislature as ascertained from the entire language of the act. Therefore, from a literal reading of the act as considered in its plain language, we conclude that if types of DNA testing are currently available that were effectively not available at the time of trial and if such testing will produce more accurate and probative results, then the statutory requirements have been met. Therefore, the district court did not err in its interpretation of the requirements of the DNA Testing Act, and we conclude that the State's cross-appeal is without merit.

VI. CONCLUSION

For the reasons set forth herein, we affirm the judgment of the district court. The DNA testing requested by Lotter could not result in noncumulative, exculpatory evidence relevant to Lotter's claim that he was wrongfully convicted or sentenced. The State's cross-appeal is dismissed.

AFFIRMED.

IN RE INTEREST OF JAC'QUEZ N., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. SELINA N., APPELLEE.

669 N.W.2d 429

Filed September 26, 2003. No. S-02-1381.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
3. ____: ____. A finding of a fact that excuses the requirement of reasonable efforts at reunification under Neb. Rev. Stat. § 43-283.01(4) (Reissue 1998) must be based on clear and convincing evidence.

4. **Parental Rights: Minors: Statutes: Words and Phrases.** The term "aggravated circumstances," as used in Neb. Rev. Stat. § 43-283.01(4)(a) (Reissue 1998), embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child and would place the child in a position of an unreasonable risk to be reabused.

Appeal from the Separate Juvenile Court of Douglas County: WADIE THOMAS, JR., Judge. Reversed and remanded with directions.

James S. Jansen, Douglas County Attorney, and Karen Kassebaum Nelson for appellant.

Thomas C. Riley, Douglas County Public Defender, and Claudia L. McKnight for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this termination of parental rights case, the separate juvenile court of Douglas County granted the State's petition to terminate the parental rights of the father, Travis M., and denied the State's petition to terminate the parental rights of the mother, Selina N., to the child, Jac'Quez N. Travis does not appeal, and his parental rights to Jac'Quez stand terminated. The State appeals and asserts that the court erred when it failed to find that reasonable efforts at reunification with Selina were not required under Neb. Rev. Stat. § 43-283.01(4) (Reissue 1998), and when it failed to terminate Selina's parental rights. Based on the record before us, we determine that reasonable efforts at reunification are not required and that Selina's parental rights to Jac'Quez should be terminated due to aggravated circumstances under Neb. Rev. Stat. § 43-292(9) (Reissue 1998). We reverse that part of the juvenile court's order which failed to terminate Selina's parental rights and remand the cause with directions to the juvenile court to enter an order terminating Selina's parental rights to Jac'Quez.

STATEMENT OF FACTS

Jac'Quez, born April 5, 2002, is the son of Selina and Travis. On June 17, 2002, the separate juvenile court of Douglas County

ordered that Jac'Quez be placed in the immediate temporary custody of the Nebraska Department of Health and Human Services (DHHS). The order was based on allegations that on June 12, Selina and Travis brought Jac'Quez to the University of Nebraska Medical Center's emergency room in Omaha with severe injuries that the supervising physician found to be consistent with child abuse, specifically, "shaken baby syndrome." Selina and Travis asserted that on June 10, Jac'Quez had rolled off the couch and hit his head on a telephone that was on the floor. It is undisputed that certain of his injuries were obvious and that Selina and Travis delayed seeking treatment until June 12. Examination revealed that Jac'Quez' injuries were so severe that he was expected to be blind and deaf and that his development was not expected to progress beyond its current state.

On August 5, 2002, the State petitioned the juvenile court seeking termination of the parental rights of both Selina and Travis. The State asserted as to both Selina and Travis that Jac'Quez was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002); that reasonable efforts to preserve and reunify the family were not required pursuant to § 43-283.01(4)(a) because Jac'Quez had been subjected to "aggravated circumstances"; that termination of parental rights was justified under § 43-292(2), (8), and (9); and that termination was in Jac'Quez' best interests.

Prior to trial, the State filed a motion in limine seeking to exclude as irrelevant any evidence pertaining to who actually inflicted the injuries on Jac'Quez. The State argued it was not relevant as to the case against either Selina or Travis whether that parent actually inflicted the abuse, only whether Jac'Quez was under Selina and Travis' control when the abuse occurred. The court overruled the State's motion in limine.

A hearing was held October 2 and 3, 2002. At the hearing, the State presented depositions of physicians who had treated Jac'Quez. Dr. Charles Gerald Judy stated that there had been an unnecessary delay in getting medical treatment for Jac'Quez and that the delay had contributed to a lack of oxygen to the brain. Dr. Judy also stated that it was obvious that Jac'Quez' injuries were caused by nonaccidental trauma or shaken baby syndrome. Dr. Judy initially feared that Jac'Quez' injuries would be

life threatening, and by the time of the hearing, he believed Jac'Quez would suffer moderately severe to severe developmental impairment and would likely be blind and possibly deaf. The State also presented the deposition of Dr. Jonathan Jaksha, a diagnostic radiologist who diagnosed Jac'Quez as suffering from a nonaccidental trauma and stated that Jac'Quez' injuries were consistent with his having been shaken.

The State presented the testimony of Dr. Lance Hoffman, an emergency room physician who had examined Jac'Quez. Dr. Hoffman questioned Selina and Travis regarding Jac'Quez' injuries when he was presented at the emergency room. Travis had told Dr. Hoffman that 2 days earlier, Jac'Quez had fallen off the couch while lying next to Travis and had struck his head against a telephone that was on the floor. Selina told Dr. Hoffman that over the past 2 days, Jac'Quez had not been acting like himself, had not been feeding well, had been crying intermittently, and had been making some twitching movements. As noted below, Selina reported to an Omaha police officer that she had seen other symptoms of injury between June 10 and 12, 2002.

According to Dr. Hoffman, when he informed Selina and Travis that he would need to report Jac'Quez' injuries to the Omaha Police Department and Child Protective Services, Selina told Travis, "I told you this was going to happen. I knew this was going to happen." Dr. Hoffman testified that Jac'Quez' injuries were not consistent with Selina and Travis' story of how the injuries were sustained but were instead caused by nonaccidental trauma or child abuse. At the time he examined Jac'Quez, Dr. Hoffman expected Jac'Quez would die within the next couple of days.

Dr. Amy Lacroix, a pediatrician who has been Jac'Quez' primary care physician since he was transferred out of the intensive care unit, testified that his head injuries and a fracture to his right leg were injuries associated with child abuse. Dr. Lacroix stated that Jac'Quez had severe cerebral palsy which may not get better over time. She was unsure whether he could see or hear. Dr. John Peters, an ophthalmologist, testified that Jac'Quez had retinal hemorrhages in both eyes, and Dr. Paul Larsen, a pediatric neurologist, testified that Jac'Quez had diffuse brain injury indicating a lack of oxygen, lack of blood supply, and massive swelling of the brain tissue.

Michele Bang, an Omaha police detective, testified that she interviewed Selina in the examining room at the hospital. Selina told Bang she had noticed that Jac'Quez' right eye was black and swollen when she came home from work on June 10, 2002. She also noticed a "change in consciousness" and shaking in his hands. She put ice on his injuries and went to bed. When she woke up the next morning, she noticed that he was unresponsive and was shaking. She went to work, and when she got home, Travis told her that Jac'Quez had not been eating. Travis suggested they take Jac'Quez to a doctor, but Selina wanted to wait until the next day. She did not want to take Jac'Quez to the doctor because she feared he would be taken from them because of the black eye.

The State presented the testimony of Jackie Fink, a DHHS protection and safety worker who was assigned to Jac'Quez' case. Fink testified that Jac'Quez had been in her custody since July 6, 2002. He had been placed with foster parents who were specially trained to deal with his medical needs, and the foster parents were willing to adopt him. Fink testified that due to Jac'Quez' medical needs, the nonaccidental nature of his injuries, and Selina and Travis' level of denial regarding the nature of his injuries, Fink believed it would be in Jac'Quez' best interests to terminate the parental rights of both Selina and Travis.

Shirley King, an initial assessment investigative worker for Child Protective Services, was assigned to Jac'Quez' case on June 17, 2002. King opined at the hearing that Jac'Quez would be in "extreme danger" if allowed to return to Selina's custody. King based this assessment on the nature and severity of the injuries Jac'Quez sustained and the fact that notwithstanding the obviousness of his injuries, no medical care was sought for 2 days after he sustained severe injuries.

The court on October 31, 2002, entered an order concluding by a preponderance of the evidence that, as to both Selina and Travis, Jac'Quez was a child within the meaning of § 43-247(3)(a). As to Travis only, the court found that Travis had subjected Jac'Quez to severe and extreme physical injury and concluded that reasonable efforts to reunify were not required, that termination of Travis' parental rights was appropriate under § 43-292(8) and (9) but not subsection (2), and that termination of Travis' parental rights was in Jac'Quez' best interests. As to Selina only, the court concluded

that other than the determination that Jac'Quez was a child within the meaning of § 43-247(3)(a), the State had failed to meet its burden of proof, and that therefore reasonable attempts to reunify Jac'Quez with Selina should be attempted and the counts relating to termination of Selina's parental rights should be dismissed. The court therefore ordered that Travis' parental rights be terminated, that Jac'Quez remain in the custody of DHHS, and that a review and permanency planning hearing be scheduled in approximately 6 months. Travis has not appealed. The State appeals the order of the juvenile court as it relates to Selina.

ASSIGNMENTS OF ERROR

The State asserts that the juvenile court erred by (1) failing to find that, as to Selina, reasonable efforts at reunification were not required under § 43-283.01(4)(a) because she had subjected Jac'Quez to "aggravated circumstances"; (2) failing to terminate Selina's parental rights under § 43-292(9) because she had subjected Jac'Quez to "aggravated circumstances"; and (3) failing to terminate Selina's parental rights under § 43-292(2) because she had "substantially and continuously or repeatedly neglected" Jac'Quez.

STANDARDS OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.* Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *Id.*

ANALYSIS

Reasonable Efforts at Reunification and Aggravated Circumstances Under § 43-283.01(4).

Section 43-283.01(4) provides, in relevant part, as follows: "Reasonable efforts to preserve and reunify the family are not

required if a court of competent jurisdiction has determined that: (a) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse."

The State asserts that the record shows that Selina subjected Jac'Quez to "aggravated circumstances" as used in § 43-283.01(4)(a). The State argues that reasonable efforts to reunify Selina and Jac'Quez were therefore not required and that the juvenile court's ruling to the contrary was error.

With respect to this assignment of error, the State urges that for purposes of § 43-283.01(4), it should be required to prove the facts excusing reunification by a mere preponderance of the evidence rather than by clear and convincing evidence. With respect to the merits, the State argues that Selina's actions, particularly her refusal to obtain medical attention for Jac'Quez for 48 hours after he had obviously sustained serious injuries, amounted to "aggravated circumstances," a fact which excuses reasonable efforts at reunification. As explained below, we conclude that the State was required to prove an exception under § 43-283.01(4) by clear and convincing evidence rather than a preponderance of the evidence. We further conclude that on the record in this case, the State met its burden of proving by clear and convincing evidence that Selina subjected Jac'Quez to "aggravated circumstances" under § 43-283.01(4)(a), and that therefore reasonable efforts at reunification were not required. The juvenile court's ruling directing continued efforts at reunification was error.

Regarding the burden of proof, we note that Neb. Rev. Stat. § 43-279.01(3) (Reissue 1998) provides, in part, that a juvenile court

> shall make a finding and adjudication to be entered on the records of the court as to whether the allegations in the petition have been proven by a preponderance of the evidence in cases under subdivision (3)(a) of section 43-247 or by clear and convincing evidence in proceedings to terminate parental rights.

Consistent with this statute, this court has previously stated that at the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State

must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of T.M.B. et al.*, 241 Neb. 828, 491 N.W.2d 58 (1992). We have also stated that in order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003). Neither statute nor prior decision of this court has stated what burden of proof is applicable to a determination under § 43-283.01(4) regarding whether reasonable efforts at reunification should be excused.

We note that various states have statutes which specifically require clear and convincing evidence in order to excuse the requirement of reasonable efforts at reunification. See, Ark. Code Ann. § 9-27-303(45)(C) (Lexis Supp. 2003); Cal. Welf. & Inst. Code § 361.5(b) (West Cum. Supp. 2003); Conn. Gen. Stat. Ann. § 17a-111b (West Cum. Supp. 2003); Ga. Code Ann. § 15-11-58(h) (Lexis Supp. 2003); Iowa Code Ann. § 232.57(2) (West Cum. Supp. 2003); La. Children's Code Ann. art. 672.1(B) (West Cum. Supp. 2003); Minn. Stat. Ann. § 260.012(b)(3) (West 2003); Mont. Code Ann. § 41-3-423(4) (2001); 42 Pa. Cons. Stat. Ann. § 6351(e)(2) (West Cum. Supp. 2003); S.D. Codified Laws § 26-8A-21.1(3) (Lexis Supp. 2003). In other states, case law establishes that the clear and convincing standard should be applied to the question of whether or not reasonable efforts at reunification are required. See *New Jersey Div. v. A.R.G.*, 361 N.J. Super. 46, 824 A.2d 213 (2003). But see *Dependency of J.W.*, 90 Wash. App. 417, 953 P.2d 104 (1998) (holding that aggravated circumstances which make services unlikely to effectuate reunification may be proved by preponderance of evidence).

[3] Upon due consideration, we hold that a finding of a fact, such as aggravated circumstances under § 43-283.01(4)(a), that excuses the requirement of reasonable efforts at reunification under § 43-283.01(4) must be based on clear and convincing evidence. In connection with our ruling, we note that dispensing with reasonable efforts at reunification frequently amounts to a substantial step toward termination of parental rights. It follows that the requisite standard of proof for such determination should be at the level required for a termination of parental rights, and

therefore the determination to excuse reasonable efforts at reunification under § 43-283.01(4) should be supported by clear and convincing evidence. To the extent that *In re Interest of Janet J.*, 12 Neb. App. 42, 666 N.W.2d 741 (2003), indicates a different burden of proof as to § 43-283.01(4), it is hereby disapproved.

Having concluded that "aggravated circumstances" which excuse reasonable efforts at reunification must be shown by clear and convincing evidence, we now consider whether that standard was met in the present case. We must therefore determine whether Selina's actions fell within the meaning of "aggravated circumstances" under § 43-283.01(4)(a). Section 43-283.01(4)(a) provides that reasonable efforts to reunify are not required if the parent "has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse." The statutes do not further define the term "aggravated circumstances." Although the statute lists abandonment, torture, chronic abuse, and sexual abuse as examples of aggravated circumstances, the "but not limited to" language clearly signifies that the list is not exhaustive.

This court has not previously addressed the meaning and scope of "aggravated circumstances" under § 43-283.01(4)(a). We note that § 43-283.01 was enacted in response to a portion of the federal Adoption and Safe Families Act of 1997, 42 U.S.C. 671(a) (2000), which provides, inter alia, that reasonable efforts to preserve and reunify families are not required when the parent has subjected his or her child to aggravated circumstances as defined by state law. Other states have also adopted statutes in response to the federal statute, and elsewhere the term "aggravated circumstances" has been explained either by statute or by case law.

[4] In *New Jersey Div. v. A.R.G.*, 361 N.J. Super. 46, 76, 824 A.2d 213, 233 (2003), the Superior Court of New Jersey noted that the determination of whether aggravated circumstances exist must be made on a case-by-case basis and that it is not possible or necessary to determine the entire universe of "aggravated circumstances." After reviewing the legislation and case law in various states establishing criteria to determine the existence of aggravated circumstances, the Superior Court of New Jersey found certain common threads, or themes, that were consistent

with the intent and purpose of the federal legislation. The court concluded that

> the term "aggravated circumstances" embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child, and would place the child in a position of an unreasonable risk to be reabused.

Id. The Court further noted that "where the circumstances created by the parent's conduct create an unacceptably high risk to the health, safety and welfare of the child, they are 'aggravated' to the extent that the child welfare agency . . . may bypass reasonable efforts of reunification." *Id.* The Court also noted that "whether the offer or receipt of services would correct the conditions that led to the abuse or neglect within a reasonable time may also be considered." *Id.* at 77, 824 A.2d at 234.

We believe the considerations articulated by the New Jersey Superior Court are helpful, and we apply these considerations to the present case. We find that the record in this case presents clear and convincing evidence that Selina subjected Jac'Quez to aggravated circumstances under § 43-283.01(4)(a). Although the evidence does not tend to establish that Selina inflicted the initial injuries on Jac'Quez, it clearly and convincingly establishes that she delayed seeking medical treatment for 48 hours after he had received obvious and serious injuries, thus severely neglecting his medical needs. Given the undisputed evidence consisting, inter alia, of the fact that Jac'Quez had a black and swollen eye and was unresponsive and shaking, it should have been apparent to Selina that Jac'Quez had a serious physical problem, but she nevertheless refused to seek treatment for 2 days, apparently because she feared Jac'Quez would be taken from her. Considering that Jac'Quez suffered severe, permanent damage as the result of his injuries and considering that when medical treatment was finally sought, the doctors feared his injuries would be life threatening, it is clear that the delay caused by Selina created an unacceptable risk to Jac'Quez' health.

As noted by the New Jersey Superior Court, a finding that aggravated circumstances excuse reasonable efforts at reunification is to be determined in the context of whether an attempt at

reunification would jeopardize and compromise the safety of the child and would place the child in a position of an unreasonable risk to be abused again. See *New Jersey Div. v. A.R.G., supra.* In the present case, Jac'Quez' current condition is such that he needs a higher than normal level of care and attention and the prospect is that he will always need this heightened level of care. Selina's failure in the past indicates that an attempt to reunify her with Jac'Quez, now a child with heightened needs, would jeopardize and compromise his safety and would engender an unreasonable risk that his needs would again be ignored at the peril of his health and well-being.

Following our de novo review, we find that there was clear and convincing evidence Selina subjected Jac'Quez to aggravated circumstances and that the juvenile court erred when it declined to find that reasonable efforts at reunification under § 43-283.01(4) should be excused.

Termination and Aggravated Circumstances Under § 43-292(9).

The State next argues that the juvenile court erred in failing to terminate Selina's parental rights under § 43-292(9) which provides that parental rights may be terminated when termination is found to be in the best interests of the child and the "parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse." We find that there was clear and convincing evidence Selina subjected Jac'Quez to "aggravated circumstances" under § 43-292(9) and that termination of Selina's parental rights is in Jac'Quez' best interests. The juvenile court erred in failing to terminate Selina's parental rights pursuant to § 43-292(9).

In connection with the previous assignment of error, we determined that the State proved by clear and convincing evidence that Selina subjected Jac'Quez to "aggravated circumstances" under § 43-283.01(4)(a). We find that the same clear and convincing evidence establishes that Selina subjected Jac'Quez to "aggravated circumstances" under § 43-292(9). However, in order to find that termination of Selina's parental rights would be appropriate, we must also find that termination would be in Jac'Quez' best interests.

The testimony of the doctors in the present case establishes that Jac'Quez suffers from severe impairments, that he will most probably be blind and deaf, and that his development is not expected to progress beyond his current stage. Fink, Jac'Quez' caseworker, testified that due to Jac'Quez' medical needs, the nonaccidental nature of his injuries, and Selina and Travis' level of denial regarding the nature of his injuries, it would be in Jac'Quez' best interests to terminate the parental rights of both Selina and Travis. King, the investigative worker for Child Protective Services, testified that Jac'Quez would be in "extreme danger" if returned to Selina's custody. Furthermore, the evidence established that Jac'Quez has been placed with foster parents who are specially trained to deal with his special medical needs and that the foster parents are willing to adopt Jac'Quez. Because a return to Selina's custody would present an unacceptable risk that Jac'Quez' heightened needs would not be fulfilled, we find that it would be in Jac'Quez' best interests to terminate Selina's parental rights.

Following our de novo review, we find that clear and convincing evidence in the record established that Selina subjected Jac'Quez to aggravated circumstances under § 43-292(9) and that termination of Selina's parental rights was in Jac'Quez' best interests. We therefore conclude that the juvenile court erred when it failed to terminate Selina's parental rights pursuant to § 43-292(9).

Termination and Substantial and Continuous or Repeated Neglect Under § 43-292(2).

The State also asserts that the juvenile court erred in failing to terminate Selina's parental rights under § 43-292(2) because she "substantially and continuously or repeatedly neglected" Jac'Quez. In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003). Because we have concluded that Selina's parental rights should have been terminated pursuant to § 43-292(9), it is not necessary to determine whether termination was also appropriate under § 43-292(2). See *id.* We therefore do not address the State's third assignment of error.

CONCLUSION

We conclude that under § 43-283.01(4), in order to establish that reasonable efforts to preserve or reunify the family are not required, the State must present clear and convincing evidence. Upon our de novo review, we find that the State met its burden in this case and that therefore, reasonable efforts to reunify Selina with Jac'Quez were not required. We further determine that the juvenile court erred when it failed to find that the State had proved by clear and convincing evidence that Selina subjected Jac'Quez to aggravated circumstances under § 43-292(9) and that termination of Selina's parental rights was in Jac'Quez' best interests. We therefore reverse that portion of the juvenile court's order in which it failed to terminate Selina's parental rights, and we remand the cause with directions to the juvenile court to enter an order terminating Selina's parental rights. The portion of the juvenile court's order terminating Travis' parental rights was not in dispute in this appeal, and Travis' parental rights to Jac'Quez stand terminated.

REVERSED AND REMANDED WITH DIRECTIONS.

ESTHER WILLIAMS, APPELLANT, AND ELIJAH WILLIAMS, APPELLEE, V. ALLSTATE INDEMNITY COMPANY, APPELLEE.

669 N.W.2d 455

Filed October 3, 2003. No. S-02-283.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
2. **Insurance: Contracts: Claims: Proof.** To establish a claim for bad faith, a plaintiff must show an absence of a reasonable basis for denying the benefits of the insurance policy and the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.
3. **Insurance: Claims.** An insurance company has a right to debate a claim that is "fairly debatable," or subject to a reasonable dispute, without being subject to a bad faith claim.
4. ____: ____. Whether a claim is subject to a reasonable dispute is appropriately decided by the court as a matter of law based on the information available to the insurance company at the time the demand is presented.
5. **Employer and Employee: Independent Contractor: Master and Servant.** Ordinarily, a party's status as an employee or an independent contractor is a question

of fact. However, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law.

6. **Employer and Employee: Independent Contractor.** No single test exists for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the type of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.
7. ____: ____. While no one factor is determinative, control is the most important factor to be considered in determining whether someone is an employee or independent contractor.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

James A. Adams, of Adams & Adams, for appellant.

Waldine H. Olson, of Nolan, Olson, Hansen, Fieber & Lautenbaugh, L.L.P., for appellee Allstate Indemnity Company.

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

CONNOLLY, J.

After a fire, the appellant, Esther Williams, sought damages from appellee, Allstate Indemnity Company (Allstate), for breach of contract and bad faith concerning its handling of her claims. Part of the bad faith claim included an allegation that Paul Davis Systems (PDS), the contractor who performed repairs on her home, was an agent of Allstate. The district court granted Allstate's motion for a directed verdict on the bad faith claim and found that the contractor was not an agent of Allstate. The jury found for Williams on the breach of contract claim. The court overruled Williams' motion for a new trial on her bad faith claim, and she appeals. Because we determine that Williams failed to show that Allstate lacked a reasonable basis for its actions and that PDS was not an agent or employee of Allstate, we affirm.

BACKGROUND

After a November 1997 fire at her home, Williams and her husband, who died during the pendency of this action, filed a claim with Allstate. The damage rendered the house uninhabitable, and Williams resided elsewhere until August 1998.

Williams' first choice for a contractor was Hicks Construction (Hicks), and she contends that Hicks could have done the job. However, David Kulm, a former project manager at Hicks, testified that Hicks was not equipped to do the type of work required and would have had to hire subcontractors, which would have incurred additional costs. Allstate was not willing to approve the contract under those circumstances. Kulm stated that Allstate's position was not unreasonable.

PDS was recommended by Allstate, and Williams hired it as the contractor. Williams, however, states that she did not want PDS to do the work. She testified that Allstate suspended payments for living expenses until she chose a contractor. Because she had not found another contractor, she believed that she did not have any choice except to choose PDS. She stated she had been looking for another contractor, but admitted that she had not found one a month after the fire. Williams believed she should have been allowed more time to find an alternate contractor or hire Hicks.

PDS is a preferred provider in the Allstate qualified vendor program. Preferred providers apply with Allstate for the designation, and Allstate performs a background check of the vendor. Under the program, Allstate will recommend PDS as a contractor and PDS will warrant its work. Allstate also guarantees the work of the contractors in the program. If a preferred provider fails to perform a quality job, it is removed from the program.

Before a contract is signed, PDS works closely with the insurance company. But after a contract is signed, it works more closely with the insured homeowner. Allstate does not directly pay the contractor. Instead, Allstate issues checks to the homeowner that are payable to both the homeowner and the contractor. Allstate did not exercise any control over PDS employees, dictate who could be hired as a subcontractor, or supervise the day-to-day work at Williams' house.

Michael Hytrek was the project manager for PDS. After the fire, an adjuster at Allstate contacted Hytrek to do a walk-through of the home and give an estimate. Hytrek stated that he did not want the job, but took it with some reluctance when Allstate asked him to, because Williams could not find a contractor. When Hytrek began receiving complaints from Williams, he communicated this to Allstate.

From the beginning, Williams and PDS had disagreements about the repairs and how they were to be done. The record contains a litany of complaints, including some items that were not part of the repair contract with PDS. The parties also disagree about whether some of the complaints were problems caused by PDS or were preexisting problems in the house. According to Hytrek, at the request of Allstate, PDS did some repair work that was not covered under the contract to "appease" Williams.

The house was declared livable by Allstate in early July 1998. Williams, however, refused to disburse money to PDS until the problems were resolved. When Allstate provided Williams with checks, she refused to endorse them. As a result, PDS did not return personal property that had been removed from the house as part of the cleaning and repair process. Williams did not move back into the house until August and experienced difficulties living without her personal property. The president of PDS admitted that the contract did not specifically authorize PDS to withhold personal property because of nonpayment.

According to PDS, Williams was also insisting that PDS finish various repairs required under the warranty before she would move back into the house. Because of nonpayment, some items covered under the PDS warranty were never completed. PDS brought suit against Williams to recover money due for the services rendered at the house, and Williams filed a cross-claim. In February 1999, the parties reached an agreement for partial payment and PDS returned Williams' property. A jury later awarded $6,922.40 to PDS and $3,500 to Williams. See *Paul Davis Sys. of Omaha v. Williams*, No. A-00-895, 2002 WL 205950 (Neb. App. Feb. 12, 2002) (not designated for permanent publication).

Williams also had disagreements with Allstate about whether items in the house needed to be completely replaced and about painting the exterior. In addition, Williams refused to accept a

$7,000 check from Allstate for items she replaced because Allstate did not specifically state the items it was covering in the check.

According to Williams, she was owed reimbursement for some damaged items and Allstate canceled a scheduled meeting to discuss the matter. Williams also complains that she was told by Allstate that her daughter would not be allowed to attend the meeting. The record, however, shows that representatives of Allstate had difficulty getting along with her daughter but that she ultimately was allowed to attend the meeting.

Williams testified that she did not receive a reimbursement check until June 2001 and that Allstate said it "forgot" about it. Williams admitted, however, that she did not finish going through boxes of damaged items until late 2000. The record also shows that after Williams finished, Allstate met with her, and that she accepted a check for partial payment. The remainder was paid later, and Williams received the check several weeks late because of an oversight by Allstate's attorney. The record shows Williams sent numerous letters complaining about how her claim was handled. Allstate moved for a directed verdict on all claims. The district court overruled the motion on the breach of contract claim but granted the motion on the bad faith claim. The court held that bad faith must be intentional and that Williams did not show an absence of a reasonable basis for Allstate to deny benefits under the policy. The jury awarded Williams $5,400 on her breach of contract claim. Williams filed a motion for a new trial, arguing that PDS was an agent of Allstate and that the court erred when it dismissed the bad faith cause of action. The court overruled the motion, and Williams appeals.

ASSIGNMENTS OF ERROR

Williams assigns that the district court erred by (1) directing a verdict for Allstate on the bad faith claim and (2) determining that PDS was not an agent of Allstate as a matter of law.

STANDARD OF REVIEW

[1] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue

should be decided as a matter of law. *Kinney v. H.P. Smith Ford, ante* p. 591, 667 N.W.2d 529 (2003).

ANALYSIS

Williams contends that the district court erred when it directed a verdict on her bad faith claim. She argues that Allstate acted in bad faith when it (1) cut off or threatened to cut off her living expense allowance, (2) communicated with Hicks to deter Hicks from submitting a bid, (3) failed to respond to her complaints in a reasonable manner, (4) missed meetings and demanded that her daughter not attend a meeting, (5) delayed processing claims in April 1999 and May 2000, (6) used a poorly defined process of reimbursement for personal items, and (7) failed to see that the house was painted properly or that items were repaired.

[2-4] To establish a claim for bad faith, a plaintiff must show an absence of a reasonable basis for denying the benefits of the insurance policy and the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998). We have recognized the holdings in other jurisdictions that an insurance company has a right to debate a claim that is "fairly debatable," or subject to a reasonable dispute, without being subject to a bad faith claim. *Id.* at 230, 583 N.W.2d at 325, citing *Morgan v. American Family Mutual Ins. Co.*, 534 N.W.2d 92 (Iowa 1995). Whether a claim is subject to a reasonable dispute is appropriately decided by the court as a matter of law. *Radecki v. Mutual of Omaha Ins. Co., supra.* The determination is based on the information available to the insurance company at the time the demand is presented. *Id.*

Here, Williams has failed to show the absence of a reasonable basis for Allstate's actions. Williams' claims of bad faith are as follows:

(1) Williams' living expense allowance was cut off. Williams, however, did not timely hire a contractor, making it reasonable for Allstate to refuse to pay the allowance until a contractor was hired. Although Williams argues that she should have had more time to arrange to hire another contractor, the record shows that the contractor of her choice could not personally perform the job. It is not unreasonable for an insurance company to be

concerned about continuing to pay a living expense allowance when the insured is not timely arranging to have the home repaired. Reasonable minds could differ on whether Williams could have more quickly found a contractor. Accordingly, Williams has failed to show the lack of a reasonable basis for Allstate's actions.

(2) Allstate acted in bad faith when it communicated with Hicks. We disagree. The record shows that Allstate informed Hicks that a bid from it would not likely be accepted because Hicks would have to hire subcontractors. Hicks agreed that Allstate's position was reasonable. We conclude that Allstate acted reasonably in communicating its concerns to Hicks.

(3) Allstate failed to respond to her complaints in a reasonable manner. The record shows that Allstate responded to Williams' complaints and attempted to work with Williams and PDS to solve the problems. It was reasonable for Allstate to expect Williams to initially raise concerns with PDS instead of through Allstate.

(4) There were complaints about missed meetings and a demand by Allstate that her daughter not attend a meeting. But the record shows that meetings were canceled when Williams had not finished going through all of her personal property. The record also indicates that representatives of Allstate had difficulty getting along with her daughter but that she ultimately was allowed to attend the meeting. Under these circumstances, Williams has failed to show that Allstate's actions were unreasonable.

(5) Allstate delayed the processing of her claims in April 1999 and May 2000. The record shows, however, that the claims were delayed in part because of Williams' failure to finish sorting her personal property. The record shows that a further delay was accidental because of an oversight by Allstate's attorney. Under these circumstances, we conclude Williams has not shown that Allstate was unreasonable in handling the claims.

We have reviewed Williams' remaining complaints, including repairs and Allstate's reimbursement policies, and find no merit. We determine that Williams has failed to show the absence of a reasonable basis for Allstate's denial of benefits.

Williams next argues, however, that PDS was an employee or agent of Allstate who acted in bad faith and that Allstate is

liable for PDS' actions. We determine that PDS was not an agent of Allstate.

[5] Ordinarily, a party's status as an employee or an independent contractor is a question of fact. However, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). By stating "where the inference is clear," this court means that there can be no dispute as to facts pertaining to the contract and the relationship of the parties involved and that only one reasonable inference can be drawn therefrom. *Id.*

[6,7] No single test exists for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the type of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. *Id.* While no one factor is determinative, control is the most important factor to be considered in determining whether someone is an employee or independent contractor. *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997).

Here, the undisputed facts show that Allstate did not exercise control over how PDS performed its work. PDS is a distinct business that is not controlled by Allstate. Obviously PDS, a building contractor, uses different skills and know-how than does Allstate, an indemnity company. Nothing in the record indicates that Allstate supplied PDS with equipment or tools. PDS was hired by Williams, not by Allstate, and was not paid directly by Allstate.

Although PDS was part of Allstate's qualified vendor program, an insured is not required to select a contractor from the program, and nothing in the record indicates that the program was intended to create an agency relationship.

Here, the inference is clear that there was not a master and servant relationship between Allstate and PDS. Accordingly, we conclude that PDS was not an employee or agent of Allstate as a matter of law. Because PDS was not an employee or agent, we do not address whether its actions were in bad faith.

CONCLUSION

We determine that Williams has failed to show that Allstate lacked a reasonable basis for its actions. We further determine that PDS was not an employee or agent of Allstate. The district court correctly directed a verdict for Allstate on the bad faith claim. Accordingly, we affirm.

AFFIRMED.

LA TONYA WRIGHT, APPELLANT, V. FARMERS MUTUAL OF NEBRASKA, A CORPORATION, AND STATE FARM GENERAL INSURANCE COMPANY, A CORPORATION, APPELLEES.

669 N.W.2d 462

Filed October 3, 2003. No. S-02-585.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Insurance.** An insurer may assert a breach of a cooperation clause as a defense when the insurer was prejudiced by the lack of cooperation.
3. **Insurance: Breach of Contract.** The failure to provide material information under a clause requiring the insured to submit to an examination under oath is a material breach of the contract. The breach may be raised by the insurer as a defense when the insurer shows prejudice.

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

Glenn Alan Shapiro and Patrick T. Riskowski, of Gallup & Schaefer, for appellant.

Thomas A. Grennan and Donald P. Dworak, of Gross & Welch, P.C., for appellee Farmers Mutual of Nebraska.

Richard C. Gordon and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee State Farm General Insurance Company.

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

CONNOLLY, J.

Appellant, La Tonya Wright, sued appellees Farmers Mutual of Nebraska (Farmers Mutual) and State Farm General Insurance Company (State Farm) after they denied her claims following a fire. The district court sustained the insurance companies' motions for summary judgment because Wright concealed information on her insurance applications about a previous fire and failed to answer questions when interviewed under oath. We conclude that there are no issues of material fact concerning Wright's failure to answer questions during examinations under oath and that thus, she materially breached the insurance contracts. We affirm.

BACKGROUND

This appeal concerns a July 28, 1999, arson fire that occurred at Wright's property in Omaha, Nebraska. Wright had purchased insurance policies from both Farmers Mutual and State Farm to cover the property.

Wright applied for the State Farm policy in July 1998 and the Farmers Mutual policy on July 16, 1999. The agent who sold Wright the Farmers Mutual policy averred in his affidavit that he read the questions on the application to Wright and wrote down her answers. According to the agent, when asked to list all losses that occurred in the 5 years before the application, Wright replied that there were none. Likewise, the State Farm agent averred in her affidavit that Wright stated there were no previous losses. Wright averred, in her affidavit, that she was not asked about previous losses by either agent and that she did not review the applications. Wright admits, however, that she signed the applications.

Wright also had previously insured the property with State Farm and did not disclose this information to Farmers Mutual. Two days before she applied for the Farmers Mutual coverage, she requested an increase in the limits of her State Farm policy.

After the arson fire, Wright submitted claims to both insurance companies. When Farmers Mutual investigated the claim, it discovered that Wright had previously sustained a fire loss of an incendiary nature at a different property in May 1998. Underwriters at Farmers Mutual and State Farm averred in their affidavits that they would not have issued the policies if Wright had disclosed the earlier loss.

The Farmers Mutual policy provides in part:

> This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

It also provides:

> The insured, as often as may be reasonably required, shall . . . submit to examinations under oath by any person named by this Company, and . . . produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof . . . at such reasonable time and place as may be designated by this Company . . . .
>
> . . . .
>
> . . . No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

The State Farm policy provides in part: "This policy is void as to you and any other **insured**, if you or any other **insured** under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss." It also provides:

> In case of a loss to which this insurance may apply, you shall see that the following duties are performed:
>
> . . . .

d. as often as we reasonably require:

(1) exhibit the damaged property;

(2) provide us with records and documents we request and permit us to make copies; and

(3) submit to examinations under oath and subscribe the same[.]

The policy further provides: "No action shall be brought unless there has been compliance with the policy provisions and the action is started within one year after the date of loss or damage." The applications for both policies provide that by signing, the insured is stating that the information is correct. The policies also require the insured to submit to examinations under oath and to produce documents for examination when a loss occurs.

Farmers Mutual conducted an examination of Wright under oath. Wright was informed that she had a right to be represented by counsel at the examination. Wright refused to answer questions about (1) her annual salary, (2) the number of properties she owned, (3) other companies she was insured with and whether she had multiple insurance policies on any of the properties she owned, (4) her indebtedness and if she ever declared bankruptcy, (5) the value of items of property, (6) whether there was a mortgage or security instrument connected with any of her properties, (7) whether she owned property outside the city of Omaha, (8) whether she had documents about insurance claims made in the 10 years before the examination, (9) whether she would produce tax documents, and (10) the status of her claim with State Farm. Wright initially refused to produce documents. She later submitted an affidavit stating that she was in the process of obtaining her tax returns, but did not submit them as of the date of the summary judgment hearing. She also failed to answer similar questions when examined under oath by State Farm and failed to submit documents to State Farm.

Wright averred in her affidavit that she was not represented by counsel at the examinations and believed the questions were personal and irrelevant. She stated that she "materially complied" with answering the questions. The record contains averments that Wright's refusal to answer questions and provide documents hindered the investigation of the claims and prejudiced Farmers

Mutual and State Farm. Wright did not present evidence to dispute the claims of prejudice.

Farmers Mutual and State Farm denied Wright's claims, and she sued. Farmers Mutual and State Farm answered that Wright had breached their policies under sections pertaining to concealment and compliance with examination under oath. Both moved for summary judgment. The district court concluded that although Wright denied being asked questions about the previous loss, she admitted that she signed the applications. Thus, the court determined that there was no issue of material fact about breach of the policies by concealment. The court further found that Wright materially breached the insurance contracts when she refused to answer questions under oath. Thus, the court granted the motions for summary judgment. Wright appeals.

ASSIGNMENT OF ERROR

Wright assigns that the district court erred by granting the insurance companies' motions for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Farmland Serv. Co-op v. Southern Hills Ranch, ante* p. 382, 665 N.W.2d 641 (2003).

ANALYSIS

Wright argues that the district court erred by granting summary judgment, because there was an issue of material fact whether she intentionally misrepresented or concealed information about her previous claim. She also contends that summary judgment is inappropriate when an insured answers some questions under oath, but refuses to answer others. Farmers Mutual and State Farm argue that submission to an examination under oath is a condition of the contract and that the failure of an insured to answer questions is a material breach of the contract, justifying denial of her claim.

[2] The effect of an insured's refusal to answer questions in an examination under oath is an issue of first impression in

Nebraska. We have held, however, that an insurer may assert a breach of a cooperation clause as a defense when the insurer was prejudiced by the lack of cooperation. See *MFA Mutual Ins. Co. v. Sailors*, 180 Neb. 201, 141 N.W.2d 846 (1966). A majority of other jurisdictions have held that submission to an examination under oath is a condition precedent to recovery under an insurance contract and that an unexcused failure to submit to an examination constitutes a material breach of the contract. See, e.g., *Warrilow v. Superior Court of State of Ariz.*, 142 Ariz. 250, 689 P.2d 193 (Ariz. App. 1984); *Halcome v. Cincinnati Ins. Co.*, 254 Ga. 742, 334 S.E.2d 155 (1985); *Standard Mut. Ins. Co. v. Boyd*, 452 N.E.2d 1074 (Ind. App. 1983); *Watson v. National Sur. Corp.*, 468 N.W.2d 448 (Iowa 1991); *Lorenzo-Martinez v. Safety Ins. Co.*, 58 Mass. App. 359, 790 N.E.2d 692 (2003); *Allison v. State Farm Fire & Cas. Co.*, 543 So. 2d 661 (Miss. 1989).

Further, courts have held that partial compliance with the cooperation clause will not excuse a partial breach of the clause. See *Halcome v. Cincinnati Ins. Co., supra*. In *Halcome*, there was evidence inferring that a fraudulent claim had been filed. The insureds submitted to an examination under oath, but then refused to answer questions about their finances, debts, and criminal history. The Georgia Supreme Court held that the failure to provide any material information was a breach of the insurance contract. Because there was evidence of fraud, the court determined that the withheld information was material and that the contract had been breached.

[3] We agree with the majority of jurisdictions that have addressed the issue. Thus, we hold that the failure to provide material information under a clause requiring the insured to submit to an examination under oath is a material breach of the contract. The breach may be raised by the insurer as a defense when the insurer shows prejudice.

Here, Wright refused to answer a number of questions about items such as her finances, debts, other properties, and other insurance. Wright, however, contends that the information was not relevant. We disagree; the evidence suggested fraudulent activity. Thus, the questions asked by the insurance companies were material to their investigation.

Wright next argues that after consulting with an attorney, she offered to comply with the cooperation clause. We note that in several instances, courts have held that a later promise to comply was too late and could not cure the breach. See, *Monticello Ins. Co. v. Mooney*, 733 So. 2d 802 (Miss. 1999); *Watson v. National Sur. Corp., supra*. Here, Wright's affidavit includes only an offer to provide tax documents. It does not offer to provide other omitted information. Further, as of the time of the summary judgment hearing, Wright had not provided any documents. We determine that under these circumstances, Wright's partial offer to comply did not cure the breach. We further determine that the insurance companies provided evidence that the breach prejudiced their investigation of the claims; Wright has not presented evidence to dispute the claims of prejudice.

Because Wright materially breached the insurance contracts by failing to answer material questions to the prejudice of the insurance companies, the district court correctly granted the insurance companies' motions for summary judgment. Accordingly, we affirm, and we need not address whether there is an issue of material fact that Wright intentionally misrepresented or concealed information when she obtained her policies.

AFFIRMED.

STEPHAN, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. GEORGE B. ACHOLA, RESPONDENT.

669 N.W.2d 649

Filed October 3, 2003. No. S-02-630.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.

3. **Disciplinary Proceedings: Appeal and Error.** In a proceeding to discipline an attorney, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception.
4. ____: ____. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive.
5. ____: ____. Under Neb. Ct. R. of Discipline 4 (rev. 2001), the Nebraska Supreme Court may consider any of the following as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
6. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
7. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
8. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.
9. ____. The propriety of a disciplinary sanction must be considered with reference to the sanctions imposed by the Nebraska Supreme Court in prior cases presenting similar circumstances.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

D.C. Bradford and Justin D. Eichmann, of Bradford & Coenen, L.L.C., for respondent.

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

PER CURIAM.

NATURE OF CASE

The office of the Counsel for Discipline of the Nebraska Supreme Court, the relator, filed formal charges against George B. Achola, alleging that he wrote unauthorized checks on his employer's account in payment of personal expenses. In his answer, Achola admitted to writing the checks. We conclude that Achola should be suspended from the practice of law in the State of Nebraska for 3 years.

BACKGROUND

Achola was admitted to the practice of law in the State of Nebraska on September 28, 1995. In May 1998, he began working as an associate for the law firm of Walentine, O'Toole, McQuillan & Gordon (Walentine, O'Toole) in Omaha, Nebraska. Walentine, O'Toole had a policy that associates did not have authority to pay for personal expenses with firm funds. Achola was authorized to sign checks on the firm's account with the expectation that such expenditures would be normal business expenditures.

On December 7, 2001, a partner in Walentine, O'Toole discovered that a number of checks had not been properly categorized in the firm's bookkeeping system. An investigation revealed that the checks had been signed by Achola and were unauthorized and improper expenditures. When Achola was confronted by partners in the firm, he admitted he had written the checks to pay for personal obligations. Achola was immediately terminated from Walentine, O'Toole, and the firm subsequently reported his conduct to the relator.

FORMAL CHARGES

The relator filed formal charges against Achola, alleging that he violated his oath of office as an attorney, see Neb. Rev. Stat. § 7-104 (Reissue 1997), and the following provisions of the Code of Professional Responsibility: "DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The relator alleged that from February to November 2001, Achola wrote nine unauthorized checks totaling more than $20,000. The relator made specific allegations with regard to two of the checks: On February 13, Achola wrote a $1,625 check against the firm's account for payment of a personal credit card bill. Achola recorded this check in the firm's accounting system as payment of a filing fee on behalf of one of the firm's clients. On July 20, Achola wrote a $6,200 check from the firm's account for payment on a personal loan. Achola recorded this check in the accounting system as the payment of an expert witness fee.

In his answer, Achola admitted that he had written the checks set forth in the formal charges. He also admitted that he had paid for personal expenses with firm funds, but he claimed that some of the checks at issue were authorized by the firm. He acknowledged that he had an obligation to reimburse the firm for any personal expenses, and he alleged that he had repaid the firm for the checks set forth in the charges. He prayed that this court would "impose such discipline as may be warranted in the premises."

REFEREE'S RECOMMENDATION

The referee found that Achola had violated DR 1-102(A)(1) and (4) and the oath of office as set forth in § 7-104. The referee explained that because Achola admitted to the violations, the sole task remaining was to determine the appropriate sanction.

The referee found that on at least two occasions, Achola fraudulently directed the firm's bookkeeper to prepare checks from the firm's account payable to Achola's creditors. Achola also provided the bookkeeper with inaccurate information as to the purpose or client to be noted on the checks. In addition, the referee found that Achola had written checks on the firm's account to his creditors by removing the checks from the bookkeeper's office, writing the checks, and using them to pay personal expenses. Achola purposely chose not to provide the bookkeeper with a carbon copy of these checks so she would not be able to reconcile the firm's checks. The referee noted that the members of the firm were authorized to take checks from the bookkeeper's office to pay legitimate operating expenses when necessary and that on some occasions, copies of the checks were not returned to the bookkeeper.

Although the referee was concerned with the calculated dishonesty involved in Achola's violations, he found credible Achola's testimony that he intended to repay the money. The referee stated: "This Referee, after observing . . . Achola's demeanor, listening to his testimony, and hearing the testimony of witnesses on his behalf, believes that . . . Achola's intent was to repay the money taken."

With regard to Achola's attitude, the referee stated:

> From the moment of discovery of his misconduct, [Achola] has admitted his wrongdoing, made restitution of all monies

> taken, and has cooperated fully in all proceedings brought by the Counsel for Discipline and his investigation. In fact, [the relator] in his closing remarks commented on . . . Achola's cooperation.
>
> This Referee was impressed by [Achola's] humility and what I felt was sincere remorse throughout the course of the hearing. He was clearly embarrassed and sorry for what he had done, and he so testified. All things being considered . . . Achola's attitude could not have been better from the date of discovery of his misconduct to the date of the hearing. The testimony on behalf of [Achola] clearly echoed this factor time and again.

The referee found that Achola's full restitution, although made after the discovery of his misconduct, was a significant mitigating factor. He also found that Achola had encountered significant financial difficulties related to obligations to his family. Achola's cultural background is tribal Kenya, and in that culture, the first-born son has considerable responsibility for his elders. Achola's therapist testified that the pressure to help his parents in Kenya was a significant factor in Achola's misconduct. Achola testified that he spent a large amount of money transporting his parents to the United States to attend his wedding. The therapist testified that Achola was too embarrassed by his financial circumstances to ask for help from his friends. The therapist also testified that Achola had taken complete responsibility for his actions.

At Achola's hearing, 68 individuals presented evidence on his behalf, including attorneys, community leaders, and 18 county court and district court judges. The evidence was in the form of live testimony, letters, and affidavits which are part of the record. The referee found that none of the individuals hesitated to recommend that Achola be allowed to continue practicing law. The referee compiled the following list from the comments made about Achola:

> "Good role model."
> "Outstanding person."
> "Hard worker."
> "Principled."
> "He will learn from his mistakes."
> "A wonderful asset to the Bar."

"Very involved in a mentoring program working with children."

"The Bar Association needs competent attorneys of [Achola's] race."

"Hard worker with solid integrity - diligent."

"Very remorseful."

"Very active in charitable work."

"Serves a needed role as an attorney in the community."

"Has the character and integrity to continue being an effective lawyer notwithstanding the charges against him."

"No reservations about his continued ability to practice law notwithstanding these charges against him."

"Independent thinker."

"Would not hesitate to practice with him notwithstanding these charges."

"These charges were out of character."

"Would not hesitate to work with him in the future as a practicing attorney."

"Extremely out of character."

"Never known him to be dishonest."

"Very hard working."

"Embarrassed by his conduct."

"The charges are an aberration."

"It is my strong belief that attorneys should be leaders in civic, charitable and religious matters. [Achola] has excelled in this area."

"A solid and willing contributor to his community. He is far more willing to be involved and give of his own time and energy to projects than most people I know."

"Ashamed by his conduct."

"No reservations about his continued ability to practice law."

"Serves a part of the community that is underrepresented."

"He will learn from his mistake, face this adversity and overcome it."

"Credit to the legal profession."

"Isolated incident."

"Conscientious and professional."

"Proud to be his friend and colleague."
"Ethical."
"Trustworthy."
"Honest and sincere."
"A good friend."
"Genuine and sincere."

The referee found that *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001), was helpful in recommending a sanction. He concluded that many of the following factors found by the referee in *Frederiksen* were also present in this case: Achola was genuinely remorseful and embarrassed by his actions, and he vowed that the actions would not be repeated. Achola had provided significant support to his community through board memberships and volunteer work. Achola practiced law effectively after his misconduct was discovered.

The referee also noted factors that distinguished this case from *Frederiksen*. These factors included Achola's intent at the time the acts of misconduct occurred and the financial distress and cultural pressures which motivated the misconduct. The referee believed that Achola was sincere when he stated that he always intended to repay the money, and the referee noted that Achola repeatedly acknowledged the "'stupidity'" of his actions. The referee commented that he "would be amazed if this conduct were ever repeated by . . . Achola."

After a review of the evidence, the referee concluded that "neither the needs of the Bar nor the public interest would be served by disbarment or a long term suspension of [Achola's] privilege to practice law." It was the referee's opinion that

> [a] three year suspension in this case would be punishment as opposed to whether it is in the public interest to permit an attorney to continue to practice when he is involved in this type of misconduct. . . . Suspension itself sends a message that the Bar considers this type of conduct most inappropriate, but, to remove a young lawyer from his profession for three years is a sanction which comes very close to disbarment.

The referee concluded:

> I believe that a suspension from the practice of law for a period of one year is a severe sanction for a young lawyer,

in the early stages of his career and just starting a family. No client was harmed as a result of his actions and I believe the mitigating circumstances weigh in favor of [Achola].

ASSIGNMENT OF ERROR

The relator assigns, restated, that the referee erred in recommending a sanction that is too lenient under the circumstances of this case.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Counsel for Dis. v. Petersen*, 264 Neb. 790, 652 N.W.2d 91 (2002).

[2] Disciplinary charges against an attorney must be established by clear and convincing evidence. *Id.*

ANALYSIS

[3,4] On November 19, 2002, the relator filed an exception to the referee's report, stating that the recommended sanction was too lenient in light of *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001). In a proceeding to discipline an attorney, this court is limited in its review to examining only those items to which the parties have taken exception. *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002). When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the court may, at its discretion, adopt the findings of the referee as final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Because neither party has filed exceptions to the referee's findings of fact, we consider them final and conclusive pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2001). We therefore adopt the referee's findings of fact and conclude that clear and convincing evidence establishes that Achola violated DR 1-102(A)(1) and (4), as well as the oath of office set forth in § 7-104.

[5] We next proceed to determine the appropriate sanction. Under Neb. Ct. R. of Discipline 4 (rev. 2001), we may consider any of the following as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. *State ex rel. NSBA v. Frederiksen, supra.*

[6,7] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Thompson, supra.* Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *Id.* For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.*

In *Frederiksen*, we noted that courts in other states have imposed a variety of sanctions, ranging from public reprimand to disbarment, where an attorney misappropriated fees from his law firm.

In Nebraska, we have ordered the attorney disbarred where there was misappropriation of a client's funds. See, *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000); *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997). We have also ordered disbarment where the attorney misappropriated nonclient funds. See, *State ex rel. NSBA v. Rosno*, 245 Neb. 365, 513 N.W.2d 302 (1994) (attorney misappropriated funds from Lincoln Darts Association while serving as treasurer; court accepted surrender of attorney's license and ordered him disbarred); *State ex rel. Nebraska State Bar Assn. v. McConnell*, 210 Neb. 98, 313 N.W.2d 241 (1981) (attorney was disbarred for withdrawing $1,500 from Madison County Bar Association's library fund without authorization).

[8] This court has not, however, adopted a "bright line rule" that misappropriation of funds will always result in disbarment.

The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002). Were we to impose a bright-line rule concerning misappropriation of funds, there would be no need to consider mitigating factors.

Because the purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to continue practicing law, we consider the underlying factors and the attorney's actions throughout the proceeding. See *id.*

In determining the appropriate sanction, we first note the serious nature of Achola's misconduct. He misappropriated approximately $20,000 from his law firm. On at least two occasions, he directed the firm's bookkeeper to prepare checks payable to his personal creditors and provided the bookkeeper with inaccurate information as to the purpose or client to be noted on the checks.

Misappropriation of funds by an attorney, whether from a client or from one's own law firm, violates basic notions of honesty and endangers public confidence in the legal profession. See *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991). We do not view the misappropriation of funds from one's own firm as any less dishonest and deceptive than the misappropriation of client funds.

With respect to Achola's attitude, the referee, who observed Achola and heard his testimony, made favorable comments, which have been set forth above. The referee found that none of the individuals who presented evidence on Achola's behalf hesitated to recommend that he be allowed to continue practicing law. The referee further found that the affidavits from judges, as well as the testimony and letters on Achola's behalf, demonstrated that he is a capable attorney. The referee also noted that Achola had practiced law effectively following the discovery of his misconduct.

[9] The propriety of a disciplinary sanction must be considered with reference to the sanctions imposed by this court in prior cases presenting similar circumstances. *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002). The only Nebraska attorney discipline case involving an attorney who

misappropriated funds from his own law firm is *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001).

Frederiksen practiced law for a firm in Des Moines, Iowa, and over the course of 3 years, he became dissatisfied with his compensation. According to the referee, " '[i]n order to give himself "his due" and abate his anger toward his partners,' " Frederiksen retained for his own use approximately $15,000 in fees that were paid directly to him by the firm's clients. See *id.* at 564, 635 N.W.2d at 430. Frederiksen later attempted to justify his actions as " 'moonlighting.' " See *id.* According to Frederiksen, he misappropriated the money solely out of anger, and he claimed no mental disorder, chemical dependency, marital discord, or economic distress.

Frederiksen subsequently resigned from the Iowa firm and joined an Omaha firm in May 1998. Upon his departure, the Iowa firm paid Frederiksen a significant amount of money, and it was this payment that triggered guilty feelings and convinced Frederiksen to discuss the misappropriations with members of the Iowa firm. Frederiksen reported his misconduct to the Iowa authorities who regulate attorney disciplinary matters, and the Iowa Supreme Court Board of Professional Ethics and Conduct issued a public reprimand. An attorney at the Iowa firm filed a complaint against Frederiksen with the Nebraska State Bar Association.

Formal charges were filed against Frederiksen in this court, and a hearing was held before a referee. The referee recommended that Frederiksen be suspended from the practice of law for 60 days to 6 months and that upon his return to the practice of law, he be placed on probation for 2 years. Frederiksen took exception to the referee's recommended suspension and appealed to this court.

After examining an assortment of sanctions imposed in other states for similar offenses, we determined that although Frederiksen's actions merited a serious sanction, disbarment was not required. We concluded that no client was harmed as a result of his actions and that there were mitigating circumstances. We noted that Frederiksen had expressed sincere remorse and had made full restitution. We also noted that he was respected by members of the legal profession for his work and was dedicated

to his family, his community, and his profession. We ordered that Frederiksen be suspended from the practice of law in the State of Nebraska for 3 years.

The referee in the case before us found two factors which distinguish Achola's case from *Frederiksen* and, in the referee's opinion, warrant a lesser sanction. First, Achola's misconduct was prompted by significant financial difficulties related to an obligation to his family, whereas Frederiksen acted solely out of anger. Second, Achola always intended to repay the money he took from the firm. Frederiksen, however, showed no intention of returning the money he misappropriated, and in fact, Frederiksen felt he was entitled to it.

The referee also noted several mitigating factors: Achola's financial difficulties were related to an obligation to his family. Achola took complete responsibility for his misconduct, and he cooperated fully in all proceedings brought by the relator. The referee found that Achola's attitude "could not have been better from the date of discovery of his misconduct to the date of the hearing." Achola was genuinely remorseful and embarrassed by his actions, and he vowed that they would not be repeated. Achola offered evidence from a number of individuals in the community, including attorneys and judges, who supported his continued law practice. Achola has provided significant support to his community and has practiced law effectively since the discovery of his misconduct. We find that although these mitigating factors do not excuse Achola's misconduct, they weigh in his favor in considering the sanction to be imposed.

CONCLUSION

This court does not condone Achola's conduct, as evidenced by the sanction imposed. However, sufficient mitigating factors support the decision not to disbar Achola. For the reasons stated above, Achola is suspended from the practice of law in the State of Nebraska for a period of 3 years, effective immediately.

JUDGMENT OF SUSPENSION.

MILLER-LERMAN, J., not participating.

CONNOLLY, J., dissenting.

For the reasons I set out in my dissent in *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001), I dissent.

The majority notes that no client was harmed and that there were mitigating factors. But as I stated in *Frederiksen*, stealing from fellow lawyers is no less a flagrant violation than stealing from a client. See, *State ex rel. NSBA v. Rosno*, 245 Neb. 365, 513 N.W.2d 302 (1994); *State ex rel. Nebraska State Bar Assn. v. McConnell*, 210 Neb. 98, 313 N.W.2d 241 (1981). Although I agree with some of the mitigating factors discussed by the majority, I do not view remorse or intent to repay the money as persuasive when these factors took place after the theft was discovered. Under the circumstances in this case, I conclude that Achola should be disbarred.

GERRARD, J., joins in this dissent.

CHERI R. DEAN, APPELLANT, V.
SHARON K. YAHNKE, APPELLEE.
670 N.W.2d 28

Filed October 3, 2003. No. S-02-925.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
5. **Municipal Corporations: Ordinances: Statutes: Presumptions.** All ordinances are presumed to be valid. However, the power of a municipality to enact and enforce any ordinance must be authorized by state statute.
6. **Municipal Corporations.** Legislative charters are always grants of power that are strictly construed.
7. **Municipal Corporations: Streets and Sidewalks.** No municipal corporation, by any act of its own, can devolve the duty of keeping its streets and sidewalks in a reasonably safe condition for travel by the public.
8. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

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

Richard H. Hoch, of Hoch, Funke & Kelch, for appellant.

Kelly K. Brandon, and, on brief, Thomas A. Otepka, of Woodke, Otepka & Gibbons, P.C., for appellee.

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

HENDRY, C.J.

INTRODUCTION

This is a negligence action in which appellant, Cheri R. Dean, alleged that she injured herself when she fell due to a break "between the cement" in the public sidewalk abutting property owned by appellee, Sharon K. Yahnke, in Peru, Nebraska, a city of the second class. After a hearing on Yahnke's motion for summary judgment, the district court found that under the city's ordinances, the city had failed to "shift" the duty to maintain the sidewalk from the city to Yahnke because the city failed to provide proper notice to Yahnke. The court therefore determined that Yahnke owed no duty to Dean to repair the sidewalk. The court sustained Yahnke's motion for summary judgment and dismissed the case. Dean appeals.

BACKGROUND

In August 1997, Yahnke wrote to the mayor and city council of Peru, requesting that the city pay for half of the cost to replace the street curb and sidewalk in front of her property. In September, the city council considered Yahnke's request. The city council voted to replace the curb, but only after Yahnke had made the sidewalk repairs herself, which the council determined was her responsibility under the applicable city ordinances. The mayor notified Yahnke of the council's decision. After this communication from the mayor, Yahnke wrote to the mayor on two other occasions to ask the city to go forward with the curb repairs. The city refused to do so until Yahnke had made the sidewalk repairs. The sidewalk repairs were never made.

In August 2001, Dean filed a petition in Nemaha County District Court, alleging that in April 2000, she was injured when she fell on the sidewalk in front of Yahnke's property due to a break "between the cement." Dean alleged that the break in the cement was concealed, that Yahnke knew or should have known of the dangerous condition of the sidewalk, and that Yahnke's negligence was the proximate cause of Dean's injuries. Dean also alleged that Yahnke had violated the city's ordinances by failing to maintain the sidewalk in a safe condition and was therefore liable for Dean's injuries. Dean did not allege that the sidewalk's condition was the result of Yahnke's affirmative wrongdoing or negligent use of the sidewalk for an unintended purpose.

In July 2002, Yahnke filed a motion for summary judgment, contending she had no duty to repair the sidewalk. In support of her motion, Yahnke offered an affidavit averring that she had never received written notice to repair the sidewalk pursuant to Peru Mun. Code § 8-204 (1986). After a hearing on the motion, the district court found that although Yahnke had knowledge of the sidewalk's condition, the city was required to comply with Peru Mun. Code § 8-203 (1986) and § 8-204 before it could "shift" to Yahnke its duty to maintain the sidewalk. Section 8-203 provides in part:

> Every owner of any lot . . . shall at all times keep and maintain the [abutting] sidewalk . . . in good and proper repair, and in a condition reasonably safe for travel for all travelers thereon. In the event that the owner . . . shall fail to construct or repair any [abutting] sidewalk . . . within the time and in the manner as directed and required herein after having received due notice to do so, they shall be liable for all damages or injury occasioned by reason of the defective or dangerous condition of any sidewalk, and the Governing Body shall have power to cause any such sidewalks to be constructed or repaired and assess the costs thereof against such property.

Section 8-204 provides in part:

> The Municipal official in charge of sidewalks may require [them] to be repaired. Notice to the owners of property upon which such sidewalks in disrepair are located shall require within twenty-four (24) hours from issuance of notice said

> owners to make arrangements to have the sidewalk repaired. Said repairs shall be completed within fourteen (14) days after issuance of said notice. No special assessment shall be levied against the property unless said owner shall neglect or refuse to repair within the time prescribed and in the event that such owner fails to repair, the Municipality shall cause the repairs to be made and assess the property owner the expense of such repairs.

The court then found that the communications between Yahnke and the city pertaining to Yahnke's request to split the repair costs for the sidewalk did not satisfy the notice provisions of the ordinances. The court reasoned that since the city had never notified Yahnke that she had 24 hours to make arrangements for sidewalk repairs and 14 days to complete the repairs, the duty to repair the sidewalk never shifted to Yahnke and remained with the city. Therefore, Yahnke owed no duty to Dean. Yahnke's motion for summary judgment was granted, and the case was dismissed.

ASSIGNMENTS OF ERROR

Dean assigns, restated and reordered, that the district court erred in granting Yahnke's motion for summary judgment for the following reasons: (1) The court improperly placed the burden on Dean to prove that Yahnke had received due notice from the city to make repairs, (2) Yahnke presented no evidence of the type of notice required under the Peru Municipal Code and Nebraska statutes, and (3) the court failed to find that there were genuine issues of material fact regarding (a) the city's notice to Yahnke of the dangerous condition existing upon her property and (b) Yahnke's actual knowledge of the sidewalk's condition and her duty to make repairs.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Farmland Serv. Co-op v. Southern Hills Ranch, ante* p. 382, 665 N.W.2d 641 (2003).

[2-4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the

conclusion reached by the trial court. *Fox v. Nick*, 265 Neb. 986, 660 N.W.2d 881 (2003). Statutory interpretation presents a question of law. *Id.* Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003).

ANALYSIS

Dean contends that the Peru Municipal Code does not specify the meaning of "due notice" and that it was not her burden to prove that actual notice was or was not required or given. She contends that the notice provision was satisfied by Yahnke's knowledge of the sidewalk's condition and the city's notification that Yahnke must make the repairs at her own expense. Yahnke contends that absent notice from the city in conformance with § 8-204 of the Peru Municipal Code, she owed no duty to Dean. We find it unnecessary to address whether the notice provisions of the municipal code were satisfied because we determine that in any event, the city was not authorized to "shift" to abutting property owners its duty to maintain its sidewalks.

[5] All ordinances are presumed to be valid. However, the power of a municipality with a legislative charter to enact and enforce any ordinance must be authorized by state statute. See *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). See, also, *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003) (defining legislative charter). Under the common law, "no duty devolved upon an abutting owner to keep the sidewalks adjacent to his property in a safe condition for travel" because "the fee of the streets and sidewalks is in the municipality," which has the primary duty of keeping them in a safe condition for travel. *Hanley v. Fireproof Building Co.*, 107 Neb. 544, 546, 549, 186 N.W. 534, 535-36 (1922). An abutting property owner could be liable for injuries caused by defective sidewalks only when the condition was the result of the owner's affirmative wrongdoing or negligent use of the sidewalk for a purpose other than its intended use. See *Andresen v. Burbank*, 157 Neb. 909, 62 N.W.2d 135 (1954). An ordinance delegating to property owners a part of a city's duty to maintain sidewalks is insufficient to impose liability on the owner for

injuries resulting from a violation of the ordinance. See, *Mackey v. Midwest Supply Co.*, 186 Neb. 834, 186 N.W.2d 916 (1971); *Hanley, supra*. Because the delegation of sidewalk maintenance to property owners is for " 'the benefit of the municipality as an organized government and not for the benefit of the individuals comp[o]sing the public, a breach of such ordinance is remediable only at the instance of the municipal government, and no right of action accrues to an individual citizen especially injured thereby.' " *Mackey*, 186 Neb. at 837, 186 N.W.2d at 918; *Stump v. Stransky*, 168 Neb. 414, 95 N.W.2d 691 (1959) (quoting *Hanley, supra*).

If, however, the Legislature enacts a statute imposing liability on property owners for failing to repair a dangerous sidewalk condition upon notice to do so, the resulting cause of action will be recognized. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). In the absence of such a statute, a city of the second class cannot independently impose liability on property owners.

[6,7] Legislative charters are always grants of power that are strictly construed. *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291 (2003). "The well-established general rule is that a municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves." 6 Eugene McQuillin, The Law of Municipal Corporations § 22.01 at 388 (3d ed. 1998 & Cum. Supp. 2003). This court has held:

> "The . . . various municipal corporations [of this state have] the duty of at all times keeping their streets and sidewalks in a reasonably safe condition for travel by the public, and no municipal corporation, *by any act of its own*, can devolve this duty on another so as to relieve itself from a liability resulting from its failure to perform such duty."

(Emphasis supplied.) *Hanley*, 107 Neb. at 546, 186 N.W. at 535. See, also, *Cassidy v. U.S./U.S. Postal Service*, 5 F. Supp. 2d 1040 (D. Neb. 1997); *Rod Rehm, P.C. v. Tamarack Amer.*, 261 Neb. 520, 522, 623 N.W.2d 690, 693 (2001) (discussing " 'sidewalk rule' " in dicta); *Stump, supra*.

Peru is a city of the second class, and the legislation delineating a second-class city's grant of power is found in chapter 17 of the Nebraska Revised Statutes. See Neb. Rev. Stat. §§ 17-501 to

17-572 (Reissue 1997 & Cum. Supp. 2000). As with other classes of cities, a second-class city is charged with keeping the streets and commons open and in repair. See § 17-567(1). In regard to sidewalks specifically, a second-class city is authorized to keep sidewalks free from encroachments and obstructions, and to assess costs to property owners who neglect or refuse to do so after notice. See §§ 17-555 and 17-557.01. A second-class city is also authorized to make sidewalk repairs and assess the expense to the abutting property owner after notice by publication or written notice to the owner. See § 17-522. However, unlike the legislative charters for metropolitan, primary, and first-class cities, no section of chapter 17 authorizes second-class cities to delegate the duty of sidewalk maintenance and repairs to owners or mandates that owners shall be liable for injuries to pedestrians if they fail to maintain or repair sidewalks. Cf., Neb. Rev. Stat. § 14-3,105 (Reissue 1997) (owner "shall be given notice to construct or repair [abutting] sidewalk" before city can undertake to do so); Neb. Rev. Stat. § 14-3,106 (Reissue 1997) (owners "shall be liable for all damages or injuries" if they "fail to construct or repair [abutting] sidewalk as directed"); Neb. Rev. Stat. § 15-734 (Reissue 1997) (abutting owner "is hereby primarily charged with the duty of keeping and maintaining sidewalks" and is "liable for injuries or damages" upon satisfaction of notice provision to make repairs); Neb. Rev. Stat. § 16-661 (Reissue 1997) (mayor and council may "cause and compel the construction and repair" of sidewalks); Neb. Rev. Stat. § 16-662 (Reissue 1997) (owners "shall be liable for all damages or injury" if they fail to comply with notice to "construct or repair [abutting] sidewalk").

The city of Peru cannot shift to an abutting property owner by its own action liability for injuries caused by a sidewalk in disrepair. In contrast to cities of the metropolitan, primary, and first class, the Legislature has not authorized a city of the second class to delegate its duty to maintain sidewalks or to impose liability upon abutting property owners. To the extent the ordinances of the city of Peru attempt to do so, they are invalid.

CONCLUSION

[8] Yahnke owed no duty to Dean to maintain the public sidewalk. Although our reasoning differs from that used by the district

court, the court did not err in finding that Yahnke owed no duty to Dean and was therefore entitled to judgment as a matter of law. Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *Jessen v. Malhotra, ante* p. 393, 665 N.W.2d 586 (2003). Because this holding is dispositive, we need not address the remaining assignments of error. The judgment of the district court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

MIKE CROSBY, APPELLEE, V. BRUCE LUEHRS AND BRUCE LUEHRS, AS PERSONAL REPRESENTATIVE OF THE KENNETH C. OLSON ESTATE, APPELLANTS.

669 N.W.2d 635

Filed October 3, 2003. No. S-02-951.

1. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **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. **Principal and Agent.** A power of attorney authorizes another to act as one's agent.
4. ____. An agent holding a power of attorney is termed an "attorney in fact" as distinguished from an attorney at law.
5. **Agency: Words and Phrases.** An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act.
6. **Principal and Agent.** An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal.
7. ____. Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere faithfully to the instructions of the principal.

8. ____. An agent's duty is to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent's own interest.
9. **Agency: Principal and Agent.** An agent is prohibited from profiting from the agency relationship to the detriment of the principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal.
10. **Principal and Agent: Gifts: Intent.** No gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument and there is shown a clear intent on the part of the principal to make such a gift.
11. **Principal and Agent: Intent.** Absent express intention, an agent may not utilize his or her position for the agent's or a third party's benefit in a substantially gratuitous transfer.
12. **Principal and Agent.** An attorney in fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney in fact's engaging in an interested transaction after full disclosure.
13. ____. The law will not permit an agent to place himself or herself in a situation where the agent may be tempted by his or her own private interest to disregard that of the principal.
14. ____. Where a fiduciary argues that a power of attorney allowed for self-dealing, that power must be specifically authorized in the instrument.
15. **Fraud.** Constructive fraud generally arises from a breach of duty arising out of a fiduciary or confidential relationship.
16. **Fraud: Words and Phrases.** Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.
17. **Fraud: Intent.** Constructive fraud is implied by law from the nature of the transaction itself. The existence or nonexistence of an actual purpose to defraud does not enter as an essential factor in determining the question; the law regards the transaction as fraudulent per se.
18. ____: ____. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.
19. **Actions: Fraud: Proof.** In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.
20. **Principal and Agent: Fraud: Proof: Intent.** In situations involving an attorney in fact, a prima facie case of fraud is established if the plaintiff shows that the defendant held the principal's power of attorney and that the defendant, using the power of attorney, made a gift to himself or herself. The burden of going forward then falls upon the defendant to establish by clear and convincing evidence that the transfer was made pursuant to power expressly granted in the power of attorney document and made pursuant to the clear intent of the donor. The fiduciary bears the burden of proving the fairness of the transaction.

21. **Decedents' Estate: Intent.** Rights at death, in joint and payable-on-death accounts, are governed by the principle that a depositor intends account balances to pass at death to his or her survivors.
22. **Principal and Agent.** An agent is authorized to do, and to do only, what it is reasonable for the agent to infer that the principal desires the agent to do in the light of the principal's manifestations and the facts as the agent knows or should know them at the time the agent acts.
23. ____. If an agent has reason to know the will of the principal, the agent's duty is not to act contrary to it.
24. **Decedents' Estates: Principal and Agent.** If an agent knows that the principal has made a will or otherwise provided for the distribution of assets after the principal's death, the agent should avoid, where possible, taking action that will defeat the principal's estate plan.
25. **Principal and Agent.** A durable power of attorney may provide the attorney in fact with the power to designate a change in the registration of payable-on-death accounts and to eliminate the former beneficiaries, if that is in the best interest of the principal.
26. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.
27. **Actions: Parties: Standing.** The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
28. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. The litigant must have some legal or equitable right, title, or interest in the subject of the controversy.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Philip E. Pierce, of Pierce Law Office, for appellants.

Douglas W. Marolf for appellee.

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

GERRARD, J.

NATURE OF CASE

Kenneth C. Olson's nephew, Bruce Luehrs, acting as Olson's attorney in fact pursuant to a durable power of attorney, transferred nearly $40,000 out of Olson's bank accounts into a new account that Luehrs opened in Olson's name. The previous accounts had named Mike Crosby (Crosby), Olson's friend and former neighbor, as a payable-on-death (POD) beneficiary, but

the new account did not. Olson died, and by virtue of the transfers, the money that had been in the POD accounts passed through Olson's estate instead of being paid to Crosby. Luehrs, as a named beneficiary of Olson's will, received money from the estate. The question presented in this appeal is whether Luehrs engaged in impermissible self-dealing when he transferred money out of the POD accounts, because the ultimate effect of the transfers was to increase the amount of Luehrs' inheritance.

BACKGROUND

The material facts of this case are essentially undisputed. Crosby and Olson met when they became next-door neighbors in 1987, and they became good friends. They often had dinner together, and Crosby helped Olson with household chores, even after Crosby moved out of the neighborhood. Crosby testified he did not know Olson had large sums of money and never tried to coerce money from Olson.

In 1997, Olson executed the will that was operative at the time of his eventual death. Olson's will devised his residence and real property to three local charities. The will set aside 10 percent of Olson's remaining assets for division among several local charities. The balance of Olson's estate was bequeathed equally to his sister, niece, and two nephews, including Luehrs. Luehrs was designated as the personal representative of Olson's estate.

In 1999, Olson opened an account at Commercial Federal Savings and Loan that named Crosby and Mary Crosby as POD beneficiaries. In April 2000, Olson opened another account at Commercial Federal Savings and Loan that named Crosby as beneficiary. Olson also obtained a certificate of deposit from West Gate Bank, designated as POD to Crosby or Mary Crosby. Prior to Luehrs' transfer of money from these accounts, they held $39,999.75. The POD designations meant that the balances in the accounts would pass, on Olson's death, to the designated beneficiaries. See Neb. Rev. Stat. §§ 30-2716(8) and 30-2723(b)(2) (Reissue 1995).

In November 2000, Olson executed a durable power of attorney, naming Olson's girl friend, Geraldine Draney, as Olson's attorney in fact and Luehrs as the alternate attorney in fact. As relevant, the document conferred on the attorney in fact the

power "[t]o deposit moneys, withdraw, invest, and otherwise deal with tangible property." The parties do not dispute that absent a conflict of interest, the durable power of attorney conferred upon the attorney in fact the power to transfer money among Olson's financial accounts.

Olson was hospitalized in November 2000, and in January 2001, he was moved from the hospital to a nursing home. Crosby, Draney, and Draney's son all testified that during the final months of his life, Olson was incoherent and unable to conduct his own affairs. Luehrs testified that during those months, Olson was not coherent "all the time." Draney had, pursuant to the durable power of attorney, been handling Olson's deposits and paying his bills, but determined that she "didn't want to handle the stock things and the business part of it." Draney formally withdrew as Olson's attorney in fact on January 19, 2001.

On January 22, 2001, Luehrs opened an account in Olson's name at Adams Bank and Trust in Ogallala, Nebraska. Luehrs was a loan officer and vice president at Adams Bank and Trust and had been a banker for over 20 years. Luehrs began to consolidate Olson's accounts and transferred $39,999.75 from the previously described POD accounts into the new account at Adams Bank and Trust, which did not have a POD designation. Olson had also set aside a large sum of money, approximately $100,000, in similar accounts, designating Draney as beneficiary. Luehrs was in the process of transferring that money as well, but the transfers were not completed before Olson's death.

Luehrs told Draney about his intent to transfer money from the Crosby POD accounts on January 20, 2001. Luehrs told Draney that " '[Crosby] was just a neighbor, and [Olson]'s leaving all that money to a neighbor?' " Luehrs also told Draney that the money might be needed for Olson's care, despite Olson's pension, Social Security and Medicare benefits, health care insurance, and the income from over $300,000 in stocks, bonds, and deposits. Draney's son confronted Luehrs about the transfers; Luehrs explained that he did not think Olson meant Crosby to have that much money, and Luehrs wanted to consolidate Olson's accounts for future needs. Luehrs conceded his remarks to Draney, but explained that he did not believe Olson had meant for that much money to be in the POD accounts. Luehrs explained that in his

opinion, Olson used those accounts to hold profits from his stock transactions until his next buying opportunity, but in this instance, had become ill and never took the money out of the accounts.

Luehrs conceded, at trial, that he had known at the time he transferred the money that he, as a beneficiary under Olson's will, stood to benefit from the transfers. Luehrs admitted that he knew, as a banker, that the POD designation on the accounts gave Crosby no right to the money in the account prior to the death of the account holder. Luehrs testified that he told Olson about his intent to consolidate Olson's accounts and that Olson said that was "'[f]ine,'" but Luehrs conceded that he had no specific instructions from Olson, written or otherwise, to transfer money from the POD accounts. Luehrs testified that he thought it was his duty to preserve Olson's assets and consolidate his accounts. In addition, a certified public accountant and financial planner testified that he had handled Olson's taxes for several years and had advised Luehrs to simplify Olson's estate. The accountant admitted that at the time of that conversation, he did not know that consolidation of Olson's accounts might increase Luehrs' share of the estate.

Olson died on January 28, 2001. Olson's estate inventory set forth a total value, at the date of death, of $471,518.84. Of that amount, $56,800 consisted of real property that, pursuant to Olson's will, was distributed to local charities; local charities also shared 10 percent of Olson's other assets. The remaining assets, pursuant to Olson's will, were distributed to Olson's sister, niece, and nephews, including Luehrs, who individually received $45,265.91.

After Olson's death, Draney told Crosby about the POD accounts and the transfers of money. Crosby testified that until informed by Draney, he had not known of the existence of the POD accounts. On April 11, 2001, Crosby filed a claim against Olson's estate. On April 30, Luehrs, as personal representative of the estate, disallowed the claim. On May 16, Crosby filed a petition for allowance of the claim. In August, the parties stipulated that the amount in controversy was $39,999.75 and, after calculating the applicable inheritance taxes, $35,124.79 was placed in escrow. The parties agreed to stay the probate action. Crosby filed an equitable action in the district court against Luehrs in his

individual capacity and as personal representative of Olson's estate (collectively Luehrs), alleging that Luehrs was not authorized by the durable power of attorney to transfer money from the POD accounts. See Neb. Rev. Stat. § 30-2671 (Reissue 1995).

After a bench trial, the court found that Luehrs had altered the ultimate distribution of Olson's property in such a manner that Luehrs profited from the change. The court cited the general principle that a power of attorney creates an agency relationship, in which the agent is prohibited from profiting from the agency relationship to the detriment of the principal, and noted that Luehrs had acted in detriment to Olson by interfering with Olson's right to dispose of his property as he saw fit. The court entered judgment for Crosby in the amount of $35,124.96. Luehrs appeals.

ASSIGNMENTS OF ERROR

Luehrs assigns that the court (1) should have found that Crosby did not present a prima facie case of fraud, (2) erred by failing to find that Luehrs was acting pursuant to the durable power of attorney and had the authority to transfer POD accounts to an account which was solely for the benefit of the principal, and (3) erred by failing to find that Crosby did not have standing in this matter.

STANDARD OF REVIEW

[1] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Gilroy v. Ryberg*, *ante* p. 617, 667 N.W.2d 544 (2003). See *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (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. *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000).

ANALYSIS

[3-6] Before considering the specific arguments advanced by Luehrs, it is helpful to set forth the basic propositions of law that will govern our disposition of this appeal. A power of attorney authorizes another to act as one's agent. *Cheloha, supra.* See *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989). An agent holding a power of attorney is termed an "attorney in fact" as distinguished from an attorney at law. *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986). An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act. *Fletcher, supra.* An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal. *Cheloha, supra*; *Fletcher, supra.*

[7-9] Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere faithfully to the instructions of the principal. *Cheloha, supra*; *Fletcher, supra.* An agent's duty is to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent's own interest. *Praefke v. American Enterprise Life Ins.*, 257 Wis. 2d 637, 655 N.W.2d 456 (Wis. App. 2002). See, *Cheloha, supra*; *Mischke v. Mischke*, 247 Neb. 752, 530 N.W.2d 235 (1995); *In re Estate of Lienemann, supra.* An agent is prohibited from profiting from the agency relationship to the detriment of the principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal. See, *Cheloha, supra*; *Mischke, supra*; *Fletcher, supra*; *In re Estate of Lienemann, supra.*

[10-12] No gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument and there is shown a clear intent on the part of the principal to make such a gift. *Cheloha, supra*; *Mischke, supra.* Absent express intention, an agent may not utilize his or her position for the agent's or a third party's benefit in a substantially gratuitous transfer. *Id.*; *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992). An attorney in fact, under the duty of

loyalty, always has the obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney in fact's engaging in an interested transaction after full disclosure. *Schock v. Nash*, 732 A.2d 217 (Del. 1999). See, *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998); *Mischke, supra*; *Vejraska, supra.*

[13,14] The basic policy concern underlying the law that forbids self-dealing is not linked to any duty an agent may have to third parties, but is primarily addressed to the potential for fraud that exists when an agent acting pursuant to a durable power of attorney has the power to make gifts, especially after the principal becomes incapacitated. *Praefke, supra.* See, *Cheloha, supra*, citing *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989); *Vejraska, supra.* A fiduciary will not be allowed to feather his or her own nest unless the power of attorney specifically allows such conduct. *Id.* The law will not permit an agent to place himself or herself in a situation where the agent may be tempted by his or her own private interest to disregard that of the principal. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997). In short, where a fiduciary argues that a power of attorney allowed for self-dealing, that power must be specifically authorized in the instrument. *Praefke, supra.* See *Cheloha, supra.*

[15-18] Constructive fraud generally arises from a breach of duty arising out of a fiduciary or confidential relationship. *Johnson v. Radio Station WOW*, 144 Neb. 406, 14 N.W.2d 666 (1944), *reversed on other grounds* 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 569 (1945) (supplemental opinion). See, *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995); *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975); *American Driver Serv. v. Truck Ins. Exch.*, 10 Neb. App. 318, 631 N.W.2d 140 (2001). Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. *Johnson v. Radio Station WOW*, 144 Neb. 406, 13 N.W.2d 556 (1944), *reversed on other grounds* 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 569 (1945). Constructive fraud is implied by law from the nature of the transaction itself. See *id.* The existence or nonexistence of an

actual purpose to defraud does not enter as an essential factor in determining the question; the law regards the transaction as fraudulent per se. See *id.* Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud. *Vogt, supra*; *Johnson, supra.*

[19,20] In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud. *Fletcher, supra.* In situations involving an attorney in fact, we have determined that a prima facie case of fraud is established if the plaintiff shows that the defendant held the principal's power of attorney and that the defendant, using the power of attorney, made a gift to himself or herself. See *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992), citing *Fletcher, supra.* A fiduciary's acquisition of a right of survivorship in property, even absent a present possessory interest, is generally sufficient to establish that a fiduciary has profited from a transaction, see *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989), and *Johnson v. First Nat. Bank*, 253 Ga. 233, 319 S.E.2d 440 (1984), and there is no basis in equity to distinguish such a situation from one in which, as here, a fiduciary's contingent interest in property is testamentary. The burden of going forward under such circumstances falls upon the defendant to establish by clear and convincing evidence that the transaction was made pursuant to power expressly granted in the power of attorney document and made pursuant to the clear intent of the donor. *Vejraska, supra*, citing *Fletcher, supra.* See *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). The fiduciary bears the burden of proving the fairness of the transaction. *Fletcher, supra.* See *Woodward, supra.*

With that framework established, we proceed to consider Luehrs' specific arguments. In support of his first assignment of error, Luehrs argues that Crosby did not prove a prima facie case of constructive fraud, because Luehrs did not gift money

to himself or directly benefit from the consolidation of accounts. Second, Luehrs argues that he acted within the scope of the durable power of attorney and solely for the benefit of Olson. Finally, Luehrs argues that because Crosby had no vested right to the money in the POD accounts at the time of the transfers, Crosby has no standing to maintain an action for the recovery of that money.

Prima Facie Case of Constructive Fraud

We turn first to Luehrs' argument that Crosby did not prove a prima facie case of constructive fraud. Obviously, Luehrs does not dispute the existence of a fiduciary relationship with Olson. Instead, Luehrs contends that because he transferred money from the POD accounts to an account opened in Olson's name, the transfers did not benefit Luehrs and did not constitute self-dealing.

However, this argument ignores two incontrovertible facts: Luehrs knew at the time of the transfers that he stood to gain financially as a result, and when Olson died, Luehrs would have gained financially as a result of the transfers, had Crosby's claim against the estate not intervened. Luehrs' argument on appeal that he did not benefit from the transfers is directly contrary to his admission at trial that he knew at the time of the transfers that he, as a named beneficiary of the will, would benefit if the transferred funds passed through Olson's estate. Luehrs argues that he was only 1 of 13 devisees named by the will. However, an examination of the terms of the will reveals that Luehrs was to receive, prior to applicable taxes, approximately 22.5 percent of $40,000 added to Olson's estate by the transfers from the POD accounts. This is hardly an inconsequential amount and is a sufficient benefit to Luehrs for Crosby to prove his prima facie case for constructive fraud. See, *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992); *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989).

Luehrs also argues that the transfers did not constitute self-dealing because realization of his gain from the transfers required several presumptions, e.g., Luehrs would survive Olson, and Olson's will would be found valid. Luehrs seems to be arguing that since he was not *certain* to benefit from the transfers, he was

not engaged in self-dealing. But there is no authority for the proposition that certainty of benefit is a requirement of self-dealing, and for good reason. Even had Luehrs directly placed his name in place of Crosby's on Olson's POD accounts, Luehrs' benefit would be contingent upon surviving Olson. There are very few certainties in the world, and Luehrs' argument, if accepted, would effectively preclude recovery for even the most egregious breaches of fiduciary duty.

Instead, the dispositive facts are that Luehrs was aware when he transferred the funds that he was highly likely to profit from the transactions, and as a practical matter, that is what actually happened. Such self-dealing by an agent, in the absence (as here) of distinct authority from the principal expressly granted in the empowering instrument, has been continuously and uniformly denounced as one of the most profound breaches of fiduciary duty, irrespective of the agent's good faith and however indirect or circuitous the accomplishment of the benefit to the agent. *Gagnon v. Coombs*, 39 Mass. App. 144, 654 N.E.2d 54 (1995). The record before us is sufficient to prove Crosby's prima facie case of constructive fraud. Luehrs' first assignment of error is without merit.

Breach of Fiduciary Duty

Since Crosby proved his prima facie case of constructive fraud, the burden of going forward then fell upon Luehrs to establish by clear and convincing evidence that the transfers were made pursuant to power expressly granted in the power of attorney document, and either made pursuant to the clear intent of the principal or necessitated by some compelling interest of the principal. See, *Vejraska, supra*; *Miller v. Peoples Federal Sav. & Loan Ass'n*, 68 Ohio St. 2d 175, 429 N.E.2d 439 (1981). Luehrs argues that his consolidation of Olson's accounts was a proper exercise of his authority under the durable power of attorney. The essence of Luehrs' argument is that the consolidation of accounts was within the authority granted by the durable power of attorney and intended to protect the interest of Olson.

However, the issue is not whether the instrument creating the power of attorney authorized the transfer of money among Olson's financial accounts; rather, the issue is whether the specific

transfers disputed here constituted a breach of Luehrs' fiduciary duty. The fact that Luehrs was expressly authorized by the power of attorney to transfer money among Olson's financial accounts is irrelevant if the authorized act was done for an improper purpose that constituted a breach of his duty of loyalty. See, *id.*; Restatement (Second) of Agency § 387, comment *a.* (1958). Luehrs has failed to explain any sound basis for concluding that the transfers from the POD accounts were in Olson's interest.

Luehrs' most consistent argument, advanced both at trial and on appeal, is that the money in the POD accounts might have been needed to care for Olson. However, this argument is inconsistent with the law governing POD accounts. A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party. Neb. Rev. Stat. § 30-2722(c) (Reissue 1995). The owner retains sole ownership, and only the owner may withdraw the proceeds or change the named beneficiary during the owner's lifetime. See, § 30-2722; *In re Estate of Platt*, 148 Ohio App. 3d 132, 772 N.E.2d 198 (2002).

Consequently, during Olson's lifetime, the money in the POD accounts belonged solely to him and was available for his use. Even after Olson's death, had the assets of his estate been insufficient to satisfy his creditors, the money in the POD accounts could have been recovered to the extent necessary to pay claims against and expenses of the estate. See Neb. Rev. Stat. § 30-2726 (Reissue 1995). In short, transferring the money from the POD accounts was unnecessary to safeguard the money, as the funds were equally available to Olson, as needed for his care and his estate, both before and after the transfers.

[21] Instead, Luehrs acted against the interest of Olson when Luehrs acted to thwart Olson's presumed intent that Crosby receive the money in the POD accounts. Although Luehrs argues that Olson did not intend for the POD accounts to contain as much money as they did at the time of Olson's death, there is little in the record to support this contention. In the absence of evidence to the contrary, we must assume that Olson was aware of the legal effect of the POD designation that he ordered for his bank accounts and knew when he deposited money into such accounts that, in the event of his death, the money would belong to the named beneficiaries. Rights at death, in joint and POD

accounts, are governed by the principle that a depositor intends account balances to pass at death to his or her survivors. See Prefatory Note, Uniform Nonprobate Transfers on Death Act, 8B U.L.A. 45 (2001).

[22-24] An agent is authorized to do, and to do only, what it is reasonable for the agent to infer that the principal desires the agent to do in the light of the principal's manifestations and the facts as the agent knows or should know them at the time the agent acts. See, *Gagnon v. Coombs*, 39 Mass. App. 144, 654 N.E.2d 54 (1995); Restatement, *supra*, § 33. If an agent has reason to know the will of the principal, the agent's duty is not to act contrary to it. See *id.* Stated more specifically, if an agent knows that the principal has made a will or otherwise provided for the distribution of assets after the principal's death, the agent should avoid, where possible, taking action that will defeat the principal's estate plan. See Carolyn L. Dessin, Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role, 75 Neb. L. Rev. 574 (1996). Luehrs, on the other hand, questioned Olson's established intent and acted to frustrate it. Compare, *Litvinko v. Downing & Roussos*, 260 Ark. 868, 545 S.W.2d 616 (1977); *Gagnon, supra*. The purported advantage of simplifying Olson's estate is not a sufficient justification when the agent's method of simplification frustrates the intent of the principal.

[25] We recognize the general principle that a durable power of attorney may provide the attorney in fact with the power to designate a change in the registration of POD accounts and to eliminate the former beneficiaries, if that is in the best interest of the principal. Cf. *Miller v. Peoples Federal Sav. & Loan Ass'n*, 68 Ohio St. 2d 175, 429 N.E.2d 439 (1981). This does not, however, authorize self-dealing absent express authority, or some other compelling explanation for why the challenged transaction was in the best interest of the principal. *Id.* The record before us supports no such explanation. There is no evidence that the money was transferred at the express direction of the principal. Compare, *Ruppert v. Breault*, 222 Neb. 432, 384 N.W.2d 284 (1986); *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986). Any purported oral authorization, even had Olson been competent to issue it, was ineffective. See *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989).

There is no evidence that the transfers were necessary for Olson's support. Compare, *Matter of Estate of Crabtree*, 550 N.W.2d 168 (Iowa 1996); *Plummer v. Estate of Plummer*, 51 S.W.3d 840 (Tex. App. 2001). In short, the record does not support the reasons proffered by Luehrs to explain why the transfers were solely in Olson's best interest.

Luehrs did not demonstrate, by clear and convincing evidence, that the transfers were authorized by the durable power of attorney. See *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992). Irrespective of whether Luehrs was acting in good faith, his actions, viewed objectively, resulted in a benefit to himself, and were unnecessary to protect the interest of his principal. Thus, Luehrs breached his fiduciary duty to Olson; Luehrs' actions were unauthorized by the durable power of attorney. Luehrs' second assignment of error is without merit.

STANDING

[26-28] Luehrs' final argument is that Crosby did not have standing to sue, because he had no right to the money in the POD accounts before Olson's death. Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. *Hradecky v. State*, 264 Neb. 771, 652 N.W.2d 277 (2002). The purpose of an inquiry as to standing 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.* In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Id.* The litigant must have some legal or equitable right, title, or interest in the subject of the controversy. See *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

Obviously, since we have concluded that Crosby proved a prima facie case for constructive fraud, thus establishing his right to relief, it would be absurd to conclude that Crosby had no standing to sue. Cf. *Brooks v. Bank of Wisconsin Dells*, 161 Wis. 2d 39, 467 N.W.2d 187 (Wis. App. 1991). Were we to conclude otherwise, we would effectively abrogate the doctrine of constructive fraud. The nature of an action for constructive fraud is

that a plaintiff, who has lost the legal right to property, is claiming that he or she has been deprived of that right by the breach of a fiduciary duty. The possession of a legal right cannot be a predicate to a suit intended to recover for the loss of that same right. By pleading an equitable cause of action and proving his allegations, Crosby also proved that he had an equitable right to the subject of the controversy. See *Chambers, supra*. We reject Luehrs' final assignment of error.

CONCLUSION

Luehrs engaged in impermissible self-dealing when he transferred money out of the POD accounts, because the ultimate effect of the transfers was to increase the amount of Luehrs' inheritance. This self-dealing was neither authorized by the durable power of attorney, nor justified by any colorable reason that the transfers were in Olson's best interest. The district court correctly concluded that Crosby was entitled to the money that was, pursuant to stipulation, set aside in escrow. The judgment of the district court is affirmed.

AFFIRMED.

KEITH E. RODEHORST, APPELLANT, V.
LORI A. GARTNER, APPELLEE.
669 N.W.2d 679

Filed October 10, 2003. Nos. S-02-795, S-02-796.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a 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.
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. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
4. **Guaranty: Uniform Commercial Code.** A guaranty is not an agreement to pay a fixed amount and is therefore not a negotiable instrument subject to article 3 of the Nebraska Uniform Commercial Code.

5. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** A guaranty is basically a contract by which the guarantor promises to make payment if the principal debtor defaults.
6. **Contracts: Guaranty: Words and Phrases.** A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance.
7. **Guaranty: Debtors and Creditors.** Under an absolute guaranty of payment, the guarantor undertakes that if the obligation is not paid when due, the guarantor will pay it according to its terms without regard to whether the guaranteed person has exhausted all remedies against the primary debtor.
8. **Principal and Surety: Words and Phrases.** An accommodation party is a surety.
9. **Contracts: Principal and Surety: Words and Phrases.** Suretyship is defined as a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal. The surety's obligation is not an original and direct one for the performance of the surety's own act, but is accessory or collateral to the obligation contracted by the principal. It is of the essence of the surety's contract that there be a valid obligation.
10. **Guaranty: Principal and Surety.** A right of contribution exists between cosureties regardless of whether they are designated as guarantors, accommodation makers, or otherwise, provided that they share the same pecuniary obligation with respect to the same debt.

Appeals from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded for further proceedings.

Michael R. Snyder, of Snyder & Hilliard, for appellant.

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

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

STEPHAN, J.

Keith E. Rodehorst brought separate actions against Lori A. Gartner (Gartner) seeking contribution for payments which Rodehorst made to Exchange Bank (the Bank) on two promissory notes following default by Premiere Motors, L.L.C. (Premiere). The district court sustained Gartner's demurrers and dismissed the actions, concluding as a matter of law that Rodehorst had no right to seek contribution from Gartner. Rodehorst perfected timely appeals in each case. The appeals were moved to our

docket pursuant to Neb. Rev. Stat. § 24-1106(3) (Reissue 1995) and consolidated for oral argument and disposition.

FACTS

We summarize here the factual allegations in Rodehorst's operative amended petitions, which, for purposes of reviewing rulings on a demurrer, we are required to accept as true. See *Stahlecker v. Ford Motor Co., ante* p. 601, 667 N.W.2d 244 (2003). On or about April 15, 1998, the Bank made an operating loan to Premiere in the amount of $150,000. In exchange, Premiere gave the Bank promissory note No. 23345, in the principal sum of $150,010. The note was signed by Premiere's members, Jonathan D. Coleman, Philip S. Mack, and Richard R. Gartner, and cosigned by the members' wives, Heidi J. Coleman, Dana M. Mack, and Gartner. The terms of the note provided in part:

> Upon any change in the terms of this Note, and unless otherwise expressly stated in writing, no party who signs this Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. . . . All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Note are joint and several.

Also on April 15, seven individuals, including both Rodehorst and Gartner, signed and delivered to the Bank personal guaranties for the indebtedness of Premiere. The guaranties were identical and provided in relevant part:

> CONTINUING UNLIMITED GUARANTY. For good and valuable consideration, [Guarantor] absolutely and unconditionally guarantees and promises to pay to EXCHANGE BANK ("Lender") or its order . . . the indebtedness . . . of PREMIERE MOTORS, L.L.C. ("Borrower") to Lender on the terms and conditions set forth in this Guaranty. . . .
>
> . . . .
>
> Indebtedness. The word "Indebtedness" is used in its most comprehensive sense and means and includes any and all of Borrower's liabilities, obligations, debts, and

> indebtedness to Lender, now existing or hereinafter incurred or created . . . .
>
> . . . .
>
> GUARANTOR'S WAIVERS. Except as prohibited by applicable law, Guarantor waives any right to require Lender . . . (b) to make any presentment, protest, demand, or notice of any kind, including notice of any nonpayment of the indebtedness or of any nonpayment related to any collateral, or notice of any action or nonaction on the part of Borrower, Lender, any surety, endorser, or other guarantor in connection with the indebtedness or in connection with the creation of new or additional loans or obligations; (c) to resort for payment or to proceed directly or at once against any person, including Borrower or any other guarantor . . . .

(Emphasis omitted.)

On July 7, 1998, the Bank loaned Premiere an additional amount of $60,478.71, in exchange for promissory note No. 23569. This note was signed only by Philip Mack in his capacity as "manager" of Premiere. On August 11, 1998, Premiere gave the Bank promissory note No. 23661, in the sum of $250,000, in order to renew and extend notes Nos. 23345 and 23569. Promissory note No. 23661 was signed by Premiere's three members.

In August 1999, during a routine inspection of Premiere's inventory, the Bank discovered that inventory valued at approximately $100,000 could not be accounted for. Therefore, on August 16, the Bank reduced Premiere's $250,000 operating line, represented by promissory note No. 23661, to $150,000 by transferring $100,000 of the indebtedness to a term note, promissory note No. 24642, and issuing promissory note No. 24641 in the principal sum of $150,000 as a partial renewal of the operating line. Promissory notes Nos. 24641 and 24642 were signed by members Jonathan Coleman and Richard Gartner and cosigned by Rodehorst. Promissory note No. 24641 was renewed by note No. 25822, given to the Bank on August 25, 2000. This note was signed by member Jonathan Coleman and cosigned by Rodehorst.

Premiere defaulted on the payment of promissory notes Nos. 24642 and 25822 by failing to make principal and interest

payments. Despite the Bank's demand for payment on the notes, Premiere, its members, and their wives (who were guarantors) failed and refused to pay the notes. On December 3, 2001, Rodehorst paid the amount then due, $87,787.37 principal and $2,490.51 interest, to the Bank in full satisfaction of promissory note No. 24642. On that same date, Rodehorst paid the amount due, $121,869.94, on promissory note No. 25822 and the Bank assigned that note to Rodehorst, who is now its owner and holder.

The Bank advanced the loan proceeds as set forth herein directly to Premiere and its members. Rodehorst was never advanced funds by the Bank in connection with any of the loans to Premiere, and he was not a direct beneficiary of the loans. Premiere, its members, and their wives, including Gartner, have refused to pay or to contribute to Rodehorst all or their proportionate share of promissory notes Nos. 24642 and 25822. Rodehorst is not related to any member of Premiere.

ASSIGNMENTS OF ERROR

Rodehorst assigns, restated, that the trial court erred by dismissing these actions after sustaining Gartner's demurrers and denying Rodehorst leave to amend his petitions.

STANDARD OF REVIEW

[1-3] In an appellate court's review of a ruling on a 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. *Stahlecker v. Ford Motor Co., ante* p. 601, 667 N.W.2d 244 (2003); *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002). 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. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002); *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003); *Rodriguez v. Nielsen*, 264 Neb. 558, 650 N.W.2d 237 (2002).

ANALYSIS

EQUITABLE CONTRIBUTION

Rodehorst seeks to enforce the equitable right of contribution among joint obligors articulated in *Exchange Elevator Company v. Marshall*, 147 Neb. 48, 59, 22 N.W.2d 403, 410 (1946), as follows:

> "Finally, the most important doctrine, perhaps, which results from the principle, Equality is equity, is that of contribution . . . among joint debtors, co-sureties, co-contractors, and all others upon whom the same pecuniary obligation arising from contract, express or implied, rests. This doctrine is evidently based upon the notion that the burden in all such cases should be equally borne by all the persons upon whom it is imposed, and its necessary effect is to equalize that burden whenever one of the parties has, in pursuance of his mere *legal* liability, paid or been compelled to pay the whole amount, or any amount greater than his proportionate share. . . ."

(Emphasis in original.) Quoting 2 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 411 (5th ed. 1941). Further quoting Pomeroy's treatise, we stated:

> "Where there are two or more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens. . . . The right, however, may be controlled or modified by express agreement among the co-sureties or debtors. The doctrine of contribution rests upon the maxim, Equality is equity . . . ."

Id., quoting 4 Pomeroy, *supra*, § 1418. More recently, in discussing the principles of contribution among joint tort-feasors, we stated that " ' "general principles of justice require that in the case of a common obligation, the discharge of it by one of the obligors without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled." ' " *Northland Ins. Co. v. State*, 242 Neb. 10, 15, 492 N.W.2d 866,

870 (1992), quoting *Royal Ind. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975).

In this case, both Rodehorst and Gartner guaranteed the promissory notes in question, but Rodehorst also cosigned the notes. The district court concluded that as a cosignor, Rodehorst's liability was primary, whereas Gartner's was secondary. Thus, the district court held that Rodehorst was not legally entitled to seek contribution from Gartner. On appeal, Rodehorst argues that because he cosigned the notes as an accommodation party, his obligation on the notes was the same as that of Gartner, and his payment therefore gave rise to an equitable right of contribution. Resolution of this issue requires an examination of the specific pecuniary obligations undertaken by each party. We look to the documents, which are incorporated by reference in Rodehorst's operative petitions, to determine whether Rodehorst's obligation as a cosigner is distinguishable from that which he and Gartner shared as coguarantors.

GUARANTIES

[4,5] A guaranty is not an agreement to pay a fixed amount and is therefore not a negotiable instrument subject to article 3 of the Nebraska Uniform Commercial Code (U.C.C.), Neb. U.C.C. §§ 3-101 to 3-605 (Reissue 2001). See, §§ 3-102 and 3-104; *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998); *Aetna Cas. & Surety Co. v. Nielsen*, 217 Neb. 297, 348 N.W.2d 851 (1984), *overruled on other grounds, First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985). A guaranty is basically a contract by which the guarantor promises to make payment if the principal debtor defaults. *Northern Bank v. Dowd*, 252 Neb. 352, 562 N.W.2d 378 (1997). We therefore rely on general principles of contract and guaranty law to determine Rodehorst's and Gartner's obligations as guarantors. See, *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992); *Nogg Bros. Paper Co. v. Bickels*, 233 Neb. 561, 446 N.W.2d 729 (1989).

[6,7] A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance.

Northern Bank v. Dowd, supra; *Chiles, Heider & Co. v. Pawnee Meadows*, 217 Neb. 315, 350 N.W.2d 1 (1984). However,

> [w]here [a] guaranty is absolute—that is, subject to no condition except the default of the principal debtor—or has become absolute by the occurrence of the named conditions, the guarantor is primarily liable for the debt. In that event, the creditor may maintain an action against the guarantor immediately upon default of the debtor, without demand upon the debtor for payment, and without first proceeding against the debtor.

38 Am. Jur. 2d *Guaranty* § 105 at 959-60 (1999). In *Transamerica Commercial Fin. Corp. v. Rochford*, 244 Neb. 802, 808, 509 N.W.2d 214, 219 (1993), this court recognized this general principle, stating that "[u]nder an absolute guaranty of payment . . . the guarantor undertakes that if the obligation is not paid when due, the guarantor will pay it according to its terms without regard to whether the guaranteed person has exhausted all remedies against the primary debtor." See, also, *Nogg Bros. Paper Co. v. Bickels, supra*; *First Nat. Bank v. Benedict Consol. Indus.*, 224 Neb. 860, 402 N.W.2d 259 (1987).

The guaranties which Rodehorst and Gartner signed on April 15, 1998, are separate documents having identical substantive provisions. Each document expresses the guarantor's intent to "guarantee at all times the performance and prompt payment" of the indebtedness of Premiere "when due, whether at maturity or earlier by reason of acceleration or otherwise." The guaranties expressly apply to the then-existing indebtedness of Premiere to the Bank, as well as indebtedness incurred or created subsequent to the execution of the guaranties. Both guaranties include an express waiver of any right to require the Bank to first proceed against Premiere before seeking payment from the guarantors. Thus, both documents were guaranties of payment, as distinguished from guaranties of collection. See *Nogg Bros. Paper Co. v. Bickels, supra.* As coguarantors of payment, Rodehorst and Gartner had identical pecuniary obligations. In *Mandolfo v. Chudy, supra*, we held that under *Exchange Elevator Company v. Marshall*, 147 Neb. 48, 22 N.W.2d 403 (1946), a guarantor of a promissory note who had made payment could seek contribution

from a coguarantor for that party's proportionate share of the obligation.

ACCOMMODATION MAKER

As we have noted, in addition to being a guarantor of payment, Rodehorst also cosigned the promissory notes dated August 16, 1999, and August 25, 2000. The notes are unconditional promises to pay a fixed amount of money with interest to the Bank at a definite time and are therefore negotiable instruments subject to the provisions of article 3 of the U.C.C. See § 3-104. In that he signed the notes and is identified therein as a person undertaking to pay, Rodehorst was a "maker" of the notes as defined by § 3-103(5). However, § 3-419(a) provides that

> [i]f an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation".

Moreover, "[a]n accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to [§ 3-419](d), is obliged to pay the instrument in the capacity in which the accommodation party signs." § 3-419(b). The rights of an accommodation party as to an accommodated party are set forth in § 3-419(e) as follows:

> An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

Rodehorst alleged that the proceeds of the loans represented by the two promissory notes were advanced to Premiere or its members, that he did not receive any of the proceeds, and that he was not a "direct beneficiary" of the loans. Rodehorst further alleged that he had no familial relationship with any member of Premiere. Assuming the truth of these factual allegations for purposes of reviewing an order sustaining a demurrer, we must

regard Rodehorst as an accommodation party on each of the two promissory notes at issue. We also note that the district court stated that the "parties agree that . . . Rodehorst's role in obtaining [the notes] was that of an accommodation maker" and that neither party has disputed this point on appeal.

[8,9] An accommodation party is a surety. *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 434 N.W.2d 532 (1989). Suretyship is defined as

> "a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal. The surety's obligation is not an original and direct one for the performance of his own act, but is accessory or collateral to the obligation contracted by the principal. It is of the essence of the surety's contract that there be a valid obligation."

(Emphasis omitted.) *Sawyer v. State Surety Co.*, 251 Neb. 440, 444, 558 N.W.2d 43, 47 (1997), quoting *Niklaus v. Phoenix Indemnity Co.*, 166 Neb. 438, 89 N.W.2d 258 (1958). "In effect the surety undertakes to 'back up' the performance of the debtor and thereby gives the creditor the added assurance of having another party to the obligation." 2 James J. White & Robert S. Summers, Uniform Commercial Code § 16-10 at 105 (4th ed. 1995).

Contribution Among Cosureties

While recognizing that some courts draw a distinction between the terms "surety" and "guarantor," this court uses the terms interchangeably. *Northern Bank v. Dowd*, 252 Neb. 352, 562 N.W.2d 378 (1997). For example, in characterizing an accommodation party as a "surety," we have observed that "by lending its name to the maker of the note, [the accommodation party] in a sense, *guarantees* that in the event of default by the principal obligor, the accommodation party will be liable." *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. at 5, 434 N.W.2d at 534. See, also, *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992) (applying surety rules in determining liability under guaranty agreement); Gaspar *v. Flott*, 209 Neb. 260, 261, 307 N.W.2d 500, 502 (1981) (describing party who signed guaranty as "guarantor or surety"); *Midstates Acceptance v. Voss*, 189

Neb. 411, 413, 202 N.W.2d 822, 824 (1972) (describing party guaranteeing payment as "surety or guarantor"). We further note that under the U.C.C., the word "surety" is defined to include a guarantor. Neb. U.C.C. § 1-201(40) (Reissue 2001).

Assuming the truth of the facts alleged by Rodehorst, we conclude that he and Gartner were both sureties and that Premiere was the primary obligor on the two promissory notes which Rodehorst paid. Thus, the dispositive issue in these cases is whether a surety who is both an accommodation maker and guarantor and who satisfies an indebtedness, has a right of contribution against a cosurety who is only a guarantor with respect to the same indebtedness.

[10] One commentator states the general rule of contribution among cosureties as follows:

> On principle, it would seem clear that whenever two persons, or one person and the property of another, have come under an absolute liability without more, there should be contribution *regardless of the form of the undertaking*, unless some contract between them or some equitable consideration requires a different result. Thus, where one person unconditionally guarantees payment and another is a surety absolutely liable for the same debt, there should be contribution.

(Emphasis supplied.) 23 Samuel Williston, A Treatise on the Law of Contracts § 61:64 at 234 (Richard A. Lord ed., 4th ed. 2002). We agree and hold that a right of contribution exists between cosureties regardless of whether they are designated as guarantors, accommodation makers, or otherwise, provided that they share the same pecuniary obligation with respect to the same debt. See *Rogers v. National Surety Co.*, 116 Neb. 170, 216 N.W.2d 182 (1927) (holding that no right of contribution existed between surety on banker's bond and statutory depositor's guarantee fund because liability of each was dependent upon different factors).

In the instant case, Rodehorst and Gartner both became obligated as guarantors of payment when the indebtedness represented by the two promissory notes was not paid at maturity. The same event triggered Rodehorst's liability as an accommodation maker. At that point, the Bank could have proceeded directly

against any of the guarantors, or against Rodehorst as the accommodation maker, without first seeking collection or satisfaction from Premiere, the primary obligor. See *First Nat. Bank v. Benedict Consol. Indus.*, 224 Neb. 860, 402 N.W.2d 259 (1987). Thus, the fact that Rodehorst was both a guarantor of payment and an accommodation maker does not distinguish his pecuniary obligation with respect to the indebtedness from that of cosurety Gartner, who was only a guarantor of payment. Because both Rodehorst and Gartner became obligated to the Bank for all of Premiere's outstanding indebtedness on the notes which were unpaid at maturity, they are cosureties who share the same pecuniary obligation with respect to the same indebtedness. Rodehorst, having allegedly satisfied the entire indebtedness, is entitled to seek equitable contribution from Gartner for her proportionate share under the principle set forth in *Exchange Elevator Company v. Marshall*, 147 Neb. 48, 22 N.W.2d 403 (1946). The assignment of promissory note No. 25822 from the Bank to Rodehorst neither enhances nor diminishes this right. See *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998).

CONCLUSION

Based upon our independent conclusion that the operative amended petitions in each of these cases include factual allegations which are sufficient to state a cause of action for equitable contribution, we reverse the judgments of the district court in each case and remand the causes for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. VASILE HURBENCA, APPELLANT.

669 N.W.2d 668

Filed October 10, 2003. No. S-02-1161.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.

2. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
3. **Criminal Law: Prior Convictions: Sentences: Juries.** The determination of whether a defendant has prior convictions that may increase the penalty for a crime beyond the prescribed statutory maximum is not a determination that must be made by a jury.
4. **Constitutional Law: Criminal Law.** With reference to cruel and unusual punishment, the Nebraska Constitution does not require more than does the Eighth Amendment to the U.S. Constitution.
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. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

James R. Mowbray and Nancy K. Peterson, of Nebraska Commission on Public Advocacy, for appellant.

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

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

WRIGHT, J.

I. NATURE OF CASE

Vasile Hurbenca pled guilty to a charge of attempted escape, and the district court for Lancaster County found him to be a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1995). The court sentenced Hurbenca to 10 to 15 years' imprisonment to be served consecutively to any sentence he was currently serving and ordered that he serve a mandatory term of 10 years. Hurbenca appeals.

II. SCOPE OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

[2] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

III. FACTS

Hurbenca was charged by amended information with attempted escape and with being a habitual criminal. At the plea hearing, the State provided a factual basis which established that Hurbenca was an inmate of the Nebraska Department of Correctional Services at the Nebraska State Penitentiary when on the morning of April 25, 2001, he and three other inmates entered the prison chapel, where they taped and bound several inmates, prison employees, and a volunteer. Hurbenca and his cohorts then drove an all-terrain vehicle to the inner fence of the penitentiary and attempted to escape by climbing over the fences surrounding the penitentiary.

Hurbenca entered a plea of guilty to the charge of attempted escape, which was accepted by the district court. Hurbenca filed a motion to quash the amended information as it pertained to his habitual criminal status and requested that the court find § 29-2221 to be unconstitutional. The court subsequently overruled Hurbenca's motion to quash and found him to be a habitual criminal. The court sentenced Hurbenca to 10 to 15 years' imprisonment to be served consecutively to any sentence he was currently serving and ordered that he serve a mandatory term of 10 years.

Hurbenca timely filed this appeal, and we granted his petition to bypass the Nebraska Court of Appeals.

IV. ASSIGNMENTS OF ERROR

Hurbenca assigns, restated, that the district court (1) erred in overruling his motion to quash for the reason that § 29-2221 is unconstitutional because it (a) increases the potential punishment without providing for a finding of fact by a jury, (b) fails to require the prosecution to prove habitual criminality beyond a reasonable doubt, and (c) violates the Eighth Amendment prohibition against cruel and unusual punishment; (2) abused its discretion by imposing an excessive sentence; and (3) erred in admitting exhibits 2 through 6 and subsequently finding Hurbenca to be a habitual criminal.

V. ANALYSIS

1. Motion to Quash

(a) Increase in Potential Punishment Without Finding of Fact by Jury

Hurbenca first argues that § 29-2221 violates his 6th Amendment right to a trial by jury, his rights under the Due Process Clause contained in the 14th Amendment to the U.S. Constitution, and his rights under article I, § 6, of the Nebraska Constitution. He claims that § 29-2221 is unconstitutional because it does not grant him the right to a jury trial to determine the existence of facts which authorize an increase in his punishment beyond that which is statutorily authorized for attempted escape, a Class IV felony. He asserts that because § 29-2221 authorized an increase in his sentence beyond the 5-year maximum for a Class IV felony without requiring a finding of fact by a jury, the statute is unconstitutional as it applies to him.

Thus, the issue before us is whether a jury must determine the fact of prior convictions for purposes of sentence enhancement under Nebraska's habitual criminal statute, § 29-2221. Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

Section 29-2221(1) provides:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal and shall be punished by imprisonment in a Department of Correctional Services adult correctional facility for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .

Hurbenca relies upon *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002); and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.

Ed. 2d 435 (2000), to support his position that any factor which could result in the increase of a sentence beyond the maximum allowed by statute is actually an element of the crime and must be decided by a jury. In support of his argument, Hurbenca notes the following excerpt from *Harris*:

> *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding.

536 U.S. at 557. Hurbenca asserts that because § 29-2221 does not allow a jury to determine the issue of whether a defendant has prior criminal convictions, it is unconstitutional. For this reason, Hurbenca claims that his motion to quash was erroneously overruled and that the district court's finding that he is a habitual criminal was in error.

In *Apprendi, supra*, the defendant was convicted pursuant to a guilty plea of possession of a firearm for an unlawful purpose and unlawful possession of a prohibited weapon. He was sentenced to an extended term under New Jersey's "hate crime statute." Both the Superior Court and the New Jersey Supreme Court affirmed. Upon certiorari, the U.S. Supreme Court reversed, and remanded, finding that the state hate crime statute violated the Due Process Clause. The hate crime statute authorized an increase in maximum prison sentence based on a judge's finding by a preponderance of the evidence that the defendant acted with purpose to intimidate the victim based on the particular circumstances of the victim violated. However, the Court stated:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones* [*v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999)]. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable

> doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), quoting *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) (Stevens, J., concurring).

The Court set forth the rationale for treating prior convictions differently than elements of the offense when it noted in *Apprendi* that

> recidivism "does not relate to the commission of the offense" itself . . . . [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

530 U.S. at 496.

Apprendi considered the determination of a prior conviction to be a narrow exception to the general rule that it is unconstitutional for a legislature to remove from a jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. In *U.S. v. Henderson*, 320 F.3d 92, 110 (1st Cir. 2003), *cert. denied* 539 U.S. 936, 123 S. Ct. 2597, 156 L. Ed. 2d 620, the Court of Appeals stated:

> We have consistently observed with a "regularity bordering on the monotonous," that *Apprendi* does not apply to sentencing enhancements based on prior convictions. *United States v. Moore*, 286 F.3d 47, 50 (1st Cir.2002); *see also United States v. Bradshaw*, 281 F.3d 278, 294 (1st Cir.2002); *United States v. Gomez-Estrada*, 273 F.3d 400, 402 (1st Cir.2001).

Nebraska's recently amended capital sentencing scheme requires a jury to determine aggravating circumstances when the death penalty is sought. See 2002 Neb. Laws, 3d Special Sess.,

L.B. 1. In *State v. Gales*, 265 Neb. 598, 624, 658 N.W.2d 604, 624 (2003), we stated: "[T]he existence of any aggravating circumstance utilized in the imposition of [a] sentence of death, other than a prior criminal conviction, must be determined by a jury." We also indicated in *Gales* that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), did not alter *Apprendi, supra*, or *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), on the issue of jury determination of prior convictions.

[3] Based on the foregoing, we conclude that the determination of whether a defendant has prior convictions that may increase the penalty for a crime beyond the prescribed statutory maximum is not a determination that must be made by a jury. Thus, Hurbenca's argument that § 29-2221 is unconstitutional because it increased his punishment without providing for a finding of fact by a jury is without merit.

(b) Burden of Proof

Hurbenca next argues that § 29-2221 is unconstitutional because it fails to require the prosecution to prove habitual criminality beyond a reasonable doubt. He asserts that because § 29-2221 and Neb. Rev. Stat. § 29-2222 (Reissue 1995) do not specify the applicable standard which the district court should have utilized in determining whether the prosecution had satisfied its burden of proving his prior convictions, the statutes violate his due process rights under the 14th Amendment. Hurbenca also claims Nebraska law violates *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), in which the U.S. Supreme Court explicitly held: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

In *State v. Orduna*, 250 Neb. 602, 610, 550 N.W.2d 356, 362 (1996), we addressed the State's burden of proof during enhancement proceedings:

> In a proceeding for an enhanced penalty, the state has the burden to show that the record of a defendant's prior conviction, based on a plea of guilty, affirmatively demonstrates that the defendant was represented by counsel, or

> that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. . . . Moreover, a checklist docket entry is sufficient to establish that a defendant has been advised of his rights and has waived them.

(Citations omitted.) The record here shows that Hurbenca was represented by counsel for each of his prior convictions. He does not claim that any of his convictions were uncounseled, and the validity of the convictions on that basis is not before us.

In *U.S. v. Williams*, 308 F.3d 833 (8th Cir. 2002), the defendant was found guilty by a jury of interfering with commerce by violence. The trial court sentenced the defendant to life in prison pursuant to the federal "three-strikes law" because he had five prior convictions for robbing cabdrivers. On appeal, the defendant argued, among other issues, that under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the government was required to prove to a jury beyond a reasonable doubt that he had prior convictions for serious felonies before the three-strikes enhancement could be applied. The U.S. Court of Appeals for the Eighth Circuit concluded:

> *United States v. Davis*, 260 F.3d 965, 968-70 (8th Cir.2001), is controlling. *Davis* held that under *Apprendi* and *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), it is "proper for the district court to make the finding according to a preponderance of the evidence that appellant had two prior convictions for serious violent felonies." [*Davis*, 260 F.3d] at 969. We therefore reject [the defendant's] argument that the government must prove beyond a reasonable doubt that he had been convicted of prior serious felonies.

Williams, 308 F.3d at 839-40.

We adopt the following holdings from *Williams*: (1) The State has the burden to prove the fact of prior convictions by a preponderance of the evidence, and (2) the trial court determines the fact of prior convictions based upon the preponderance of the evidence standard. Thus, the narrow exception set forth in *Apprendi* remains the applicable law. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to

a jury, and proved beyond a reasonable doubt." See *Apprendi*, 530 U.S. at 490.

We conclude that neither the state nor the federal Constitution requires the State to prove the fact of prior convictions beyond a reasonable doubt for purposes of sentence enhancement under § 29-2221. Hurbenca's assignment of error on this issue is without merit.

(c) Cruel and Unusual Punishment

Hurbenca next argues that § 29-2221, as it applies to him, violates the Eighth Amendment prohibition against cruel and unusual punishment. He asserts that the application of § 29-2221 in his case resulted in a sentence that was "grossly disproportionate" to the crime of which he was convicted. See brief for appellant at 26. Hurbenca complains that he will be required to serve 10 years before becoming eligible for parole.

Hurbenca notes a number of problems with § 29-2221: It does not prohibit the use of convictions regardless of the age of the convictions, it does not differentiate between prior violent and nonviolent offenses, it does not allow the trial court to consider the age at which the offender was incarcerated or the positive accomplishments that have marked the offender's attempts at rehabilitation, it does not allow the court to consider whether a sentence would inflict undue hardship on the offender's family or whether attempts at restitution were made by the offender, and it does not permit the sentencing court to consider the facts of the substantive offense for which the defendant stands to be sentenced or any cooperation provided by the defendant.

The State argues that Hurbenca's sentence is not disproportionate to the number of offenses he has committed. It argues that the sentence he received was at the low end of the habitual criminal range, which allows for a maximum sentence of 60 years. See § 29-2221(1). The State also argues that the gravity of the offense should be considered and that attempting to escape from prison is a serious offense, particularly under these circumstances where inmates, prison employees, and a volunteer were taped and bound to facilitate the escape.

In addition, the State argues that the enhanced punishment imposed for Hurbenca's most recent offense should not be viewed

as an additional penalty for his earlier crimes, but, rather, should be viewed as a greater penalty for the most recent offense, which is considered to be an aggravated offense as a result of Hurbenca's prior convictions.

Again we are presented with a question of law and are, therefore, obligated to reach a conclusion independent of the decision reached by the court below. See *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). Thus, we must review Hurbenca's criminal record.

In 1984, Hurbenca was convicted of possession of a forged certificate of title and theft by receiving stolen property, and he was sentenced to 18 months to 2 years in prison. In 1986, he was convicted of theft by receiving stolen property and attempting to procure fraudulent title, and he was sentenced to consecutive terms of 6 to 20 years' and 4 years' imprisonment. In 1987, he was convicted of attempted escape and sentenced to 1 year in prison. In 1991, Hurbenca was convicted of fraudulent application for a motor vehicle title and was sentenced to 19 months' to 5 years' imprisonment. In 1996, he was convicted of possession of a firearm by a felon, and he was sentenced as a habitual criminal to 10 to 15 years in prison. Hurbenca was serving this sentence when he was convicted of attempted escape in the case before us.

[4] "[W]ith reference to cruel and unusual punishment, the Nebraska Constitution does not require more than does the [Eighth Amendment to the] U.S. Constitution." *State v. Moore*, 256 Neb. 553, 566, 591 N.W.2d 86, 95 (1999), *cert. denied*, *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 145 L. Ed. 2d 370. Section 29-2221 has withstood Eighth Amendment cruel and unusual punishment challenges in decisions of both the U.S. Court of Appeals for the Eighth Circuit and this court. See, *Fowler v. Parratt*, 682 F.2d 746 (8th Cir. 1982); *State v. Goodloe*, 197 Neb. 632, 250 N.W.2d 606 (1977), *disapproved on other grounds*, *State v. Clifford*, 204 Neb. 41, 281 N.W.2d 223 (1979); *State v. Graham*, 192 Neb. 196, 219 N.W.2d 723 (1974).

In *Fowler, supra*, the defendant was convicted of embezzling approximately $433 and was sentenced as a habitual criminal to 10 to 15 years in prison. The defendant had previously been convicted of issuing an insufficient funds check in the amount of $40 and possession of a forged instrument in the amount of

$100. The defendant challenged his 10- to 15-year habitual criminal sentence as being violative of the Eighth Amendment protection against cruel and unusual punishment because it was disproportionate to the severity of the crimes involved. The Eighth Circuit affirmed the sentence as not in violation of the Eighth Amendment.

Section 29-2221 has been amended since *Fowler*. Prior to its amendment in 1995, § 29-2221 (Cum. Supp. 1994) provided that the sentence imposed on a habitual criminal was to be a "term of not less than ten nor more than sixty years." As amended by 1995 Neb. Laws, L.B. 371, § 29-2221(1) (Reissue 1995) provides that a habitual criminal "shall be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years." L.B. 371 became operative on September 9, 1995, and is applicable to Hurbenca's case.

The U.S. Supreme Court recently addressed whether the Eighth Amendment prohibits the State of California from sentencing a repeat felon to a prison term of 25 years to life under the state's " 'Three Strikes and You're Out' " law. See *Ewing v. California*, 538 U.S. 11, 14, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003). Pursuant to California law, if a defendant has one prior " 'serious' " or " 'violent' " felony conviction, he or she must be sentenced to " 'twice the term otherwise provided as punishment for the current felony conviction.' " 538 U.S. at 16. If the defendant has two or more prior " 'serious' " or " 'violent' " felony convictions, he or she must receive " 'an indeterminate term of life imprisonment.' " *Id.* If a defendant is sentenced to life under the California three-strikes law, he or she "become[s] eligible for parole on a date calculated by reference to a 'minimum term,' which is the greater of (a) three times the term otherwise provided for the current conviction, (b) 25 years, or (c) the term determined by the court . . . for the underlying conviction, including any enhancements." *Id.*

Gary Ewing was on parole from a 9-year prison term when he walked out of a shop with three golf clubs, priced at $399 each, concealed in his pants. He was convicted of one count of felony grand theft of personal property in excess of $400. Ewing had previously been convicted of, among other crimes, three burglaries and a robbery. The trial court sentenced Ewing to 25 years to

life in prison under the three-strikes law as a newly convicted felon with two or more "serious" or "violent" felony convictions in his past. The California Court of Appeal affirmed, and the Supreme Court of California denied Ewing's petition for review. The U.S. Supreme Court subsequently granted certiorari.

In analyzing whether Ewing's sentence of 25 years to life in prison was unconstitutionally disproportionate to his offense, the Court stated:

> In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." . . .
>
> Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record.

Ewing, 538 U.S. at 29-30. The Court held that Ewing's sentence of 25 years to life in prison under the three-strikes law was not grossly disproportionate and therefore did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

We conclude that Hurbenca's sentence is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Hurbenca's assignment of error concerning cruel and unusual punishment is without merit.

2. Excessive Sentence

Hurbenca argues that the district court abused its discretion by imposing an excessive sentence. He asserts that the only fair and just sentence would be a lesser term of imprisonment. While he acknowledges that his offense calls for some degree

of incarceration, he argues that the "extremely lengthy" sentence is inappropriate for a "relatively minor" offense. See brief for appellant at 31. He asserts the district court ignored the realities of his sentence and abused its discretion by ordering the sentence to be served consecutively to the sentence he was currently serving. He specifically requests this court to resentence him to 10 years' imprisonment to be served concurrently.

Attempted escape is a Class IV felony carrying a maximum 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. §§ 28-105 and 28-201 (Cum. Supp. 2002) and 28-912 (Reissue 1995). Since Hurbenca was found to be a habitual criminal, under § 29-2221, the district court was required to sentence him to a minimum of 10 years in prison and a maximum of 60 years in prison.

[5] Hurbenca's sentence for attempted escape as a habitual criminal was within the statutory limits. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). 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. *Id.*

We conclude that Hurbenca's sentence does not demonstrate that the district court abused its discretion. Therefore, this assignment of error has no merit.

3. Exhibits 2 Through 6

[6] Hurbenca argues that the district court erred in admitting exhibits 2 through 6 at his sentencing and enhancement hearing and in finding him to be a habitual criminal. In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Lotter, ante* p. 245, 664 N.W.2d 892 (2003).

Specifically, Hurbenca argues that exhibit 2 did not contain a signed judgment, as required by Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002). He claims that exhibit 3 did not contain a valid certification and therefore did not comport with § 29-2222, which

requires a duly authenticated copy of the former judgment. He also claims that exhibit 3 did not contain the judge's signature, which rendered it deficient under § 25-1301. Hurbenca argues that exhibits 4 through 6 did not contain an order of commitment, as required by § 29-2222, nor a judge's signature, as required by § 25-1301. We will address each exhibit individually.

We initially point out that § 29-2221 requires two prior felony convictions for a finding of habitual criminality. Section 29-2221(1) provides: "Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state . . . for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal . . . ." Section 29-2222 provides:

> At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.

In *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987), we recognized that § 29-2222 does not confine proof of the defendant's prior convictions to the document specifically mentioned. See, also, *State v. Bundy*, 181 Neb. 160, 147 N.W.2d 500 (1966), *cert. denied* 389 U.S. 871, 88 S. Ct. 152, 19 L. Ed. 2d 150 (1967).

In *Bundy*, the State offered authenticated copies of two prior judgments. Instead of the actual commitment papers, the State offered certified copies of the sheriff's return and the warden's receipt, which evidenced the defendant's commitment to the Nebraska Penal and Correctional Complex. Despite the defendant's argument that § 29-2222 provided the exclusive method of proof, we held that the State was in substantial compliance with the requirement of proof of commitment. We stated that the purpose of § 29-2222 is to give competency and weight to the particular evidence mentioned. The fact that the statute indicates that an authenticated copy of a conviction is prima facie evidence is itself suggestive that other proof may also be received.

We also note that prior to its amendment in 1999, § 25-1301 (Reissue 1995) provided:

> (1) A judgment is the final determination of the rights of the parties in an action.
>
> (2) Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action.
>
> (3) Entry of a judgment is the act of the clerk of the court in spreading the proceedings had and the relief granted or denied on the journal of the court.

The judgments reflected in exhibits 2 through 6 were rendered before the 1999 amendment to § 25-1301 and therefore were not subject to the requirement that a judgment must bear the signature of a judge.

Exhibit 2, received over Hurbenca's objection, contained an amended information filed January 5, 1984, charging Hurbenca with possession of a forged certificate of title and theft by receiving stolen property, a commitment signed by the deputy clerk indicating Hurbenca was sentenced for a period of imprisonment of 18 months to 2 years, and a sheriff's return indicating that Hurbenca was delivered to the Department of Correctional Services in March 1984. The exhibit also contained the judge's minutes indicating that Hurbenca was sentenced to 18 months' to 2 years' imprisonment.

Exhibit 3 contained an information filed September 28, 1987, charging Hurbenca with attempted escape, a commitment signed by the deputy clerk indicating he was sentenced to a period of 1 year's imprisonment, and a sheriff's return indicating that Hurbenca was delivered to a representative of the Department of Correctional Services. The exhibit also contained the judge's minutes indicating Hurbenca's 1-year sentence.

Exhibit 4 contained an information filed July 11, 1986, charging Hurbenca with theft by receiving stolen property and attempting to procure fraudulent title. The exhibit also contained a "Judgment and Sentence" indicating that Hurbenca was sentenced to 6 to 20 years' imprisonment and that commitment was ordered accordingly. Hurbenca's sentence was further evidenced

by a copy of the judge's minutes. The exhibit established that Hurbenca was delivered to the Nebraska Penal and Correctional Complex in September 1986.

Exhibit 5 contained an information filed May 8, 1991, charging Hurbenca with false application for a motor vehicle title, a "Judgment and Sentence," and the judge's minutes, which indicate that Hurbenca was sentenced to 19 months to 5 years in prison and that commitment was ordered accordingly. The exhibit shows that Hurbenca was delivered to the Nebraska Penal and Correctional Complex in December 1991.

Exhibit 6 contained an amended information filed September 8, 1995, charging Hurbenca with possession of a firearm by a felon and asserting habitual criminal status, as well as a "Judgment and Sentence" indicating that Hurbenca was sentenced to a period of 10 to 15 years' imprisonment and that commitment was ordered accordingly. The exhibit contains the judge's minutes, which reflect Hurbenca's sentence and show that he was delivered to the Nebraska Penal and Correctional Complex in March 1996.

Exhibits 2 through 6 each include a statement of authentication signed by a clerk of the district court and a district court judge.

Proof of Hurbenca's prior convictions is not confined to the requirements of § 29-2222. See, *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987); *State v. Bundy*, 181 Neb. 160, 147 N.W.2d 500 (1966), *cert. denied* 389 U.S. 871, 88 S. Ct. 152, 19 L. Ed. 2d 150 (1967). We conclude that exhibits 2 through 6 were properly received as evidence of Hurbenca's prior convictions. These exhibits sufficiently prove that Hurbenca had twice been convicted of a crime, sentenced, and committed to prison in this state for terms of not less than 1 year. Therefore, the district court did not err in finding Hurbenca to be a habitual criminal under § 29-2221.

VI. CONCLUSION

For the reasons set forth herein, the judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF REBECKA P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LARRY P., APPELLANT.

669 N.W.2d 658

Filed October 10, 2003. No. S-02-1353.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Parental Rights: Evidence: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
4. **Constitutional Law: Rules of the Supreme Court: Notice: Statutes: Appeal and Error.** Strict compliance with the provisions of Neb. Ct. R. of Prac. 9E (rev. 2000) is required in order for an appellate court to consider a challenge to the constitutionality of a statute.
5. **Parental Rights: Rules of Evidence.** The Nebraska Evidence Rules do not apply in cases involving the termination of parental rights.
6. **Parental Rights: Due Process.** In termination of parental rights cases, due process controls and requires that fundamentally fair procedures be used by the State in an attempt to prove that a parent's rights to his or her child should be terminated.
7. **Parental Rights: Rules of Evidence.** Because the Nebraska rules of evidence do not apply in cases involving the termination of parental rights, the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the application of which is limited to those cases in which the Nebraska rules of evidence apply, are not applicable in parental rights termination cases.
8. **Parental Rights.** The foremost purpose and objective of the Nebraska Juvenile Code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law.
9. **Minors: Evidence.** To determine the child's best interests, the court must look at the evidence and assess the weight to be given that evidence.

Appeal form the County Court for Butler County: PATRICK R. MCDERMOTT, Judge. Reversed and remanded for further proceedings.

John H. Sohl, of Edstrom, Bromm, Lindahl, Sohl & Freeman-Caddy, and Gregory A. Brigham, Senior Certified Law Student, for appellant.

C. Jo Petersen, Deputy Butler County Attorney, for appellee.

Julie L. Reiter, of Mills & Reiter, guardian ad litem for Rebecka P.

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

MILLER-LERMAN, J.

NATURE OF CASE

On October 25, 2002, the Butler County Court, sitting as a juvenile court, entered an order terminating the parental rights of Larry P. to his minor daughter, Rebecka P., pursuant to Neb. Rev. Stat. § 43-292(2), (5), (6), and (7) (Reissue 1998). Larry appeals the termination of his parental rights. We reverse the judgment and remand the cause for further proceedings.

STATEMENT OF FACTS

Larry is the natural father of Rebecka, born October 28, 1997. On August 29, 2001, Rebecka's biological mother, Marie H., voluntarily relinquished her parental rights to Rebecka, and Marie is not a party to these appellate proceedings.

On July 6, 2000, Rebecka was in the physical custody of Marie when she was removed from Marie's custody and placed in protective custody with the Nebraska Department of Health and Human Services (DHHS) due to allegations including neglect and lack of proper parental care. From November 1 to December 22, Rebecka was briefly returned to Marie's custody. On December 22, 2000, she was again removed from Marie's custody, and she has remained in foster care in the custody of DHHS since that date. During the pendency of these proceedings, Rebecka has never been in Larry's custody. The record suggests, however, that at the time these proceedings were initiated, Larry may have been in the process of seeking custody of Rebecka in separate proceedings.

On July 6, 2000, a petition was filed alleging that Rebecka was a juvenile as described under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998). Larry was named as Rebecka's father in the petition and was advised of his rights pursuant to Neb. Rev. Stat. § 43-279.01 (Reissue 1998). An adjudication hearing was held on

September 13. In the court's September 13 order, Rebecka was adjudicated to be a juvenile within the meaning of § 43-247(3)(a). Larry did not appeal the adjudication order.

A hearing was held on October 5, 2000, and a disposition order was entered on October 11, setting forth a rehabilitation plan for Marie. The permanency objective was reunification of Rebecka with Marie. The first rehabilitation plan did not set forth a rehabilitation plan for Larry. Subsequent disposition hearings were held on January 24 and August 8, 2001. The case plans reviewed and approved by the court at these hearings were similar to the original case plan, but also included a rehabilitation plan for Larry, setting forth two goals. First, Larry was to appropriately parent Rebecka by participating in parenting classes and setting rules and consequences for Rebecka. Second, Larry was to appropriately supervise Rebecka by attending scheduled visits, demonstrating awareness of Rebecka and her activities during visits, and ensuring that Rebecka was safe during visits. The court also ordered Larry to obtain a psychological evaluation. Larry did not appeal the disposition orders establishing the rehabilitation plan.

On March 31, 2001, Larry was evaluated by Stephen Skulsky, Ph.D., a licensed clinical psychologist. The evaluation included a series of tests and a personal interview. In Skulsky's report issued following the evaluation, he noted that Larry possessed several "potential personality strengths," including "practical common sense," "good reality testing," "a strong interest in inter-personal relationships," and "some good underlying empathic capacities." Skulsky also noted some areas of concern, including Larry's suffering from depression and possessing a low frustration tolerance. Skulsky recommended that Larry undergo psychotherapy, as well as participate in a course of group work with other parents learning to become more effective as parents.

On May 2, 2001, a petition was filed to terminate Marie's parental rights to Rebecka. On August 29, Marie voluntarily relinquished her parental rights, and an order was entered the same day terminating her parental rights to Rebecka.

On October 3, 2001, a disposition hearing was held, and a new case plan involving Larry was approved by the court. Although Rebecka remained in foster care, the permanency objective was

reunification. Larry was given increased weekly supervised visits with Rebecka. This case plan continued the original goals set for Larry and spelled out a number of new goals for him, including providing appropriate shelter, food, and clothing for Rebecka during visitation, properly caring for Rebecka's hygiene, and participating in psychological counseling. Larry did not appeal this dispositional order.

On October 10, 2001, Skulsky evaluated Larry and Rebecka for the purpose of a bonding assessment "to determine if Rebecka and Larry have a substantial paternal bond." Skulsky's evaluation was based upon an interview he conducted with Larry and Rebecka, as well as upon his review of a September 25 court report prepared by DHHS containing observations of Larry's visits with Rebecka. In Skulsky's report prepared after this evaluation, he noted the following:

> During this evaluation it became quite clear that [Larry] could interact very well and appropriately with Rebecka. During the evaluation he sat on a chair as she played on the floor. He seemed to know her preferences in play. He seemed to be able to direct himself to interact with her in a very appropriate way and show her new toys and ways to see things.
>
> [Larry] was able to describe how he should handle discipline. He was able to describe ways that he needed to be affectionate with his daughter that he also showed in this interactional evaluation. [Larry] knew favorite foods, favorite activities, favorite TV shows and movies, who the best friend was, how his daughter played with the pets in the home. He therefore had a very good knowledge of her preferences.
>
> [Larry] was able to be loving and affectionate with Rebecka. During this evaluation he could talk about the appropriate things to do with her. She was quite a delightful child in many ways in the interactions with her father and the examiner.

As to the nature of Larry's relationship with Rebecka, Skulsky stated the following:

> The examiner in this bonding assessment was charged with establishing whether or not [Larry] was bonded

> strongly to his daughter. He has bonded strongly to her. His daughter seems emotionally connected to, and caring of, him. It would hurt her somewhat if this bond were broken and she was not placed with him.

A permanency hearing was held on January 16, 2002. In a report prepared by DHHS, dated November 29, 2001, and received into evidence by the court, DHHS outlined certain of the services being provided to Larry by family support workers, including assistance with budgeting, guidance in menu preparation, and instruction in a nurturing program, in which Larry would work on setting rules, consequences, and boundaries for Rebecka. The report noted that "Rebecka has a very close relationship with Larry. They spend a lot of time together and have a lot of interaction." The report also stated that

> Larry continues to provide Rebecka with a lot of love and nurturance during their visits. Larry's interactions with Rebecka are appropriate most of the time . . . .
>
> . . . .
>
> Larry continues to work on the nurturing program with the family support worker and his visitations have been increased to allow him the full responsibility of parenting Rebecka.

The report also stated, however, that Larry was "struggling financially" and did not "understand the amount of attention and limits and boundaries Rebecka need[ed] in order to be safe in her environment."

The court continued the permanency hearing and ordered DHHS to prepare a permanency plan for Rebecka. At the continued hearing held on March 6, 2002, the court received into evidence a February 20 report prepared by DHHS that recommended that the permanency objective of reunification be changed to adoption, with the termination of Larry's parental rights. At this point, with the exception of November and December 2000, Rebecka had continuously been in out-of-home placement since July 2000.

The February 20, 2002, report indicated that Larry was making "[p]oor progress" to alleviate the necessity for out-of-home placement and that there were "no compelling reasons to continu[e] work toward reunification. Rebecka needs to be able to

have a permanent situation which the current foster parents are able to provide." The report supported this conclusion by noting that Larry continued to struggle with providing appropriate supervision for Rebecka during visitation, was unable to understand the amount of attention and limits Rebecka needed, continued to have financial difficulties, and had failed to complete assignments relating to the nurturing program. In an order filed March 6, 2002, the court approved the February 20 report and its permanency plan of adoption for Rebecka.

On April 2, 2002, the State filed a petition for termination of Larry's parental rights to Rebecka, which petition was amended on May 1. The petition, as amended, sought termination of Larry's parental rights under § 43-292(2), (3), (5), (6), and (7). The amended motion also asserted that termination of parental rights was in Rebecka's best interests.

Section 43-292(2) requires a finding that the parent has substantially and continuously or repeatedly neglected or refused to give the juvenile or a sibling of the juvenile necessary parental care and protection. Section 43-292(3) requires a finding that the parent, being financially able, has

> willfully neglected to provide the juvenile with the necessary subsistence, education, or other care necessary for his or her health, morals, or welfare or ha[s] neglected to pay for such subsistence, education, or other care when legal custody of the juvenile is lodged with others and such payment ordered by the court.

Section 43-292(5) requires a finding that the parent is unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period. Section 43-292(6) requires a finding that following a determination that the juvenile is one as described in § 43-247(3)(a), reasonable efforts to preserve and unify the family under the direction of the court have failed to correct the conditions leading to the determination. Section 43-292(7) requires a finding that the juvenile has been in out-of-home placement for 15 or more of the most recent 22 months.

On July 8 and 9 and continuing on September 12, 2002, the State's petition for termination came on for hearing. Larry was

present and represented by counsel. A total of six witnesses testified, and documentary evidence was received.

Skulsky's deposition was admitted into evidence over Larry's objection as to its reliability based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Skulsky's deposition included copies of his two written evaluations. Skulsky's deposition testimony essentially repeated the findings and conclusions included in his evaluations.

Several witnesses testified on behalf of the State, including Rebecka's DHHS caseworkers and certain family support workers. During the course of the trial proceedings, Larry filed a motion to quash and a plea in abatement, challenging the constitutionality of § 43-292(7) and Neb. Rev. Stat. § 43-292.02(1)(a) (Reissue 1998). Following a hearing, in a journal entry and order filed May 13, 2002, the court rejected Larry's challenge to the constitutionality of these statutes.

In a written order filed October 25, 2002, the court found that the State had proved by clear and convincing evidence the grounds for termination set forth in § 43-292(2), (5), (6), and (7). The court further found that it was in Rebecka's best interests that Larry's parental rights be terminated. Accordingly, the court terminated Larry's parental rights to Rebecka. Larry appeals.

ASSIGNMENTS OF ERROR

On appeal, Larry asserts four assignments of error which we restate as three. Larry claims, renumbered and restated, that the trial court erred (1) in overruling his constitutional challenges to §§ 43-292(7) and 43-292.02(1)(a); (2) in overruling Larry's foundation objection to the testimony of Skulsky, which objection was based upon the standards set forth in *Daubert, supra*; and (3) in finding that the State had presented sufficient evidence to terminate Larry's parental rights.

STANDARDS OF REVIEW

[1-3] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003); *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). When the evidence is in conflict, however, an appellate court may give weight

to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.* Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *In re Interest of Joshua R. et al., supra.*

ANALYSIS

Constitutionality of Statutes.

For his first assignment of error, Larry asserts that the court erred by overruling his plea in abatement to the effect that §§ 43-292(7) and 43-292.02(1)(a) are unconstitutional. We do not reach this issue. The rules of the Nebraska Supreme Court impose a specific notice requirement on parties seeking to challenge the constitutionality of a statute on appeal. Specifically, Neb. Ct. R. of Prac. 9E (rev. 2000) provides, inter alia: "Cases Involving Constitutional Questions. A party presenting a case involving the federal or state constitutionality of a statute must file and serve a separate written notice thereof with the Supreme Court Clerk at the time of filing such party's brief."

[4] We have previously stated that "strict compliance" with the provisions of rule 9E is required in order for an appellate court to consider a challenge to the constitutionality of a statute. See, *Mid City Bank v. Douglas Cty. Bd. of Equal.*, 260 Neb. 282, 616 N.W.2d 341 (2000); *In re Application of SID No. 384*, 259 Neb. 351, 609 N.W.2d 679 (2000); *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000); *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456 (1998). See, also, *State v. Campbell*, 260 Neb. 1021, 1028, 620 N.W.2d 750, 756 (2001) (stating "court will not consider claim that statute is unconstitutional when party failed to file notice required by rule 9E").

In the instant case, Larry did not file a written notice in compliance with rule 9E. Since the record in this case contains no separate written notice, we do not consider Larry's assignment of error to the effect that the court erred in failing to hold §§ 43-292(7) and 43-292.02(a)(1) unconstitutional.

Admission of Skulsky's Testimony.

For his second assignment of error, Larry claims that Skulsky's testimony, introduced at the termination hearing through his

deposition and attachments thereto, fails to satisfy the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), for the evaluation of expert testimony, and therefore, such testimony should have been excluded. We conclude that Larry's reliance on *Daubert* in the context of an appeal from the proceedings of a termination of parental rights hearing at which the rules of evidence are not required, is misplaced. We further determine that the introduction of Skulsky's testimony did not violate Larry's due process rights. Accordingly, we conclude this assignment of error is without merit.

In *Daubert*, the U.S. Supreme Court held that the "general acceptance" test for the admissibility of testimony about scientific evidence as set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), had been superseded by the adoption of the Federal Rules of Evidence. *Daubert, supra.* The Supreme Court rejected the *Frye* test and redefined the standards for the admission of expert testimony in the federal courts in the context of the Federal Rules of Evidence. *Id.* Those standards require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and the reliability of that opinion. *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

We note that Nebraska's rules of evidence governing expert testimony are "essentially identical" to the Federal Rules of Evidence. *Phillips v. Industrial Machine*, 257 Neb. 256, 268, 597 N.W.2d 377, 385 (1999) (Gerrard, J., concurring). Compare Fed. R. Evid. 701 through 706, with Neb. Rev. Stat. §§ 27-701 through 27-706 (Reissue 1995). In *Schafersman, supra*, this court adopted the *Daubert* standards for the determination of the admissibility of expert testimony for trials in Nebraska state courts commencing on or after October 1, 2001. We specifically limited our ruling to those cases where the question was "the admissibility of expert opinion testimony under the Nebraska rules of evidence." *Id.* at 232, 631 N.W.2d at 876.

[5,6] We have previously recognized that the Nebraska Evidence Rules do not apply in cases involving the termination of parental rights. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999); *In re Interest of Constance*

G., 254 Neb. 96, 575 N.W.2d 133 (1998). See, also, Neb. Rev. Stat. § 43-283 (Reissue 1998) (stating that "[s]trict rules of evidence shall not be applied at any dispositional hearing"). Instead, we have stated that due process controls and requires that fundamentally fair procedures be used by the State in an attempt to prove that a parent's rights to his or her child should be terminated. *In re Interest of Natasha H. & Sierra H., supra*; *In re Interest of Constance G., supra.* Because the application of the *Daubert* standards in Nebraska state court cases is limited to those cases in which the Nebraska rules of evidence apply, and the Nebraska rules of evidence are not applied in cases involving the termination of parental rights, we conclude the *Daubert* standards do not apply to cases involving the termination of parental rights. Compare *Mulroy v. Becton Dickinson Co.*, 48 Conn. App. 774, 712 A.2d 436 (1998) (stating *Daubert* standards inapplicable in workers' compensation case where workers' compensation commissioner is not bound by rules of evidence); *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995) (declining to apply *Daubert* standards in workers' compensation case because workers' compensation board is not bound by technical rules of procedure).

Rather than the formal rules of evidence, we evaluate the admission of evidence in termination of parental rights cases using a due process analysis. We have recently addressed a parent's due process rights during termination proceedings. In *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 158, 655 N.W.2d 672, 681 (2003), we stated: " '[S]tate intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause.' " (Quoting with approval *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999).)

We also recognized:

> "Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is

> required by the Constitution or statutes; and a hearing before an impartial decisionmaker."

In re Interest of Ty M. & Devon M., 265 Neb. at 158, 655 N.W.2d at 681 (quoting *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999)).

In the instant case, the record reflects that Larry received proper notice of the termination hearing and that during the termination hearing, Larry appeared and was represented by counsel. With regard to Skulsky's testimony, the record reflects that Larry's counsel cross-examined Skulsky on Larry's behalf, and raised several objections to the testimony, including an objection going to the reliability of Skulsky's testimony. The record further reflects that the court considered these objections and issued a written order. Based on this record, we conclude that Larry was afforded due process in general and specifically with respect to the receipt of Skulsky's testimony. See *In re Interest of Ty M. & Devon M., supra.*

[7] Because the Nebraska rules of evidence do not apply in cases involving the termination of parental rights, the *Daubert* standards, the application of which is limited to those cases in which the Nebraska rules of evidence apply, are not applicable in parental rights termination cases. The admission of Skulsky's testimony is evaluated under a due process analysis, and the record reflects that Larry's due process rights were not violated by the admission of Skulsky's testimony. Accordingly, Larry's assignment of error surrounding the admission of Skulsky's testimony is without merit.

Termination of Parental Rights and Best Interests.

The court found that the State established grounds for termination under § 43-292(2), (5) (6), and (7). The court did not address the State's allegation that Larry's parental rights should be terminated pursuant to § 43-292(3). Larry asserts that the court erred when it determined that the State had presented sufficient evidence to terminate his parental rights. We agree and determine that on this record, the best interests of Rebecka are not served by terminating Larry's parental rights at this time.

[8,9] We have previously recognized that "[t]he foremost purpose and objective of the Nebraska Juvenile Code is the

protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law." *In re Interest of L.H. et al.*, 241 Neb. 232, 245, 487 N.W.2d 279, 289 (1992). The law is clear that in a termination of parental rights case, the State must prove by clear and convincing evidence that termination is in the best interests of the child. *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003). To determine the child's best interests, the court must look at the evidence and assess the weight to be given that evidence. *In re Interest of John T.*, 4 Neb. App. 79, 538 N.W.2d 761 (1995).

The record in this case reflects that Larry and Rebecka have a loving father-daughter relationship. The caseworkers who have observed Larry's visitations with Rebecka note that Larry interacts frequently and appropriately with Rebecka. Skulsky's testimony was to the same effect. The record contains numerous references to Larry's playing with Rebecka, instructing her in a variety of activities, and conversing with her in an age appropriate manner. The record also indicates that Larry has made progress on providing balanced meals for Rebecka and caring for her hygiene needs. Although Larry has continued to struggle with supervision and discipline issues, there is evidence that he has made some improvement in these areas. While the caseworkers have expressed some concern that Larry is not always awake when Rebecka arrives in the mornings for visits, we note that on at least one such occasion, Larry had been up until 3 o'clock in the morning baking a birthday cake for Rebecka.

We acknowledge that the record reflects that Larry has not yet accomplished all of the goals set forth in the rehabilitation plans. We note, however, that the record indicates that he has progressed and can demonstrate some sound parenting techniques. In this regard, we are aware that the initial goal of the rehabilitation plan was reunification of Rebecka with Marie without regard to Larry and that this goal was abandoned after Marie relinquished her parental rights. After the initial plan, Larry became subject to a plan. Larry then became subject to a plan with the objective of reunification in October 2001. However, the goals of the plans including Larry changed from reunification to adoption

in about 5 months. The record suggests that Larry's opportunities for compliance may have been limited. For example, although Skulsky expressed reservations with regard to the potential for Larry's psychological development, the record is unclear whether Larry received the individual psychotherapy recommended in Skulsky's report and outlined in the rehabilitation plan. Finally, we note that a strong bond has developed between Larry and Rebecka, and we are mindful of Skulsky's conclusion that Rebecka will be hurt if that bond is severed.

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003). Under our de novo review, and on the record presented, we conclude that regardless of the asserted statutory basis for termination, the State has failed to prove by clear and convincing evidence that Rebecka's best interests are served by terminating Larry's parental rights at this time.

CONCLUSION

Based upon our de novo review of the record, we conclude there is not clear and convincing evidence that the termination of Larry's parental rights to Rebecka is in Rebecka's best interests. Accordingly, the judgment of the county court terminating such rights is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

K N ENERGY, INC., A DIVISION OF KINDER MORGAN, INC., APPELLEE, V. CITIES OF ALLIANCE AND OSHKOSH, MUNICIPAL CORPORATIONS OF THE STATE OF NEBRASKA, APPELLANTS.

K N ENERGY, INC., A DIVISION OF KINDER MORGAN, INC., APPELLEE, V. CITIES OF KIMBALL ET AL. AND VILLAGE OF GURLEY, MUNICIPAL CORPORATIONS OF THE STATE OF NEBRASKA, APPELLANTS.

K N ENERGY, INC., A DIVISION OF KINDER MORGAN, INC., APPELLEE, V. VILLAGE OF HEMINGFORD AND CITIES OF GORDON AND CHADRON, MUNICIPAL CORPORATIONS OF THE STATE OF NEBRASKA, APPELLANTS.

670 N.W.2d 319

Filed October 24, 2003. Nos. S-01-1031 through S-01-1033.

1. **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, provided, 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.
2. **Municipal Corporations: Public Utilities: Rates.** A municipal corporation, in fixing rates to be charged by a public utility, acts in a legislative rather than a judicial capacity.
3. **Ordinances: Presumptions: Proof.** Courts will generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority and that the burden rests on those who challenge their validity.
4. **Public Utilities: Rates: Ordinances: Collateral Attack: Due Process: Proof.** In a collateral attack on a rate or rates set by an ordinance, the burden is on a utility to show that the municipally established rate is unjust, unreasonable, and confiscatory, in violation of the constitutional right to due process.

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

David A. Hecker and Norman M. Krivosha, of Kutak Rock, L.L.P., for appellants.

M.J. Bruckner, of Bruckner Fowles Law Firm, P.C., Stephen M. Bruckner, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., and B.J. Becker and William M. Lopez, of Kinder Morgan, Inc., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

K N Energy, Inc. (KNE), a division of Kinder Morgan, Inc., initiated these actions against the Cities of Alliance, Oshkosh, Kimball, Chappell, Sidney, Gordon, and Chadron and the Villages of Hemingford and Gurley (collectively the municipalities). The municipalities initiated a review of a "P-0802 surcharge" under Neb. Rev. Stat. § 19-4618(1) (Reissue 1997) and passed ordinances prohibiting KNE from collecting the P-0802 surcharge from ratepayers within the municipalities. KNE initiated these collateral attacks to enjoin the municipalities from enforcing the ordinances. The district court found KNE's actions to be prudent and reasonable and thus enjoined the municipalities from enforcing the ordinances. The municipalities appeal, arguing that the P-0802 surcharge is not a "prudently incurred" expense under Neb. Rev. Stat. § 19-4612(5) (Reissue 1997). We affirm.

BACKGROUND

In 1972, KNE obtained the right to purchase leases for several hundred thousand acres of potential natural gas reserves in Montana, in an area known as the Bowdoin Field. KNE assigned those lease rights to its then wholly owned production affiliate, Midlands Gas Corporation (Midlands). Midlands later purchased the Bowdoin Field leases, and on December 21, 1973, KNE entered into a contract to purchase natural gas from Midlands—the P-0802 contract. The P-0802 contract required KNE to purchase gas for the life of the Bowdoin Field.

The P-0802 contract was amended in 1975 to add additional acreage, bringing the total to approximately 600,000 acres of gas reserves. The 1975 amendment provided for the pricing of gas under the contract at the maximum lawful price established for the Bowdoin Field, whether that price was higher or lower than the base contract price. The amendment also included a provision under which Midlands, but not KNE, could trigger price redetermination as to any gas sold under the contract that became

deregulated. Natural gas first flowed under the P-0802 contract in 1976 and has continued without interruption ever since.

KNE occasionally loaned money to Midlands to fund Midlands' gas exploration and development operations. In 1981, Midlands entered into a production payment financing agreement in which it pledged the revenue from the P-0802 contract to repay a $30 million loan from institutional investors. The proceeds from this loan were used to repay KNE for capital advances made by KNE to assist Midlands in the acquisition and development of leases in the Bowdoin Field. KNE used those funds for corporate purposes, including additional gas purchases.

In 1983, KNE divested Midlands to avoid a hostile takeover. After December of that year, KNE had no corporate relationship with Midlands.

Beginning in 1998, KNE offered a "Choice Gas" program that gave its Nebraska retail customers an annual option to choose their gas supplier. Each of the municipalities has adopted the choice gas program. The municipal ordinances that adopted this program provided that KNE would recover any above-market costs of the P-0802 contract. When the P-0802 contract was below market, retail customers would receive a credit. The mechanism by which above-market costs of the P-0802 contract are recovered has come to be referred to as the "P-0802 Surcharge."

Between February and April 1999, each of the municipalities adopted resolutions to conduct a "targeted prudence and rate-related review" of the P-0802 surcharge. Following hearings in each rate area, each of the municipalities adopted ordinances similarly providing that

> the above-market costs associated with the P-0802 Contract currently recovered by KNE through the "P-0802 Surcharge" from all customers on KNE's distribution system in this municipality and throughout the rate areas served by KNE are not prudently incurred costs and therefore such above-market costs are not an authorized expense recoverable through a "rate" under the [Municipal Natural Gas Regulation Act] and consequently KNE should be prohibited from including and seeking to recover such above-market costs, whether as part of the "P-0802 Surcharge," or through any other rate or charge, including

without limitation, as part of a purchase gas adjustment schedule ("PGA").

KNE filed these collateral attacks in the district court for Lancaster County, seeking to enjoin the municipalities from enforcing the ordinances. On August 3, 2001, the district court ruled in favor of KNE and enjoined enforcement of the ordinances.

ASSIGNMENTS OF ERROR

The municipalities assign the following errors: (1) the August 3, 2001, order and judgment of the district court finding that (a) the original terms of the P-0802 contract were prudent and reasonable, (b) the terms of the April 1975 amendment to the P-0802 contract were prudent and reasonable, (c) the 1981 production payment financing transaction involving KNE and Midlands was prudent and reasonable, (d) KNE's divestiture of Midlands in 1983 benefited KNE ratepayers and was prudent and reasonable, and (e) KNE's divestiture of Midlands without first amending the P-0802 contract to insert a contract termination or price redetermination clause was prudent and reasonable; (2) the determination of the district court that the ordinances adopted by the municipalities should be enjoined and that each municipality, its officers, elected officials, employees, representatives, and agents are enjoined from enforcing such ordinances; (3) the scope of the district court's order purporting to enjoin the municipalities from ever " 'prohibiting KNE from continuing to include in its rate or charges the above-market costs associated with the P-0802 [c]ontract' "; and (4) the failure of the district court to award the municipalities their reasonable attorney fees under § 19-4618(2).

At trial in the district court, the municipalities did not contend that the 1975 amendment to the P-0802 contract was imprudent nor did they contend that the 1981 production payment transaction was imprudent. Thus, their assignments of error (1)(b) and (c) will not be considered by this court.

STANDARD OF REVIEW

[1] 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, provided, 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. *K N Energy, Inc. v. Cities of Broken Bow et al.*, 244 Neb. 113, 505 N.W.2d 102 (1993).

ANALYSIS

[2,3] It is evident from the parties' briefs that the proper burden of proof and scope of review requires some clarification. We have held that a municipal corporation, in fixing rates to be charged by a public utility, acts in a legislative rather than a judicial capacity. *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 447 N.W.2d 227 (1989). Courts will generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority and that the burden rests on those who challenge their validity. *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 623 N.W.2d 672 (2001).

The municipalities contend, without citation, that "[i]f any substantial evidence exists supporting the Municipalities' findings reflected in the Ordinances, the Ordinances are valid." Brief for appellants at 13. The municipalities are mistaken in this contention. In *K N Energy, Inc. v. City of Scottsbluff, supra*, the City of Scottsbluff made a similar and unsuccessful argument.

[4] Elsewhere, the municipalities argue that this court examines the evidence to determine if "any rational basis exists to support the Municipalities' actions." Reply brief for appellants at 13. Again, the municipalities are simply wrong. It is well established that in a collateral attack on a rate or rates set by an ordinance, the burden is on a utility to show that the municipally established rate is unjust, unreasonable, and confiscatory, in violation of the constitutional right to due process. *K N Energy, Inc. v. Cities of Broken Bow et al., supra*; *K N Energy, Inc. v. City of Scottsbluff, supra*; *Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney*, 186 Neb. 168, 181 N.W.2d 682 (1970). The review by this court of factual questions is de novo on the record. See *K N Energy, Inc. v. Cities of Broken Bow et al., supra*.

Prior to the recent enactment of the State Natural Gas Regulation Act, Neb. Rev. Stat. § 66-1801 et seq. (Supp. 2003), rates charged by a utility for natural gas service were regulated by municipalities under the Municipal Gas Regulation Act, Neb.

Rev. Stat. § 19-4601 et seq. (Reissue 1997). Municipalities were authorized, once in any 36-month period, to "initiate a proceeding for a review and possible adjustment in rates to conform such rates to the standards of section 19-4612 by the introduction of a resolution for such purpose." § 19-4618(1). The ordinances passed by the municipalities in this case make no mention of § 19-4618(1) and instead purport to initiate a review under § 19-4604(1). However, the resolutions call for a "targeted prudence and rate-related review." As we shall see below, the prudence of a rate charged is one of the standards encompassed in § 19-4612. Thus, for purposes of our analysis, we deem the resolutions to have initiated a § 19-4618(1) review.

As stated, the municipalities' proceedings are initiated for the purpose of "a review and possible adjustment in rates to conform such rates to the standards of section 19-4612." § 19-4618(1). Section 19-4612 provides:

> (1) The municipality, in the exercise of its power under the Municipal Natural Gas Regulation Act to determine just and reasonable rates for public utilities, shall give due consideration to the public need for adequate, efficient, and reasonable natural gas service and to the need of the utility for revenue sufficient to enable it to meet the cost of furnishing the service, including adequate provisions for depreciation of its utility property used and useful in rendering service to the public, and to earn a fair and reasonable return upon the investment in such property.
>
> (2) Cost of service shall include operating expenses and a fair and reasonable return on rate base, less appropriate credits. . . .
>
> (3) In determining a fair and reasonable return on the rate base of a utility, a rate of return percentage shall be employed that is representative of the utility's weighted average cost of capital including, but not limited to, long-term debt, preferred stock, and common equity capital.
>
> (4) The rate base of the utility shall consist of the utility's property, used and useful in providing utility service, including the applicable investment in utility plant, less accumulated depreciation and amortization, allowance for working capital, such other items as may be reasonably included, and

> reasonable allocations of common property, less such investment as may be reasonably attributed to other than investor-supplied capital unless such deduction is otherwise prohibited by law.
>
> (5) Operating expenses shall consist of expenses *prudently incurred* to provide natural gas service including a reasonable allocation of common expenses which shall include allocations authorized by subsection (3) of section 19-4621.

(Emphasis supplied.)

The municipalities contend that the P-0802 surcharge is not a "prudently incurred" expense under § 19-4612(5) and thus is not recoverable by a utility under the Municipal Gas Regulation Act. This case marks the first opportunity for this court to determine if a utility's expenses were "prudently incurred" under § 19-4612(5). KNE urges this court to adopt the test for determining the prudence of a utility's expenses established by the Federal Energy Regulatory Commission (FERC) in *New England Power Co.*, 31 F.E.R.C. ¶ 61,047 (1985), *rehearing denied* 32 F.E.R.C. ¶ 61,112, *affirmed sub nom. Violet v. F.E.R.C.*, 800 F.2d 280 (1st Cir. 1986). In that decision, FERC's analysis of the relevant case law resulted in the following statement:

> "[M]anagers of a utility have broad discretion in conducting their business affairs and in incurring costs necessary to provide services to their customers. In performing our duty to determine the prudence of specific costs, the appropriate test to be used is whether they are costs which a reasonable utility management (or that of another jurisdictional entity) would have made, in good faith, under the same circumstances, and at the relevant point in time. We note that while in hindsight it may be clear that a management decision was wrong, our task is to review the prudence of the utility's actions and the costs resulting therefrom based on the particular circumstances existing either at the time the challenged costs were actually incurred, or the time the utility became committed to incur those expenditures."

(Emphasis omitted.) *Violet v. F.E.R.C.*, 800 F.2d at 282-83, quoting *New England Power Co., supra.*

The disdain for viewing a utility's incurrence of costs in hindsight can be traced further back to a concurring opinion in *S. W. Tel. Co. v. Pub. Serv. Comm.*, 262 U.S. 276, 289 n.1, 43 S. Ct. 544, 67 L. Ed. 981 (1923), where Justice Brandeis stated:

> The term "prudent investment" is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.

We are persuaded by the logic of the test established in *New England Power Co., supra*, and hold that whether expenses are "prudently incurred" under § 19-4612(5) shall be judged against that test. We now proceed to apply that test to the facts of this case.

At the rate hearings, the municipalities' expert witness, Dr. William G. Foster, challenged three actions of KNE with respect to the P-0802 contract: (1) the 1975 amendment, (2) the 1981 production payment financing, and (3) the 1983 divestiture of Midlands. At trial, Foster testified that he no longer believed the 1975 amendment to the P-0802 contract was imprudent. Furthermore, he did not testify that the production payment transaction was imprudent. He did, however, maintain that KNE acted imprudently in divesting Midlands without adding a market-out clause to the P-0802 contract. A market-out clause allows a buyer to terminate the contract if the seller declines to accept a price lower than the contractually agreed-upon price. Our review in this appeal is limited to prudence of the P-0802 surcharge in light of the 1983 divestiture of Midlands.

KNE's distribution system differed from most interstate pipeline companies. It may best be described as a "spider web" extending into Colorado, Wyoming, Nebraska, and Kansas, unlike most other pipeline companies that utilize a single line of pipeline. KNE's system required sufficient natural gas supplies at the south and west end of its system to ensure reliable and adequate service to its customers as required by FERC policy.

Notably, KNE's natural gas service to its customers has been continuous since the P-0802 contract was executed.

Dr. Charles J. Cicchetti testified as an expert witness for KNE. He testified that between 1975 and 1981, several events occurred to prompt a "major energy crisis," including the Iranian revolution, the hostage crisis in Tehran, and the Iran-Iraq war. In addition to those events, the emergence of spot prices and a "value gap" between natural gas prices and competing fuels led to the emergence of "corporate raiders." Most experts of the time predicted a significant price increase after deregulation of some types of natural gas. Cicchetti testified that in 1983, it was widely expected that the types of gas constituting the bulk of gas purchased under the P-0802 contract would be regulated indefinitely.

The district court also received evidence regarding the events and circumstances leading up to the 1983 divestiture of Midlands. According to Cicchetti, the passage of the Natural Gas Policy Act of 1978 (NGPA) was a significant event in the regulation of natural gas pipeline companies, and he explained the various pricing rules established by the NGPA for different types of natural gas. The different categories of gas came to be referred to by the relevant section of the NGPA; for example, section 107 gas was an expensive gas source found in deep or tight sand formations. The gas wells under the P-0802 contract were made up of four NGPA categories. The majority of the P-0802 gas were low-priced sections 104 and 108 gas, and these categories were not subject to deregulation under the NGPA. There was no expensive section 107 gas under the P-0802 contract.

As indicated both by Cicchetti's testimony and a 1990 report prepared by Foster for other litigation, forecasts from 1981 predicted that the natural gas prices would increase significantly in the next decade. It was predicted that natural gas prices would rise more rapidly than other fuels because (1) regulation had kept natural gas prices substantially below their market value and replacement cost; (2) higher priced supplemental gas would become a larger part of the supply; (3) natural gas would be priced at the same level as oil; (4) exploration costs would increase; and (5) natural gas supplies were limited. These predictions were based on the fact that most experts, including Cicchetti, thought the surplus of natural gas that existed in 1983

would be short lived. Furthermore, at this time, pipeline reserve-to-production ratios were still below their historic levels. Cicchetti testified that experts widely thought natural gas prices would be tied to oil prices.

Cicchetti testified that in 1983, industry and market conditions made it advantageous for investors to purchase gas supplies rather than drill for them. Those conditions led to the emergence of "corporate raiders" like T. Boone Pickens. In 1983, Pickens and his company, Mesa Petroleum, initiated a hostile takeover to acquire KNE's gas reserves, including those held by Midlands. Hassel Sanders, a former officer of KNE, testified that in order to protect the valuable gas reserves provided under the P-0802 contract, KNE decided to divest its Midlands affiliate to KNE shareholders. The spinoff of Midlands allowed KNE to obtain a reasonable value for Midlands' production assets while protecting KNE ratepayers from a breakup of the corporation by Pickens or other "corporate raiders."

According to Cicchetti's analysis of a report prepared by Foster in 1985, market-out clauses were becoming evident in contracts after 1982, but they were not the norm in older contracts. Consistent with its 1983 gas acquisition guidelines, KNE sought to have market-out clauses included in its new contracts. Also in 1983, KNE had the lowest weighted average cost of gas (WACOG) of any interstate pipeline. At that time, the P-0802 contract average price was lower than alternate fuels.

Cicchetti testified that market-out clauses had less value in 1983 to low-cost pipeline companies such as KNE, which did not have large amounts of expensive Canadian or NGPA section 107 gases. Such clauses mostly were triggered by pipelines with high WACOG's. The district court found that KNE should not have reasonably anticipated exercising a clause for contracts like the P-0802 contract that covered no section 107 gas. In 1983, KNE was exercising contract termination rights for certain contracts, but only for its relatively small amount of high-priced section 107 gas. There was no section 107 gas in the P-0802 contract.

The district court found that KNE did not need to insert new buyer protection or contract termination language in the P-0802 contract. At trial, Foster criticized KNE for not inserting a market-out clause in the P-0802 contract before the Midlands spinoff.

However, Cicchetti testified that the P-0802 contract already had buyer protection language. Both the initial P-0802 contract and the 1975 amendment had a provision that would allow the contract price to be adjusted downward if FERC ever disallowed a portion of the price. The contract also had language to address deregulation. This language was utilized later by KNE in 1985 to force a price renegotiation of the contract.

Cicchetti explained that market-out clauses were not that common in 1983. In 1983, KNE did exercise market-out clauses in other contracts to lower gas costs, but only for contracts containing high-priced section 107 gas. KNE needed the P-0802 contract to maintain its balanced gas portfolio. Cicchetti testified that KNE could keep its overall WACOG low, even if certain gas categories in the contract exceeded market prices, by exercising market-out clauses in other higher-priced contracts.

Moreover, Cicchetti testified that KNE had a strong regulatory reason not to include a market-out clause in the P-0802 contract. FERC required that all similar contracts be treated in the same manner. Therefore, if KNE decided to exercise market-out clauses in other contracts, it then would have had to do the same in the P-0802 contract if, in fact, the P-0802 contract contained a market-out clause. This would have jeopardized the valuable reserves KNE had under the contract. As established by Sanders, those reserves at the western end of the KNE system were absolutely essential in order to maintain the pressure and the gas supply necessary for uninterrupted service to KNE customers. Thus, KNE maintained the option to treat the critical P-0802 contract reserves differently and keep that gas flowing, while terminating, if necessary, more recent vintage contracts to keep its overall gas costs low.

With regard to KNE's rate of return, Dr. R. Charles Moyer testified that the appropriate rate of return on equity for KNE was 12.7 percent. KNE also presented evidence of its actual rate of return in each of the three rate areas as 6.10 percent, 6.44 percent, and 0.35 percent. If the P-0802 surcharge were eliminated pursuant to the municipalities' ordinances, those rates of return for each of the three rate areas dropped to -1.29 percent, -0.63 percent, and -7.79 percent.

In our de novo review, we are mindful that the district court credited certain evidence rather than other evidence, and we conclude that the P-0802 surcharge was a prudently incurred expense under § 19-4612(5). The district court did not err in enjoining the municipalities from enforcing the ordinances. While the municipalities take exception to the scope of the district court's order, we do not read the district court's order as broadly as do the municipalities. The district court enjoined enforcement of the ordinances passed in this case, just as requested by KNE's petition. The judgment of the district court is affirmed. In light of our conclusion, the district court did not err in denying the municipalities attorney fees under § 19-4618(2).

AFFIRMED.

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

MARGARET LALLEY, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, AND OMAHA POLICE DEPARTMENT, APPELLEES.
670 N.W.2d 327

Filed October 24, 2003. No. S-02-966.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Greg Abboud, of Abboud Law Firm, for appellant.

Frederick J. Coffman, Special Projects Attorney, and Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellees.

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

WRIGHT, J.

NATURE OF CASE

At the intersection of 30th and Jackson Streets in Omaha, Nebraska, an unknown driver operating a stolen white Nissan Maxima, traveling northbound on 30th Street, ran a stop sign and collided with Margaret Lalley's vehicle, causing both physical injury to Lalley and property damage to her car. The driver of the Nissan fled and was never apprehended by police. Lalley alleged in a tort claim against the City of Omaha (City) and the Omaha Police Department (OPD) that the accident was the result of a vehicular pursuit by police and that she was an innocent third party. Lalley appeals from the summary judgment entered in favor of the City and the OPD.

SCOPE OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Big Crow v. City of Rushville, ante* p. 750, 669 N.W.2d 63 (2003).

[2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Farmland Serv. Co-op v. Southern Hills Ranch, ante* p. 382, 665 N.W.2d 641 (2003).

FACTS

On July 25, 2000, officers of the OPD were stationed near a residence on South 30th Avenue in Omaha, where an undercover police officer and a confidential informant were to make a purchase of marijuana and methamphetamine from a drug dealer. Gary Kula, an officer with the narcotics unit, was assigned to conduct surveillance of the alley behind the residence. He was driving an unmarked sport utility vehicle that had no emergency lights or sirens. He was accompanied by Kenneth Rowe, an officer who was in uniform.

At one point, Kula received a radio communication indicating that two persons had arrived in the alley behind the residence in a white Nissan. One person remained inside the Nissan, and the

other got out to conduct the transaction. After the Nissan arrived, Kula moved his vehicle into the alley and stopped south of the location of the Nissan. Kula had been instructed that upon receiving notification via police radio that the drug transaction had taken place, he was to proceed through the alley and arrest anyone in the Nissan.

When Kula was advised that the transaction had been completed, he drove north through the alley to attempt to block the white Nissan into its parking stall. However, the Nissan backed out and nearly struck Kula's vehicle. The Nissan then traveled northbound through the alley at a high rate of speed. Kula followed the Nissan as it drove to Mason Street and turned north onto 30th Street. At about that time, Kula received a radio broadcast advising him not to follow the Nissan any farther and instructing him to advise other officers as to the location of the Nissan and its speed.

Kula testified that he accelerated to about 30 miles per hour in the alley, but that he slowed to 5 to 10 miles per hour when turning onto Mason Street. Kula estimated that he accelerated to 30 to 35 miles per hour on Mason Street and again slowed down as he turned the corner at the intersection of 30th and Mason Streets. He returned to a speed of 30 to 35 miles per hour on 30th Street. When he reached the intersection of 30th and Leavenworth Streets, Kula stopped for traffic and lost sight of the Nissan. Kula estimated that the Nissan was traveling down 30th Street at 50 to 70 miles per hour.

Kula stated that it was never his intent to try to stop the Nissan; rather, his orders were to prevent the Nissan from leaving the scene of the drug transaction and to arrest the occupant. Kula stated that the OPD's standard operating procedure provides that unmarked, undercover police vehicles are not to engage in a pursuit unless they are equipped with emergency lights and sirens and that his vehicle was not so equipped. He said he followed the Nissan to maintain sight of it so he could relay the information on the police radio.

Rowe confirmed the statements made by Kula. Rowe testified that he was present in uniform to ensure that the suspect understood that it was police who were approaching to arrest him. Rowe said he and Kula were instructed to stop the Nissan from

leaving the alley and to place the driver under arrest. Kula and Rowe were 125 to 150 feet away from the Nissan when they saw other officers come around to the rear of the residence. Kula and Rowe then saw the reverse lights of the Nissan activate and began to move forward. Rowe stated that as the Nissan backed out, it almost struck the police vehicle, and that Kula swerved to avoid hitting the Nissan. At that time, Kula and Rowe were within 5 to 10 feet of the Nissan, which was the closest they came to the vehicle at any time. By the time the officers reached Mason Street, the Nissan was turning north on 30th Street, after traveling between 40 and 45 miles per hour in the alley. Rowe estimated that Kula was traveling between 25 and 35 miles per hour. According to Rowe, the officers were directed not to pursue the Nissan because they were in an unmarked police vehicle with no lights or sirens. Rowe said they saw the Nissan go through two red lights before they lost sight of it.

Sgt. Mark Langan, the supervising officer for the undercover operation, stated that on the date in question, Kula and Rowe were assigned to wait near the alley in an unmarked vehicle. An undercover officer advised Langan that the suspect had entered the alley as a passenger in a white Nissan. The other officers deployed into the backyard, and Kula and Rowe were then to move up and arrest the occupant of the Nissan. As Langan proceeded to effectuate the arrest of the suspect in the backyard, he observed the Nissan accelerate northbound through the alley at 35 to 40 miles per hour. Langan contacted Kula by radio and directed him not to pursue the Nissan. Langan testified that he gave this order because "[the OPD's] standard operating procedure manual says unmarked cars will not pursue under any circumstances." The driver of the Nissan was never identified or apprehended.

At the intersection of 30th and Jackson Streets, the Nissan collided with a vehicle driven by Lalley, who was traveling eastbound on Jackson Street. Jackson Street is not controlled by traffic signs for eastbound and westbound traffic, and the Nissan failed to stop for a stop sign on 30th Street.

A copy of the OPD's standard operating procedure concerning police vehicle pursuits was admitted into evidence. The document states in relevant part that "[u]nmarked vehicles not equipped with lights and a siren shall not engage in a pursuit."

Lalley sued the City and the OPD, alleging that at the time of the collision, the Nissan was "subject to vehicular pursuit" by the police. The action was filed under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2000). There is no dispute that Lalley complied with the filing requirements of the act.

Lalley alleged in her petition that as a result of the collision, (1) she incurred hospital, doctor, and medical expenses in the amount of $8,114.51 and would incur additional expenses in the future; (2) she sustained property damage in the amount of $7,575; (3) she lost wages of approximately $8,060; (4) she sustained future permanent loss of earning capacity, permanent vocational and physical disability, and permanent disability to enjoy and live life fully; and (5) she had been caused pain and suffering.

Following a hearing on cross-motions for summary judgment, the district court granted the motion for summary judgment by the City and the OPD, overruled Lalley's motion for summary judgment, and dismissed Lalley's petition with prejudice. The court found that Lalley failed to meet her burden to establish the existence of a vehicular pursuit within the meaning of § 13-911 and that she failed to establish a genuine issue of material fact precluding the entry of summary judgment in favor of the City and the OPD.

Lalley filed a motion to reconsider based on this court's decision in *Meyer v. State*, 264 Neb. 545, 650 N.W.2d 459 (2002), which Lalley alleged had direct application to the issue of proximate cause. The motion was overruled, and Lalley timely filed this appeal.

ASSIGNMENTS OF ERROR

Lalley's assignments of error, restated, assert that the district court erred (1) in overruling her motion for summary judgment and granting the motion for summary judgment by the City and the OPD, based on the court's finding that a vehicular pursuit did not occur, and (2) in failing to apply *Meyer* and failing to grant Lalley's amended motion for reconsideration.

ANALYSIS

This case is governed by Nebraska law concerning vehicular pursuits by law enforcement and liability to third parties as the

result of a pursuit. The applicable statute, § 13-911, provides in pertinent part:

> (1) In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer.
>
> . . . .
>
> (5) For purposes of this section, vehicular pursuit means an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

In its order, the district court noted that § 13-911 sets out three requirements which must be met before a finding can be made that a vehicular pursuit occurred. First, there must be an active attempt by a law enforcement officer to apprehend occupants of another motor vehicle. Second, the driver of the fleeing vehicle must be aware of the attempt to apprehend. Third, the driver must resist apprehension by taking some action, such as speeding, ignoring the officer, or attempting to elude the officer while driving at a speed which is not reasonable under the conditions.

With respect to the second element, the district court noted that because the driver of the Nissan was never apprehended, testimony was not available concerning the driver's knowledge of whether the officers were pursuing him. The court found that the officers (1) were driving an unmarked vehicle, (2) did not use emergency lights or sirens, (3) were ordered by their superior officer not to pursue the fleeing Nissan while they were still positioned in the alley, (4) followed the Nissan at a legal rate of speed in order to maintain visual contact, and (5) kept a considerable distance between their vehicle and the fleeing Nissan during their quest to maintain visual contact. Based on these findings, the court concluded that Lalley had failed to prove that the driver of the Nissan was aware that a police vehicle was following him.

Regarding the third element, the district court found that Lalley had failed to prove that the driver of the Nissan was resisting apprehension. The court concluded the evidence established that the officers were not attempting to apprehend the driver and that the driver was not resisting apprehension.

For these reasons, the district court found as a matter of law that a vehicular pursuit did not occur because Lalley failed to prove two of the three elements necessary to support a finding that a vehicular pursuit had occurred.

The district court properly found as a matter of law that no vehicular pursuit occurred. The testimony of the police officers was undisputed and was consistent in stating that Kula and Rowe did not actively attempt to apprehend the driver of the Nissan. Kula and Rowe were in an unmarked police vehicle, and the OPD's standard operating procedure provides that unmarked vehicles not equipped with lights and a siren shall not engage in a pursuit. The officers followed the Nissan in order to provide information to other officers as to the Nissan's location. It is not reasonable to infer that the officers were actually engaged in a pursuit of the driver of the Nissan.

Kula testified that he was directed to "set up" near the alley behind the residence where the drug transaction was expected to occur. After the deal was completed, Kula's assignment was to proceed into the alley and to arrest anyone in the Nissan. Kula was given a description of the Nissan and was told that one person remained in it while the other person left to complete the drug transaction. After the transaction, Kula began to drive down the alley toward the Nissan. The driver backed out of the parking stall and nearly struck Kula's vehicle. Kula followed the Nissan, which left the alley at a high rate of speed. Kula continued to follow the Nissan through city streets, but he did not actively attempt to apprehend the driver of the Nissan, based on directions received from Langan. Kula stopped for traffic at an intersection and lost sight of the Nissan. Kula stated that he never traveled faster than 30 to 35 miles per hour, while the Nissan was traveling between 50 and 70 miles per hour. Kula stated that it was never his intent to try to stop the Nissan. Rather, he followed the Nissan to maintain sight of it so he could relay the information on the police radio.

Rowe, the uniformed officer who was a passenger in Kula's vehicle, corroborated Kula's testimony concerning their assignment and Kula's actions while following the Nissan. Rowe stated that Kula was driving at 25 to 35 miles per hour in the alley and that the Nissan was traveling at 40 to 45 miles per hour in the alley. Rowe said the officers saw the Nissan go through two red lights before they lost sight of it.

Langan, the supervising sergeant for the operation, saw the Nissan accelerate through the alley at 35 to 40 miles per hour. He contacted Kula on the police radio and directed him not to pursue the Nissan, based on the OPD's standard operating procedure.

None of the evidence supports Lalley's claim that a vehicular pursuit occurred. Therefore, she has failed to establish that law enforcement officers were engaged in an active attempt to apprehend the driver of the Nissan.

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Farmland Serv. Co-op v. Southern Hills Ranch, ante* p. 382, 665 N.W.2d 641 (2003). The district court properly granted the motion for summary judgment filed by the City and the OPD, based on the court's finding as a matter of law that a vehicular pursuit did not take place. Therefore, Lalley's assignment of error concerning the entry of summary judgment and the finding that a vehicular pursuit did not occur is without merit.

Lalley also assigns as error the district court's failure to apply the holding of *Meyer v. State*, 264 Neb. 545, 650 N.W.2d 459 (2002), to her amended motion for reconsideration, which she claims applied to the issue of proximate cause. Lalley argues that the officers' actions were a proximate cause of her damages because the officers attempted to stop the Nissan and then pursued it. "Had the officers in the vehicle not attempted to effectuate the stop, the suspect driver could have snuck out of the alley without drawing attention to him." Brief for appellant at 6.

In *Meyer*, a State Patrol trooper pursued a vehicle that was traveling at more than 90 miles per hour on a state highway. The pursuit continued for 27 miles. The driver of the vehicle passed

through a roadblock at a speed estimated at between 70 and more than 100 miles per hour. When the vehicle reached a town, it collided with two other vehicles, resulting in the death of one driver and injuries to persons in the second vehicle.

On appeal, the estate of the deceased driver argued that the district court erroneously interpreted the proximate cause element of state law to require that the vehicular pursuit be the sole proximate cause of the accident, rather than merely a proximate cause of the accident. This court construed Neb. Rev. Stat. § 81-8,215.01 (Reissue 1994), which is a part of the State Tort Claims Act and the equivalent of § 13-911 in the Political Subdivisions Tort Claims Act. We concluded:

> [T]he plain language of § 81-8,215.01 requires that the actions of a law enforcement officer during a vehicular pursuit be merely a proximate cause of the damage, and not the sole proximate cause. A proximate cause is a cause (1) that produces a result in a natural and continuous sequence and (2) without which the result would not have occurred. . . .
>
> . . . A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster.

Meyer, 264 Neb. at 550, 650 N.W.2d at 463.

The *Meyer* case is inapplicable to the case at bar because in *Meyer*, there was no dispute that a vehicular pursuit had taken place. Therefore, the issue was whether the pursuit was a proximate cause of the damages. In the present case, no vehicular pursuit occurred, and it is not necessary to address the proximate cause question. Thus, the district court did not err in failing to grant the motion for reconsideration based on *Meyer*, and Lalley's assignment of error concerning this issue is without merit.

CONCLUSION

For the reasons set forth herein, the judgment of the district court is affirmed.

AFFIRMED.

PAT LOONTJER, APPELLEE AND CROSS-APPELLANT, V. GREG ROBINSON ET AL., APPELLANTS AND CROSS-APPELLEES, THE HONORABLE JOHN GALE, SECRETARY OF STATE OF THE STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, AND TIMOTHY A. BUNDY, INTERVENOR-APPELLEE AND CROSS-APPELLEE.

670 N.W.2d 301

Filed October 24, 2003. No: S-02-1030.

1. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
2. **Injunction: Equity.** An action for injunction sounds in equity.
3. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Initiative and Referendum: Statutes: Pleadings.** Questions dealing with statutory provisions concerning the form of a petition and the technical requirements of the sponsors affect the legal sufficiency of an initiative.
5. **Constitutional Law: Legislature: Initiative and Referendum.** The constitutional provision authorizing the Legislature to enact laws to facilitate the operation of the initiative power means that it may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment.
6. **Legislature: Initiative and Referendum.** The Legislature and the electorate are concurrently equal in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual.
7. **Constitutional Law: Initiative and Referendum: Statutes.** The power of initiative must be liberally construed to promote the democratic process, and the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise.
8. **Initiative and Referendum.** The sworn statement requirement of Neb. Rev. Stat. § 32-1405(1) (Reissue 1998) is mandatory.
9. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

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

John M. Boehm and Patrick T. O'Brien, of Butler, Galter, O'Brien & Boehm, for appellants.

L. Steven Grasz and Michael S. Degan, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellee Pat Loontjer.

J.L. Spray and Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for intervenor-appellee.

Jon Bruning, Attorney General, and Dale A. Comer for appellee John Gale, Nebraska Secretary of State.

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

CONNOLLY, J.

Greg Robinson, Charles Whitney, Harry Prososki, Gerald Brown, Russell Dodd, Verlouis Forster, and Richard Lindauer, all members of the Committee for Local Option Gaming (the Committee), appeal from the district court's order enjoining the placement of an initiative petition on the ballot. The petition sought to accomplish the following:

(1) Revise the Nebraska Constitution to allow electronic gaming devices under local control;

(2) Provide limitations on the manner income from the gaming could be spent;

(3) Limit the ability of the Legislature to tax the gaming; and

(4) Require the creation of a gaming commission.

Appellee Pat Loontjer filed for declaratory relief and sought to enjoin the placement of the petition on the ballot.

The district court determined there was substantial compliance with Neb. Rev. Stat. § 32-1405(1) (Reissue 1998), which requires the sponsors of an initiative petition to file a sworn statement listing their names and street addresses. The court also determined, however, that the petition violated the single subject rule of Neb. Const. art. III, § 2. Thus, the court enjoined the placement of the initiative on the ballot. Loontjer cross-appeals the court's determination that there was substantial compliance with § 32-1405(1).

We determine that the petition was legally insufficient because the sponsors failed to include a sworn statement of their names and street addresses. Accordingly, we affirm.

BACKGROUND

On December 16, 2001, the appellants submitted an Initiative for Local Option Gaming to the Nebraska Secretary of State for review before circulating the petition for signatures to place the initiative on the ballot. The initiative petition was not individually signed. Instead, "THE LOCAL OPTION GAMING COMMITTEE BOX 636 KIMBALL, NEBRASKA 69145" was typed at the end. The appellants submitted a cover letter, omitting their addresses; however, it was not sworn. A handwritten note signed by Prososki stated that Bill Kurtenbach "can take care of any correspondence for me" and provided Kurtenbach's post office box address. Testimony at trial showed that the appellants are members of the Nebraska Cooperative Government Commission (NCGC), an interlocal agency that operates keno for a group of about 72 cities, counties, and villages in Nebraska. Kurtenbach is an attorney that represents the NCGC.

In January 2002, the appellants submitted the final draft; the draft does not contain a sworn statement of the sponsors with their street addresses. Instead, it contains an unsworn typed signature of the Committee and provides street and Internet addresses. A cover letter contains the unsworn signatures of the appellants and their telephone numbers. The appellants offered an exhibit, Kurtenbach's sworn statement, filed with the Secretary of State 3 days before trial, stating that the appellants constitute all of the sponsors of the petition. The court, however, ruled that the exhibit was inadmissible.

The record shows that the NCGC contracted with Community Lottery Systems, Inc., also known as Lotto Nebraska, a company operated by Paul Schumacher, to run keno. Schumacher also owns an interest in Community Internet Systems, Inc., which hosts an Internet Web site for the Committee.

The record shows that the initial work on the petition was done through the NCGC, and the Committee was formed later. A "Statement of Organization of a Political Committee" was not filed for the Committee until December 26, 2001. Robinson, the chairman of both the Committee and the NCGC, testified that the earliest versions of the petition were drafted at his request by Schumacher, Kurtenbach, and a law firm. Robinson stated that he believed Schumacher was involved in drafting the petition

from "day one." He believed that drafting the petition was part of Kurtenbach's duties as general counsel for the NCGC.

In July 2001, after early versions had already been drafted, a motion was passed at a NCGC meeting to ask Schumacher and Kurtenbach to draft a petition. Specifically, minutes of the July 28, 2001, NCGC meeting state:

> **Item No. 7:** Discussion and action on gaming legislation in the 2001 legislative session and initiative petitions
>
> Motion- Whitney, second- Forster, to encourage Lotto Nebraska and the NCG General Counsel to (1) cause an initiative petition drive to be commenced that would permit cities and counties to conduct games of chance or skill or any combination thereof using player activated electronic gaming devices for the purpose of local tax relief and keeping Nebraska resources in Nebraska, and (2) form the necessary alliances to accomplish the circulation and passage of such a petition in the November, 2002, general election . . . .

The motion passed unanimously. On October 26, 2001, the NCGC voted to endorse the enactment of the petition. The record also contains evidence that Schumacher asked the Committee to "sponsor" the petition. When Robinson delivered signed petitions to the Secretary of State's office in July 2002, he delivered a speech that Schumacher helped to draft. Schumacher arranged and paid for Robinson to arrive at the State Capitol Building by charter airplane.

Kurtenbach testified that several people, including Schumacher, had the initial idea to seek a constitutional amendment to allow video gambling. Kurtenbach agreed that a section of the initiative requires that no gaming operator shall be licensed unless it has demonstrated proficiency in operating local government lotteries. Kurtenbach believed around a dozen companies would meet the requirement. According to Kurtenbach, various people, including himself, Schumacher, and Whitney drafted language in the petition.

Schumacher has been described as the person who spearheaded the fundraising for the Committee after it was formed. Schumacher or his corporation contributed $62,000 to the Committee. According to Robinson, Schumacher was not made

an "official sponsor" of the petition because his company had the potential to profit if the initiative was passed. Schumacher testified that it was not his initial idea to try to get a constitutional amendment allowing video gaming. Instead, he testified about several people or groups that had an interest in seeking an amendment. He admitted to being involved in the drafting process, but denied drafting the early forms of the petition or the entire petition. According to Schumacher, it was Kurtenbach's idea to form the Committee. Schumacher was involved in the process to obtain signatures on the petition, but the level of that involvement is unclear.

The deputy Secretary of State testified that he believed the sponsors of the petition were the appellants. He stated that his office provides a place at the bottom of a petition for sponsors to place any information regarding where to return signed petitions, which information in this case was the name and address of the Committee.

The Secretary of State determined that the petition received enough signatures to place it on the ballot. Loontjer sought declaratory and injunctive relief to stop the petition from being placed on the ballot. Loontjer alleged that the petition (1) failed to include a sworn statement of its sponsors in violation of § 32-1405; (2) violated the single subject rule under Neb. Const. art. III, § 2; (3) contained an insufficient ballot title; and (4) violated the taxing authority of the Legislature. Appellee Timothy A. Bundy intervened with the same allegations but did not challenge the existence of a sworn statement. The Secretary of State was named as a defendant to the action.

In addressing whether the petition properly contained a sworn statement of the sponsors, the district court determined that Schumacher and Kurtenbach were not "sponsors" of the petition. The court also determined that the Committee was not a sponsor of the petition and dismissed it from the action. Instead, the court determined that the individual appellants were the sponsors.

The court next determined that although the appellants failed to include a sworn statement with their street addresses, they had substantially complied with the requirements of § 32-1405(1). The court determined that the purpose of § 32-1405(1) is to avoid fraud and deception and concluded that the appellants had

provided enough information to make it possible to identify and locate them as the sponsors of the petition.

The court ruled, however, that the petition violated the single subject rule. The court determined that the petition's purpose is the "expansion of gambling." The court then addressed the single subject issue and determined that the following provisions of the petition lacked a natural or necessary connection with each other or the purpose of the petition:

> (1) the requirement that at least 7% of the net proceeds be used for charitable grants;
>
> (2) the authorization that revenue obtained from the permitted gambling to be used for bonuses to certified teachers and programs of tuition credits to students;
>
> (3) the prohibition against the Legislature from levying any special or excise tax on the permitted gambling;
>
> (4) the authorization for the creation of what appear to be new political subdivisions, by means of interlocal agreements; and
>
> (5) the restriction against the Legislature from authorizing any form of gambling that would compete with the permitted gambling.

The court enjoined the Secretary of State from placing the petition on the ballot. The appellants filed this appeal, and Loontjer cross-appealed.

ASSIGNMENTS OF ERROR

The appellants assign, consolidated and rephrased, that the district court erred in (1) failing to dismiss the case because the pleadings did not present a justiciable controversy that was ripe for determination and (2) determining that the petition violated the single subject rule and granting injunctive relief.

On cross-appeal, Loontjer assigns, consolidated and rephrased, that the court erred by failing to declare the petition legally insufficient for failure to include a sworn statement containing the names and addresses of the sponsors.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is a matter of law. *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

[2,3] An action for injunction sounds in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

ANALYSIS

JURISDICTION

The appellants first contend that the district court should have dismissed the action because it did not present a justiciable controversy that was ripe for determination.

Neb. Rev. Stat. § 32-1412(2) (Reissue 1998) provides:

> On a showing that an initiative or referendum petition is not legally sufficient, the court, on the application of any resident, may enjoin the Secretary of State and all other officers from certifying or printing on the official ballot for the next general election the ballot title and number of such measure. If a suit is filed against the Secretary of State seeking to enjoin him or her from placing the measure on the official ballot, the person who is the sponsor of record of the petition shall be a necessary party defendant in such suit.

We have stated that a district court properly refused to address a prayer for declaratory relief when it sought a declaration that a term limits initiative violated the U.S. Constitution. *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996). Under those circumstances, we stated, "The court correctly declined to enter an advisory opinion or any declaratory judgment unless and until the initiative measure was adopted." *Id.* at 424, 544 N.W.2d at 76.

[4] Here, § 32-1412 allows a court to consider whether an initiative petition is "legally sufficient." Questions dealing with statutory provisions concerning the form of a petition and the technical requirements of the sponsors affect the legal sufficiency

of an initiative. The issue whether the petition is legally sufficient, as presented by Loontjer's cross-appeal, is ripe for review.

SWORN STATEMENT

On cross-appeal, Loontjer contends that the initiative petition is legally insufficient because it does not contain a sworn statement of the sponsors listing their names and street addresses. The appellants admit that the initiative does not contain a sworn statement but argue that they substantially complied with the requirement when the cover letter with the initiative contained the names of the sponsors and post office box addresses.

Section 32-1405(1) provides:

> Prior to obtaining any signatures on an initiative or referendum petition, a statement of the object of the petition and the text of the measure shall be filed with the Secretary of State together with a sworn statement containing the names and street addresses of every person, corporation, or association sponsoring the petition.

[5] The Nebraska Constitution reserves the right of the people to enact constitutional amendments by initiative. Neb. Const. art. III, § 2. It also authorizes legislation to facilitate the operation of the initiative process. Neb. Const. art. III, § 4. " ' "[T]he constitutional provision authorizing the legislature to enact laws to facilitate the operation of the initiative power means that it may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment. . . ." ' " *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 211, 602 N.W.2d 465, 474 (1999).

[6,7] The Legislature and the electorate are concurrently equal in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual. *Id.* Thus, we stated that " 'the power of initiative must be liberally construed to promote the democratic process and that the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to i[t]s exercise.' " *Id.* at 212-13, 602 N.W.2d at 476. Because we avoid limiting the right of initiative

through strict or narrow interpretation, we have, in some circumstances, allowed substantial compliance with the statutes pertaining to the initiative. See, e.g., *id.*; *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968).

This court specifically addressed the requirement for a sworn statement by sponsors in *State, ex rel. Winter, v. Swanson*, 138 Neb. 597, 294 N.W. 200 (1940). In *State, ex rel. Winter*, the Secretary of State refused to accept initiative petitions that were not in conformance with the provisions of a statute that preceded § 32-1405(1). That statute required a sworn statement containing the names of the sponsors and people or associations that contributed or pledged money to defray the cost of the petition. See 1939 Neb. Laws, ch. 34, § 13, p. 184-85. We stated that the provision requiring the filing of the names of sponsors was a safeguard against fraud and deception. We then rejected an argument that the provisions of the statute were directory instead of mandatory, stating:

> It seems to us that none of the features of a directory statute is present in this case. It would seem to us that an anomalous situation would be created if statutory safeguards against the perpetration of frauds and deceptions were held to be directory. Such requirements must by their very nature be mandatory, or the purposes of the legislature will be completely defeated. We hold that the provisions of the statute herein discussed are mandatory and that the failure of relators to comply therewith justifies the action of the secretary of state in refusing to file the same.

State, ex rel. Winter, v. Swanson, 138 Neb. at 599, 294 N.W. at 201.

We later distinguished the mandatory sworn statement requirement from a situation involving the *late filing* of a verified statement of contributions and expenses. In the case of a late filing which was ultimately complete and met all the other requirements of the statute, we allowed substantial compliance. *State ex rel. Morris v. Marsh, supra.* In *State ex rel. Morris*, we specifically noted the complete failure of the relators in *State, ex rel. Winter*, to file a copy of the petition and the sworn statement.

[8] Here, the appellants ask us to determine that they substantially complied with the sworn statement requirement of

§ 32-1405(1), but we decline to do so. Instead, we determine that the sworn statement provision is mandatory. As we stated in *State, ex rel. Winter*, the language of the statute is not directory.

Requiring a sworn statement is not an onerous duty. Further, the sworn statement requirement serves several important purposes. First, by providing a sworn statement, the sponsors take responsibility for the petition and expose themselves to potential criminal charges if information is falsified. See Neb. Rev. Stat. § 32-1502 (Reissue 1998) (making election falsification under oath Class IV felony). This requirement prevents fraud in the process. Second, the provision allows the public and the media to scrutinize the validity and the completeness of any list of sponsors. Knowing the petition's sponsor could affect the public's view about an initiative petition. For example, a petition sponsored by a large casino might have less appeal to some members of the public than a petition sponsored by local citizens. A sworn list of the sponsors and their street addresses allows the public to make an informed judgment whether to sign the petition. Third, under § 32-1412, the sponsor of an initiative shall be a necessary party to any suit seeking to enjoin the placement of an initiative on the ballot. The failure to provide a sworn statement of the sponsors and street addresses can frustrate the ability to join necessary parties in a lawsuit.

Here, the statement of the sponsors omitted some street addresses and it was never sworn. Because the appellants failed to file a sworn statement, the petition is legally insufficient.

[9] Although the appellants offered an exhibit containing a sworn statement 3 days before trial, the statement was not provided to the Secretary of State before the petition was circulated for signatures. The district court did not allow the exhibit into evidence, and the appellants do not assign the court's refusal to do so as error. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Forgét v. State*, 265 Neb. 488, 658 N.W.2d 271 (2003). Thus, we do not consider the exhibit.

The initiative petition was legally insufficient because it omitted a sworn statement of the sponsors and their street addresses. Accordingly, the district court should have enjoined placing the initiative on the ballot because it lacked a sworn

statement. Instead, the district court enjoined placing the petition on the ballot because it violated the single subject rule. Because we affirm based on Loontjer's cross-appeal, we do not address the single subject rule, nor do we address whether Schumacher and Kurtenbach were sponsors of the petition.

AFFIRMED.

HENDRY, C.J., concurring in the result.

I concur with the result reached by the majority. However, I write separately as I respectfully disagree with the majority's conclusion that it need not decide whether the appellants substantially complied with Neb. Rev. Stat. § 32-1405(1) (Reissue 1998). In my view, the district court appropriately considered substantial compliance and correctly determined that substantial compliance with § 32-1405(1) was shown.

Relying on *State, ex rel. Winter, v. Swanson*, 138 Neb. 597, 294 N.W. 200 (1940), the majority holds that the sworn statement provision of § 32-1405(1) is mandatory rather than directory. However, given the factual distinctions and our recognition that "the right of initiative . . . should not be circumscribed by . . . narrow and strict interpretation of the statutes pertaining to i[t]s exercise," *State ex rel. Morris v. Marsh*, 183 Neb. 521, 531, 162 N.W.2d 262, 269 (1968), I do not believe that *State, ex rel. Winter,* precludes substantial compliance.

In *Marsh, supra*, a case in which we applied substantial compliance, we determined that the petitioners had substantially complied with the statutory requirements of the predecessor to § 32-1405(1) and affirmed the district court's decision to require the State to place the petition on the ballot. Although substantial compliance was not invoked in *Marsh* to specifically address the absence of a verified statement, we nonetheless distinguished *State, ex rel. Winter,* by noting that *State, ex rel. Winter,* "involved a complete failure to file both the copy of the form of petition to be used and the preliminary sworn statement." *Marsh*, 183 Neb. at 534, 162 N.W.2d at 270. In noting such distinction in *Marsh*, I believe *State, ex rel. Winter,* should be read as simply recognizing the impossibility of applying substantial compliance in a situation where the record clearly demonstrated a "complete failure" to comply.

It is axiomatic that without some level of compliance, there can never be substantial compliance. The case before us is not one in which there was a "complete failure" to comply with § 32-1405(1). Rather, the record shows that the final draft of the proposed initiative petition, together with a cover letter signed by the appellants, which included either a street address or post office box for each appellant, was filed with the Secretary of State. Moreover, preliminary drafts and cover letters had previously been submitted to the Secretary of State, which ultimately culminated in the initiative petition at issue. Given the importance of the initiative process in our governmental structure and recognizing that "the right of initiative . . . should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to i[t]s exercise," *Marsh*, 183 Neb. at 531, 162 N.W.2d at 269, I would reach the issue of substantial compliance. In reaching that issue, I agree with the district court that substantial compliance with § 32-1405(1) has been shown.

Section 32-1405(1) is part of the legislative procedure through which citizens of Nebraska exercise their power of initiative. This court has emphasized the importance of this process, stating: "The decisions almost universally hold that the power of initiative must be liberally construed to promote the democratic process and that the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise." *State ex rel. Morris v. Marsh*, 183 Neb. 521, 531, 162 N.W.2d 262, 269 (1968). We have further stated that " '[t]he right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.' " *State ex rel. Brant v. Beermann*, 217 Neb. 632, 636, 350 N.W.2d 18, 21 (1984) (quoting *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (1948)).

Substantial compliance, in the context of a statute, has been defined as

> "actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it

> was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case."

Larson v. Hazeltine, 552 N.W.2d 830, 835 (S.D. 1996). The key determination, therefore, is identifying the purpose of the statute and whether that purpose has been served.

In *State, ex rel. Winter, v. Swanson*, 138 Neb. 597, 599, 294 N.W. 200, 201 (1940), this court discussed the purpose of the statutory predecessor to § 32-1405(1) as follows:

> The requirement that the form of the petition be filed with the secretary of state before the petitions were circulated is calculated to advise the electorate in advance as to the exact provisions of the proposal through publicity resulting from its filing. By this means the proposal is rendered intelligible and the possibilities of fraud greatly reduced. The requirement that the name of every person, corporation or association sponsoring the petition or contributing or pledging contributions to defray the cost of preparation, printing and circulation of petitions be filed is likewise a safeguard against fraud and deception.

Thus, according to *State, ex rel. Winter*, the purpose to be served by what is now § 32-1405(1) is to safeguard against fraud by informing the public of the exact provisions of the proposal, as well as identifying the sponsors of such proposal.

I believe that given the record before us, the filings with the Secretary of State met the purpose of § 32-1405(1); thus the appellants substantially complied with the statute.

Pat Loontjer contends that the appellants' filings fail to substantially comply with § 32-1405(1) for essentially three reasons. First, Loontjer argues that the purpose of a sworn statement is to prevent fraud and deception. Loontjer contends that under Nebraska's election laws, the making of a false statement under oath is a crime and the ability to hold a signer liable for criminal penalties acts to safeguard against possible fraud and deception. A fortiori, Loontjer reasons the purpose of § 32-1405(1) has not been met and, therefore, substantial compliance has not been shown.

However, I concur with the district court's determination that the primary purpose of § 32-1405(1) is not to "facilitate criminal prosecution." In addition, as the district court observed, although *State, ex rel. Winter,* "requir[ed] the name of every person sponsoring an initiative petition [a]s a 'safeguard against fraud and deception,' " *State, ex rel. Winter,* "did not state that the filing of a *sworn* statement provided such a safeguard." In the district court's order, it reasoned, and I agree, that

> [a]lthough having a statement made under oath or verified may facilitate criminal prosecution, it does not seem realistic to believe that a person who is intent on engaging in a deception is going to be deterred by whatever ramifications there may be of falsifying a statement under oath to the Secretary of State.

Furthermore, as stated earlier, the purpose of § 32-1405(1) is to safeguard against fraud and deception by requiring those who are sponsoring the initiative petition to identify themselves in a sworn statement filed with the Secretary of State. The district court found that the individuals who signed the cover letter that was filed with the Secretary of State were in fact the actual initiative sponsors. In my de novo review of the record, giving weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another, see *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002), I reach the same conclusion. As such, the purpose of § 32-1405(1) has been served, notwithstanding the absence of a sworn statement.

Second, Loontjer contends that the requirement of "street addresses" for each sponsor safeguards against fraud and deception. Loontjer argues that post office boxes are not "street addresses" and that the failure to provide "street addresses" for all sponsors does not substantially comply with the statute. However, I fail to see how, in this instance, the failure to include all "street addresses" is a safeguard against fraud and deception. Loontjer simply argues that "the street addresses for the sponsors were needed for summons and subpoenas, and most were not available." Brief for appellee Loontjer at 30. However, as the district court observed, "[i]t is clear . . . that, with the information provided by the individual defendants and a little work, [Loontjer]

was able to secure the information necessary to perfect service on the individuals [sic] defendants."

Finally, Loontjer asserts that Paul Schumacher, the Nebraska Cooperative Government Commission (NCGC), and the Committee for Local Option Gaming (the Committee) are sponsors and that the failure to list them in the documents filed with the Secretary of State violates § 32-1405(1).

The term "sponsor," as used in § 32-1405(1), is not defined in the statutes setting forth the procedure by which the initiative process is to be exercised. "Sponsor" is defined as "one who assumes responsibility for some other person or thing." Webster's Third New International Dictionary, Unabridged 2204 (1993).

In adopting a definition of the term "sponsor" in this circumstance, we must keep in mind that "the right of initiative . . . should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to i[t]s exercise." *State, ex rel. Morris v. Marsh*, 183 Neb. 521, 531, 162 N.W.2d 262, 269 (1968). Within that framework, it seems reasonable to define sponsor as simply one who identifies himself or herself as willing to assume statutory responsibilities once the initiative process has commenced. See, e.g., § 32-1405(2) (requiring Secretary of State to provide sponsor(s) with suggested changes made to initial proposal by Revisor of Statutes); Neb. Rev. Stat. § 32-1409(3) (Reissue 1998) (requiring Secretary of State to notify "the person filing the initiative" whether, in opinion of Secretary of State, sufficient valid signatures have been collected to meet constitutional and statutory requirements); Neb. Rev. Stat. § 32-1412(2) (Reissue 1998) (notifying sponsor(s) that in any suit commenced to enjoin Secretary of State from placing measure on official ballot, sponsor(s) of record will be party defendant(s) in such suit). In my view, those individuals agreeing to accept such responsibilities were identified in the documents filed with the Secretary of State.

In her brief, Loontjer specifically contends that "Schumacher sought to hide his involvement [with the petition] by creating a sham committee to advance the Petition. Hence, the Committee . . . was formed." Brief for appellee Loontjer at 28. Loontjer further alleges that Schumacher, together with Bill Kurtenbach, legal counsel for the NCGC, "recruited the same seven people

who serve on the [NCGC] to serve on the Committee." *Id.* Thus, Loontjer's concern appears to be that Schumacher's backing, financial or otherwise, was such that he must be identified as a sponsor of the petition and further, that Kurtenbach's involvement similarly involved the NCGC. However, in this instance, I do not believe such support equates to sponsorship.

The predecessor to § 32-1405(1) required the filing of a statement containing "the name or names of every person, corporation or association sponsoring said petition *or contributing or pledging contribution of money or other things of value*" with the Secretary of State. (Emphasis supplied.) See 1939 Neb. Laws, ch. 34, § 13, p. 184. Thus, even the predecessor of § 32-1405(1) recognized a possible distinction between one who sponsors a petition initiative and one who financially contributes to that effort.

Section 32-1405(1), as currently codified, goes even further by eliminating any filing requirement with the Secretary of State for those financially contributing to such petition effort. Such involvement must now be disclosed by filing with the Nebraska Accountability and Disclosure Commission. See, e.g., Neb. Rev. Stat. §§ 49-1454 and 49-1455 (Reissue 1998 & Cum. Supp. 2002). The record shows that Schumacher's financial contributions, made through Community Lottery Systems, Inc., were disclosed by the Committee in its filings with the Nebraska Accountability and Disclosure Commission.

In summary, I agree with the Secretary of State who persuasively argues that "the main purpose of § 32-1405(1) is to prevent fraud by requiring that petition sponsors advise the electorate in advance as to the exact provisions of their initiative proposal and as to precisely who sponsored their initiative. Clearly, the materials filed with the Secretary of State . . . do that." Reply brief for appellee Secretary of State at 13-14.

Although concluding that the appellants have substantially complied with § 32-1405(1), I nevertheless concur in the result.

In Justice Wright's concurrence, he determines, inter alia, that the appropriate standard in evaluating whether an initiative petition seeking a constitutional amendment contains more than one subject is the "natural and necessary connection" test set out in *Munch v. Tusa*, 140 Neb. 457, 300 N.W.2d 385 (1941). I agree with Justice Wright's reasoning and believe such result is further

supported by the applicable rules for determining the intent and understanding of a constitutional amendment.

The appellants contend that the standard articulated in *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967), should apply to the amendment. I disagree. In my view, the application of such standard cannot be justified when construing Neb. Const. art. III, § 2, as a whole. See *State ex rel. Spire v. Beermann*, 235 Neb. 384, 455 N.W.2d 749 (1990) (stating that with respect to determining intent and understanding of constitutional amendment, it is to be construed as whole, and no part is to be rejected as meaningless or surplusage if such can be avoided). The sentence in article III, § 2, immediately preceding the amended language at issue reads: "The constitutional limitations as to the scope and subject matter of statutes enacted by the Legislature shall apply to those enacted by the initiative." This sentence clearly applies to *statutes* enacted by initiative and "incorporates" the "one subject" requirement for legislative bills and resolutions found in Neb. Const. art. III, § 14. With respect to applying the "one subject" requirement to legislative bills and resolutions, it is true that in such circumstance this court has applied the broader standard set forth in *Tiemann, supra*. The problem with the appellants' argument, however, is I do not believe that construing article III, § 2, as a whole leads one back to article III, § 14.

Given my belief that the sentence quoted above from article III, § 2, refers only to *statutes* proposed by initiative, the amendment to article III, § 2, at issue, "[i]nitiative measures shall contain only one subject," must be a reference to the only remaining initiative power, that being the initiative whereby constitutional amendments may be adopted by the people. To read it otherwise would, in my view, fail to consider article III, § 2, as a whole. As such, the appropriate standard would not be that as applied to statutes (article III, § 14), but that as applied to a proposed constitutional amendment. That standard is found in *Munch, supra*.

Although *Munch*, was a proceeding to enjoin the placement upon the ballot of amendments to the city of Omaha's home rule charter, we have observed that "[t]he power to form a charter may be likened to the power of a people to form a constitution. The charter of a home rule city is its constitution." *Mollner v.*

City of Omaha, 169 Neb. 44, 50, 98 N.W.2d 33, 37 (1959). In *Munch, supra*, we reviewed cases involving constitutional amendments embracing several subjects and enunciated the standard applicable when constitutional amendments are at issue. That such standard is narrower than that applied to statutes is a recognition of the "seriousness of the business in which we are engaged. A legislative act may be amended or repealed at any succeeding session of the legislature. A constitutional provision is intended to be a much more fixed and permanent thing." *State, ex rel. Hall, v. Cline*, 118 Neb. 150, 154-55, 224 N.W. 6, 8 (1929). See, also, *Omaha Nat. Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269 (1986) (noting that differences between law and constitutional amendment enacted by initiative are obvious and great in that any law may later be repealed by Legislature but constitutional amendment (assuming it does not violate federal Constitution) can only be repealed by people in subsequent amendment to constitution).

The initiative process is a precious right reserved to the people. The people, however, through their constitution and elected representatives, determine the manner in which this right is to be exercised. In this instance, the people, in an election conducted in May 1998, approved an amendment to their constitution requiring that any "[i]nitiative measures shall contain only one subject."

Prior to this amendment, the state Constitution contained no language specifically addressing the issue of whether an initiative petition seeking to amend the constitution could contain more than one subject. By amending their constitution in May 1998, the people of Nebraska considered that specific question and determined that in such instance, a multiplicity of subjects shall not be permitted. The function of this court is not to question that decision, but to ensure that the initiative process reserved to the people is implemented in the manner the people have chosen. The determination that *Munch v. Tusa*, 140 Neb. 457, 300 N.W.2d 385 (1941), sets forth the appropriate standard does not thwart the will of the people. To the contrary, it upholds it. To permit the proposed measure to be submitted to the people through the initiative process would be to effectively ignore the determination of the people as expressed in their amendment to article III, § 2, and this

court's standard, enunciated 57 years prior to the amendment's passage, for determining when a proposed constitutional amendment contains more than one subject. The district court determined the initiative petition violated the single subject requirement of the constitution in that a "myriad of the provisions of the Initiative Petition for Local Option Gaming have no natural or necessary connection with each other and/or with the general subject of gambling." After my de novo review of the initiative petition, I agree. I therefore concur in the result.

WRIGHT, J., concurring.

There are two reasons why the initiative petition at issue is not "legally sufficient" to place the measure before the voters. The first reason is that the petition does not contain a sworn statement listing the names and addresses of its sponsors. Therefore, I concur in the result reached by the majority. However, I write separately to address the second reason, which is equally important if not more important.

In the case at bar, the issue is whether the initiative petition is legally sufficient. Neb. Rev. Stat. § 32-1412(2) (Reissue 1998) provides in part:

> On a showing that an initiative or referendum petition is not legally sufficient, the court, on the application of any resident, may enjoin the Secretary of State and all other officers from certifying or printing on the official ballot for the next general election the ballot title and number of such measure.

The question presented is whether this court may examine the initiative petition for compliance with Neb. Const. art. III, § 2, to determine the legal sufficiency of the measure preelection or whether the court must wait until the measure has been voted upon and passed by the voters. This question boils down to whether article III, § 2, is a procedural requirement for initiative petitions. I conclude that it is.

Article III, § 2, as amended in 1998 provides in part: "Initiative measures shall contain only one subject." The primary purpose of the single subject rule is to prevent "log-rolling," the practice of combining dissimilar propositions into one proposed amendment "so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately." See *Tilson v. Mofford*, 153 Ariz. 468,

471, 737 P.2d 1367, 1370 (1987). The rule is designed to ensure that decisions made at the polls represent the free and mature judgment of the electors, so submitted that they cannot be constrained to adopt measures of which in reality they disapprove, in order to secure the enactment of others they earnestly desire. See *Kerby v. Luhrs*, 44 Ariz. 208, 36 P.2d 549 (1934). "[The single subject rule] prevents those who propose initiatives from confusing or deceiving the voters by inserting unrelated provisions in an initiative proposal and 'hiding them' from the voters." *Slayton v. Shumway*, 166 Ariz. 87, 90, 800 P.2d 590, 593 (1990). "It prevents two minority groups from combining different proposals—and thus their votes—to obtain a majority in favor of the joint proposal when neither standing alone could achieve such a majority." *Id.* "[The single subject rule] serves to ensure that each legislative proposal depends upon its own merits for passage and protects against fraud and surprise occasioned by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex bill." *In re Ballot Title 2001-02 No. 43*, 46 P.3d 438, 440 (Colo. 2002) (general discussion of reasons for single subject rule).

Prior to obtaining any signatures on an initiative petition, a statement of the object of the petition and the text of the measure shall be filed with the Secretary of State together with a sworn statement containing the names and street addresses of every person, corporation, or association sponsoring the petition. Neb. Rev. Stat. § 32-1405 (Reissue 1998). Section 32-1405 deals with the form of the petition and the technical requirements for assessing the legal sufficiency of an initiative.

There are both constitutional and statutory prerequisites involved in the initiative process. The Nebraska Constitution requires that an initiative must contain only one subject. Clearly, an initiative that does not comply with the requirements of the constitution cannot and should not be placed before the voters. The Secretary of State's duties in the review of initiative petitions are ministerial in nature. *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996). See, also, *State ex rel. Labedz v. Beermann*, 229 Neb. 657, 428 N.W.2d 608 (1988). The Secretary of State is required to perform promptly all the ministerial duties imposed by law. *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984). In *State ex rel. Brant*, we recognized that the

Secretary of State may refuse to place on the ballot proposed petitions that are facially invalid or unconstitutional.

Prior to the 1998 amendment of article III, § 2, the Secretary of State was authorized to pass upon the facial invalidity of a proposed initiative petition. Now, the constitution requires that initiative petitions must contain only one subject. A petition which contains more than one subject is facially invalid because it does not meet the constitutional requirement. In order for an initiative petition to be legally sufficient, it must not only comply with the technical requirements of § 32-1405, but it must also comply with the constitutional requirements of article III, § 2.

I believe the amendment to article III, § 2, was intended by the Legislature to protect voters in regard to the manner in which initiative petitions seeking to amend the state Constitution may be presented. Constitutional amendments are not to be proposed as package deals which contain multifaceted proposals.

Neb. Const. art. XVI, § 1, requires that legislatively proposed constitutional amendments must be presented to the voters such that they can vote separately on each amendment. The purpose of article XVI, § 1, is to prevent logrolling. Article III, § 2, simply applies this principle to constitutional amendments by initiative petition. An initiative petition proposing to amend the state Constitution cannot contain multisubject proposals which require that the voters adopt all the proposals in order to pass the amendment.

As argued by Loontjer, the Nebraska Constitution has long required that statutory measures proposed by initiatives follow the same "constitutional limitations as to the scope and subject matter" as are applicable to statutes enacted by the Legislature. See Neb. Const. art. III, § 2. This includes the single subject requirement for statutes set forth in Neb. Const. art. III, § 14. Prior to 1998, therefore, legislatively proposed constitutional amendments were subject to a different constitutional provision than were statutory proposals.

The appellants' argument that the standards for statutory proposals must now be applied to constitutional amendments by initiative petition has no historical basis. Article XVI, § 1, of the Nebraska Constitution requires that legislatively proposed constitutional amendments be presented to the voters in a manner

that allows the voters to vote separately on each amendment. I agree with Loontjer's argument that the 1998 amendment was intended to emulate the requirements of article XVI, § 1, and not the single subject standards for statutes. As a result, the 1998 amendment providing that "[i]nitiative measures shall contain only one subject" is intended to prevent logrolling.

The requirements of article III, § 2, are meant to afford protection to the public at the time the petition is signed by requiring that only one subject be presented in the petition. Also, by requiring a single subject when the initiative petition seeks to amend the constitution, the public is not forced to vote for several measures in order to pass a specific measure which is contained within the package.

The district court concluded that the standard for determining whether the petition complied with the single subject rule was that each of its provisions must have a natural and necessary connection with each other and, taken as a whole, with the general subject. The district court relied on *Munch v. Tusa*, 140 Neb. 457, 463, 300 N.W. 385, 389 (1941), in which this court stated:

> "The rule has been laid down that *a constitutional amendment* which embraces several subjects, all of which are germane (near or akin) to the general subject of the amendment, will, under such a requirement, be upheld as valid and may be submitted to the people as a single proposition." . . . In *State* [*ex rel. Fargo*] *v. Wetz*, [40 N.D. 299, 168 N.W. 835 (1918)], it was said that the controlling consideration in determining the singleness of an amendment is its singleness of purpose and the relationship of the details to the general subject. . . .
>
> The rule followed by a majority of American jurisdictions is to the effect that where the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition.

(Emphasis supplied.) (Citations omitted.)

In my opinion, the foundation for this requirement is to protect the voter when the voting public is asked to amend its constitution and to clearly define the measure for which the public is voting.

In the case at bar, the public is being asked to amend the constitution to permit the use of video slot machines as a form of gambling in Nebraska. In my opinion, the petition contains subjects that do not have a natural and necessary connection with one another. For example, tuition credits to students have no natural and necessary connection with the legalization of video slot machines. Also, the Legislature's taxing authority is not part of the general subject of gambling. Neb. Const. art. VIII, § 1, provides: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." In effect, the initiative petition before us would amend article VIII, § 1.

In the case at bar, the district court specifically found that the initiative petition did not comply with the single subject requirement. The court determined that "[a] myriad of the provisions of the Initiative Petition For Local Option Gaming have no natural or necessary connection with each other and/or with the general subject of gambling."

As the majority has pointed out, "'"'[t]he constitutional provision authorizing the legislature to enact laws to facilitate the operation of the initiative power means that it may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment. . . .'"'" See *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 211, 602 N.W.2d 465, 474 (1999). In *Duggan v. Beermann*, 245 Neb. 907, 915, 515 N.W.2d 788, 794 (1994), we stated: "[I]n adopting the Constitution, the people have imposed upon themselves limitations on their ability to amend this fundamental law." Now, we have a constitutional amendment requiring a single subject for initiative petitions, and the same reasoning would apply to the constitutional requirement in article III, § 2. In order for an initiative petition to be placed before the voters, there is a procedural limitation that the petition contain only one subject. The objective of this requirement would be frustrated if this issue is not adjudicated preelection.

The appellants argue that our decision in *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996), prevents this court from deciding the constitutionality of an initiative measure before it has been approved by voters. In my opinion, *Duggan* is readily

distinguishable. In *Duggan*, the district court declined to address the constitutionality of the initiative petition because the measure had not been adopted and an opinion on its constitutionality would be advisory. We held, inter alia, that the district court had correctly declined to enter an advisory opinion or any declaratory judgment unless and until the initiative measure was adopted. We stated that "[t]o the degree that appellants sought a declaration that Measure #408, if adopted, would enact amendments which violated the U.S. or the Nebraska Constitution, appellants were seeking an advisory opinion." *Id.* at 424, 544 N.W.2d at 77.

Duggan dealt, in part, with an attempt to litigate the substantive constitutionality of the measure before it was adopted. That is not the issue before us. Here, we are not asked to decide the substantive constitutional defects of the petition, but, rather, whether it complies with the statutory and constitutional prerequisites for placement before the voters. The issue is the legal sufficiency of the initiative petition under § 32-1405 and article III, § 2, of the Nebraska Constitution. The determination of whether the measure contains more than one subject is a justiciable issue that must be decided before the initiative can be submitted to the voters.

The Supreme Court of California in *Senate of the State of Cal. v. Jones*, 21 Cal. 4th 1142, 988 P.2d 1089, 90 Cal. Rptr. 2d 810 (1999), set forth why a determination concerning the single subject provision in California's constitution was ripe for adjudication before the measure was submitted to the voters.

> [D]eferring a decision until after the election not only will defeat the constitutionally contemplated procedure . . . but may contribute to an increasing cynicism on the part of the electorate with respect to the efficacy of the initiative process.
>
> . . . [" ' "[If an initiative measure] is facially defective in its entirety, it is 'wholly unjustified to allow voters to give their time, thought, and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain. . . .' " ' [Citations.]"].

Id. at 1154-55, 988 P.2d at 1096-97, 90 Cal. Rptr. 2d at 819.

The Supreme Court of Missouri in *Missourians to Protect Init. Proc. v. Blunt*, 799 S.W.2d 824, 828 (Mo. 1990), held that

> [a]ny controversy as to whether the prerequisites of [the one subject requirement] have been met is ripe for judicial determination when the Secretary of State makes a decision to submit, or refuse to submit, an initiative issue to the voters. At that point, a judicial opinion as to whether the constitutional requirements have been met is no longer hypothetical or advisory.

Other courts have also considered the appropriateness of the single subject requirement prior to submission of an initiative to the voters. Like Nebraska, Arizona has refused to consider the substantive constitutionality of initiative petitions prior to adoption by the voters. See *State v. Osborn*, 16 Ariz. 247, 143 P. 117 (1914). However, in *Slayton v. Shumway*, 166 Ariz. 87, 800 P.2d 590 (1990), the court considered an action to enjoin the Secretary of State from certifying and putting an initiative measure on the ballot. The parties alleged that the measure was not legally sufficient because it violated the single subject rule. The court examined the petition and concluded it did not violate the single subject requirement of the state constitution. See, also, *Korte v. Bayless*, 199 Ariz. 173, 16 P.3d 200 (2001) (action seeking to enjoin Secretary of State from placing initiative petition on ballot due to alleged violation of single subject rule).

The Colorado Supreme Court also considered preelection challenges under the state's single subject rule. In *In re Ballot Title 2001-02 No. 43*, 46 P.3d 438, 443 (Colo. 2002), the court discussed the preelection application of Colorado's single subject rule: "Our role is limited. We may not address the merits of a proposed initiative or suggest how an initiative might be applied if enacted; however, we must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated."

It makes sense to decide whether an initiative petition complies with the single subject rule before the measure has been submitted to the voters. One of the functions of the judicial branch is to ensure that the people's right to bring an initiative petition is properly exercised. "Expressing the written will of the people, the

Constitution . . . demands that initiative supporters exercise due care and caution appropriate to the significance of that task." *Duggan v. Beermann*, 249 Neb. 411, 435, 544 N.W.2d 68, 82 (1996). A prerequisite to the exercise of the initiative power is set forth in article III, § 2, of the Nebraska Constitution. Had the measure complied with the technical requirements set forth in § 32-1405, the issue of compliance with article III, § 2, would still have to be decided. If the measure were adopted by the voters, they would not have been given the protection required by the constitution that such initiatives contain only one subject.

Thus, I conclude that an initiative petition which on its face contains more than one subject cannot legally be placed upon the ballot for consideration by the voters. The necessity for compliance with this requirement before the measure is voted upon is obvious. If a measure is adopted by the people and then is rejected by the court on the procedural ground that it did not comply with the constitutional requirement of only one subject, the public interest is not well served. The fact that an initiative petition on its face contains more than one subject makes it ripe for judicial determination.

GERRARD, J., joins in this concurrence.

CONTROLLED ENVIRONMENTS CONSTRUCTION, INC., A CALIFORNIA CORPORATION, APPELLANT, V. KEY INDUSTRIAL REFRIGERATION CO., A CALIFORNIA CORPORATION, DEFENDANT, HILL-PHOENIX, INC., A DELAWARE CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, AND REFRIGERATION EQUIPMENT SPECIALISTS, THIRD-PARTY DEFENDANT, APPELLEES.

670 N.W.2d 771

Filed October 31, 2003. No. S-02-708.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing an order for summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Warranty: Time.** In order to constitute a future performance warranty, the terms of the warranty must unambiguously indicate that the manufacturer is warranting the future performance of the goods for a specified period of time.
4. **Uniform Commercial Code: Warranty.** Only express warranties may trigger the future performance exception set forth in Neb. U.C.C. § 2-725(2) (Reissue 2001).
5. **Warranty.** The mere existence of repair and replace language will not disturb a finding that a warranty extends to future performance.
6. **Limitations of Actions: Breach of Warranty.** When a warranty extends to future performance, the statute of limitations is tolled and the cause of action does not begin to accrue until the breach of that warranty is or should have been discovered.
7. **Summary Judgment: Appeal and Error.** The governing standard of review for an order of summary judgment should be, and continues to be, one favorable to the nonmoving party.
8. **Uniform Commercial Code: Limitations of Actions: Warranty.** When goods are warranted against defects, the discovery analysis should focus on the buyer's knowledge of the nature and extent of the problem(s) with the goods. It is only when a buyer discovers, or should have discovered, facts sufficient to doubt the overall quality of the goods that Neb. U.C.C. § 2-725(2) (Reissue 2001) is satisfied and that the statute of limitations begins to run.
9. **Summary Judgment: Proof.** A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
10. **Summary Judgment: Evidence: Proof.** After the movant makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents summary judgment as a matter of law shifts to the party opposing the motion.
11. **Summary Judgment: Appeal and Error.** Where ambiguity exists in a summary judgment proceeding, an appellate court resolves such matters in favor of the nonmoving party.
12. **Limitations of Actions: Sales.** The determination of a discovery date is essentially an inquiry into all of the facts and circumstances facing the buyer; thus, a court should examine all relevant evidence that bears on the buyer's discovery.
13. **Sales: Breach of Warranty.** Denials of a defect by the seller may not prolong discovery of a breach of warranty in the face of overwhelming evidence to the contrary.
14. **Summary Judgment: Evidence.** In connection with a motion for summary judgment, unless the evidence is marked, offered, and received, it does not become part of the record and cannot be considered by the trial court as evidence in the case.
15. **Uniform Commercial Code: Limitations of Actions.** Neb. U.C.C. § 2-725(1) (Reissue 2001) prohibits the parties, at least by original agreement, from extending the statute of limitations.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

David S. Houghton and J.P. Sam King, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellant.

Mary Kay Frank, of Cline, Williams, Wright, Johnson & Oldfather, and Brian W. McGrath and G. Michael Halfenger, of Foley & Lardner, for appellee Hill-Phoenix, Inc.

Michael A. Nelsen, of Hillman, Forman, Nelsen, Childers & McCormack, for appellee Key Industrial Refrigeration Co.

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

GERRARD, J.

I. NATURE OF CASE

Controlled Environments Construction, Inc. (CEC), sued Key Industrial Refrigeration Co. (Key) and Hill-Phoenix, Inc., for breaches of contract and warranty arising out of two separate construction contracts to build refrigeration facilities in Omaha, Nebraska, and Minot, North Dakota. Essentially, CEC alleged that Hill-Phoenix sold defective refrigeration equipment to Key and that Key then sold that equipment to CEC for use in the construction projects they were undertaking for Food Services of America, Inc. (FSA). Only the warranty claims arising out of the Minot project are at issue in this appeal.

The district court determined that the Hill-Phoenix warranty extended to future performance and that the breach of warranty was or should have been discovered by CEC by January or February 1994. As such, the court concluded that CEC's warranty claims—filed in July 1998—were barred by the 4-year statute of limitations for the sale of goods, Neb. U.C.C. § 2-725 (Reissue 2001), and entered summary judgments for Hill-Phoenix and Key. CEC appeals.

II. FACTUAL AND PROCEDURAL BACKGROUND

In June 1992, CEC contracted with FSA to construct a building in Omaha. In June 1993, CEC entered into a second contract with FSA to construct a similar building in Minot. Shortly thereafter, CEC entered into agreements with Key. Under these agreements, Key was to design and provide the refrigeration equipment for the Minot and Omaha projects in accordance with the specifications set out in the contracts between FSA and CEC. As relevant here, Key was to provide a Hill-Phoenix Para-Temp Rack System (Rack System) and associated equipment at each location.

Hill-Phoenix provided a 1-year limited express warranty under which each Rack System was "WARRANTED TO BE FREE FROM DEFECTS IN MATERIAL AND WORKMANSHIP . . . FOR A PERIOD OF ONE YEAR." Hill-Phoenix also provided a 4-year extended warranty on compressors. In turn, Key extended the "manufacturer's One (1) year warranty against defects in material and workmanship in parts . . . to the owner."

FSA experienced failures of the refrigeration equipment almost immediately upon installation. The cause, nature, and severity of the failures in the Minot system are matters of dispute between the parties. It is clear, however, that for the next few years, CEC, Hill-Phoenix, and Key made repeated attempts to remedy the problems and provide FSA with a properly functioning refrigeration system.

On May 23, 1995, John Vana, the vice president of engineering of Hill-Phoenix, wrote a memorandum to CEC and others. In it, Hill-Phoenix promised to warrant the unit in Minot "for parts for one year with a four year extended warranty on the compressors to be honored," after certain changes were made to the Rack System. When asked in his deposition if Hill-Phoenix was extending a new warranty, Vana stated, "After the work was done we were going to warrant it as if it shipped from the factory," and that it was his "intent to extend the warranty for a year . . . from the time all changes were made." CEC contends that within 3 months after receipt of this memorandum, it had completed the changes requested by Hill-Phoenix.

The problems in Minot continued, and in a letter dated February 27, 1996, Hamid Shekarbakht, an employee of Hill-Phoenix, advised Gary Guesman, the president of CEC, that Hill-Phoenix would no longer participate in further attempts to resolve existing or future problems with the Rack System.

On July 16, 1998, CEC sued Hill-Phoenix and Key for breach of contract and breach of warranty based on the problems at the projects in Minot and Omaha. In general, CEC alleged that the refrigeration systems in Minot and Omaha repeatedly malfunctioned. More specifically, CEC alleged that the Hill-Phoenix Rack Systems were defective and that Key and Hill-Phoenix failed to fix the refrigeration systems.

Hill-Phoenix moved for summary judgment on January 19, 1999. By order dated June 1, 1999, the district court found there was no written contract between Hill-Phoenix and CEC, and granted summary judgment for Hill-Phoenix on CEC's contract claim. By the same order, the court found there was a genuine issue of material fact as to whether Hill-Phoenix breached its express limited warranty and the implied warranties of merchantability and fitness for a particular purpose. CEC is not appealing any part of this order.

On August 23, 2000, Hill-Phoenix filed a second motion for summary judgment. The court granted summary judgment for Hill-Phoenix on claims arising out of the Minot project, finding the statute of limitations had run on the warranty claims. The court denied Hill-Phoenix's motion for summary judgment on claims arising out of the Omaha project, finding material issues of fact remained as to whether CEC gave sufficient notice of the breach to Hill-Phoenix.

Key moved for summary judgment on December 13, 2001. The court granted Key's motion for summary judgment in part, finding CEC's causes of action arising out of the Minot project were barred by the statute of limitations. The court denied Key's motion for summary judgment on claims arising out of the Omaha project. On June 24, 2002, the court, finding no just reason to delay entry of a final judgment for some of the disputed claims, issued a final order pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000) on all of CEC's claims relating to the Minot project. As mentioned previously, only the warranty claims relating to the system in Minot are at issue in this appeal.

III. ASSIGNMENTS OF ERROR

CEC assigns, restated and renumbered, that the court erred in (1) concluding that CEC's claims against Hill-Phoenix for breach of express and implied warranties on the Rack System were barred by the statute of limitations pursuant to § 2-725; (2) determining no genuine issue of material fact existed as to when CEC discovered or should have discovered the breach of warranty by Hill-Phoenix; (3) failing to find that Hill-Phoenix provided a new express warranty on or near August 23, 1995; (4) failing to find Hill-Phoenix breached its 4-year warranty on the compressors;

(5) determining the contract between Key and CEC was one for the sale of goods, governed by the Uniform Commercial Code; and (6) concluding that CEC's claims against Key for breach of express and implied warranties on the Rack System were barred by the statute of limitations pursuant to § 2-725.

IV. STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Finch v. Farmers Ins. Exch.*, 265 Neb. 277, 656 N.W.2d 262 (2003).

[2] In reviewing an order for summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Zannini v. Ameritrade Holding Corp., ante* p. 492, 667 N.W.2d 222 (2003).

V. ANALYSIS

1. Future Performance Exception

CEC and Hill-Phoenix agree that the transaction for the Rack System supplied by Hill-Phoenix is governed by the Nebraska Uniform Commercial Code and that the applicable statute of limitations for claims arising out of that sale is § 2-725. The relevant sections of § 2-725 state:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

CEC alleged, and the district court found, that the warranty issued by Hill-Phoenix explicitly extended to future performance, tolling the accrual of the statute of limitations until the breach of warranty was or should have been discovered by CEC. The warranty states, in relevant part:

> **ONE-YEAR WARRANTY.** MANUFACTURER'S PRODUCT IS WARRANTED TO BE FREE FROM DEFECTS IN MATERIAL AND WORKMANSHIP UNDER NORMAL USE AND MAINTENANCE FOR A PERIOD OF ONE YEAR FROM THE DATE OF ORIGINAL INSTALLATION. A NEW OR REBUILT PART TO REPLACE ANY DEFECTIVE PART WILL BE PROVIDED WITHOUT CHARGE, PROVIDED THE DEFECTIVE PART IS RETURNED TO MANUFACTURER. THE REPLACEMENT PART ASSUMES THE UNUSED PORTION OF THE WARRANTY.
>
> . . . .
>
> . . . The foregoing shall constitute the sole and exclusive remedy of any purchases and the sole and exclusive liability of Manufacturer in connection with this product.

The existence of future performance warranties has been a highly litigated area of law. See, 1 James J. White & Robert S. Summers, Uniform Commercial Code § 11-9 (4th ed. 1995) (listing cases); 2 William D. Hawkland, Uniform Commercial Code Series § 2-725:2 (2002) (listing cases); Annot., 81 A.L.R.5th 483 (2000) (listing cases). This court has examined the future performance exception a number of times. See, *Nebraska Popcorn v. Wing*, 258 Neb. 60, 602 N.W.2d 18 (1999); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992); *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990); *Allan v. Massey-Ferguson, Inc.*, 221 Neb. 528, 378 N.W.2d 664 (1985); *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). While not confronting similar warranty language, these cases provide us with three important guideposts: (1) a future performance warranty must be explicit, (2) a future performance warranty must be express, and (3) a limited warranty to repair or replace does not extend to future performance.

First, like most courts examining the future performance exception, this court has focused on the word "explicitly" in § 2-725(2). *Nebraska Popcorn*, 258 Neb. at 65, 602 N.W.2d at 23 ("warranty must *explicitly* extend to future performance" (emphasis in original)). Quoting from Webster's Third New International Dictionary, Unabridged (1981), the *Murphy* court stated: " 'Explicit' is defined as 'characterized by full clear expression: being without vagueness or ambiguity: leaving nothing implied . . . unreserved and unambiguous in expression: speaking fully and clearly.' . . . Synonyms for explicit include 'unequivocal,' 'definite,' 'specific,' 'express,' and 'categorical.' " 240 Neb. at 285-86, 481 N.W.2d at 430. Courts, including this one, focus on the word "explicitly" because the exception to § 2-725(2) is just that—an exception—and, as such, courts reason that it should be interpreted quite narrowly. See *Joswick v. Chesapeake Mobile*, 362 Md. 261, 765 A.2d 90 (2001).

[3] Simply put, there is a "judicial reluctance to infer from the language of express warranties terms of prospective operation that are not clearly stated." *Binkley Company v. Teledyne Mid-America Corporation*, 333 F. Supp. 1183, 1186 (E.D. Mo. 1971), *affirmed* 460 F.2d 276 (8th Cir. 1972). See, also, *Crouch v. General Elec. Co.*, 699 F. Supp. 585 (S.D. Miss. 1988); 1 White & Summers, *supra*, § 11-9 at 608 ("this extension . . . does not occur in the usual case, even though all warranties in a sense apply to the future performance of goods"). Thus, in order to constitute a future performance warranty, "the terms of the warranty must unambiguously indicate that the manufacturer is warranting the future performance of the goods for a specified period of time." *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 823 (8th Cir. 1983).

[4] Second, because § 2-725 mandates that a warranty must explicitly extend to future performance, this court has held that only an express warranty will trigger the exception. *Nebraska Popcorn v. Wing*, 258 Neb. 60, 65, 602 N.W.2d 18, 23 (1999) ("in order to meet the exception based on a warranty of future performance, the warranty must be an express rather than an implied warranty"); *Murphy*, 240 Neb. at 286, 481 N.W.2d at 430 ("the exception applies only to an express warranty and not to an implied warranty"). As only express warranties may trigger the

future performance exception, CEC's implied warranty claims, against both Hill-Phoenix and Key, were barred by the statute of limitations 4 years after the delivery of the Rack System—on or about July 24, 1997—well before CEC filed this suit.

Third, this court has found that a limited warranty to repair or replace does not extend to future performance. *Nebraska Popcorn, supra.* The justification is that a warranty to repair or replace goods only "anticipates potential defects and specifies the buyer's remedy during the stated period" and does not "explicitly guarantee the proper performance of goods for some period of time into the future." *Id.* at 67, 602 N.W.2d at 24. See, also, *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

Contrary to assertions by Hill-Phoenix, *Nebraska Popcorn, supra*, is not dispositive. The warranty at issue in *Nebraska Popcorn* provided that " '[the manufacturer] warrants to the original purchaser that it will repair or replace, at its option, any part of a . . . product which, in [the manufacturer]'s judgment, is defective in material or workmanship for a period of one (1) year from the date of shipment.' " 258 Neb. at 68, 602 N.W.2d at 24. In addition, the statement of limited warranty provided:

> "[The manufacturer] warrants to the original purchaser that it will repair or replace, at its option, any load cell supplied with a motor truck scale which, in [the manufacturer]'s judgment, is defective in material or workmanship for a period of two (2) years from the date of original shipment. This warranty expressly excludes any load cell damaged by lightening, overvoltage, overloading, or submersion."

Id. Based on this language, we found the aforementioned warranty to be a limited warranty to repair or replace, and as such, we determined, like the overwhelming majority of other jurisdictions, that such a warranty does not extend to future performance. *Id.*

[5] Although the Hill-Phoenix warranty contains repair or replace language, the mere existence of such language does not necessarily lead to the conclusion that the warranty does not extend to future performance. See *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 823 (8th Cir. 1983) ("[w]e do not believe that the presence of language limiting the remedy to replacement of defective materials, by itself, is determinative of

the exact nature of the warranties in question"). See, also, *Nebraska Popcorn*, 258 Neb. at 67, 602 N.W.2d at 24 ("a warranty to repair or replace, *without more*, is not an explicit warranty of future performance" (emphasis supplied)). Instead, courts have noted the difference between a warranty of a good's future performance and a limitation of remedy in the event of a breach of that warranty, see *Shatterproof Glass Corp., supra*, and *Joswick v. Chesapeake Mobile*, 362 Md. 261, 765 A.2d 90 (2001), finding the existence of the latter does not bear on the existence of the former. See *Joswick*, 362 Md. at 269, 765 A.2d at 94 ("a commitment to repair or replace defective parts" does not "convert a warranty that *does* extend to future performance into one that does not do so" (emphasis in original)). Thus, the mere existence of repair and replace language will not disturb a finding that the warranty extends to future performance. *Id.* See, also, *Shatterproof Glass Corp., supra*; *Standard Alliance Ind. v. Black Clawson Co.*, 587 F.2d 813 (6th Cir. 1978), *cert. denied* 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396 (1979); *Executone v IPC Communications*, 177 Mich. App. 660, 442 N.W.2d 755 (1989).

The Hill-Phoenix warranty promises that the Rack System will be "free from defects in material and workmanship . . . for a period of one year." This warranty guarantees that the goods will be free from defects for a certain period of time. And although the warranty contains no explicit reference to any particular kind or level of performance of the good, "the quality of the goods, which underlies an expected performance, is warranted for a certain period of time and, absent a sooner manifestation, the buyer will not know whether there has been a breach until that time has expired." *Joswick*, 362 Md. at 273, 765 A.2d at 96 (discussing nearly identical warranty language, including similar remedy limitation).

We believe the following analysis of the Maryland Court of Appeals is persuasive:

> If the seller affirms that the goods will have a certain quality or be free from defects for a stated period of time, that constitutes a warranty that the goods will conform to that affirmation and have that quality throughout the stated period, and thus explicitly extends to the future. Moreover, the quality of the goods, either by positive attribute or by

> negation of defects, necessarily relates to their performance. If the goods do not have the stated quality or develop a defect warranted against, they likely will not perform in the manner of goods that conform to the promise and thus in the manner that is reasonably anticipated by the parties. A warranty that goods will have a certain quality or be free from defects for a stated time thus . . . explicitly extends to future performance . . . .

Id. at 273-74, 765 A.2d at 96-97.

Other courts that have examined similar warranty language agree with the conclusion of *Joswick*. For example, the Eighth Circuit has found the future performance exception applicable on two occasions. In *Grand Island Exp. v. Timpte Industries, Inc.*, 28 F.3d 73, 75 (8th Cir. 1994), the court found Timpte's warranty that its trailers would be " 'free from defects in materials and workmanship for a period of five years' " explicitly extended to future performance under Nebraska law. Likewise, in *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 822 n.3 (8th Cir. 1983), the court determined a warranty extended to future performance when the seller warranted its " 'insulating glass units for a period of twenty (20) years from the date of manufacture against defects in material or workmanship . . . .' "

Our discussion of the issue in *Nebraska Popcorn v. Wing*, 258 Neb. 60, 602 N.W.2d 18 (1999), also supports the conclusion that the Hill-Phoenix warranty extends to future performance. In *Nebraska Popcorn*, 258 Neb. at 68, 602 N.W.2d at 24, this court found that the warranty did not extend to future performance because it "did not explicitly guarantee the future performance of the scale for any number of years nor did it give a warranty that the scale would be *free of defects for any number of years*." (Emphasis supplied.) At a minimum, we acknowledged that a warranty which promises that a good shall be free from defects for a stated period of time may explicitly extend to future performance.

In an attempt to support its interpretation of *Nebraska Popcorn, supra*, Hill-Phoenix cites a variety of cases rejecting claims of a warranty of future performance. These cases, however, have been overruled or are easily distinguishable. Initially, Hill-Phoenix relies on the opinion of the Court of Special Appeals in *Joswick v.*

Chesapeake Mobile Homes, 130 Md. App. 493, 747 A.2d 214 (2000), but as discussed and cited above, the Maryland Court of Appeals issued an opinion rejecting the logic, reasoning, and conclusions of the Court of Special Appeals. *Joswick v. Chesapeake Mobile*, 362 Md. 261, 765 A.2d 90 (2001).

Hill-Phoenix also cites *Kline v. U.S. Marine Corp.*, 882 S.W.2d 597 (Tex. App. 1994), which found that a warranty that contained language similar to that at issue here did not extend to future performance. The court, however, relied exclusively on *Muss v. Mercedes-Benz of North America*, 734 S.W.2d 155 (Tex. App. 1987), which examined warranty language similar to that in *Nebraska Popcorn, supra*. Like this court in *Nebraska Popcorn*, the *Muss* court found the warranty language constituted a limited warranty of repair and replacement that did not extend to future performance. *Muss, supra.*

While the *Muss* opinion is an accurate statement of the law, the court in *Kline, supra*, failed to appreciate the difference between a warranty of a good's future performance and a limitation of remedy in the event of a breach of that warranty. See, *Shatterproof Glass Corp., supra*; *Joswick, supra*. Lastly, Hill-Phoenix cites *Allis-Chalmers v. Herbolt*, 17 Ohio App. 3d 230, 236, 479 N.E.2d 293, 300 (1984), but the warranty at issue in that case only guaranteed that the good would be free from defects " 'at the time of shipment.' " Thus, the quality of the good was not warranted into the future, and the warranty in *Allis-Chalmers* is factually distinguishable from the Hill-Phoenix warranty.

In sum, the district court did not err in finding that the Hill-Phoenix warranty explicitly extends to future performance.

2. Discovery of Breach

[6] When a warranty extends to future performance, as it does here, the statute of limitations is tolled and the cause of action does not begin to accrue until the breach of that warranty is or should have been discovered. § 2-725(2). Thus, the district court had to determine whether there was a genuine issue of material fact concerning the timeframe at which CEC discovered, or should have discovered, that the Rack System in Minot was defective. See *id.*

Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Finch v. Farmers Ins. Exch.*, 265 Neb. 277, 656 N.W.2d 262 (2003).

(a) Hill-Phoenix's Motion for Summary Judgment

The district court, relying solely on CEC's second amended petition, which stated that the "failures began within weeks of the startup," found that CEC knew or should have known of the breach in January or February 1994. CEC contends the court erred because the earliest CEC could have possibly known of the breach was July 28, 1994, when Thomas Nau, Jr., a partner in Refrigeration Equipment Specialists, received a report from Robert Funderburk of Hill-Phoenix listing various changes to the Rack System that Hill-Phoenix needed to make immediately. Obviously, an accrual date of July 28, 1994, would make CEC's July 16, 1998, claims timely.

[7] As Hill-Phoenix points out, this court has stated that "[t]he point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong." *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 453, 590 N.W.2d 380, 389-90 (1999), citing *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996), and *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). Accord, *Andersen v. A.M.W., Inc., ante* p. 238, 665 N.W.2d 1 (2003); *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002); *Blankenau v. Landess*, 261 Neb. 906, 626 N.W.2d 588 (2001). However, this level of deference does not apply to an appellate court's review of a grant of summary judgment under § 2-725(2). The governing standard of review for an order of summary judgment should be, and continues to be, one favorable to the nonmoving party. An appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible

from the evidence. *Zannini v. Ameritrade Holding Corp.*, *ante* p. 492, 667 N.W.2d 222 (2003).

This court has not previously analyzed when a party should "discover" a breach under § 2-725(2). We are guided, however, by the Eighth Circuit's analysis in *R.W. Murray, Co. v. Shatterproof Glass Corp.*, 758 F.2d 266 (8th Cir. 1985), and *Grand Island Exp. v. Timpte Industries, Inc.*, 28 F.3d 73 (8th Cir. 1994), two cases that analyzed discovery under the future performance exception to § 2-725. In *Shatterproof Glass Corp.*, the Eighth Circuit upheld the district court's determination that the discovery of relatively few defective glass panels did not compel a finding that the buyer should have discovered the extensive nature of the panel failures.

In *Timpte Industries, Inc., supra*, Grand Island Express bought 52 trailers from Timpte Industries in 1984. By 1986, Grand Island Express began experiencing problems with the trailers' floors, and by May 1986, Grand Island Express made its first floor repairs. By June and July 1987, it was repairing 4 or 5 trailer floors a month, and by August 1987, at least 14 repairs were made on 12 trailers. The Eighth Circuit found that Grand Island Express should have discovered the breach of warranty prior to August 1987 and went on to distinguish *Shatterproof Glass Corp.* by noting that there, the plaintiffs discovered relatively few defects. *Timpte Industries, Inc., supra.*

[8] We read these cases to stand for what seems both obvious and logical, namely, that when goods are warranted against defects, the discovery analysis should focus on the buyer's knowledge of the nature and extent of the problem(s) with the goods. It is only when a buyer discovers, or should have discovered, facts sufficient to doubt the overall quality of the goods that § 2-725(2) is satisfied and that the statute of limitations begins to run.

[9] A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Kaiser v. Millard Lumber*, 255 Neb. 943, 587 N.W.2d 875 (1999). The record is clear that Hill-Phoenix proved its prima facie case. More specifically, the record contains evidence, which if uncontroverted, would support a finding that CEC discovered the breach in January or February 1994. For example, CEC's second amended petition stated that following

installation of the refrigeration equipment, "FSA experienced repeated failures of the . . . Hill-Phoenix equipment," the Hill-Phoenix equipment did not function properly, and the "failures began within weeks of the startup of the systems."

In addition, Guesman, president of CEC, stated in his affidavit that "the Hill Phoenix rack systems began to fail immediately upon installation." Nau stated that "shortly after completion of installation and start-up at both projects, the rack refrigeration systems designed and manufactured by Phoenix experienced problems and failures."

Moreover, on January 12, 1994, Bob Henriksen of CEC wrote David Smith of Key complaining that the "refrigeration system . . . appears to be incapable of sustained operation." On February 14, Henriksen again wrote Smith, noting that there were "continuing problems with the refrigeration system" and that the "rack unit still will not run reliably." Additional evidence shows that Hill-Phoenix made repairs and replaced parts on the Rack System. We conclude that Hill-Phoenix established its prima facie case.

[10] After the movant makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents summary judgment as a matter of law shifts to the party opposing the motion. *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999). Giving CEC all reasonable inferences, we cannot say as a matter of law that the breach of warranty was discovered or should have been discovered by CEC in January or February 1994. We find that a genuine issue of material fact exists as to when CEC discovered or should have discovered the breach of warranty.

[11] As noted above, establishing a discovery date under § 2-725(2) is largely an inquiry into the buyer's knowledge of the problems with the goods—here, the Rack System. In this case, there is no doubt that the record contains substantial evidence that the Rack System in Minot did not function properly. However, the record also contains evidence that disputes the cause and severity of the problems. We note that it is difficult to tell from the present record what CEC knew in early 1994 and what allegations concerning early 1994 are based on information obtained after February 1994. Where ambiguity exists in a summary judgment proceeding, we resolve such matters in favor

of the nonmoving party. See *Zannini v. Ameritrade Holding Corp., ante* p. 492, 667 N.W.2d 222 (2003).

First, the record shows that not everyone was certain that the Rack System was the cause of the problems as of January or February 1994. For example, a January 17, 1994, letter from Smith to Henriksen stated that some of the problems could be the result of Hill-Phoenix's failure to complete startup of the unit. Likewise, in his deposition, Shekarbakht stated his belief that the problems in Minot were due, at least in part, to the improper installation of the Rack System. Concerns about installation were also noted by Daniel Vaow of Hill-Phoenix.

In addition, the record contains evidence that as of January or February 1994, certain parties believed the problems were caused, at least in part, by the accessibility of the equipment or the weather in Minot. In his deposition, Gary Karnes of Hill-Phoenix stated that he understood the problems were those of the refrigeration system as a whole and not the Rack System in particular.

[12,13] In Guesman's deposition, he stated that Hill-Phoenix shifted all of the blame for the problems in Minot to other parties or factors and never admitted to a possible problem with the Rack System itself. As Hill-Phoenix notes, the Eighth Circuit in *Grand Island Exp. v. Timpte Industries, Inc.*, 28 F.3d 73 (8th Cir. 1994), rejected the buyer's contention that it should not have discovered the breach because the seller asserted the problems with the goods were caused by something extraneous to the goods. However, unlike the record in the instant case, the severity of the problems with the actual goods in *Timpte Industries, Inc.* clearly established the buyer's discovery of the breach. The determination of a discovery date is essentially an inquiry into all of the facts and circumstances facing the buyer; thus, a court should examine all relevant evidence that bears on the buyer's discovery. In *Timpte Industries, Inc.*, the Eighth Circuit merely states that denials of a defect by the seller may not prolong discovery of a breach of warranty in the face of overwhelming evidence to the contrary.

Obviously, the problems listed above, including problems related to the startup and installation of the Rack System, would not relate to the quality of the Rack System itself and, therefore, do not automatically lead to the conclusion that CEC discovered

the Rack System itself was defective. Simply put, there is a difference between defective goods and goods that are malfunctioning because of extraneous causes, and knowledge of the latter does not necessarily lead to the discovery of the former.

Second, the record contains some evidence that the initial problems occurring with the Rack System were insignificant and correctable. For example, on February 1, 1994, Nau wrote to Smith stating that the serviceman's report indicated that "he had no problem in getting the system operational except properly setting the controls and using the controller as designed." According to a fax transmission dated March 1, 1994, minor changes were again made in March which convinced parties overseeing the repair work in Minot that the system would begin to work. We conclude that these facts dispute the severity of the problems with the Rack System and, together with the aforementioned evidence disputing the cause of the problems in Minot, create a genuine issue of material fact as to when the breach was or should have been discovered by CEC.

After viewing the evidence in a light most favorable to CEC and giving it the benefit of all reasonable inferences, we determine that the district court erred in concluding that, as a matter of law, the breach of warranty was or should have been discovered by CEC in January or February 1994. We find that a genuine issue of material fact exists as to when the breach of warranty was or should have been discovered; thus, the summary judgment granted by the district court in favor of Hill-Phoenix is reversed and the cause remanded for further proceedings.

(b) Key's Motion for Summary Judgment

CEC argues that the district court erred in not finding its contract with Key was predominantly for the rendition of services, governed by the 5-year statute of limitations for breach of a written contract. See Neb. Rev. Stat. § 25-205 (Reissue 1995). We find this argument to be without merit. CEC's written proposal to Key, which was offered and received in evidence, shows that the transaction was predominantly one for goods, and therefore, § 2-725 is applicable.

Key moved for summary judgment, and on January 24, 2002, a hearing was held on the motion. There were certain exhibits

offered and received by both parties at the hearing, but neither party offered the evidence already received by the court from the prior Hill-Phoenix summary judgment proceeding. In its order granting summary judgment on CEC's Minot-based claims, the court stated that it was relying on the facts it included in its order granting summary judgment for Hill-Phoenix. CEC argues that the court erred in relying on evidence that was offered and received for the Hill-Phoenix motion for summary judgment but was not offered and received for Key's motion for summary judgment.

To the extent the trial court relied on evidence not marked, offered, and received into evidence in Key's motion for summary judgment, it erred. Summary judgment is proper when the pleadings and the evidence *admitted at the hearing* disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Finch v. Farmers Ins. Exch.*, 265 Neb. 277, 656 N.W.2d 262 (2003).

[14] In connection with a motion for summary judgment, "'[u]nless the [evidence] is marked, offered, and [received], it does not become part of the record and cannot be considered by the trial court as evidence in the case.'" *Hogan v. Garden County*, 264 Neb. 115, 120, 646 N.W.2d 257, 261 (2002), quoting *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002). Even though we cannot specifically ascertain from the record what evidence was improperly relied upon by the court, it is apparent from statements in the court's order that the court was relying on evidence that was offered and received in a separate proceeding (i.e., the Hill-Phoenix summary judgment proceeding). The court erred in that regard, and in the absence of an order untainted by consideration of evidence that was offered and received in the separate Hill-Phoenix summary judgment proceeding, we must reverse the grant of summary judgment in favor of Key.

3. "New" Express Warranty

Because we reverse the district court's grant of summary judgment for Hill-Phoenix, we need not consider CEC's claim that Hill-Phoenix issued a new express warranty on the Rack System in 1995.

4. EXTENDED WARRANTY ON COMPRESSORS

As it did to CEC's claims arising out of the manufacturer's warranty, discussed above, the district court also ruled that CEC's claims against Hill-Phoenix for breaching its 4-year warranty on the compressors in the Rack System were barred by § 2-725. CEC argues the court erred in not finding Hill-Phoenix breached this separate warranty. CEC's argument is without merit.

The 4-year warranty given to CEC by Hill-Phoenix was separate and distinct from the 1-year express warranty against defects in the Rack System. This Hill-Phoenix warranty simply provided for a "FOUR YEAR EXTENDED COMPRESSOR WARRANTY." CEC has never suggested this warranty extended to future performance, and it is clear that it does not. Thus, under § 2-725, the statute of limitations began to accrue upon tender of delivery—here, July 24, 1993—and CEC's claim for breach of the extended warranty was barred by July 1997, almost a full year before its July 1998 filing.

Alternatively, CEC argues that Hill-Phoenix issued a new 4-year extended warranty on the compressors in 1995. If a new warranty was given, CEC asserts, its 1998 claim for breach of warranty would be timely. The court found the alleged warranty extension by Hill-Phoenix did not "implicate" the statute of limitations. Prior to deciding if the 1995 memorandum did in fact give CEC a new warranty, we need to determine whether a warranty can be given postsale and, if so, whether it starts the statute of limitations running anew.

[15] Section 2-725(1) prohibits the parties, at least by original agreement, from extending the statute of limitations. Some courts, however, relying on Unif. Commercial Code § 2-313, 1A U.L.A. 101 (1989), allow a seller to extend a new express warranty or modify a contract of sale after the sale has been completed. See, *Bigelow v. Agway, Inc.*, 506 F.2d 551 (2d Cir. 1974) (statement by manufacturer's agent, made after delivery, that machine could safely bale hay with 32-percent moisture content may have constituted modification of warranty); *Glyptal Inc. v. Engelhard Corp.*, 801 F. Supp. 887 (D. Mass. 1992) (postsale telephone conversation could create express warranty); *Phillips Petroleum v. Bucyrus-Erie Co.*, 131 Wis. 2d 21, 388 N.W.2d 584 (1986) (incorporation into approval drawings, after sale, of

specification for grade of steel, created express warranty by modification of original contract); *Jones et al. v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976) (promises made to buyers of mobile home after contract of purchase was signed, including promise that all defects would be repaired, amounted to express warranty). Other courts have concluded that once a legally binding contract exists, subsequent affirmations and/or statements are not part of the basis of the bargain because the buyer could not have relied on them in making the deal. See, *Global Truck & Equipment Co. v. Palmer Mach. Works*, 628 F. Supp. 641 (N.D. Miss. 1986); *Roxalana Hills, Ltd. v. Masonite Corp.*, 627 F. Supp. 1194 (S.D.W. Va. 1986), *affirmed* 813 F.2d 1228 (4th Cir. 1987); *Fitzner Pontiac-Buick-Cadillac v. Smith*, 523 So. 2d 324 (Miss. 1988); *Terry v. Moore*, 448 P.2d 601 (Wyo. 1968); *Byrd Motor Lines v. Dunlop Tire and Rubber*, 63 N.C. App. 292, 304 S.E.2d 773 (1983).

Courts that are willing to find a valid postsale modification or new warranty make two key inquiries prior to such a finding. First, obviously, the court must find that the statement or affirmation by the seller is a warranty. Clearly, the 1995 memorandum by Vana is an explicit obligation which satisfies this first step. Second, and more importantly, to the extent a seller can create a postsale warranty or modification of the contract for sale, this ability appears to be limited in time. Comment 7 to § 2-313 states:

> The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are *fairly to be regarded as part of the contract.* If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209).

(Emphasis supplied.) Unif. Commercial Code, 1A U.L.A. at 103.

In interpreting this comment, respected commentators have concluded that comment 7 "contemplate[s] only the cases of face-to-face dealings that occur while the deal is still warm," and "urge a different rule for seller's statements made more than

a short period beyond the conclusion of the agreement." 1 James J. White & Robert S. Summers, Uniform Commercial Code § 9-5 at 498 (4th ed. 1995). Thus, it is unlikely that Hill-Phoenix effectuated a modification of the old warranty, or created a new warranty, as the memorandum was written 2 years after delivery of the good.

In any event, even if we assume Hill-Phoenix could extend a new postdeal warranty to CEC, CEC's claim is still barred unless the new warranty either extends the statute of limitations or starts a new accrual date. The plain language of § 2-725 states that the cause of action on a claim of breach of warranty accrues upon tender, except when the warranty extends to future performance. On its face, § 2-725 is limited to only two accrual date possibilities. There is no exception for new express warranties extended postsale, and the creation of such an exception is a matter within the province of the Legislature, not this court.

Support for a narrow reading of § 2-725 can be found by examining the purpose behind the provision. The limitations period was designed to be relatively short to serve as a point of finality for businesses after which they could destroy records without the fear of subsequent suits. See *Ontario Hydro v. Zallea Systems, Inc.*, 569 F. Supp. 1261 (D. Del. 1983). See, also, *Sudenga Industries v. Fulton Performance Products*, 894 F. Supp. 1235 (N.D. Iowa 1995); *Rose City Paper Box v. Egenolf Graphic Mach.*, 827 F. Supp. 646 (D. Or. 1993).

> In the usual circumstances . . . defects are apt to surface within [the 4-year] time period, and the few odd situations where this is not the case, resulting in hardship to the buyer, are thought to be outweighed by the commercial benefit derived by allowing the parties to destroy records with reasonable promptness.

2 William D. Hawkland, Uniform Commercial Code Series § 2-725:2 at 2-677 to 2-678 (2002). Hence, the finality necessary to promote the flow of commerce is effectuated by the limitation period. *Ontario Hydro, supra.*

The tender of the compressors occurred July 24, 1993, barring CEC's claim for breach of the 4-year compressor warranty by July 24, 1997. The court was correct in finding CEC's July 1998 claim was barred by the statute of limitations.

VI. CONCLUSION

The district court correctly determined that CEC's claims for breaches of the extended warranty on the compressors and the implied warranty on the Rack System were barred by the statute of limitations. Like the district court, we determine that Hill-Phoenix's express warranty on the Rack System explicitly extended to future performance. The court erred, however, in concluding that, as a matter of law, the breach of the express warranty was or should have been discovered by CEC by January or February 1994. There is a genuine issue of material fact as to when CEC knew or should have known of the breach of warranty. For the reasons set forth herein, the summary judgments entered by the court in favor of Hill-Phoenix and Key are both reversed, and the cause is remanded for proceedings consistent with this opinion.

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

WRIGHT and MCCORMACK, JJ., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. CHERYL LECHNER, RESPONDENT.

670 N.W.2d 457

Filed October 31, 2003. No. S-03-487.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This is an action brought by the Counsel for Discipline of the Nebraska Supreme Court, relator, seeking the imposition of discipline against respondent, Cheryl Lechner, a member of the Nebraska State Bar Association. Respondent was formally charged with violating certain disciplinary rules and her oath of office as an attorney. Respondent did not file an answer or otherwise respond

to the formal charges. Relator moved for judgment on the pleadings pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 2001) and requested that this court enter an appropriate sanction. We determine that the requirements of rule 10(I) have been satisfied. Therefore, we grant relator's motion for judgment on the pleadings and order that respondent be disbarred.

STATEMENT OF FACTS

The substance of the allegations contained in the formal charges may be summarized as follows: Respondent was admitted to the practice of law in the State of Nebraska on September 24, 1996. On May 1, 2003, formal charges were filed by relator against respondent. Count I alleges that on January 9, 2002, respondent was retained by William Kruger to initiate dissolution of marriage proceedings and that Kruger paid respondent $1083 in advance for her fees and costs. Respondent did file the dissolution action and did meet with Kruger once. Thereafter, however, despite Kruger's repeated attempts to communicate with respondent at her office, on the telephone, or by e-mail, respondent failed to contact Kruger. On May 2, Kruger hired new counsel to represent him in the dissolution proceedings. Respondent has failed to refund any of the fees or costs advanced by Kruger. The formal charges allege that respondent's actions constitute a violation of respondent's oath as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997), and the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violate disciplinary rule); Canon 2, DR 2-110(A)(2) (withdraw from employment) and DR 2-110(A)(3) (refund fees); Canon 6, DR 6-101(A)(3) (neglect); Canon 7, DR 7-101(A)(2) (fail to carry out contract of employment); and Canon 9, DR 9-102(A) (deposit client funds in account), DR 9-102(B)(3) (maintain records of funds), and DR 9-102(B)(4) (return funds to client).

Count II alleges that on or about August 8, 2001, Terri Kurtenbach retained respondent to finalize Kurtenbach's divorce, paying her $600 in advanced fees. Thereafter, Kurtenbach did not hear from respondent for approximately 2 months. On October 3, Kurtenbach drove to respondent's office and found a note on the door indicating the respondent had moved her office to a new location. Kurtenbach drove to the new location and found the

office locked. Kurtenbach slid a note under the door requesting that respondent contact her. In mid-November, respondent contacted Kurtenbach and promised to send a letter that same day to Kurtenbach's former husband. It appears, however, that respondent did not send the letter until December 6. Eventually, Kurtenbach's former husband sent respondent a check for a portion of the proceeds from the sale of the marital home. When Kurtenbach contacted respondent regarding the check, respondent indicated that she would wait 1 week and then file a motion for the balance of the proceeds. Thereafter, despite repeated telephone calls, Kurtenbach was never able to contact respondent. The formal charges allege that respondent's actions constitute a violation of respondent's oath as an attorney and the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1), DR 2-110(A)(2) and (3), DR 6-101(A)(3), DR 7-101(A)(2), DR 9-102(A), and DR 9-102(B)(3) and (4).

Count III alleges that Jodei Oltman retained respondent to represent her in a child support and custody proceeding. On December 19, 2001, a trial was held at which respondent appeared, and at the conclusion of the trial, the trial judge directed respondent to prepare a judgment in accordance with the trial court's ruling pronounced in court. Respondent failed to prepare the judgment. Oltman repeatedly attempted to contact respondent but was never able to speak with her. The formal charges allege that respondent's actions constitute a violation of respondent's oath as an attorney and the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1), DR 2-110(A)(2), DR 6-101(A)(3), DR 7-101(A)(2), and DR 7-106(A) (disregard court ruling).

Count IV alleges that beginning in 1999, respondent represented Merlin Kidwiler in a dissolution of marriage action, for which Kidwiler paid respondent $3000. As part of the dissolution proceedings, respondent needed to prepare a qualified domestic relations order (QDRO) to effect Kidwiler's interest in his former spouse's pension plan. Kidwiler repeatedly attempted to contact respondent to have her prepare the QDRO. In April 2002, Kidwiler drove from Missouri to respondent's office to speak with respondent concerning the QDRO. After respondent finally answered Kidwiler's knocking on her office door, respondent

informed him that she had been ill but would work on the QDRO. Respondent never prepared the QDRO. The formal charges allege that respondent's actions constitute a violation of respondent's oath as an attorney and the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1), DR 2-110(A)(2), DR 6-101(A)(3), and DR 7-101(A)(2).

Under rule 10(H), respondent has 30 days from the date of service of the formal charges to file an answer. The court file reflects that respondent was served by publication of notice after relator, despite repeated attempts, was unable to contact or locate respondent in order to obtain personal service. The court file further reflects that respondent did not file an answer to the formal charges stated above. On September 12, 2003, relator moved for judgment on the pleadings pursuant to rule 10(I).

ANALYSIS

Rule 10(I) provides that if no answer is filed "within the time limited therefor," the matter may be disposed of by the court on its own motion or on a motion for judgment on the pleadings. We determine that the requirements of rule 10(I) have been satisfied, and therefore, we grant the relator's motion for judgment on the pleadings. The failure of a respondent to answer the formal charges subjects the respondent to a judgment on the formal charges filed. See *State ex rel. NSBA v. Mahlin*, 252 Neb. 985, 568 N.W.2d 214 (1997). We conclude that by virtue of respondent's conduct, respondent has violated the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1), DR 2-110(A)(2) and (3), DR 6-101(A)(3), DR 7-101(A)(2), DR 7-106(A), DR 9-102(A), and DR 9-102(B)(3) and (4). We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment;

(2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Hart*, 265 Neb. 649, 658 N.W.2d 632 (2003); *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Id.*

Pursuant to the formal charges, to which respondent has failed to respond, respondent has engaged in conduct that has violated several disciplinary rules and her oath of office as an attorney. There is no record in the instant case of any mitigating factors. We have previously disbarred attorneys who, similar to respondent, had violated disciplinary rules regarding trust accounts, mishandled client funds, and failed to cooperate with the Counsel for Discipline during the disciplinary proceedings. See, *State ex rel. Special Counsel for Dis. v. Brinker*, 264 Neb. 478, 648 N.W.2d 302 (2002); *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000).

We have considered the undisputed allegations of the formal charges and the applicable law. Upon due consideration, the

court finds that respondent should be disbarred from the practice of law in the State of Nebraska.

CONCLUSION

The motion for the judgment on the pleadings is granted. It is the judgment of this court that respondent should be disbarred from the practice of law in the State of Nebraska, and we therefore order respondent disbarred, effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

IN RE ESTATE OF JEAN BRESLOW, DECEASED. DOUGLAS COUNTY, APPELLANT, V. SONIA BRESLOW, COPERSONAL REPRESENTATIVE, ET AL., APPELLEES.

670 N.W.2d 797

Filed November 7, 2003. No. S-02-858.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. **Decedents' Estates: Taxation: Statutes: Proof.** Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute.

Appeal from the County Court for Douglas County: DARRYL R. LOWE, Judge. Reversed.

James S. Jansen, Douglas County Attorney, James R. Thibodeau, and Bernard Monbouquette for appellant.

William D. Kuester, of Crosby Guenzel, L.L.P., for appellee Sonia Breslow.

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

CONNOLLY, J.

Neb. Rev. Stat. § 77-2007.04 (Reissue 1996) sets out the requirements for a charitable bequest exemption from Nebraska inheritance tax. In this appeal, we decide if a bequest to the State of Israel to be used exclusively for charitable purposes qualifies as an exemption under § 77-2007.04.

The Douglas County Court determined that § 77-2007.04 exempted the bequest from Nebraska inheritance tax. Because we determine that the bequest does not meet the conditions set out in § 77-2007.04, we reverse.

BACKGROUND

The underlying facts are not in dispute. The decedent, Jean Breslow, left the remainder of her estate to the State of Israel. The $1,792,446 bequest was to be used exclusively for charitable purposes in Israel in providing aid and assistance to meet the housing needs of the aged or indigent immigrants to Israel or such other similar charitable purposes as deemed appropriate by such legatee. Breslow's will further provided "[i]t is my express and controlling intention that the entire charitable bequest contained in this Section shall entitle my estate to receive a charitable deduction equal in amount to the value of this bequest, under all applicable local, state and federal laws regarding inheritance, transfer, death and estate taxes."

Following Breslow's death, several of her heirs challenged the validity of the will and the proceedings were transferred from the Douglas County Court to the Douglas County District Court. While the will contest was pending, the personal representatives paid $109,288.48 in tentative inheritance taxes to the Douglas County treasurer. The personal representatives paid the tentative inheritance tax to prevent interest from accruing on any inheritance tax that the heirs would have owed if the will contest were successful. The heirs and the personal representatives later settled the will contest, agreeing that each heir would receive $8,571.43 from the estate.

After the heirs had settled, the personal representatives filed a petition for redetermination of inheritance tax and claim for

refund with the Douglas County Court. In the petition, the personal representatives requested that the court determine the amount of inheritance tax due. More importantly, the personal representatives also alleged that § 77-2007.04 exempted the bequest to Israel from Nebraska's inheritance tax and that the estate was entitled to a refund of $106,638.85. Douglas County answered, denying that the bequest was exempt from the inheritance tax.

Following a hearing, the court determined that the bequest met the requirements of § 77-2007.04 and that the estate was entitled to a refund. Douglas County appealed. We granted the personal representatives' petition to bypass.

ASSIGNMENT OF ERROR

Douglas County assigns that the court erred in concluding that under § 77-2007.04, the bequest to Israel was exempt from Nebraska inheritance tax.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002).

ANALYSIS

Section 77-2007.04 exempts, from inheritance, tax transfers made to further religious, charitable, educational, scientific, and public purposes. Specifically, it provides:

> All bequests, legacies, devises, or gifts to or for the use of any corporation, organization, association, society, institution, or foundation, organized and operating exclusively for religious, charitable, public, scientific, or educational purposes, no part of which is owned or used for financial gain or profit, either by the owner or user, or inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, or educational purposes shall not be subject to any tax under the provisions of sections 77-2001 to 77-2006, and any amendments thereto, if any of the following conditions are present:

(1) Such corporation, organization, association, society, institution, or foundation is organized under the laws of this state or of the United States, or

(2) The property transferred is limited for use within this state, or

(3) In the event that the corporation, organization, association, society, institution, or foundation is organized or existing under the laws of a territory or another state of the United States or of a foreign state or country, at the date of the decedent's death either of the following occurred:

(a) The territory, other state, foreign state, or foreign country did not impose a legacy, succession, or death tax of any character in respect to property transferred to a similar corporation, organization, association, society, institution, or foundation, organized or existing under the laws of this state, or

(b) The laws of the territory, other state, foreign state, or foreign country contained a reciprocal provision under which property transferred to a similar corporation, organization, association, society, institution, or foundation, organized or existing under the laws of another territory or state of the United States or foreign state or country was exempt from legacy, succession, or death taxes of every character, if the other territory or state of the United States or foreign state or country allowed a similar exemption in respect to property transferred to a similar corporation, organization, association, society, institution, or foundation, organized or existing under the laws of another territory or state of the United States or foreign state or country.

[2,3] This is our first opportunity to determine whether a bequest to a foreign state for charitable purposes is exempt from inheritance tax under § 77-2007.04. In general, statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Metropolitan Utilities Dist. v. Balka*, 252 Neb. 172, 560 N.W.2d 795 (1997). Also, statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the

language of the statute. *In re Estate of Kite*, 260 Neb. 135, 615 N.W.2d 481 (2000).

For a transfer to qualify for an exemption under § 77-2007.04, it must fall into one of the two categories of transfers set out in the first paragraph of the statute. The first category consists of "[a]ll bequests, legacies, devises, or gifts to or for the use of any corporation, organization, association, society, institution, or foundation, organized and operating exclusively for religious, charitable, public, scientific, or educational purposes, no part of which is owned or used for financial gain or profit . . . ." The second category of transfers consists of "[a]ll bequests, legacies, devises, or gifts . . . to a trustee or trustees exclusively for such religious, charitable, or educational purposes . . . ." In addition to falling into one of the two categories set out in the initial paragraph of § 77-2007.04, to qualify for the exemption, the transfer must meet one of the three conditions that appear in subsections (1) through (3).

The personal representatives argue that the bequest falls into both categories of transfers set out in the initial paragraph of § 77-2007.04 and that the bequest also meets the condition listed in subsection (3). Because it simplifies our analysis, we begin by focusing on subsection (3).

Section 77-2007.04(3) begins as follows:

> In the event that the *corporation, organization, association, society, institution, or foundation* is organized or existing under the laws of a territory or another state of the United States or of a foreign state or country, at the date of the decedent's death either of the following occurred . . . .

(Emphasis supplied.) (The conditions following in § 77-2007.04(3)(a), (b), and (c) are not relevant to our discussion.)

The italicized language corresponds to the first category of transfers that are set out in the opening paragraph of § 77-2007.04, i.e., transfers "to or for the use of any *corporation, organization, association, society, institution, or foundation*, organized and operating exclusively for religious, charitable, public, scientific, or educational purposes, no part of which is owned or used for financial gain or profit." (Emphasis supplied.) Subsection (3) does not refer to transfers to trustees. From this, we conclude that subsection (3) is not applicable if the transfer in

question falls into only the second category of transfers set out in the opening paragraph of § 77-2007.04, i.e., transfers "to a trustee or trustees exclusively for . . . religious, charitable, or educational purposes." Thus, we determine whether the bequest falls into the first category of transfers. If it does not, then the bequest is subject to inheritance tax.

The personal representatives do not contend that Israel is a "corporation, organization, association, society, institution, or foundation, organized and operating exclusively for religious, charitable, public, scientific, or educational purposes, no part of which is owned or used for financial gain or profit." It does, however, argue that the language of the will requires Israel to hold the bequest as a fiduciary for charitable organizations in Israel. Thus, it claims that the bequest is for the benefit of organizations operating exclusively for charitable purposes and that it falls into the first category of transfers set out in the opening paragraph of § 77-2007.04.

The personal representatives' interpretation, however, ignores the plain language of the will. The will leaves the remainder of Breslow's estate to "the State of Israel exclusively for charitable purposes in Israel in providing aid and assistance to meet the housing needs of the aged or indigent immigrants to Israel or such other similar charitable purposes deemed appropriate by such legatee." Although the bequest certainly has a charitable intent and evidence in the record (affidavit from Israel's Ministry of Justice) suggests that Israel will give the funds to charitable organizations, *the language of the will does not require* Israel to use charitable organizations to carry out the will's charitable intent. Israel could, for example, satisfy the terms of the bequest by using it to fund government construction of housing for indigent or elderly immigrants. Without language in the will requiring Israel to give the funds to charitable organizations "operating exclusively for religious, charitable, public, scientific, or educational purposes, no part of which is owned or used for financial gain or profit," the bequest does not fall into the first category of transfers set out by the initial paragraph of § 77-2007.04.

CONCLUSION

The personal representatives failed to meet their burden to clearly show that § 77-2007.04 exempted the bequest to Israel

from Nebraska inheritance tax. Accordingly, we reverse the judgment of the Douglas County Court.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
LAWRENCE J. ORTIZ, APPELLANT.
670 N.W.2d 788

Filed November 7, 2003. No. S-02-1051.

1. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **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 known to the defendant and which were or could have been litigated on direct appeal.
4. ____: ____. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
5. ____: ____. A defendant's failure to diligently prosecute an appeal from a denial of a prior motion for postconviction relief results in a procedural default that bars later action on the claim.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Lawrence J. Ortiz, pro se.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

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

WRIGHT, J.

NATURE OF CASE

On February 13, 1971, Lawrence J. Ortiz was convicted of murder in the first degree and sentenced to life imprisonment by

the Buffalo County District Court. This appeal involves the district court's denial of Ortiz' third motion for postconviction relief.

SCOPE OF REVIEW

[1] On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Narcisse*, 264 Neb. 160, 646 N.W.2d 583 (2002).

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *State v. Dandridge*, 264 Neb. 707, 651 N.W.2d 567 (2002). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

FACTS

The circumstances which led to Ortiz' conviction and sentence may be found in *State v. Ortiz*, 187 Neb. 515, 192 N.W.2d 151 (1971). We repeat only those facts that are relevant to this appeal. On Friday, August 28, 1970, Ortiz and the victim registered at a motel in Lincoln, Nebraska. The next evening, they were out eating and drinking until 1:30 a.m. Sunday. Ortiz registered alone at a motel in Kearney, Nebraska, at approximately 9:30 a.m. on Sunday. He left the motel before 7 o'clock Monday morning, and later that day, he sold his automobile to a Lincoln used-car dealer. Human blood was subsequently found on the rear floor mat and the chrome strip under the right door of the automobile.

On Monday, August 31, 1970, a brush fire occurred in an area adjacent to the Platte River approximately 15 miles west of Kearney and 3 miles south and 1¼ miles east of Elm Creek, Nebraska. The body of the victim was found on the edge of the burned patch, and there were marks indicating the body had been dragged from a lane referred to as a "river trail." The victim had been badly beaten around the face, and her hands had been severed. The body was burned in certain areas and was nearly bloodless.

On direct appeal, Ortiz challenged the sufficiency of the evidence and asserted error in the admission of evidence and in a denial of the right to introduce surrebuttal testimony. The judgment of the district court was affirmed. See *id.*

Ortiz' first postconviction motion was filed on February 28, 1973. Ortiz asserted, summarized and restated, (1) that he was denied his right to due process because the State failed to prove motive, premeditation, deliberation, and intent and failed to connect him with the killing; (2) that he was denied due process because the district court denied his request for a continuance until a subpoenaed witness had been located; (3) that he was denied his right to a fair and impartial trial because the State presented rebuttal testimony of a witness that had not been endorsed; (4) that the State had not proved where the victim was killed; and (5) that he was denied his right to a fair and impartial trial due to a pretrial order that he should remain in handcuffs throughout the trial. Postconviction relief was denied in March 1973 by the Buffalo County District Court. There is no record that Ortiz appealed this decision.

Ortiz' second motion for postconviction relief was filed on February 12, 1976. In that motion, Ortiz again sought to set aside the judgment and sentence of the district court. He alleged ineffective assistance of counsel for failure to move for a continuance due to the unavailability of the same subpoenaed witness described in the 1973 postconviction motion. Ortiz' second motion for postconviction relief was denied in May 1976. The district court stated that the motion contained no new basis for postconviction relief that was not available to Ortiz at the time the 1973 motion was filed and that he was not entitled to relief under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1989). There is no record that Ortiz appealed this decision.

On June 19, 2002, Ortiz filed a motion for DNA testing in the Buffalo County District Court pursuant to the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2002). He sought to have analyzed the DNA from spots of blood found in his automobile. He claimed that this blood was introduced at trial as the victim's blood, but that the source of the blood was never established. Ortiz alleged that the bloodstains did not come from the victim. The district court found

> based upon the affidavits submitted that the DNA testing requested by the defendant was affectively [sic] not available at the time of trial, that the biological material has

> been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncummulative [sic], exculpatory evidence relevant to the claim by the defendant that he was wrongfully convicted and sentenced.

The district court granted Ortiz' motion in July 2002 and set out the specifics of the DNA testing. That matter is not before us at this time.

On August 21, 2002, Ortiz filed a third motion for postconviction relief in the Buffalo County District Court. Ortiz asserted (1) that the Buffalo County District Court lacked jurisdiction over the offense because it was not committed in Buffalo County, (2) that he was denied a fair trial because of prosecutorial misconduct, (3) that he was denied a fair trial because of jury misconduct, and (4) that he was denied his right to effective assistance of counsel on his direct appeal. As part of his argument, Ortiz claimed that DNA testing will show that bloodstains recovered from his car did not originate from the victim.

The district court denied Ortiz' third motion for postconviction relief on September 4, 2002. The district court found that all of the issues raised in the motion have previously been raised or could have been raised in Ortiz' prior postconviction motions. Ortiz timely appealed.

ASSIGNMENTS OF ERROR

Ortiz assigns, restated, that the district court erred in denying his third motion for postconviction relief while the results of the DNA testing were still pending. Additionally, he assigns that the court reporter and the district court have not prepared the bill of exceptions as requested and in accordance with the rules of this court.

ANALYSIS

Denial of Ortiz' Third Motion for Postconviction Relief

Ortiz' postconviction motion identified four issues: (1) whether the Buffalo County District Court lacked jurisdiction over the offense because it was not committed in Buffalo County, (2) whether Ortiz was denied a fair trial because of prosecutorial

misconduct, (3) whether he was denied a fair trial because of jury misconduct, and (4) whether he was denied his right to effective assistance of counsel on direct appeal. The district court found that all of these matters had previously been raised or could have been raised.

[3] We first note that Ortiz is barred from relying on prosecutorial or jury misconduct as a basis for his third postconviction motion. These issues were known to Ortiz and his counsel at the time of trial, and there is no evidence that either was raised on direct appeal. It is well settled that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

[4] With respect to Ortiz' claim concerning ineffective assistance of counsel, Ortiz raised this issue in his second motion for postconviction relief in the context of counsel's failing to move for a continuance due to the unavailability of a defense witness. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *Id.* Additionally, the Nebraska Postconviction Act states in part: "The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner." § 29-3001.

Ortiz' ineffective assistance of counsel claim is procedurally barred. For the sake of argument, even if Ortiz could not have raised the ineffective assistance of counsel issue until his second motion for postconviction relief, he is clearly barred from raising the claim in his third motion. As such, the issue is not properly before us and will not be considered.

As to Ortiz' claim of improper venue as grounds for relief, we note that Ortiz failed to raise venue as an issue in his direct appeal. On direct appeal, Ortiz challenged only the sufficiency of the evidence to sustain his conviction, asserted that there was

error in the admission of certain evidence, and claimed error in a denial of his attempt to introduce surrebuttal testimony.

Ortiz points out that at trial, his counsel moved for a dismissal of the information on the grounds of improper venue and the Buffalo County District Court's lack of jurisdiction. This motion was denied by the trial court. Accordingly, the issue of venue was known to Ortiz and could have been litigated on direct appeal. Since Ortiz failed to litigate the issue on direct appeal, he is procedurally barred from raising it in a motion for postconviction relief. See *State v. Reeves, supra.*

[5] In addition, a defendant's failure to diligently prosecute an appeal from a denial of a prior motion for postconviction relief results in a procedural default that bars later action on the claim. *Id.* In his first motion for postconviction relief, Ortiz asserted that

> your petitioner was denied a fair trial in that during petitioner[']s trial and throughout the entire trial not once was it proven where the deceased had been killed nor in what County of Nebraska, or even if the deceased was killed in Nebraska. To this day speculations are being made as to where the deceased was killed. It very well may be that this Court had no jurisdiction to try said case.

This motion was denied when the district court found that the motion did not state a matter which would entitle Ortiz to postconviction relief. There is no record that Ortiz filed an appeal from this denial. Since Ortiz raised the issue of venue based upon a dearth of evidence that the offense took place in Buffalo County, his failure to appeal from the denial of his first motion for postconviction relief serves as an additional procedural bar to his raising the issue of venue in this third motion for postconviction relief.

Ortiz' third postconviction motion states as a factual allegation that the DNA testing granted by the district court will reveal that the blood found in his automobile did not originate from the victim. Ortiz argues that the district court's denial of his third motion for postconviction relief is inconsistent with the same court's ruling on his motion for DNA testing. He reasons that since the district court's decision to grant the DNA motion was predicated upon a finding that DNA testing of the blood evidence

was not previously available, it is inconsistent for the same court to rule that all of the issues raised in his third postconviction motion have previously been or could have been raised. He states that the district court's ruling on the third postconviction motion will become res judicata and preclude the exculpatory effect of the DNA test results.

The DNA Testing Act provides in part: "Nothing in the DNA Testing Act shall be construed to limit the circumstances under which a person may obtain DNA testing or other postconviction relief under any other provision of law." § 29-4124. The results of the DNA testing and the application of the DNA Testing Act are not before us in this appeal. Therefore, Ortiz' arguments relating to the pending DNA test results will not be considered here.

All of the issues asserted in Ortiz' third motion for postconviction relief have previously been raised or could have been raised by Ortiz. The district court correctly denied Ortiz' third motion for postconviction relief.

Incomplete Bill of Exceptions

The record before us does not contain the entire bill of exceptions requested by Ortiz. Ortiz argues that since neither the court reporter nor the district court has certified the entire bill of exceptions in this case, the documents presently before this court should be stricken from the record, the judgment should be reversed, and the cause should be remanded to the district court.

We recently addressed a case in which the defendant who appealed a denial of his motion for postconviction relief assigned as error the district court's refusal to grant his motion to order the preparation of a bill of exceptions of his trial. See *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002). We stated:

> Because the bill of exceptions from the trial would have been useful only to assess claimed trial errors, the evaluation of which were procedurally barred, the district court did not err in these postconviction proceedings in denying Curtright's motion to order the preparation of a bill of exceptions of the trial.

Id. at 984, 637 N.W.2d at 605.

The case at bar differs from *Curtright* in that here, an incomplete bill of exceptions was delivered. However, the policy

underlying our decision in *Curtright* remains unchanged. The issues that Ortiz relies upon in seeking postconviction relief are procedurally barred, and a complete bill of exceptions is not necessary for a proper review of Ortiz' motion. There is no merit to Ortiz' argument to the contrary.

CONCLUSION

The issues upon which Ortiz bases his third motion for postconviction relief are procedurally barred. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MANUEL DIAZ, APPELLANT.
670 N.W.2d 794

Filed November 7, 2003. No. S-02-1153.

1. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, and the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Hall County, TERESA K. LUTHER, Judge, on appeal thereto from the County Court for Hall County, DAVID A. BUSH, Judge. Judgment of District Court affirmed.

Lisa K. Anderson, of Truell, Murray & Maser, P.C., for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

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

WRIGHT, J.

NATURE OF CASE

The district court for Hall County affirmed the decision of the Hall County Court that denied Manuel Diaz' application for

reduction of license suspension. The county court found that Neb. Rev. Stat. § 60-6,211 (Reissue 1998), which purports to allow one in Diaz' position to submit an application to the court for the reduction of a lifetime revocation of a motor vehicle operator's license, is unconstitutional based upon our decision in *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996). Diaz appeals the decision of the district court.

SCOPE OF REVIEW

[1] The constitutionality of a statute is a question of law, and this court is obligated to reach a conclusion independent of the decision reached by the trial court. *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995).

FACTS

In September 1985, Diaz was arrested and charged under Neb. Rev. Stat. § 39-669.07 (Reissue 1984) for driving under the influence (DUI), third offense. Section 39-669.07 was subsequently transferred, and it can currently be found at Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2002). Diaz was convicted, and in October 1985, the county court for Hall County suspended Diaz' operator's license for life. In the years that followed, Diaz has filed a number of applications in an effort to reduce the suspension.

On February 19, 2002, Diaz filed an application for reduction of license suspension that relied upon § 60-6,211. An identical application was filed on April 2. It was upon this last application that the county court for Hall County declared § 60-6,211 to be unconstitutional, consequently denying Diaz' application.

On appeal to the Hall County District Court, Diaz claimed as his sole assignment of error that the Hall County Court erred in not granting the application for reduction of license suspension. The district court affirmed the decision of the county court. On appeal to this court, Diaz claims that the district court erred in affirming the county court's denial of his application for reduction of license suspension.

Diaz timely filed this appeal and gave notice that the constitutionality of Neb. Rev. Stat. §§ 60-6,209 (Cum. Supp. 2002) and 60-6,211 would be raised. The State filed a petition to bypass the Nebraska Court of Appeals, which we granted based upon our exclusive jurisdiction to decide cases involving the

constitutionality of a statute under Neb. Rev. Stat. § 24-1106(1) (Reissue 1995).

ASSIGNMENT OF ERROR

Diaz assigns as error that the cumulative effect of §§ 60-6,209 and 60-6,211 violates his right to due process.

ANALYSIS

The State has framed the sole issue in the case as the constitutionality of § 60-6,211, which provides:

> Any person who prior to April 19, 1986, has had his or her motor vehicle operator's license revoked for life pursuant to section 60-6,196 or 60-6,197 may submit an application to the court for a reduction of such lifetime revocation. The court in its discretion may reduce such revocation to a period of fifteen years.

The briefs submitted by the parties seem to be in agreement that based upon our decision in *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996), § 60-6,211 is unconstitutional. *Bainbridge* examined § 60-6,209 (Reissue 1993), which allowed the court to reduce a 15-year motor vehicle operator's license suspension imposed under § 60-6,196(2)(c) (Reissue 1993). At that time, § 60-6,196(2)(c) provided for a 15-year suspension for drivers who had two DUI convictions. We found license revocation pursuant to § 60-6,196(2)(c) (Reissue 1993) to be a form of punishment. See, also, *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985). Relying on the fact that the power of commutation of punishment belongs to the executive branch pursuant to Neb. Const. art. IV, § 13, we held in *Bainbridge* that § 60-6,209 (Reissue 1993) is unconstitutional as a violation of the separation of powers inherent in the Nebraska Constitution.

After *Bainbridge*, § 60-6,209 was amended to comply with the separation of powers inherent in the Nebraska Constitution. Presently, § 60-6,209(1) (Cum. Supp. 2002) allows a person whose license was revoked under § 60-6,196 (Cum. Supp. 2002) for a period of 15 years to request that the Department of Motor Vehicles make a recommendation to the Board of Pardons for reinstatement of his or her operator's license.

In the case at bar, the county court concluded that § 60-6,211 is unconstitutional. Since Diaz relied on § 60-6,211 for the

authority of the county court to reduce his license suspension, the court denied his application. Diaz admits as much in his brief when he states that "[b]ased on the ruling in Bainbridge, the courts today cannot reduce a life-time revocation of a driver's license to a 15 year revocation as allowed in Neb. Rev. Stat. §60-6,211 (Reissue 1993) because the statute is unconstitutional." See brief for appellant at 6. He also admits that he relied on § 60-6,211 as the basis for the reduction of his license suspension.

Diaz argues that he has been caught in a statutory Catch-22. He asserts that his lifetime suspension cannot be reduced to a 15-year suspension pursuant to § 60-6,211 because the statute is unconstitutional. He asserts that as a result, he is not allowed to utilize the amended proceedings outlined under § 60-6,209 because they apply only to one whose license suspension under § 60-6,196 was for a period of 15 years (current maximum suspension for third-offense DUI). For this reason, Diaz now claims that the combination of §§ 60-6,209 and 60-6,211 violates his right to due process of the law.

The first time Diaz raised the issue of a violation of due process was in his brief to this court. This was also the first time that the unconstitutionality of § 60-6,209, as amended, was raised. These issues were not presented to either the county court or the district court, and § 60-6,209 was not mentioned in Diaz' April 2, 2002, application for reduction of license suspension.

[2] We are asked to consider the due process consequences of §§ 60-6,209 and 60-6,211. Since this issue was not raised by either party at the county court or district court level, it is not properly before us. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *Mason v. City of Lincoln, ante* p. 399, 665 N.W.2d 600 (2003).

Therefore, the only issue remaining is the correctness of the county court's determination that § 60-6,211 is unconstitutional and, as a result, the court's denial of Diaz' application for reduction of license suspension. The constitutionality of a statute is a question of law, and this court is obligated to reach a conclusion independent of the decision reached by the trial court. *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995).

Based upon the reasoning articulated in *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996), we conclude that § 60-6,211 is unconstitutional.

Like the pre-*Bainbridge* § 60-6,209, § 60-6,211 allows the court to commute a license revocation. The only difference between the two statutes is the amount of time involved in the original suspension. The pre-*Bainbridge* § 60-6,209 allowed reduction of a 15-year suspension to the time served upon application to the court after 5 years of the revocation had been served. See *State v. Bainbridge, supra*. Section 60-6,211 allows for the reduction of a lifetime suspension to a period of 15 years. The thrust of both statutes is identical—the commutation of the suspension of a motor vehicle operator's license. Since *Bainbridge* held that such commutation by the judiciary constitutes the improper use of a power reserved for the executive branch, the county court correctly determined that § 60-6,211 is unconstitutional.

CONCLUSION

Diaz' due process challenge to §§ 60-6,209 and 60-6,211 is not appropriate for appellate review because this issue was not presented to the county court or the district court and was therefore inappropriately raised for the first time upon seeking redress from an appellate court. The county court correctly determined that § 60-6,211 is unconstitutional, and the district court did not err in affirming that determination. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. PAUL M. MUIA, RESPONDENT.

670 N.W.2d 635

Filed November 7, 2003. No. S-03-387.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

On April 8, 2003, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Paul M. Muia. Respondent's answer disputed the allegations. A referee was appointed and heard evidence. The referee filed a report on September 19, 2003. With respect to the single count in the charges, the referee concluded that respondent's conduct had breached disciplinary rules of the Code of Professional Responsibility and his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended that respondent be suspended from the practice of law for 4 months. Neither relator nor respondent filed exceptions to the referee's report. On September 30, relator filed a motion for judgment on the pleadings under Neb. Ct. R. of Discipline 10(L) (rev. 2001).

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 14, 1990. He has practiced in Douglas County. The substance of the referee's findings may be summarized as follows: In June 1998, Janice Russell retained respondent to represent her in a medical malpractice action involving her right knee. The referee found that respondent agreed to represent Russell in her malpractice case even though respondent had no prior experience handling medical malpractice actions. Respondent advised Russell that there would be certain costs involved in litigating her case and that she would be responsible for those costs. Respondent requested a $1,500 advance from Russell to pay for these costs. Russell did not have the full $1,500, and she and respondent agreed that she would make an initial payment of $250, and then pay $100 a month to respondent to pay for costs incurred in litigating her malpractice action. The referee found that between June and December 1998, Russell made periodic payments to respondent totaling $600. Russell made no further payments after December.

The referee determined that respondent secured medical records relating to Russell's condition, for which he paid $100.27 from the moneys advanced by Russell. The referee found, however, that respondent did little else to advance Russell's medical malpractice action. The referee found that the respondent failed to contact outside experts, failed to speak with Russell's treating physicians, and failed to research the applicable statute of limitations. Furthermore, the record reflects that at no time did respondent actually file a lawsuit on behalf of Russell. According to the referee's report, "[w]hen . . . Russell's payments stopped in December 1998, [respondent] seemed to lose interest [in the case]." The referee determined that respondent performed no work on Russell's medical malpractice action after February 1999.

The referee found that on August 9, 2000, respondent wrote Russell a letter informing her that he was ending his representation of her case. According to the referee, respondent "essentially dropped . . . Russell, without ever filing a lawsuit, without ever advising her concerning the statute of limitations, and without ever helping her secure other representation."

The referee also found that respondent "fail[ed]" to properly handle Russell's advanced payment of costs. According to the referee's report, respondent failed to deposit one of Russell's advances into his attorney trust account, although the referee found that respondent did not intentionally fail to make this deposit. The referee found that respondent ultimately repaid to Russell all of her advanced costs, except for the $100.27 expended for medical records.

The referee found by clear and convincing evidence that as a result of respondent's conduct, respondent had violated Canon 2, DR 2-110(A)(2) (withdrawal from employment); Canon 6, DR 6-101(A)(3) (neglect); and Canon 9, DR 9-102(A) (deposit client funds into trust account), of the Code of Professional Responsibility. The referee also found that respondent had violated his oath of office as an attorney.

In his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules recited above and his oath as an attorney. With respect to the sanction which ought to be imposed for the foregoing

violations, and considering the mitigating and aggravating factors the referee found present in the case, the referee recommended that respondent be suspended from the practice of law for 4 months.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings under rule 10(L). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Hart*, 265 Neb. 649, 658 N.W.2d 632 (2003). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted.

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Sipple*, 265 Neb. 890, 660 N.W.2d 502 (2003). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Hart, supra.*

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 2-110(A)(2), DR 6-101(A)(3), and DR 9-102(A). We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation

in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Hart, supra*; *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Id.*

The evidence in the present case establishes, inter alia, that respondent neglected a legal matter entrusted to him, improperly withdrew from employment, and failed to properly account for client funds in his attorney trust account.

As mitigating factors, we note the isolated nature of respondent's misconduct and his cooperation during the disciplinary proceedings.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court agrees with the referee's recommendation and finds that respondent should be suspended from the practice of law for 4 months.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that respondent should be and is hereby

suspended from the practice of law for a period of 4 months, and we therefore order him suspended from the practice of law for a period of 4 months, effective immediately, after which period respondent may apply for reinstatement. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

McCORMACK, J., not participating.

THERESA ANN GASE, APPELLANT AND CROSS-APPELLEE, V. JOHN CHARLES GASE, APPELLEE AND CROSS-APPELLANT.

671 N.W.2d 223

Filed November 14, 2003. No. S-02-1115.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, 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. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
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. **Taxation: Corporations: Words and Phrases.** Subchapter S is a tax status designed to tax corporate income on a pass-through basis to shareholders of a small business corporation.
6. **Child Support: Corporations: Parent and Child.** While an S corporation is a separate legal entity, for purposes of calculating child support, an S corporation's income and expenses are attributable to the parent.

7. **Child Support: Rules of the Supreme Court: Taxation.** Paragraph D of the Nebraska Child Support Guidelines provides that if 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. Income for the purpose of child support is not synonymous with taxable income.
8. **Child Support: Rules of the Supreme Court: Partnerships.** The Nebraska Child Support Guidelines do not limit "self-employed" persons to sole proprietorships or partnerships.
9. **Child Support: Rules of the Supreme Court: Corporations.** The owner of a wholly owned S corporation is self-employed within the meaning of the Nebraska Child Support Guidelines.
10. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
11. **Supreme Court: Administrative Law: Judicial Notice.** The Nebraska Supreme Court will take judicial notice of general rules and regulations established and published by Nebraska state agencies under authority of law.
12. ____: ____: ____. The Nebraska Supreme Court will take judicial notice of rules and regulations established and published by federal agencies under authority of law.
13. **Child Support: Rules of the Supreme Court: Pensions.** The Nebraska Child Support Guidelines do not allow a deduction for contributions to retirement plans in excess of the minimum amount required by the plan for purposes of calculating child support.
14. **Child Support: Rules of the Supreme Court.** Paragraph D of the Nebraska Child Support Guidelines defines total monthly income as the income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Michael D. Gooch for appellant.

Angela L. Burmeister and Christian R. Blunk, of Berkshire & Blunk, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This is an appeal from an order modifying a divorce decree awarding child support. Theresa Ann Gase filed a petition for modification of decree, seeking to modify the support being paid by John Charles Gase for the minor children of the parties. The

district court for Sarpy County entered an order increasing John's monthly support obligation. Theresa appeals the trial court's order. She claims that the trial court erred in calculating the parties' respective incomes, in incorrectly crediting John twice for the children of his second family, and in failing to retroactively apply the modification of child support. John cross-appeals, contending that the trial court erred in failing to add depreciation claimed on Theresa's federal income tax returns back to her income.

BACKGROUND

Theresa and John are the parents of two children born July 3, 1983, and October 19, 1984. Their marriage was dissolved by a decree entered in the district court for Sarpy County. The decree awarded custody of the parties' minor children to Theresa with reasonable visitation to John. The decree further ordered John to pay child support in the sum of $175 per month for each child, for a total of $350 per month. John subsequently remarried; has two children with his current spouse, which children are ages 12 and 4; and lives in Texas. Theresa later filed an application for modification and, following a hearing on the application, the trial court entered an order modifying the decree. The modification order found that Theresa's net monthly income was $5,200 and that John's net monthly income was $2,800. Finding that there had been a material change in circumstances since entry of the original decree, the trial court ordered John to pay monthly child support of $675 for two children and $450 for one child.

On September 13, 2001, Theresa again filed a petition for modification of decree, seeking an increase of John's child support obligation. The petition indicates that it was sworn and subscribed to and served upon John by U.S. mail on April 23, 2001. At or around that time, John signed an undated voluntary appearance. John contends on appeal that the first notice he received that Theresa actually filed the petition for modification was early February 2002, when he received notice from the court that a hearing date had been set. The hearing date had been set for March 20. The record does not reveal whether John and Theresa had any additional discussions regarding the petition for modification between the time John signed the voluntary appearance in

approximately April 2001 and the time he learned of the hearing date in approximately February 2002. John's attorney entered her appearance in the matter on February 13. On February 14, John answered and filed a cross-petition requesting a decrease in his child support obligation. On April 22, John sought to continue the hearing originally set for April 25 for the reason that he had not received all responses to discovery. On May 15, Theresa served supplemental documents in reply to John's requests for production of documents.

An evidentiary hearing was held on May 23, 2002, at which John and his current wife's federal income tax returns for the years 1999 through 2001 were offered and received into evidence. John's 2001 W-2 wage and tax statement was also offered and received into evidence. Box No. 1 on John's 2001 W-2, entitled "Wages, tips, other compensation," reported income of $72,441.20. Box No. 12a of John's 2001 W-2 reported an undescribed dollar figure not otherwise included in box No. 1 in the amount of $9,509.20. Also offered and received into evidence was a copy of John's most current pay stub for the period ending March 31, 2002, which pay stub reported year-to-date earnings of $24,858.40. In addition to contributions made to a 401K and a flexible spending account, the pay stub also reflected current and year-to-date FICA payments. John's wife's monthly gross income in 2001 was $2,800.

Theresa is an attorney and is the sole shareholder of several corporations organized under subchapter S (S corporations): Lone Star Solutions, Inc.; Gase Technologies, Inc.; Peel Country, Inc.; and Gase and Associates. See I.R.C. § 1361(a)(1) (2000). Theresa's federal income tax returns for the years 1998 through 2001 and selected accompanying schedules were offered and received into evidence. The returns reported total income of $112,128 in 1998, $95,300 in 1999, and $127,134 in 2001. The 2000 return reported a $48,210 loss. The record reveals that Theresa received W-2 wage and tax statements from Gase Technologies for 1998 and 1999 and from Lone Star Solutions for 2001. Theresa's 1999 W-2 reported the amount of $89,090.76 in box No. 1, "Wages, tips, other compensation," and an undescribed amount in box No. 13 of $7,800. While it is not clear from the record whether the $7,800 was also included in the box

No. 1 income, the 1999 W-2 contains a section providing a summary listing of Theresa's income adjustments. This summary reported "EE 401K" deferrals of $7,800, which presumably describes the nature of the amount listed in box No. 13. The 2001 W-2 reported the amount of $32,199.96 in box No. 1, "Wages, tips, other compensation." Box No. 12a reported an undescribed dollar figure not otherwise included in box No. 1 in the amount of $2,799.94.

Theresa's federal income tax returns reported a $44,887 capital gain in 1999 and a $3,000 capital loss in each of the years 2000 and 2001. No capital gain or loss activity was reported in 1998.

Theresa's returns also reported deductions taken for both personal and business depreciation. On her 1999 personal federal income tax return, Theresa took depreciation deductions for rental real estate she personally owned and depreciation associated with Peel Country and Gase Technologies. On her 2000 personal federal income tax return, Theresa took depreciation deductions associated with Lone Star Solutions and Peel Country. Theresa's 2001 personal federal income tax return reported depreciation deductions for her personally owned rental real estate, depreciation associated with Peel Country, and depreciation deductions pursuant to I.R.C. § 179 (2000). Our review of the record reveals that Theresa may have taken additional depreciation deductions not otherwise reflected in the record on appeal.

John offered two proposed worksheets, both of which were received into evidence. The first proposed worksheet 1 calculated John's child support obligation to the two children of his current family at $1,006. The worksheet reflected his income and that of his current wife and reported deductions for federal and state income taxes and FICA. The worksheet also deducted from John's income $491 for "Child Support Previously Ordered" (presumably with respect to the two children from his first family). The second proposed worksheet 1 calculated John's child support obligation to the two children of his first family. This worksheet listed Theresa's monthly income and reported the same income and deductions for John as appeared on the first proposed worksheet 1, with one exception. The $491 for "Child Support Previously Ordered" appearing on the first proposed worksheet 1 was replaced with the calculated child support obligation of

$1,006. The second proposed worksheet calculated John's child support obligation at $522.80 for two children. Theresa's proposed worksheet 1 was not received into evidence on lack of foundation and hearsay grounds.

On June 4, 2002, the trial court issued a letter to counsel for the parties resolving the issues before it. With respect to Theresa's income, the court was not convinced that there had been a change upward or downward. Specifically, the court was not persuaded by Theresa's contention that she had sustained a significant reduction in income. Nor was the court persuaded by John's argument that depreciation, when added back in, would show a sizable increase in Theresa's income. Accordingly, for purposes of calculating child support, the trial court indicated it would rely on the finding in the previous modification decree and keep Theresa's monthly income at $5,200. The trial court found that John's income had increased substantially, but noted he was entitled to a deduction for support attributed to the two children of his second family. The court applied a three-step process to determine John's child support obligation to the children of his first family. It is helpful here to quote directly from the trial court's June 4 letter:

> The first step is to calculate [John's] child support obligation as to his present family, recognizing there is no divorce in process. [John] and his wife live in the state of Texas and so the state income taxes should be added back in to their net income. In [the first proposed worksheet 1, John's counsel] allowed a deduction of $491 for child support previously ordered - in reality, this figure should be $675. When I round the figures off, the Child Support Guidelines show [John's] obligation for his present family to be the sum of $1,026.
>
> Next, using the $5,200 per month as a net income for [Theresa], and a net income for [John] of $3,300 (a gross of approximately $6,035 with the deductions including the $1,026), [John's] support for two children of his first marriage would be $755 and, for one child, the sum of $520. This equates to a total support of four children in an approximate amount of $1,780. The last step is to apportion this between the two families. This would then require [John] to

pay the sum of $890 as child support for the two children of his first marriage.

The trial court issued its order on August 26, 2002, which repeated the terms of its June 4 letter and also added a provision ordering John to pay the modified child support commencing on June 1, 2002. Neither the June 4 letter nor the order included a completed worksheet 1. Theresa appealed, and John cross-appealed. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Theresa assigns, restated and renumbered, that the trial court erred by (1) failing to prepare and attach worksheet 1 to its findings or order; (2) incorrectly determining the amount of John's income when it used his 2001 income rather than his 2002 projected annual income; (3) incorrectly determining the amount of John's income by failing to take into account other income listed on John's 2001 W-2 wage and tax statement; (4) incorrectly determining the amount of her income and that it had not materially changed when it included a "one-time" capital gain she earned in 1999; (5) incorrectly crediting John twice for the children of his second family, resulting in substantially more support being provided to said children than for the children of his first family; and (6) failing to apply the modification of child support retroactively to the first day of the month following the filing date of the petition for modification.

John assigns, on cross-appeal, that the trial court erred by failing to add depreciation claimed on Theresa's federal income tax returns back to her taxable income for the purpose of calculating child support.

STANDARD OF REVIEW

[1,2] Modification of child support payments is entrusted to the trial court's discretion, 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. *Erica J. v. Dewitt*, 265 Neb. 728, 659 N.W.2d 315 (2003); *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). A judicial abuse of discretion exists

when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

[3] Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. See *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

ANALYSIS

[4] 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. *Gammel v. Gammel*, 259 Neb. 738, 612 N.W.2d 207 (2000).

While several provisions of the Nebraska Child Support Guidelines relevant to the matters at issue in this lawsuit were amended effective September 1, 2002, we rely on those provisions of the guidelines in effect at the time the modification order was entered on August 26, 2002. Paragraph Q of the guidelines stated:

> 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.

Depreciation

John contends, on cross-appeal, that the trial court abused its discretion, depriving him of a just result. John claims the trial court failed to add depreciation claimed on Theresa's federal tax returns back to her income for purposes of calculating child support.

Theresa concedes in her brief that any depreciation associated with rental properties owned by her personally should be added back to her income for purposes of calculating her child support

obligation. Theresa contends, however, that depreciation reported on her federal tax returns related to her wholly owned S corporations should not be added back to her income because there is no evidence in the record that she is self-employed. Theresa appears to contend that merely holding an ownership interest in an S corporation does not render her "self-employed." Theresa also directs us to the Social Security Administration's definition of self-employed as someone who reports and pays taxes directly to the Internal Revenue Service rather than to an " 'employer.' " Reply brief for appellant at 6. See, also, Soc. Sec. Admin., Pub. No. 05-10022, If You're Self-Employed (Jan. 2003). She points out that the W-2 wage and tax statements she received in 1998 and 1999 from Gase Technologies and in 2001 from Lone Star Solutions indicate that Social Security and Medicare taxes were paid by the respective corporations on her behalf. Theresa maintains that these W-2's are evidence that she is an employee and not self-employed. Theresa further contends that the depreciation John seeks to have added back to her income belongs to the corporations and not to her. As such, Theresa argues that corporate depreciation cannot be added back to personal income without first piercing the corporate veil. We address this last contention first.

[5,6] Subchapter S is a tax status designed to tax corporate income on a pass-through basis to shareholders of a small business corporation. I William H. Painter, Painter on Close Corporations § 1.10.1 (Theodore Rinehart & Albert E. Jenner, Jr., eds., 3d ed. 1999). "Since . . . a Subchapter S corporation is not taxed on its earnings, the various income, expense, loss, credit, and other tax items 'pass through' and . . . are taxable to or deductible by shareholders in a manner analogous to that which is applicable to partners." I Painter, *supra*, § 1.10.3 at 1:52. See, I.R.C. §§ 1361 to 1379 (2000); 1 F. Hodge O'Neal & Robert B. Thompson, O'Neal's Close Corporations § 2.06 (3d ed. 1998). Thus, although the corporations owned by Theresa are separate legal entities, because subchapter S was elected, their income and expenses for tax purposes are attributable to Theresa. Accordingly, it is not necessary for the corporations to be a party to this action nor is it necessary for us to "pierce the corporate veil" before making a finding that depreciation should be added back to income.

[7,8] Paragraph D of the applicable version of the guidelines provides: "If 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." Income for the purpose of child support is not synonymous with taxable income. *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999). Simply because "self-employed" may exclude from its definition for tax purposes someone like Theresa who is the sole shareholder of several S corporations, she is not necessarily excluded for purposes of calculating child support. The guidelines do not limit "self-employed" persons to sole proprietorships or partnerships. In *Glass v. Oeder*, 716 N.E.2d 413 (Ind. 1999), the court treated a shareholder of an S corporation as self-employed. In *Glass*, an action for modification of child support, the court stated: "We hold that the business expenses of a self-employed parent are to be considered in calculating income for purposes of child support, and income from a wholly-owned subchapter S corporation is to be treated the same as income from a sole proprietorship." 716 N.E.2d at 415. The court further held that "the shareholder of a wholly-owned subchapter S corporation is to be treated the same as a self-employed person operating the business." *Id.*

Likewise, several other jurisdictions have determined depreciation deductions associated with an S corporation must be considered in determining the parent's income for purposes of calculating child support. In *Thill v. Thill*, 26 S.W.3d 199 (Mo. App. 2000), a dissolution action, the Missouri Court of Appeals recognized that the trial court must consider, in its determination of income for purposes of calculating child support, reductions in income for depreciation and § 179 deductions taken by two S corporations. The court explained that because the two corporations at issue chose subchapter S status under the Internal Revenue Code, "they were taxable substantially as is done with a partnership. In that arrangement, no taxes are assessed at the corporate level but rather the income and losses (including depreciation) are passed through to the individual tax returns of the shareholders." 26 S.W.3d at 207. As such, the court continued, "[w]here complicated business and tax status applies, the partnership and Subchapter S income reflected on the individual's

tax return may not represent the true amount of cash or benefit that may be available to the parent and therefore, for the support of the child." *Id.* See, *Bass v. Bass*, 779 N.E.2d 582 (Ind. App. 2002) (holding that trial court did not abuse its discretion adding depreciation expense deduction back to father's income from S corporation); *Foster v. Foster*, 150 Ohio App. 3d 298, 780 N.E.2d 1041 (2002) (affirming lower court's order adding back to father's income his share of depreciation deduction taken by S corporation in which father owned 50-percent interest). See, also, *Grams v. Grams*, 9 Neb. App. 994, 624 N.W.2d 42 (2001) (requiring sole shareholder of S corporation to add depreciation back to income for purpose of calculating child support).

[9,10] Based on the foregoing, we conclude that the owner of a wholly owned S corporation is self-employed within the meaning of the guidelines. Accordingly, under the guidelines, we determine that Theresa is self-employed. We have stated that the paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). To allow Theresa to reduce her income by the amount of depreciation deductions passed through to her from the wholly owned S corporations would work against the best interests of her children. Thus, all depreciation reported on Theresa's income tax returns for the years 1999 through 2001 and all depreciation from Theresa's wholly owned S corporations must be added back to her income in those respective years. This includes any deductions reported in those years pursuant to § 179. See *Gammel v. Gammel*, 259 Neb. 738, 612 N.W.2d 207 (2000) (for purpose of paragraph D of guidelines, deduction pursuant to § 179 is "depreciation" which should be added back to income or loss in calculating self-employed parent's average monthly income).

Retirement Income

Theresa contends that the trial court erred by using John's 2001 income rather than a projected estimate of his 2002 income. Theresa contends, however, that if it was proper for the trial court to rely on John's 2001 income for purposes of calculating child support, the court did not properly calculate that income, because

the court failed to include John's elective deferrals to a retirement account. We affirm the trial court's use of John's 2001 income, but agree with Theresa that voluntary deferrals to a retirement account should have been added back to John's income.

The trial court assigned to John gross monthly income of approximately $6,035, which figure apparently derives from box No. 1 of John's 2001 W-2. Box No. 1, entitled "Wages, tips, other compensation," reports 2001 income of $72,441.20. Theresa contends it was improper for the trial court to rely on box No. 1 income without adding back to it income listed in box No. 12a. Box No. 12a of John's 2001 W-2 reads "D 9509.20." Theresa contends that the instructions on the back side of the W-2 indicate that the entry in box No. 12a of John's 2001 W-2 represents contributions to a voluntary retirement account, which contributions must be added back to income. The instructions portion of the 2001 W-2 wage and tax statement are not a part of the record on appeal.

[11,12] We have stated that this court will take judicial notice of general rules and regulations established and published by Nebraska state agencies under authority of law. *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002); *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002). Likewise, we will take judicial notice of rules and regulations established and published by federal agencies under authority of law. A review of the "2001 Instructions for Forms W-2 and W-3 Wage and Tax Statement and Transmittal of Wage and Tax Statements" leads us to conclude that $9,509.20 reported in box No. 12a, preceded by "Code D" of John's 2001 W-2, constitutes an elective deferral to either a 401K or a SIMPLE (savings incentive match plan for employees) retirement account from John's gross earnings.

[13] Paragraph E of the applicable version of the guidelines, entitled "Deductions," provided in pertinent part: "The following deductions should be annualized to arrive at monthly net income: . . . (4) Mandatory Retirement. Individual contributions, in a minimum amount required by the plan." The guidelines do not, however, allow a deduction for contributions to retirement plans in excess of the minimum amount required by the plan for purposes of calculating child support. See *Workman v. Workman*, 262 Neb.

373, 632 N.W.2d 286 (2001). In *Workman*, we concluded that a self-employed father was entitled to deduct from his income minimum required payments made to a voluntarily established money purchase pension plan, where, once established, the father was required to contribute to the plan. Thus, while the decision to participate in a retirement plan may be voluntary in the first instance, where contributions made to the plan thereafter become mandatory, the minimum contribution required by the plan in effect at the time child support is calculated is deducted from income.

In the instant case, although John's contributions to a 401K or SIMPLE plan are characterized by federal regulation as an "elective deferral," the contributions may nonetheless be "mandatory" under the guidelines. Because the record on appeal does not reveal whether John's contributions were required by the retirement plan, we remand with directions to the district court to determine what portion, if any, of John's contributions was mandatory within the meaning of the guidelines. All sums which the trial court determines are "voluntary" contributions shall be added back to John's income. Theresa's W-2's in the record on appeal appear to reflect similar elective deferrals to retirement accounts in the amounts of $7,800 in 1999 and $2,799.94 in 2001. Because it is unclear whether we have a complete record on appeal, upon remand, the trial court should determine the amount of Theresa's elective deferrals to a retirement account. The trial court should then determine what portion, if any, of those deferrals are voluntary. Those deferrals that the trial court determines are voluntary should be added back to Theresa's income.

Averaging Theresa's Income

Theresa next contends the trial court erred by incorrectly determining the amount of her income and concluding that her income had not materially changed. Specifically, Theresa contends that because her income fluctuated between 1999 and 2001, the trial court should have averaged her income from the prior 3 years to establish her average monthly income, rather than relying on her income as determined during the prior modification hearing.

[14] Paragraph D of the guidelines defines total monthly income as the income of both parties derived from all sources,

except all means-tested public assistance benefits and payments received for children of prior marriages. The fifth comment to worksheet 1 of the guidelines further provides that "[i]n the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent . . . ." Because we conclude depreciation must be added back to Theresa's income, based on the evidence in the record, we conclude that Theresa's income did experience significant fluctuations during the 3 years prior to the hearing. Accordingly, upon remand, we instruct the trial court to average Theresa's income from 1999 through 2001, adding back all depreciation deductions and contributions to voluntary retirement accounts.

CONCLUSION

Having considered all of the parties' assignments of error, we affirm in part, and in part reverse and remand with directions as follows:

(1) We remand with respect to the trial court's findings as to the parties' incomes with directions to determine what portions, if any, of John's deferrals as set forth on his 2001 W-2 and Theresa's deferrals as set forth in the evidence were mandatory within the meaning of the guidelines. Such sums as the trial court finds are voluntary shall be added to that party's income for purposes of calculating child support obligations under the guidelines.

(2) We reverse the trial court's finding as to Theresa's income. We direct the trial court to average Theresa's income from 1999 through 2001. We further direct the trial court to determine Theresa's depreciation from both her personal holdings and the depreciation claimed by her from her wholly owned S corporations. The total of her personal depreciation and the depreciation from the wholly owned S corporations shall then be added to Theresa's income.

(3) The trial court shall determine the child support obligations of the parties pursuant to the guidelines, using the income figures as amended by the above directions as to deferred income, averaging of Theresa's income, and depreciation. The trial court shall prepare and submit worksheet 1 together with its findings.

In our de novo review, we determine that based upon the record in this case, Theresa's remaining assignments of error are without merit.

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

STEPHAN, J., not participating.

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