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THOMAS P. MCNALLY, TRUSTEE, AND SHIRLEY J. MCNALLY, TRUSTEE, APPELLANTS, V. CITY OF OMAHA AND CITY OF OMAHA BOARD OF REVIEW, APPELLEES.

731 N.W.2d 573

Filed May 18, 2007. No. S-05-1022.

1. **Administrative Law.** When a board or tribunal is required to conduct a hearing and receive evidence, it exercises judicial functions in determining questions of fact.
2. **Municipal Corporations: Pleadings.** Claims under Neb. Rev. Stat. § 14-804 (Reissue 1997) are claims filed with the city comptroller seeking monetary compensation.
3. **Jurisdiction.** Compliance with Neb. Rev. Stat. §§ 25-1903 and 25-1905 (Reissue 1995) is jurisdictional.
4. **Administrative Law: Final Orders: Appeal and Error.** It is an administrative body's pronounced vote that is the final order to be appealed from, not any entry of that vote on the record.
5. **Administrative Law: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1905 (Reissue 1995), filing of the praecipe for transcript with the clerk of the district court satisfies the 30-day appeal requirement, even if the tribunal does not timely prepare and furnish the transcript to the appellants for filing with the clerk of the district court.
6. **Administrative Law: Jurisdiction: Appeal and Error.** In reviewing an administrative decision on a petition in error, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence.
7. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
8. **Administrative Law.** The interpretation of administrative regulations presents a question of law.
9. **Municipal Corporations: Ordinances: Statutes.** A municipality's police powers can operate only within legislative limits because the power of a municipality to enact and enforce any ordinance must be authorized by state statute.
10. **Statutes.** Absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous.
11. **Municipal Corporations: Public Utilities: Licenses and Permits: Words and Phrases.** The use of the term "exclusive" in Neb. Rev. Stat. § 14-815 (Reissue 1997) plainly means that a city cannot share with a municipal utilities district the power granted to the district to inspect and issue permits for gas furnaces.
12. **Municipal Corporations: Public Utilities.** To the extent that Neb. Rev. Stat. § 14-102(33) (Cum. Supp. 2006) grants a city authority over heating appliances, it does so only as to those heating appliances that are not for gas on the premises of consumers.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed in part, and in part reversed.

Andrew D. Strotman and Stanton N. Beeder, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellants.

Alan M. Thelen, Assistant Omaha City Attorney, for appellees.

Daniel G. Crouchley, Susan E. Prazan, and Patrick L. Tripp for amicus curiae Metropolitan Utilities District of Omaha.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ., and CASSEL, Judge.

McCORMACK, J.

I. NATURE OF CASE

Thomas P. McNally and Shirley J. McNally appeal from the Douglas County District Court, which affirmed a decision of the City of Omaha Building Board of Review (the Board) denying the McNallys' challenge of a "Notice of Violation" (violations notice) issued by the City of Omaha code inspectors on a rental property.

II. BACKGROUND

The McNallys own a duplex in Omaha, Nebraska, which they rent out to tenants. On April 22, 2004, the City of Omaha Planning Department sent the McNallys a violations notice. The violations notice was accompanied by a violations list. The notice stated that the duplex was in violation of the Omaha Municipal Code (the Code) and was declared to be unsafe, unfit for human occupancy, or unlawful, because of the violations designated in the violations list. The McNallys were ordered to repair or cure the violations by June 24 or else the property would be placarded and occupancy would be prohibited until the violations were cured and released.

There were seven specified aspects of the duplex which the city alleged were in violation of city ordinances: (1) the fact that the furnaces were installed without City of Omaha permits or inspections; (2) large cracks in the brick exterior walls on the north and east sides; (3) an upheaved sidewalk from the front

door to the driveway; (4) unpainted stucco where doors were removed on the east side of the second floor; (5) a window at the second floor, west side, not "painted in [a] workman like [sic] manner"; (6) tuck-pointing at the front entry stairs not done in a "workman like [sic] manner"; and (7) loose and missing glazing putty on all sides.

The McNallys appealed the designation to the Board, although the McNallys eventually agreed to repair the loose and missing glazing putty. Mike Johnson, a housing code inspector, responded with a case analysis for the Board which described the reasons Johnson thought the relief requested in the McNallys' appeal should be denied. A hearing was conducted before the Board. Johnson and Kevin J. Denker, the chief code inspector, presented various photographs of the duplex and made their arguments to the Board. Thomas McNally also presented his evidence and argument.

With regard to violations (4) through (6), the evidence presented to the Board showed that a front upper-level paned glass casement window had paint on the glass resulting from painting the trim. Photographs demonstrated that various cracks in the masonry sidewall of the front stoop were repaired by tuck-pointing, but that the mortar used was uneven in its application. The unpainted stucco violation stemmed from the fact that a back upper door opening onto an awning roof had been cemented in, and the stucco finishing on the cement was never painted to match the rest of the house.

The unpainted stucco, the poorly painted window trim, and the "unworkmanlike" tuck-pointing were alleged to violate § 303.2 of the 2000 International Property Maintenance Code (IPMC), "Protective treatment" (see Omaha Mun. Code, ch. 48, art. I, §§ 48-111 and 48-112 (2003)), and Omaha Mun. Code, ch. 48, art. I, § 48-15 (2003), "Workmanship." At the hearing before the Board, however, the city made it clear that it lacked any evidence that these three elements violated § 303.2. Denker and Johnson admitted that the poorly painted window trim, the poor tuck-pointing, and the unpainted stucco were cosmetic issues. They asserted that such cosmetic issues violated § 48-15.

Section 48-15 states: "Repairs, maintenance work, alterations or installations which are caused directly or indirectly by the

enforcement of this code shall be executed and installed in a workmanlike manner and installed in accordance with the manufacturer's installation instructions." Denker later explained: "It's not necessarily a notice of violation, it's just that we're saying the work was done poorly and probably should have been done better and needs to be addressed."

As evidence of the exterior cracks in the north and east walls of the duplex, photographs were presented to the Board showing areas where the mortar was cracked and where the bricks lay askew. Denker explained to the Board that these cracks appeared to him to be structural and that it was his opinion that there was a possibility of partial collapse. Denker also explained that in his opinion, the loose masonry could fall onto someone walking alongside the property. The exterior cracks were stated to be "unsafe structures" in violation of Omaha Mun. Code, ch. 48, art. I, § 48-71(1) (2003), which states in part:

> An unsafe structure is one that is found to be dangerous to the life, health, property or safety of the public or the occupants of the structure by not providing minimum safeguards to protect or warn occupants in the event of fire, or because such structure contains unsafe equipment or is so damaged, decayed, dilapidated, structurally unsafe, or of such faulty construction or unstable foundation, that partial or complete collapse is possible.

The violations list, referring to § 303.6 of the IPMC, specified that the McNallys were required to obtain a structural review of the walls by a registered engineer-architect. Denker explained to the Board that the city was requiring some directive by a licensed structural engineer to opine with precision as to what the structural danger was and what needed to be done to fix it.

With regard to the two gas furnaces located in the basement of the duplex, the city argued that the furnaces fell under the definition of "unsafe structures" in § 48-71(1), for the sole reason that they had not been inspected by the city. They also were alleged to violate Omaha Mun. Code, ch. 40, art. II, § 40-106 (2003), which provides that "[t]he installation, alteration, repair or replacement of any air conditioning/air distribution system or exhaust system shall not be undertaken within the jurisdiction of the city without a permit issued by the permits and inspections

division prior to said installation." Omaha Mun. Code, ch. 40, art. II, § 40-117 (2003), similarly states: "It shall be unlawful for any person to operate any air conditioning/air distribution or ventilating system installed, altered or repaired until such systems have been inspected and approved by the permits and inspections division."

The McNallys countered with evidence that the furnaces had passed inspection by the Metropolitan Utilities District (MUD). The chief mechanical inspector with the city explained that under the Code, it is required that the city make an inspection of the furnace regardless of whether the furnace has been inspected by MUD. The inspector explained that it was not customary for the city to recognize a MUD inspection in lieu of a city inspection, and evidence was presented that each entity had different inspection criteria.

Evidence regarding the sidewalk violation showed that a portion of the sidewalk had an approximate 1-inch variance at the joint between two sections. The sidewalk was cited as being in violation of § 302.3 of the IPMC. The commentary to that section states:

> Sidewalks and driveways. All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions.
>
> . . . The code official is authorized to require that all sidewalks, walkways, stairs, driveways, parking spaces, etc., are usable and kept in proper repair. Walking surfaces that have deteriorated to a condition that presents a hazard to pedestrians must be repaired or replaced to eliminate the hazard and thus reduce the potential for accidents or injuries.

Denker explained to the Board that the sidewalk presented a tripping hazard.

At the end of the hearing, the Board voted to deny the McNallys' requests for relief as to the items described above. The McNallys appealed to the district court, which affirmed the decision of the Board. The McNallys now appeal to this court.

III. ASSIGNMENTS OF ERROR

The McNallys assert, consolidated and restated, that the district court erred in affirming the Board's decision because (1) its determination that there were violations was not supported by competent evidence; (2) if any applicable ordinance or other provision establishes a workmanship standard based on appearance, then such provision is unconstitutional because it is vague, bears no reasonable relation to public health or safety, and is arbitrary; (3) the city lacks authority to require permits and inspections of the furnaces because Neb. Rev. Stat. § 14-815 (Reissue 1997) gives unfettered, exclusive, and paramount powers to MUD; (4) the city lacks authority to order the McNallys to obtain a structural review by a registered engineer or architect with respect to the cracked masonry in the north and east walls of the property; and (5) the Board's decision was erroneous and illegal because it was not issued in writing as required by Omaha Mun. Code, ch. 43, art. I, § 43-65 (2003).

IV. ANALYSIS

1. Proper Mode of Appeal

Before reaching the McNallys' assignments of error, we first consider which statute controls the McNallys' appeal. The resolution of this question determines the jurisdictional prerequisites for perfecting the appeal, as well as the applicable standard of review. The history of this case presents some confusion as to whether the appeal from the Board was brought pursuant to Neb. Rev. Stat. § 14-813 (Reissue 1997), Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2006), or even the catchall provision, Neb. Rev. Stat. § 25-1937 (Reissue 1995). We conclude that the McNallys' appeal is controlled by § 25-1901.

[1] Section 25-1901 states in relevant part that "[a] judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court . . . ." Accordingly, where a board or tribunal decides no question of adjudicative fact and no statute requires it to act in a judicial manner, the orders are not "judicial" and

are not reviewable by error proceedings.[1] But, when the board or tribunal is required to conduct a hearing and receive evidence, it exercises "judicial functions" in determining questions of fact.[2]

As relevant to this case, § 43-65 of the Code, "Conduct of hearing," states in part that "[t]he board shall hear all arguments and review all evidence submitted by the applicant, the building official, and any other person(s) interested in the case, and shall render its opinion." Thus, § 43-65 required the Board to conduct a hearing and receive evidence. The Board did, in fact, receive photographs and other evidence concerning the alleged violations of the McNallys' duplex. The Board also considered the statements of Thomas McNally and of city officials before making its determination of whether violations were in fact presented. We conclude that the Board exercised "judicial functions."

[2] While we have said that a petition in error may not be applicable where the Legislature has adopted another specific method for appeal,[3] we find that § 14-813 does not apply to the McNallys' appeal. Section 14-813 describes the mode of appeal for claims against the city that are described by Neb. Rev. Stat. § 14-804 (Reissue 1997). Claims under § 14-804 are claims filed with the city comptroller seeking monetary compensation.[4] The McNallys simply appealed a determination by the city that they were in violation of the Code. This is not a claim under § 14-804.[5]

[3] In order to perfect a petition in error, Neb. Rev. Stat. § 25-1903 (Reissue 1995) directs the petitioner to file the petition to the district court setting forth the errors complained of.

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[1] See, *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*, 270 Neb. 140, 699 N.W.2d 25 (2005); *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001).

[2] See, *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002); *Abboud v. Lakeview, Inc.*, 237 Neb. 326, 466 N.W.2d 442 (1991); *Andrews v. City of Fremont*, 213 Neb. 148, 328 N.W.2d 194 (1982).

[3] See *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004).

[4] See *Schmitt v. City of Omaha*, 191 Neb. 608, 217 N.W.2d 86 (1974).

[5] See *Adams v. City of Omaha*, 179 Neb. 684, 139 N.W.2d 885 (1966).

In addition, Neb. Rev. Stat. § 25-1905 (Reissue 1995) directs the petitioner to "file with his or her petition a transcript of the proceedings or a praecipe directing the tribunal, board, or officer to prepare the transcript of the proceedings." We have held that compliance with §§ 25-1903 and 25-1905 is jurisdictional.[6] Under Neb. Rev. Stat. § 25-1931 (Cum. Supp. 2006), the filings required by §§ 25-1903 and 25-1905 must be made within "thirty days after the rendition of the judgment or making of the final order complained of."

[4,5] While the parties debate whether a written order was rendered by the Board, we have repeatedly held that it is the administrative body's pronounced vote that is the final order to be appealed from, not any entry of that vote on the record.[7] The record shows that within 30 days of the Board's pronouncement, the McNallys filed with the district court a praecipe for a transcript directing the Omaha city clerk and the Board to prepare a transcript of the Board's proceedings. In *River City Life Ctr.*,[8] we explained: "After the 1991 amendment [to § 25-1905], filing of the praecipe for transcript with the clerk of the district court satisfied the 30-day appeal requirement, even if the tribunal did not timely prepare and furnish the transcript to the appellants for filing with the clerk of the district court." We determine that the jurisdictional requirements for the timely filing of a petition in error were met for the McNallys' appeal to the district court, and this court has jurisdiction over the McNallys' timely appeal from the district court.

2. Sufficiency of Violations Evidence

[6-8] We now consider the McNallys' assignments of error. In reviewing an administrative decision on a petition in error, both

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[6] See, e.g., *River City Life Ctr. v. Douglas Cty. Bd. of Equal.*, 265 Neb. 723, 658 N.W.2d 717 (2003).

[7] See, *McCorison v. City of Lincoln*, 218 Neb. 827, 359 N.W.2d 775 (1984); *In re Covault Freeholder Petition*, 218 Neb. 763, 359 N.W.2d 349 (1984); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976); *Brown v. City of Omaha*, 179 Neb. 224, 137 N.W.2d 814 (1965).

[8] *River City Life Ctr. v. Douglas Cty. Bd. of Equal., supra* note 6, 265 Neb. at 727, 658 N.W.2d at 721.

the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence.[9] The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.[10] The interpretation of administrative regulations presents a question of law.[11]

(a) Cracked Brick Walls

With regard to the cracked brick walls, the McNallys argue that the evidence was insufficient to support the alleged dangerous condition because the city stated only that collapse was "possible" and that this "possibility" was not based upon any specified evidence.[12] In support of this contention, the McNallys point to Denker's statement that the structural integrity of the masonry "should be evaluated by somebody that is professionally educated and trained to do so." The McNallys argue that the city essentially shifted its burden of proof to the McNallys to disprove the mere allegation of structural damage. The McNallys also argue that, regardless, the city was generally without authority to require the opinion of a structural engineer at the McNallys' expense.

The city, in contrast, asserts that the demand for a structural engineer's professional opinion was not in the context of the inspector's uncertainty that a dangerous condition existed, but only with regard to the details of how such condition should be repaired. We agree and find that the evidence was sufficient to support the Board's finding that the cracked brick walls constituted "unsafe structures" in violation of § 48-71(1).

Referring to various pictures of the exterior of the duplex, Denker explained to the Board that it was his opinion that the

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[9] See *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004).

[10] *Id.*

[11] *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000).

[12] Brief for appellants at 21.

cracks appeared structural and that there was a possibility of partial collapse. Denker further explained that the loose masonry could fall onto somebody walking alongside the property. A structural engineer was required to set forth the danger with more precision and to specify what would need to be done to fix it. The city points out that Omaha Mun. Code, ch. 48, art. I, § 48-43 (2003), provides in part:

> Whenever there is insufficient evidence of compliance with the provisions of this code, or evidence that a material or method does not conform to the requirements of this code, or in order to substantiate claims for alternative materials or methods, the code official shall have the authority to require tests to be made as evidence of compliance at no expense to the city.

As already set forth, an "unsafe structure" under § 48-71(1) of the Code includes one where "partial or complete collapse is *possible.*" (Emphasis supplied.) There was sufficient relevant evidence to support a violation of § 48-71(1). We find nothing in the record to indicate that it is illegal for the city to impose the burden on the homeowner to employ the proper experts in the repair of a proven violation. The district court was thus correct in affirming the Board's decision that the cracked mortar constituted a violation under the Code and its decision to uphold the requirement for a structural review by a registered engineer or architect.

(b) Sidewalk

We next consider the sidewalk violation. Pictures presented to the Board show that a portion of the sidewalk has an approximate 1-inch variance at the joint between two sections of the sidewalk. Denker stated that this was a tripping hazard. We find the evidence was sufficient to support the Board's finding that the sidewalk violated § 302.3 of the IPMC, because it presented a hazard to pedestrians.

(c) Furnaces

With regard to the furnace violations, we note that the city did not allege any violation relating to the ductwork or other air distribution structural elements of the home. It construed §§ 40-106 and 40-117 of the Code to require the city inspection

of the gas furnaces connecting into those systems. Even though the furnaces were already inspected by MUD, the city points out that its furnace inspections have different elements than the MUD inspections. The McNallys argue that there was no competent evidence that the furnaces in the duplex were dangerous. They assert that there can be no violation simply on the basis of an ordinance mandating routine city inspection and permits for gas furnace installation, because any such ordinance is preempted by statutory law giving this power exclusively to MUD. We agree that there was no showing that the furnaces were dangerous and that the application of the municipal ordinance inspection and permit requirements in this case is not authorized by statute. As such, there was insufficient evidence to support a finding that the furnaces were in violation of the Code.

First, there was no showing that the gas furnaces were unsafe equipment as alleged in the violations list. Section 48-71(2) of the Code, "[u]nsafe equipment," provides that unsafe equipment includes any heating equipment "which is in such disrepair or condition that such equipment is a hazard to life, health, property or safety of the public or occupants of the premises or structure." The city inspectors admitted to the Board that since the furnaces had not been inspected, they could not affirmatively say they were dangerous. In contrast, the McNallys presented evidence that the furnaces had passed inspection by MUD.

[9] Nor can a violation be premised simply in the McNallys' failure to adhere to §§ 40-106 and 40-117 insofar as the city construes these as requiring separate city inspections and permits of the furnaces. A municipality's police powers can operate only within legislative limits because the power of a municipality to enact and enforce any ordinance must be authorized by state statute.[13] The plain meaning of the applicable statutes grants to MUD exclusive authority over the routine inspection of gas furnaces. It follows that if the Legislature granted this power exclusively to MUD, then the city lacked statutory authority over the same matter.

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[13] See, *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

Section 14-815, titled "Utilities district; powers and duties exclusive," states:

> Nothing in sections *14-101 to 14-138*, 14-201 to 14-229, 14-360 to 14-376, 14-501 to 14-556, 14-601 to 14-609, 14-702, 14-704, and 14-804 to 14-816 shall be construed so as to interfere with the powers, duties, authority, and privileges that are conferred and imposed upon the metropolitan utilities district as prescribed by law, but all matters relating to the powers, duties, authority, and privileges of such metropolitan utilities district so far as elsewhere conferred, imposed, and defined by law *shall be exclusive and paramount.*

(Emphasis supplied.) Elsewhere, Neb. Rev. Stat. § 14-2124 (Reissue 1997) confers upon the board of directors of a metropolitan utilities district the power to "adopt rules and regulations, in the interest of public health and safety and the conservation of gas, relating to the use, installation, and maintenance of piping, equipment, and appliances for gas on the premises of consumers." There is no dispute that pursuant to this section, MUD adopted a rule relating to permits and inspections of gas furnaces, under which the McNallys' furnaces were inspected in this case.

[10,11] Absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous.[14] We cannot escape the plain language used in § 14-815 that the power, duties, authority, and privileges of a metropolitan utilities district "shall be exclusive." The term "exclusive" is defined as "excluding or not admitting other things" and "restricted or limited to the person, group, or area concerned."[15] The term has been described as precluding any idea of coexistence.[16] The use of the term "exclusive" in

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[14] *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002).

[15] Concise Oxford American Dictionary 311 (2006).

[16] See *Desousa, et al. v. Z. H. B. Whitehall Twp.*, 19 Pa. Commw. 367, 339 A.2d 650 (1975).

§ 14-815 plainly means that the city cannot share with MUD the power granted to MUD to inspect and issue permits for gas furnaces.

The city argues that Neb. Rev. Stat. § 14-102(33) (Cum. Supp. 2006) expresses the Legislature's intent that this inspection and permitting power not be exclusive to MUD. Section 14-102(33) grants the city authority and the power to enact "[b]uilding regulations" to "prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, stovepipes, ovens, boilers, and *heating appliances* used in or about any building or a manufactory and to cause the same to be removed or placed in safe condition when they are considered dangerous." (Emphasis supplied.)

[12] Section 14-102(33) is specifically referenced by § 14-815 as not to interfere with MUD's exclusive powers. Moreover, we find that because § 14-102(33) refers to the more generic term "heating appliances," it does not create any ambiguity in the statutory scheme in which § 14-815 gives exclusive powers to MUD over the more specific realm of gas appliances and equipment. Even assuming a gas furnace could otherwise be considered a "heating appliance," to the extent that § 14-102(33) grants the city authority over "heating appliances," it does so only as to those heating appliances that are not for "gas on the premises of consumers."[17] Rules and regulations "relating to the use, installation, and maintenance of piping, equipment, and appliances for gas on the premises of consumers" are, according to the Legislature, a power "exclusive" to the metropolitan utilities districts.[18]

The city also relies on Neb. Rev. Stat. § 18-2314 (Reissue 1997) and points out that, unlike § 14-102, § 18-2314 is not listed as expressly preempted by § 14-815. This lack of specific mention in § 14-815 notwithstanding, we find nothing in the language of § 18-2314 that changes the unambiguous grant in § 14-815 of exclusive power to MUD. Section 18-2314 deals with the authority of the city to employ inspectors to work for

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[17] § 14-2124.

[18] *Id.* See, also, § 14-815.

the "air conditioning air distribution board." It does not specifically grant the city power to inspect and permit gas furnaces, nor could it. To the extent that any of the other provisions of chapter 18, article 23, of the Nebraska Revised Statutes allow for city "furnace" inspectors, they do not specify "gas" furnaces. The provisions of chapter 18, article 23, must likewise be read in conjunction with the plain mandate of § 14-815, making "exclusive" the power granted to MUD in sections such as § 14-2124.

(d) Stucco, Tuck-Pointing, and Window Paint

Finally, we address the three cosmetic issues found by the Board to be in violation of the workmanlike manner of § 48-15. Because Denker and Johnson admitted to the Board that these aspects of the duplex were really appearance issues and that they had never inspected them closely enough to know if there were any protective treatment violations, there is clearly insufficient evidence that these items were in any other way unsafe, unfit, or unlawful under the Code.

Section 48-15 states: "Repairs, maintenance work, alterations or installations which are caused directly or indirectly by the enforcement of this code shall be executed and installed in a workmanlike manner and installed in accordance with the manufacturer's installation instructions." Workmanlike is defined elsewhere in the commentary to the IPMC as:

> Executed in a skilled manner; e.g., generally plumb, level, square, in line, undamaged and without marring adjacent work.
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> . . . To be workmanlike, maintenance or repair work must be performed in a manner consistent with work done by a skilled craftsman. In general, floors should be level, walls plumb and square, and windows installed so that they operate easily and fit within the rough opening to exclude the elements. The use of proper tools, methods, and materials is usually necessary for workmanlike repairs.

Whether or not the unattractiveness of the repairs could fall under this definition of "workmanlike," the McNallys argue that § 48-15 is inapplicable. The McNallys point out that none of the items were "caused directly or indirectly by the enforcement of

this code."[19] Instead, the window trim painting, the stucco, and the tuck-pointing were repairs which the McNallys conducted on their own accord. We agree that § 48-15 is inapplicable in this case because the ordinance clearly limits the "workmanlike" mandate to situations where the work is conducted pursuant to enforcement of the Code.

The McNallys also argue that if § 48-15 were interpreted to mean that the city could pass out violations notices for "unworkmanlike" repairs done on the owner's own accord when there is no danger presented by the repairs, then the ordinance would be unconstitutional. Having already determined that § 48-15 does not in fact grant such authority and that no violation was shown as to these items, we do not reach this issue.

(e) Failure to Render Decision in Writing

The McNallys assign as error that the Board failed to render a decision in writing. This, argue the McNallys, was contrary to § 43-65 of the Code, and therefore, its decision is void. Because the record contains a copy of the minutes reflecting the Board's decision at the hearing, we find no merit to this argument.

V. CONCLUSION

We affirm the district court's decision with regard to the cracked exterior walls and the upheaved sidewalk as being in violation of the Code. We reverse the district court's decision as to the violations stemming from the unpainted stucco, the poorly painted window, the unsightly tuck-pointing, and the furnaces.

AFFIRMED IN PART, AND IN PART REVERSED.

WRIGHT, J., not participating.

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[19] Brief for appellants at 27.

TIMOTHY BRUMMELS, APPELLANT AND CROSS-APPELLEE, V. TOM TOMASEK AND MJR ENTERPRISES, INC., DOING BUSINESS AS TAX AND BUSINESS CONSULTANTS, APPELLEES AND CROSS-APPELLANTS, AND ROGER DAVIS AND BANK OF BENNINGTON, APPELLEES.

731 N.W.2d 585

Filed May 18, 2007. No. S-05-1548.

1. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
2. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing attorney fees under Neb. Rev. Stat. § 25-824 (Reissue 1995) for frivolous or bad-faith litigation will be upheld in the absence of an abuse of discretion by the trial court.
3. **Pleadings: Proof.** A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief.
4. **Pleadings: Appeal and Error.** When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.
5. **Fraud: Pleadings.** In order to state a claim for fraudulent misrepresentation, a plaintiff must allege (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that the representation was made with the intention that the plaintiff should rely on it; (5) that the plaintiff did so rely on it; and (6) that the plaintiff suffered damage as a result.
6. **Negligence: Fraud: Liability.** Under a claim for negligent misrepresentation, the liability of the supplier of false information is limited to the person who receives the information or one of a limited group of persons for whose benefit and guidance the supplier intends to supply the information or knows that the recipient intends to supply it.
7. **Fraud: Pleadings.** In order to assert a claim for fraudulent concealment, a plaintiff must allege that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.
8. **Conspiracy: Liability.** A conspiracy is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort. Without such an underlying tort, there can be no claim for relief for a conspiracy to commit the tort.

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

Gregory C. Scaglione and Heather S. Voegele, of Koley Jessen, P.C., L.L.O., for appellant.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., for appellees Tom Tomasek and MJR Enterprises, Inc.

James J. Niemeier and Michael T. Eversden, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee Bank of Bennington.

Betty L. Egan and Kylie A. Wolf, of Walentine, O'Toole, McQuillan & Gordon, for appellee Roger Davis.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Timothy Brummels, appellant, filed his third amended complaint in the district court for Douglas County against Tom Tomasek; MJR Enterprises, Inc., doing business as Tax and Business Consultants (MJR); Dennis L. Carlson; Roger Davis; and the Bank of Bennington, appellees. In his operative complaint, Brummels set forth four separate claims for relief entitled "Fraud," "Negligent Misrepresentation," "Fraudulent Concealment," and "Conspiracy." Brummels alleged, inter alia, that appellees had prepared and submitted false information to the Internal Revenue Service (IRS), allegedly involving Brummels' misappropriation of funds and unreported income, and that appellees concealed exonerating information from the IRS. Brummels alleged that the actions of appellees resulted in an IRS audit of Brummels. Brummels further alleged that the IRS ultimately cleared him of any liability but that he sustained damages as a result of appellees' actions. In response to Brummels' allegations, appellees each filed rule 12(b)(6) motions to dismiss, asserting that the complaint failed to state a claim upon which relief could be granted. See Neb. Ct. R.

of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). The district court sustained appellees' motions and did not grant leave to replead. Brummels appeals. Tomasek and MJR cross-appeal from the district court's order denying their motion for attorney fees under Neb. Rev. Stat. § 25-824 (Reissue 1995). We find no merit to either the appeal or the cross-appeal and accordingly affirm.

II. STATEMENT OF FACTS

Brummels initiated this action on January 18, 2005. On June 2, he filed his amended complaint naming appellees as the defendants. Appellees Tomasek, MJR, Davis, and the Bank of Bennington each filed rule 12(b)(6) motions to dismiss Brummels' amended complaint. The district court sustained appellees' motions but granted Brummels leave to replead. On July 25, Brummels filed his second amended complaint, to which appellees each filed rule 12(b)(6) motions to dismiss. The district court sustained appellees' motions and again granted Brummels leave to replead.

On October 7, 2005, Brummels filed his third amended complaint, the operative complaint for purposes of this appeal (hereafter complaint). Because the district court in this case sustained appellees' rule 12(b)(6) motions to dismiss the complaint, this statement of facts is taken from the facts alleged in Brummels' complaint.

According to the complaint, in October 1997, Brummels and Larry Welchert incorporated Welchert Construction, Inc. (the corporation), and formed Welchert Enterprises, L.L.C. (the LLC). Brummels and Welchert were equal owners of the LLC, and Brummels and Welchert, together with their spouses, were equal owners of the corporation. Brummels and Welchert retained Tomasek, Carlson, and MJR to provide financial reporting and tax preparation services for the corporation and the LLC. The corporation and the LLC also formed loan and other contractual relationships with the Bank of Bennington and the bank's employee Davis. In April 2000, Brummels ceased any management relationship with either the corporation or the LLC. We note that Brummels does not allege in his complaint that he ceased to be an owner of either the corporation or the LLC.

In his complaint, Brummels alleged that after he ceased his management role in the corporation and the LLC, disputes arose between Brummels and Welchert regarding their respective wages, salaries, benefits, "draws," and distributions. Brummels alleged that in 2001, Welchert and appellees conferred and mutually agreed to materially and falsely alter the business records, reports, and general ledgers of the corporation and the LLC in such a way as to falsely exaggerate the amount of income attributed to Brummels and reduce the amount attributed to Welchert for the years 1997 through 2000. Appellees then allegedly reported this false financial information to the IRS. Brummels also asserted that appellees "advised and convinced" the IRS that Brummels had misappropriated money from the corporation and the LLC. Brummels further alleged that appellees had access to facts and documents that showed the information they were reporting to the IRS was false, but that appellees intentionally failed to provide such information to the IRS and never advised the IRS of such exonerating facts and documents.

Brummels alleged that appellees' false reporting to the IRS prompted the IRS to institute an audit of Brummels in 2002 for unreported income. As a result of the IRS' action, Brummels retained accounting, tax, and legal counsel to assist him in responding to the audit. In October 2003, the IRS completed its audit and determined that Brummels was not liable for unreported income and misappropriated funds. In his complaint, Brummels asserted that the audit cost him substantial amounts in fees for accountants and attorneys as well as lost wages and opportunities.

As a result of appellees' alleged actions, Brummels set forth four separate claims for relief against appellees: fraud, negligent misrepresentation, fraudulent concealment, and conspiracy. During appellate oral argument in this case, counsel for Brummels acknowledged that the fraud claim was a claim for fraudulent misrepresentation, which title we use hereafter. In his complaint, Brummels sought damages against appellees for the costs he incurred as part of the IRS' audit, as well as damages for injury to his reputation, business relationships, and credit.

Appellees each filed rule 12(b)(6) motions to dismiss Brummels' complaint, all to the effect that the complaint failed to state a claim for which relief could be granted. In their motion to dismiss, Tomasek and MJR also moved for attorney fees pursuant to § 25-824, claiming that Brummels' complaint was frivolous. On November 21, 2005, the district court entered an order sustaining appellees' motions to dismiss and dismissing Brummels' complaint. In its order, the district court did not grant leave to replead. On December 19, the district court entered an order denying Tomasek and MJR's motion for attorney fees. Brummels appeals. Tomasek and MJR cross-appeal from the district court's order denying their motion for attorney fees.

We note that as a result of a settlement reached between Brummels and Carlson after Brummels had filed the instant appeal, Brummels and Carlson stipulated that Carlson should be dismissed as a party to the appeal. That stipulation was approved, and on June 2, 2006, Carlson was ordered dismissed from the appeal with prejudice. Accordingly, further references in this opinion to appellees exclude Carlson.

III. ASSIGNMENTS OF ERROR

On appeal, Brummels assigns numerous errors, all of which can be summarized as claiming that the district court erred in determining that Brummels' complaint failed to state a claim for relief for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and conspiracy.

For their cross-appeal, Tomasek and MJR claim, restated, that the district court erred in failing to award Tomasek and MJR attorney fees pursuant to § 25-824.

IV. STANDARDS OF REVIEW

[1] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. *Ichtertz v. Orthopaedic Specialists of Neb.*, *ante* p. 466, 730 N.W.2d 798 (2007).

[2] On appeal, a trial court's decision allowing or disallowing attorney fees under § 25-824 for frivolous or bad-faith litigation will be upheld in the absence of an abuse of discretion by the trial court. *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998).

V. ANALYSIS

1. Appeal: The District Court Did Not Err in Dismissing Brummels' Complaint

Brummels asserts on appeal that the district court erred in dismissing his complaint. In summary, he argues that he adequately stated claims against appellees for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and conspiracy. We determine that Brummels has failed to state a claim against appellees under any of his asserted claims for relief, and we therefore conclude that the district court did not err in dismissing Brummels' complaint.

[3,4] Our consideration of Brummels' arguments on appeal is guided by the rules governing rule 12(b)(6) motions to dismiss. A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief. *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006). An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. *Ichtertz v. Orthopaedic Specialists of Neb., supra.* When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff. *Id.*

(a) Fraudulent Misrepresentation

[5] We have stated that in order to state a claim for fraudulent misrepresentation, a plaintiff must allege (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that the representation was made with the intention that the plaintiff should rely on it; (5) that the plaintiff did so rely on it; and (6) that the plaintiff suffered damage as a result. See, *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005); *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000).

In his complaint, Brummels alleges that appellees made representations to the IRS that they knew were false. Brummels

further alleges that appellees made the representations intending that the IRS would rely on them and that the IRS did rely upon appellees' representations, leading to the IRS' audit of Brummels and causing him damage. In his complaint, Brummels does not allege that appellees made false representations to him, intending that he rely upon them. As noted above, an element of a fraudulent misrepresentation claim is that allegedly false representations were made to the plaintiff, with the intention that the plaintiff relied upon them. See, e.g., *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 557, 578 N.W.2d 418, 422 (1998) (discussing in case involving fraudulent misrepresentation claim whether plaintiff would be "justified in relying upon a representation made to him"). Thus, Brummels has failed to allege a necessary element for a fraudulent misrepresentation claim. See *Eicher v. Mid America Fin. Invest. Corp., supra*. In the absence of an allegation of a representation to Brummels, Brummels has failed to state a claim for fraudulent misrepresentation, and the district court did not err in sustaining appellees' motions to dismiss Brummels' fraudulent misrepresentation claim.

(b) Negligent Misrepresentation

[6] In *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 370, 518 N.W.2d 910, 921 (1994), this court adopted the definition of negligent misrepresentation found in the Restatement (Second) of Torts § 552 (1977), which provides as follows:

> "(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> "(2) Except as stated in Subsection (3) [discussing the liability of individuals who are under a public duty to disseminate information] the liability stated in Subsection (1) is limited to loss suffered
>
> "(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the

> information or knows that the recipient intends to supply it; and
>
> "(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction."

Accord *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003). Thus, under a claim for negligent misrepresentation, § 552 of the Restatement specifically limits the liability of a supplier of false information to the person who receives the information "or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it." *Id.* at 127. By its terms, § 552 contemplates liability to third parties only if the supplier intends for the misinformation to ultimately reach the third party or if the supplier knows that the recipient will pass the misinformation on to the third party.

In support of his negligent misrepresentation claim, Brummels relies on the reasoning of the New Jersey Superior Court, Appellate Division, which extended the supplier's potential liability to third persons who were not the recipient of the negligent misrepresentation. See *Singer v. Beach Trading Co., Inc.*, 379 N.J. Super. 63, 876 A.2d 885 (2005). Brummels suggests we adopt this reasoning.

We have not been directed to any cases where this court has extended negligent misrepresentation claims to permit those purported claims to be brought by individuals who have not received and have not been guided by the allegedly false information. In connection with our consideration of the reasoning urged by Brummels, we note that a comment to § 552 specifically provides that

> [t]he maker of the negligent misrepresentation is subject to liability to only those persons for whose guidance he knows the information to be supplied, and to them only for loss incurred in the kind of transaction in which it is expected to influence them, or a transaction of a substantially similar kind.

Id., comment *i.* at 136-37. We are guided by this comment and its indication of the limitations of § 552. Given our existing jurisprudence and the confines of § 552, we do not think

it prudent to extend the scope of negligent misrepresentation claims as suggested by Brummels and, accordingly, we reject Brummels' invitation to do so.

As noted above, Brummels alleges in his complaint that appellees made false representations to the IRS. Brummels fails to allege, however, that appellees made such misrepresentations to him or that appellees supplied the information for Brummels' guidance. Accordingly, Brummels failed to state a claim for negligent misrepresentation, see *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994), and the district court did not err in sustaining appellees' motions to dismiss Brummels' negligent misrepresentation claim.

(c) Fraudulent Concealment

[7] In order to assert a claim for fraudulent concealment, a plaintiff must allege that

> "(1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment."

Streeks v. Diamond Hill Farms, Inc., 258 Neb. 581, 589, 605 N.W.2d 110, 118 (2000).

In his complaint, Brummels alleged that appellees suppressed or concealed information with the intention that the IRS would act in response to the concealment or suppression. There is no allegation, however, that appellees suppressed information so that Brummels would be misled. In the absence of an allegation that appellees concealed information with the intention that Brummels would act in response to the concealment or suppression, Brummels has failed to state a claim for fraudulent concealment. See *Streeks v. Diamond Hill Farms, Inc., supra.* The district court did not err in sustaining appellees' motions to dismiss Brummels' claim for fraudulent concealment.

(d) Conspiracy

[8] In his complaint, Brummels alleges that appellees formed a conspiracy to harm him by developing an agreement or understanding between themselves to inflict a wrong or an injury against him. We have previously stated that a "conspiracy" is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort. *Hatcher v. Bellevue Vol. Fire Dept.*, 262 Neb. 23, 628 N.W.2d 685 (2001). Without such an underlying tort, there can be no claim for relief for a conspiracy to commit the tort. *Id.* As set forth above, we have determined that the district court did not err in dismissing Brummels' claims against appellees for fraudulent misrepresentation, negligent misrepresentation, and fraudulent concealment. In the absence of any of these underlying tort claims, Brummels cannot state a claim for conspiracy. The district court did not err in sustaining appellees' motions to dismiss Brummels' conspiracy claim.

We have reviewed de novo the district court's dismissal of Brummels' complaint for failure to state a claim. See *Ichtertz v. Orthopaedic Specialists of Neb., ante* p. 466, 730 N.W.2d 798 (2007). Accepting the complaint's factual allegations as true and construing them in the light most favorable to Brummels, we determine that on the face of his complaint, Brummels has failed to state a claim for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, or conspiracy. See *id.* The controlling complaint was the fourth complaint filed by Brummels, and in its order, the district court did not grant leave to replead. We find no error in the district court's ruling, and, accordingly, we affirm the district court's order sustaining appellees' rule 12(b)(6) motions to dismiss and dismissing Brummels' complaint.

2. Cross-Appeal: The District Court Did Not Err in Denying Tomasek and MJR's Motion for Attorney Fees

For their cross-appeal, Tomasek and MJR claim that the district court erred in denying their motion for attorney fees pursuant to § 25-824. Section 25-824 provides generally that the district court can award reasonable attorney fees and court costs against any attorney or party who has brought or defended

a civil action that alleges a claim or defense that a court determines is frivolous or made in bad faith. See *Stewart v. Bennett, ante* p. 17, 727 N.W.2d 424 (2007).

The district court in the instant case denied Tomasek and MJR's motion, effectively determining that Brummels' claims in the instant case were not frivolous or made in bad faith. We review such ruling for an abuse of discretion. See *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998). In connection with his negligent misrepresentation claim, Brummels proposed a plausible, albeit unsuccessful, extension of the law of negligent misrepresentation based on authority from another jurisdiction. Reviewing the entire procedural history of this case, we conclude that the district court did not abuse its discretion in denying Tomasek and MJR's motion for attorney fees, and we affirm the district court's decision.

VI. CONCLUSION

For the reasons discussed above, we conclude that the district court did not err in sustaining appellees' rule 12(b)(6) motions to dismiss and in dismissing Brummels' complaint. We further conclude that the district court did not abuse its discretion in denying Tomasek and MJR's motion for attorney fees. The decisions of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
ZACHARY D. MERRILL, APPELLEE.
731 N.W.2d 570

Filed May 18, 2007. No. S-06-081.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.

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

Susan P. Buettner, Deputy Lancaster County Attorney, and Jeremy Lavene for appellant.

Kurt P. Leffler for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this criminal case, the State of Nebraska appeals an order of the district court for Lancaster County directing the clerk of the district court to return bond money to Richard Andersen, the grandfather of Zachary D. Merrill, the defendant in this case. We dismiss this appeal for lack of jurisdiction.

STATEMENT OF FACTS

Merrill was arrested on November 13, 2004, and was charged with felony child abuse and other crimes. On November 15, bond was set in the amount of $150,000. Bond was subsequently reduced to $100,000 and later to $50,000. On March 2, 2005, Andersen, Merrill's grandfather, posted bond money of $5,000 on behalf of Merrill.

On March 22, 2005, Merrill filed an "Assignment of Rights" in which he stated that he assigned "whatever rights [he] may have, if any, to the $5,000 bond money posted in the above captioned matter" to Andersen and that he authorized the court to return the bond money to Andersen.

On March 24, 2005, the State filed an "Affidavit of Lien for Child Support" in this criminal case. The affidavit was filed by a deputy Lancaster County Attorney who stated that she was appearing on behalf of the State "solely for the purpose of collecting child support." She stated that in a separate civil case, Merrill had been ordered to pay child support, and that as of March 18, child support of $17,669.72 including interest was due. The deputy county attorney further stated that "she has good reason to and does believe the Clerk of the District Court

of Lancaster County, Nebraska has property in the form of bond money of . . . Merrill in its possession."

After Merrill was convicted and sentenced to imprisonment, Andersen filed a bond refund request with the clerk of the district court. The clerk's office declined and provided Andersen a letter dated August 4, 2005, stating, "On March 24, 2005, the County Attorneys [sic] Office filed a lien against the bond money for child support owed in [civil case] 572-300. The bond money will not be returned to . . . Merrill."

On August 30, 2005, Merrill filed a motion in this criminal case asking the court to "Order the Clerk of the District Court to return the $5,000 bail bond money posted in this matter to . . . Anders[e]n." A hearing was held on the request on September 1. The deputy county attorney who filed the March 24 affidavit appeared on behalf of the State. She stated at the hearing that a garnishment had been filed in the civil child support case. The court discussed with the parties the status of the garnishment in the child support case and whether the issues in that proceeding should be considered at the September 1 hearing. After such discussion, the court stated that "we will just be proceeding today in the criminal case found at CR04-937."

On December 15, 2005, the court entered an order in this criminal case ruling on Merrill's request to direct the clerk to return the bail bond money. The court rejected the State's various arguments to the effect that the State had a lien on the bond money and concluded that Merrill's request for an order directing that the bond money be returned to Andersen should be granted. On December 15, the court ordered the clerk of the district court "to return the posted bond money to . . . Andersen . . . thirty-one days after the date of this order, unless the state has filed a notice of appeal from this order."

The State filed a notice of appeal of the December 15, 2005, order.

ASSIGNMENT OF ERROR

The State asserts that the district court erred in rejecting its arguments claiming a lien and in granting Merrill's request for an order directing the clerk to return the bail bond money to Andersen.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *State v. Hudson, ante* p. 42, 727 N.W.2d 219 (2007).

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Id.* We conclude that the State was not authorized to appeal the December 15, 2005, order in this criminal case and that therefore, this court lacks jurisdiction over this appeal.

We note that the order being appealed by the State was entered following a hearing on a defendant's motion in a criminal case. At the September 1, 2005, hearing the court noted that elsewhere, the State was simultaneously seeking garnishment in a child support civil case, and the court clarified that it and the parties would "just be proceeding today in the criminal case found at CR04-937." On December 15, the court entered the challenged order in this criminal case.

[3] Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006). We have found such specific statutory authorizations to include error proceedings authorized under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006), see *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004), and appeals of sentences as excessively lenient authorized under Neb. Rev. Stat. § 29-2320 et seq. (Reissue 1995 & Cum. Supp. 2006), see *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005).

The State asserts in its brief that "[t]his appeal is pursuant to Neb. Rev. Stat. §25-1301 [(Cum. Supp. 2006)] and §25-1911 [(Reissue 1995)]." Such statutes are statutes of general application found in chapter 25 of the Nebraska Revised Statutes relating to civil procedure. We do not find such statutes to be specific statutory authorization for the appeal by the State in this criminal case.

As noted by the district court at the hearing in this criminal case, the State is seeking to enforce whatever lien it may have on

the bond money through a garnishment proceeding in the child support case. The district court correctly noted that the State's remedy is in the civil case. Regardless of the status of that civil proceeding, the State has no specific statutory authorization to appeal the December 15, 2005, order entered in this criminal case directing the clerk to return the posted bond money to Andersen.

CONCLUSION

We conclude that the State has no specific statutory authorization to appeal the December 15, 2005, order entered in this criminal case. This court therefore lacks jurisdiction over this appeal, and we dismiss the appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
JENNIFER SOMMER, APPELLANT.
731 N.W.2d 566

Filed May 18, 2007. No. S-06-832.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires that a defendant be tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
3. ____. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged.
4. ____. To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to determine the last day the defendant can be tried.
5. **Speedy Trial: Proof.** The burden of proof is upon the State that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) are applicable when the defendant is not tried within 6 months.
6. ____: ____. To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

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

Thomas P. Strigenz, Sarpy County Public Defender, Patrick J. Boylan, and Matthew Klahn, Senior Certified Law Student, for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

Jennifer Sommer appeals the denial of her motion for discharge based upon the State's alleged failure to provide her with a speedy trial in violation of her statutory and constitutional rights.

BACKGROUND

On September 27, 2004, an information was filed against Sommer charging her with one count of abuse of a vulnerable adult. Beginning in October 2004, Sommer filed several motions to continue, which were all granted by the district court. On November 3, Sommer filed a plea in abatement, which was denied on December 20. On April 4, 2005, Sommer's counsel filed a motion to withdraw, which was granted on April 15. Sommer's case was initially set for trial on July 18. On July 6, the district court, on its own motion, continued the trial to August 10. Sommer waived her right to a jury trial on August 10, and her trial was then set for September 27. On September 12, Sommer filed a motion to discharge on the grounds that her statutory and constitutional rights to a speedy trial had been denied. Sommer's motion to discharge was denied on September 26.

Sommer appealed the denial of her motion to discharge, and the Nebraska Court of Appeals remanded the matter with directions for the district court to determine whether the State proved by a preponderance of the evidence that the time attributable to the continuance of the jury trial on the district court's own

motion from July to August 2005 was excludable for good cause and to make specific findings. See *State v. Sommer*, 14 Neb. App. xlvi (No. A-05-1179, Mar. 8, 2006). On July 14, 2006, the district court entered another order overruling Sommer's motion to discharge. Pursuant to the mandate of the Court of Appeals, the district court determined that the continuance of Sommer's trial on the court's own motion was excludable for good cause. The district court found that on July 18, 2005, a double homicide case, State v. Golka, Sarpy County District Court, docket CR 04, page 717, was set for trial as the primary case and Sommer's case was set as the backup case. The court stated that on July 5, the defendant in the double homicide case waived his right to a jury trial. State v. Golka remained set for trial on July 18 and 19 as a bench trial, rather than the primary jury case. The court further stated that on July 6, it continued Sommer's case to August 10 in order to facilitate the double homicide trial which was the primary jury case for July 18 and 19 and that Sommer's case was moved from a secondary position for the July jury term to the primary case for the August term, which was the next available jury panel date. Sommer timely appeals the district court's July 14, 2006, order.

ASSIGNMENTS OF ERROR

Sommer assigns that the district court erred in determining that (1) Sommer was not denied her statutory right to a speedy trial, because, on remand, the district court failed to determine whether the State proved by a preponderance of the evidence that the time attributable to the continuance of the jury trial on the court's own motion from July to August 2005 was excludable for good cause and failed to make specific findings as required by the order on remand, and (2) Sommer was not denied her constitutional right to a speedy trial.

STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.[1]

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[1] *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

ANALYSIS

STATUTORY SPEEDY TRIAL

Sommer asserts that the district court erred in overruling her motion to discharge because the continuance of her jury trial from July 18 to August 10, 2005, was not excludable for good cause under Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995).

[2-4] Section 29-1207 requires that a defendant be tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.[2] If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged.[3] To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried.[4]

The information was filed against Sommer on September 27, 2004. If there were no time periods excludable under § 29-1207(4), the last day the State could have brought Sommer to trial would have been March 27. The district court found that a total of 119 days was excludable under § 29-1207(4) between October 4, 2004, and April 15, 2005, for numerous motions to continue, a plea of abatement, and a motion to withdraw. Sommer does not dispute the 119 days excluded by the district court. Accordingly, absent any other excludable time periods, the last day the State could have brought Sommer to trial before the expiration of the speedy trial period specified in § 29-1207(4) was July 24, 2005.

Section 29-1207(4)(f) provides for the exclusion of "'[o]ther periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.'"[5] The district court

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[2] *State v. Cox*, 10 Neb. App. 501, 632 N.W.2d 807 (2001).

[3] *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002).

[4] *Id.*

[5] *State v. Covey*, 267 Neb. 210, 214, 673 N.W.2d 208, 211 (2004).

found that an additional 22 days were excludable for good cause under § 29-1207(4) as a result of the continuance of Sommer's trial from July to August 2005, on the court's own motion. Upon remand by the Court of Appeals, the district court specifically found that it continued Sommer's trial until August 10 to facilitate a double homicide trial, which was the primary case for July 18 and 19, and that Sommer's case was moved to the primary case for the August term.

[5,6] The burden of proof is upon the State that one or more of the excluded time periods under § 29-1207(4) are applicable when the defendant is not tried within 6 months.[6] To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.[7]

We have stated that docket congestion can be a "good cause" for delay in speedy trial calculations. In *State v. Alvarez*,[8] we found that the Legislature intended to include docket congestion in excusable delays and to exclude periods attributable thereto from the statutory 6-month period. We have also held that the substantial preponderance of the evidence must support a court's finding of good cause.[9] In the instant case, the record before the district court did not establish good cause by a substantial preponderance of the evidence. The only evidence is a certified copy of three journal entries from the case of State v. Golka, Sarpy County District Court, docket CR 04, page 717. The journal entries reveal that the defendant in that case waived his right to a jury trial and that a trial to the court was scheduled on July 18 and 19, 2005. The journal entries further reveal that on July 13, the defendant in that case entered guilty pleas and sentencing was deferred to September 9. This evidence simply does not indicate that Sommer's case could not have been tried prior to July 24, the final trial date for speedy trial purposes.

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[6] *State v. Schmader*, 13 Neb. App. 321, 691 N.W.2d 559 (2005).

[7] *Id.*

[8] *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972).

[9] *Id.*

Because the evidence before this court is insufficient to prove that the 22 days excluded as a result of the district court's continuance of Sommer's trial until August 10, 2005, were excludable for good cause under § 29-1207(4)(f), we find that the district court erred in excluding this period. Having so concluded, we determine that Sommer was not brought to trial within the time specified under § 29-1207.

Constitutional Speedy Trial

[7] Sommer also argues that her constitutional right to a speedy trial was violated. Because an appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it,[10] we do not address this issue.

CONCLUSION

For the reasons discussed above, we conclude that Sommer is entitled to discharge under Neb. Rev. Stat. § 29-1208 (Reissue 1995) because the State has failed to meet its burden of showing that Sommer was brought to trial within the statutory deadline imposed by § 29-1207.

Reversed.

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[10] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

State of Nebraska, appellee, v. Jerry Dean Morrow, Sr., appellant.

731 N.W.2d 558

Filed May 18, 2007. No. S-06-866.

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 discretion a factor in determining admissibility.
2. ____. When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.
3. **Rules of Evidence: Hearsay: Impeachment.** Under Neb. Rev. Stat. § 27-806 (Reissue 1995), the declarant of a hearsay statement may be impeached by the introduction of a prior or subsequent statement made by the declarant that is inconsistent with the hearsay statement already admitted at trial.

4. **Hearsay.** If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.
5. **Evidence.** Evidence that is not relevant is not admissible.
6. **Trial: Rules of Evidence: Probable Cause.** Existence of probable cause, as a prerequisite determinant for admissibility of evidence obtained by a search or arrest, is a preliminary question for a court as a judicial function without intervention of a jury.
7. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
8. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
9. **Verdicts: Juries: Appeal and Error.** In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
11. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
12. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for a new trial.

Gerard A. Piccolo, Hall County Public Defender, and Jeff E. Loeffler for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Jerry Dean Morrow, Sr., was convicted of one count of possession of a controlled substance, a Class IV felony. See Neb.

Rev. Stat. § 28-416(3) (Cum. Supp. 2004). At trial, the State offered in evidence certain out-of-court statements made by an unavailable witness. Morrow sought to impeach such statements with other out-of-court statements from the same witness. The district court denied admission of the out-of-court statements offered by Morrow. For the reasons set forth herein, we reverse the judgment of conviction and remand the cause for a new trial.

SCOPE 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 discretion a factor in determining admissibility. *State v. Kuehn, ante* p. 219, 728 N.W.2d 589 (2007).

FACTS

An officer of the Grand Island Police Department was on patrol during the late afternoon on July 30, 2005. The officer testified that he observed a car failing to yield to oncoming traffic at an intersection and that he initiated a traffic stop by turning on his patrol unit's emergency overhead lights. The driver saw the officer but continued traveling for about 2½ blocks. The officer observed "a lot of movement inside the vehicle from all the occupants." The driver pulled over to the roadside after the officer activated his siren.

The driver of the car was identified as Morrow. Nancy Sensenbach was sitting in the front passenger seat, and Shelli Ballou was sitting behind Morrow. After collecting Morrow's driver's license and vehicle documentation, the officer returned to his patrol unit and wrote out a traffic citation. He again observed movement inside the car. The officer returned to Morrow's car and explained the citation to Morrow.

Morrow then consented to the officer's request to search Morrow's car. The passengers exited, and the officer searched the interior of the car. He found a disposable coffee cup wedged between the front passenger seat and the center console of the car. The cup contained a small glass pipe with a burned residue substance in it and a baggie containing a crystal substance, which later was determined to be methamphetamine. Morrow denied

having knowledge of the cup. The officer had Morrow sit in the back of the patrol unit while he questioned the passengers.

Upon cross-examination, the officer stated that he told the passengers Morrow would be arrested unless one of them admitted to owning the items found in the cup. On redirect examination, the State elicited testimony from the officer that both Sensenbach and Ballou "denied ownership" of the cup and its contents. On recross-examination, the officer said that he asked Ballou if she was responsible for the items in the cup and that she denied responsibility.

Both Sensenbach and Ballou were called to testify at trial. Sensenbach appeared, but Ballou did not. During the State's case, the defense cross-examined Sensenbach. She said that after Morrow was arrested and driven away by the police, she talked to Ballou about what had happened. Defense counsel then attempted to elicit from Sensenbach what Ballou told Sensenbach about the cup and the methamphetamine. The district court sustained the State's hearsay objection to such questioning.

After the prosecution rested, the defense called Sensenbach in order to present an offer of proof concerning Ballou's statements to Sensenbach. Out of the jury's presence, Sensenbach testified that she and Ballou conversed as Morrow was "pulling over" his vehicle, with the patrol unit behind them. Sensenbach testified that Ballou was concerned a warrant might have been issued for her arrest and that Ballou said, "'Well, if I do go to jail or if I do get arrested, then don't do my stuff that's in the cup.'"

The defense offered Ballou's statement to Sensenbach as a statement against penal interest, an exception to the hearsay rule. See Neb. Rev. Stat. § 27-804(2)(c) (Reissue 1995). The defense asserted that the statement tended to expose Ballou (an unavailable declarant) to criminal liability and that it was offered to exculpate Morrow (the accused). See *id.* Alternatively, the defense offered the statement for the purpose of impeaching the credibility of Ballou's statement to the officer, in which she had denied responsibility for the items in the cup, that had already been admitted in evidence. See Neb. Rev. Stat. § 27-806 (Reissue 1995).

The district court denied admission of the out-of-court statement Ballou allegedly made to Sensenbach claiming responsibility for the "'stuff'" in the cup. The jury found Morrow guilty of possessing a controlled substance, and Morrow appealed.

ASSIGNMENT OF ERROR

Morrow claims the district court erred in not allowing in evidence Ballou's statement to Sensenbach.

ANALYSIS

In an offer of proof by Morrow, Sensenbach testified that Ballou said, "'Well, if I do go to jail or if I do get arrested, then don't do my stuff that's in the cup.'" Morrow offered the statement under §§ 27-804(2)(c) and 27-806. The district court refused to admit the statement in evidence.

Admissibility Under § 27-806

Section 27-806 provides in relevant part:

> When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain.

Morrow argues that Sensenbach should have been permitted to testify about Ballou's statement so that Morrow could impeach Ballou's credibility. During the State's case, the officer testified that Ballou had denied ownership of the items in the cup.

The State claims that Morrow failed to preserve his § 27-806 argument for appeal. The record indicates that when defense counsel called Sensenbach to testify in order to present an offer of proof, he included both §§ 27-804(2)(c) and 27-806 as bases for admissibility. His theory under § 27-806 was that Ballou's statement to the officer denying responsibility for the methamphetamine was a statement by a coconspirator, which, along with a hearsay statement, is contemplated in § 27-806. After a recess, defense counsel asked to amend his § 27-806 argument and labeled Ballou's statement to the officer as a hearsay

declaration. Defense counsel proposed to make another offer of proof, but the State stipulated that Morrow had adequately preserved the issue for appeal. Thus, the State's claim of procedural waiver is without merit.

[2] This court has not previously applied § 27-806, which is substantially the same as rule 806 of the Federal Evidence Rules. When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule. *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

Under § 27-806, if a hearsay statement is admitted in evidence, a party may discredit the out-of-court declarant by utilizing recognized methods of impeachment. The rationale behind this rule has been described in the following manner: "'The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment . . . as though he had in fact testified.'" *U.S. v. Trzaska*, 111 F.3d 1019, 1024 (2d Cir. 1997) (quoting Fed. R. Evid. 806 advisory committee's notes).

[3] Under § 27-806, the declarant of a hearsay statement may be impeached by the introduction of a prior or subsequent statement made by the declarant that is inconsistent with the hearsay statement already admitted at trial. See *Trzaska, supra*. See, also, *Carver v. United States*, 164 U.S. 694, 17 S. Ct. 228, 41 L. Ed. 602 (1897) (inconsistent hearsay statement admissible to impeach dying declaration already admitted). When this impeachment method is used, no opportunity to deny or explain the inconsistency need be given to the declarant. See § 27-806.

[4] Section 27-806 does not provide for impeachment, however, if the previously admitted out-of-court statement was nonhearsay. See 2 McCormick on Evidence § 324.2 (Kenneth S. Broun et al., 6th ed. 2006). See, also, *U.S. v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006) (noting "clearly established" principle that statement not offered to prove truth of matter asserted may not be impeached under Fed. R. Evid. 806). If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay. See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Kuehn, ante* p. 219, 728 N.W.2d 589 (2007). Section 27-806 is not discretionary. If hearsay has been admitted, then the credibility of the declarant may be attacked. Thus, we must determine whether Ballou's statement made to the officer was hearsay. In other words, was the statement offered to prove that the contraband in the coffee cup did not belong to Ballou?

Unlike cases in which a trial court has determined that a statement was hearsay, in this case, Morrow did not object to the admission of Ballou's statement denying responsibility for the items in the cup. When Morrow introduced Ballou's statement that the items were her "'stuff,'" he asserted that Ballou's statement to the officer, already admitted in evidence, was hearsay, subject to impeachment under § 27-806. The district court noted Morrow's § 27-806 argument but excluded Ballou's statement to Sensenbach. No determination was made as to whether Ballou's statement of denial to the officer was hearsay.

The question is, For what purpose was Ballou's out-of-court statement to the officer offered? The only relevant purpose for introducing Ballou's statement of denial was to prove the truth of the matter asserted. If the jury believed that the items did not belong to Ballou or Sensenbach (Sensenbach testified that the items were not hers), the jury could conclude that the items belonged to Morrow, the only other person in the car. The statement was hearsay. Therefore, under § 27-806, the credibility of Ballou (the declarant) could be impeached by the introduction of an inconsistent statement.

The State argues that Ballou's statement denying responsibility for the items in the cup was nonhearsay. The State claims it offered the statement to explain the officer's actions. More specifically, the State claims the statement was introduced to show why the officer did not search Sensenbach and Ballou and why the officer arrested Morrow, the person who the officer believed he had probable cause to arrest.

We have reviewed the officer's testimony in order to put Ballou's statement of denial in context. The record does not

support the State's claim that Ballou's statement to the officer was introduced to show why he decided against searching the passengers. Ballou made the statement to the officer after he had already decided not to search the passengers, not before. The officer testified he did not search Sensenbach and Ballou "[w]hen they got out" of the car because they had not consented to a search and he "had no reason [to search them] at that time." According to the officer, this took place *before Morrow was placed in the patrol unit.* The officer said that Sensenbach and Ballou denied responsibility for the contraband *after Morrow was placed in the patrol unit.* Thus, Ballou's statement of denial could not have been the reason the officer decided not to search Sensenbach and Ballou.

[5,6] The State also suggests that it introduced Ballou's statement to the officer for the nonhearsay purpose of showing that the officer believed he had probable cause to arrest Morrow. The problem with this theory is that if the State indeed offered Ballou's statement of denial for that purpose, the evidence would be irrelevant. Evidence that is not relevant is not admissible. See Neb. Rev. Stat. § 27-402 (Reissue 1995). What the officer believed with regard to arresting Morrow was not relevant because that issue was not for the jury to decide. Existence of probable cause, as a prerequisite determinant for admissibility of evidence obtained by a search or arrest, is a preliminary question for a court as a judicial function without intervention of a jury. *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992). We have stated:

> Under [Neb. Rev. Stat. § 27-104 (Reissue 1995)], a trial court makes preliminary determinations in relation to constitutional protection from unreasonable searches and seizures; therefore, whether police had reasonable or probable cause to believe that a felony had been committed or was being committed [is a] preliminary [question] of fact to be decided by a judge, who makes the final decision on admissibility outside the hearing of the jury and preferably, even sometimes necessarily, before trial.

Salamon, 241 Neb. at 888-89, 491 N.W.2d at 697.

Even if the State's purported nonhearsay purposes for introducing Ballou's statement of denial were relevant and supported

by the record, we note that no instruction was given limiting the statement's use by the jury. In order for the State's nonhearsay argument to prevail, an instruction limiting Ballou's statement to the nonhearsay purpose was required. See 2 McCormick on Evidence § 324.2 (Kenneth S. Broun et al., 6th ed. 2006).

In *U.S. v. Burton*, 937 F.2d 324 (7th Cir. 1991), the government enlisted the aid of an informant to catch members of a theft ring. The informant helped the FBI tape several conversations that were admitted in evidence against the defendants. The informant did not testify at the defendants' trial, but the tapes that included the informant's statements were admitted in their entirety, without any instruction to the jury limiting the use of such statements. The defendants later sought to impeach the credibility of the informant under Fed. R. Evid. 806. The government argued that the informant's remarks had been offered not to prove the truth of the matter asserted but to provide context to the conversations in which the defendants participated.

The Seventh Circuit concluded as follows:

> In the absence of any limiting instruction directing the jurors to use [the informant's] statements only to put [the defendants'] statements in context, [the informant's] statements must be taken as hearsay testimony admitted against defendants which they had a right to impeach . . . under Rule 806. . . . The jurors were free to take [the informant's] statements as substantive evidence rather than as mere filler. Once [the informant's] statements were admitted without qualification, the defendants had a right to impeach his credibility.

Burton, 937 F.2d at 327-28.

Applying the reasoning of *Burton*, we conclude that Ballou's statement of denial made to the officer must be taken as hearsay testimony against Morrow, testimony that he had a right to impeach under § 27-806. Thus, the district court erred in refusing to permit Morrow to introduce Ballou's inconsistent statement for the purpose of impeaching her credibility under § 27-806.

[7-9] In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable

doubt. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *Id.* In a harmless error review, we look at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error. *State v. McKinney, ante* p. 346, 730 N.W.2d 74 (2007).

The evidence at trial showed that two other people besides Morrow had been riding in his car when the police officer discovered the methamphetamine. Sensenbach denied responsibility for the methamphetamine. And as a witness, she was subjected to cross-examination. The jury also heard, by means of a hearsay statement, that Ballou had denied responsibility for the illegal drug. Ballou was, in effect, a witness. Her credibility was subject to impeachment as if she had testified. See *U.S. v. Trzaska*, 111 F.3d 1019 (2d Cir. 1997). Morrow was not allowed to impeach her credibility with an inconsistent statement under § 27-806. We cannot say that exclusion of the inconsistent statement by Ballou was harmless error. One person allegedly made inconsistent statements concerning ownership of the methamphetamine. The contraband was in a location where it could have been placed by anyone in the car. No other evidence established ownership. We cannot say that the guilty verdict was unattributable to the exclusion of the evidence with which Morrow sought to impeach Ballou's credibility. Therefore, we conclude that it was prejudicial error for the district court to prevent Morrow from introducing the inconsistent statement in order to attack Ballou's credibility in accordance with § 27-806.

ADMISSIBILITY UNDER § 27-804(2)(C)

[10] Because we have concluded that Ballou's statement to Sensenbach was admissible under § 27-806, we need not address Morrow's alternate argument that the statement was admissible under § 27-804(2)(c). An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate

the case and controversy before it. *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

Sufficiency of Evidence

[11,12] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). The Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *Id.* We conclude that the evidence was sufficient to sustain Morrow's conviction. As a result, the cause may be remanded for a new trial.

CONCLUSION

The district court erred in refusing to permit Morrow to introduce Ballou's inconsistent statement for the purpose of impeaching her credibility under § 27-806. We conclude that the evidence was sufficient to support the conviction, but for the reasons set forth above, we reverse Morrow's conviction and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

PLATTE VALLEY NATIONAL BANK & TRUST COMPANY, SPECIAL ADMINISTRATOR OF THE ESTATE OF ROBERT P. ANDERSON, APPELLEE, V. BARBARA J. LASEN AND PAUL S. LASEN, WIFE AND HUSBAND, APPELLANTS.

732 N.W.2d 347

Filed May 25, 2007. No. S-05-1073.

1. **Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decision made by the lower court.
2. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court is without jurisdiction to entertain appeals from nonfinal orders.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

4. **Actions: Abatement, Survival, and Revival.** A pending action that survives a party's death must be revived in the manner provided by statute.
5. **Judgments: Final Orders.** A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
6. **Actions: Statutes.** Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
7. **Final Orders.** An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action.
8. **Actions: Abatement, Survival, and Revival: Final Orders: Appeal and Error.** An order reviving an action, whether the order was entered in proceedings under Neb. Rev. Stat. § 25-322 (Cum. Supp. 2006) or under Neb. Rev. Stat. §§ 25-1403 to 25-1420 (Reissue 1995 & Cum. Supp. 2006), is not a final order from which an appeal may immediately be taken. The order may be reviewed after final judgment in the case.

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

Larry L. Miller, of Curtiss, Moravek, Curtiss, Margheim & Miller, P.C., L.L.O., for appellants.

John A. Selzer, of Simmons Olsen Law Firm, P.C., for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

This action was originally brought by Platte Valley National Bank & Trust Company (Platte Valley), as the *conservator* for Robert P. Anderson, to recover money and real property from Barbara J. Lasen and Paul S. Lasen. While the case was awaiting trial, Anderson died. The case was revived in the name of Platte Valley as *special administrator* of Anderson's estate. From the order of revivor, the Lasens appeal. The issue presented is whether an order of revivor is a final order from which an appeal can immediately be taken.

II. SCOPE OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an

appellate court to reach a conclusion independent of the decision made by the lower court. See *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

III. FACTS

In an earlier case, the county court for Scotts Bluff County appointed Platte Valley as Anderson's conservator because he suffered from mental and physical disabilities that left him unable to manage his property and personal affairs. Anderson's adult daughter, Barbara Lasen, appealed and contended that she should have been appointed conservator. We determined it was in Anderson's best interests to have a disinterested third party appointed as his conservator and affirmed the judgment of the county court. See *In re Conservatorship of Anderson*, 262 Neb. 51, 628 N.W.2d 233 (2001).

In December 2001, Platte Valley, as conservator, filed the current action against the Lasens in the district court for Scotts Bluff County to recover money and real property the Lasens allegedly had improperly transferred to themselves and members of their family from Anderson's assets. Before the action could be tried, Anderson died on February 22, 2003. Anderson's grandchildren by his deceased son asked the county court to probate a will Anderson had executed in 1997. Attorneys for Platte Valley and the Lasens advised the district court of the will proceedings and requested that their action be stayed, pending the resolution of the probate case.

Barbara Lasen filed an objection to probate of the 1997 will and offered for probate wills that were allegedly executed by Anderson in 1998. A jury found that Anderson's 1997 will was valid and that the two 1998 wills offered by Barbara Lasen were the result of undue influence exerted upon Anderson by the Lasens.

On July 15, 2005, the county court entered an order admitting the 1997 will to formal probate. In that same order, the court found as follows:

> Now that the Will Contest has been resolved, and the . . . 1997 Will has been determined to be the valid last Will of the decedent, a general Personal Representative should be appointed for the decedent's estate and such Personal

> Representative should be authorized to be substituted as Plaintiff in the District Court case brought against the Lasens. The appointment of a Personal Representative for this purpose should not be further delayed.

The county court then appointed Platte Valley as personal representative of Anderson's estate.

On July 19, 2005, Anderson's grandchildren by his deceased son moved the county court to amend its order and appoint Barbara Lasen's nominee as general personal representative of the estate on the condition that Platte Valley be appointed as special administrator for the purpose of maintaining the claims against the Lasens. The court sustained the motion, and Platte Valley was appointed special administrator.

On July 21, 2005, Platte Valley filed in the district court a motion to revive the action against the Lasens in the name of Platte Valley as special administrator of Anderson's estate. The motion was served on the Lasens' attorney. Platte Valley then filed a motion to amend the pleadings along with an attached amended complaint, which included in the caption the name of Platte Valley as "[s]pecial [a]dministrator." The Lasens objected to Platte Valley's motion to revive. A hearing was held on Platte Valley's motion to revive and motion for leave to file an amended pleading. Both parties appeared by their attorneys and offered evidence that was received by the district court.

On August 26, 2005, the district court entered an order reviving the action in the name of Platte Valley, as special administrator of Anderson's estate. The Lasens appealed from this order. This court transferred the appeal to its docket in accordance with its authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

IV. ASSIGNMENTS OF ERROR

The Lasens claim, restated, that the district court erred (1) in reviving the action when more than 1 year had passed since the order of revivor could have first been entered, (2) in determining that the Lasens consented to revivor by filing the joint stipulation after Anderson died, (3) in finding that the court had personal jurisdiction over the Lasens, and (4) in reviving the

action solely in the name of Platte Valley as special administrator when the action involved real property.

V. ANALYSIS

[2,3] Platte Valley argues that this court is without jurisdiction over the Lasens' appeal because the district court's order substituting the party plaintiff and reviving the action was not a final, appealable order. An appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006). Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Id.*

1. Two Methods for Reviving Actions in Nebraska

[4] A pending action that survives a party's death must be revived in the manner provided by statute. *Fox v. Nick*, 265 Neb. 986, 660 N.W.2d 881 (2003). Nebraska law provides for two coexisting methods by which an action may be revived. The statutory procedures for revivor are set forth in Neb. Rev. Stat. §§ 25-1403 to 25-1420 (Reissue 1995 & Cum. Supp. 2006) and in Neb. Rev. Stat. § 25-322 (Cum. Supp. 2006). See *Fox v. Nick, supra.*

Under the first method of revival, a conditional order may be made on the motion of the representative or successor of the party who died. See §§ 25-1406 and 25-1407. This method contemplates that a hearing will be held on the conditional order of revivor and that if "sufficient cause be not shown against the revivor, the action shall stand revived." See § 25-1408.

Section 25-322 provides the alternate and independent method by which an action may be revived. See, *Fox v. Nick, supra*; *Hayden v. Huff*, 62 Neb. 375, 87 N.W. 184 (1901). Under § 25-322, when a party dies, "the court may allow the action to continue by or against his or her representative or successor in interest." This section confers authority upon the court to allow the action to be prosecuted by the representatives of the deceased party. For this purpose, supplemental pleadings may be filed and summons served as in the commencement of the action. *Rakes v. Brown*, 34 Neb. 304, 51 N.W. 848 (1892).

2. APPELLATE REVIEW OF ORDER REVIVING ACTION

(a) Appealability of Revivor Orders Under Existing Approach in Nebraska

In the case at bar, the Lasens argue that the order of revivor was immediately appealable because Platte Valley sought to revive the action under the method prescribed in §§ 25-1403 to 25-1420. Conversely, Platte Valley argues that the order was not immediately appealable because it claims to have revived the action under § 25-322.

This court has held that when the method of revivor set forth in §§ 25-1403 to 25-1420 is followed, a conditional order of revivor made absolute is a final order and appealable. See *Levin v. Muser*, 107 Neb. 230, 185 N.W. 431 (1921). In *Levin v. Muser*, on the plaintiff's motion, a conditional order of revivor was entered, and in pursuance of that order, the court revived the action after finding that no sufficient cause had been shown against the revivor. The defendant immediately appealed.

On appeal, the issue arose whether the revivor order was final and appealable. Based on our statutory definition of a final order found in Rev. Stat. § 8176 (1913) (now Neb. Rev. Stat. § 25-1902 (Reissue 1995)), this court concluded that the order was appealable, even though it neither terminated the action nor constituted a final disposition of the case, because it was made in a special proceeding and it affected a substantial right.

We stated that in cases

> where the special statutory method of revivor [i.e., §§ 25-1403 to 25-1420] is followed, as distinguished from the procedure to revive by the filing of supplemental pleadings and the issuance of summons . . . and where the conditional order is made and, in pursuance thereof, an absolute order of revivor entered . . . the absolute order conclusively adjudicates the matters regarding the right of revivor, and those questions cannot then be later tried along with the merits of the case, nor reviewed on an appeal from the final judgment.

Levin v. Muser, 107 Neb. at 232, 185 N.W. at 432. This revivor method was considered to be an independent and special

proceeding rather than a provisional remedy that was merely incidental to and a part of the main case.

(b) Appealability of Revivor Orders in Other Jurisdictions

As described above, this court has held (at least under one revivor method) that a revivor order is immediately appealable. See *Levin v. Muser, supra.* Among other states that have addressed this issue, there is variance among the decisions as to whether an order granting revival of an action upon the death of a party is a final order from which an appeal may immediately be taken. See Annot., 167 A.L.R. 261 (1947).

An order reviving an action is immediately appealable in a few states other than Nebraska. See, *National Council K. and L. of S. v. Weisler*, 131 Minn. 365, 155 N.W. 396 (1915); *Missouri Slope Livestock Auction, Inc. v. Wachter*, 113 N.W.2d 222 (N.D. 1962); *Voss v. Stoll*, 141 Wis. 267, 124 N.W. 89 (1910).

Other states hold that an order reviving an action is merely interlocutory and not appealable before a final disposition of the case upon a final judgment. See, *Land v. Cooper*, 244 Ala. 141, 12 So. 2d 410 (1943); *Blum v. Pulaski County*, 92 Ark. 101, 122 S.W. 109 (1909); *Ray v. Anderson*, 117 Ga. 136, 43 S.E. 408 (1903), *overruled in part on other grounds, Southern Ry. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S.E. 429 (1907); *Ware's Admr. v. Wilson*, 3 Ky. Op. 478 (1870); *Arthur v. Griswold et al.*, 60 N.Y. 143 (1875); *Squire v. Gdn. Tr. Co.*, 147 Ohio St. 1, 68 N.E.2d 312 (1946); *Tallarico v. Autenreith et al. (KERR, Aplnt.)*, 343 Pa. 325, 22 A.2d 700 (1941).

(c) Revivor Order Not Final and Appealable

In *Squire v. Gdn. Tr. Co., supra*, the Ohio Supreme Court found that an order of revivor was not an order affecting a substantial right made in a special proceeding and thus was not immediately appealable. The court explained:

> Such order is interlocutory in character and amounts to no more than a substitution of one party for another as an incident in the original cause. An order of revivor does not in effect determine the action and prevent a judgment.
>
> As we view the matter, the order of revivor does no more than bring before the court a person who is responsible for

> costs and who is capable of prosecuting or defending the action. The action in all essential respects remains the same and goes on to final hearing as if the death had not occurred. There is no decision of the court except that the action stand revived and no adjudication as to the rights of the parties; there is merely an order that the representative of the deceased party take the latter's place in the action. The revivor in no sense represents the commencement of a new action but is simply a phase in the old one made necessary by the death of one of the parties.

Id. at 3-4, 68 N.E.2d at 313.

In *Blum v. Pulaski County*, 92 Ark. at 102, 122 S.W. at 110, the Supreme Court of Arkansas stated that an order of revival

> is not final in the sense that it concludes the rights of the parties to the action, and . . . the appeal in this case is premature. The order does not end the action, even if it be erroneous, for the action is still pending. The error of reviving the action, if error it be, is like any other erroneous ruling of the court, to be reviewed on appeal from the final decree in the cause.

See, also, *Mackaye v. Mallory*, 79 F. 1, 2 (2d Cir. 1897) (stating that revivor order "does not finally dispose of the cause, and can be reviewed . . . by an appeal from the final decree therein"); *Ware's Admr. v. Wilson*, 3 Ky. Op. at 479 (stating that revivor order "settles no rights in litigation in the original suit").

Our case law suggests that while an order of revivor under §§ 25-1403 to 25-1420 is directly appealable, a similar order under § 25-322 is not. See *Levin v. Muser*, 107 Neb. 230, 185 N.W. 431 (1921). With this distinction, whether an order of revivor is directly appealable may change from case to case, depending on the appellate court's determination of which revival path was taken. In our opinion, this distinction is an artificial one. A revivor order under either method serves the same purpose—it substitutes a party plaintiff or party defendant and allows the action to continue following the death of a party if the action does not abate by death.

When the Ohio Supreme Court determined that a revivor order was not final and appealable in *Squire v. Gdn. Tr. Co.*, 147 Ohio St. 1, 68 N.E.2d 312 (1946), Ohio's statutory scheme

provided methods for reviving actions that were similar to those currently found in this state. See *Squire v. Guardian Trust Co.*, 84 N.E.2d 99, 102 (Ohio Com. Pl. 1945) (stating that Ohio "legislature provided two methods of reviving a dormant action," and describing methods which are similarly found in Nebraska). See, also, *Fox v. Abbott*, 12 Neb. 328, 11 N.W. 303 (1882) (describing that Nebraska's revivor methods were similar to those found in Ohio).

Whereas this court has in the past differentiated between the two methods with regard to the appealability of a revivor order, the Ohio Supreme Court has not. The action in *Squire v. Gdn. Tr. Co., supra*, was revived under the conditional order method of revival, the same method before this court in *Levin v. Muser, supra*. The Ohio court held that the revivor order was interlocutory and not immediately appealable. Nothing in that court's opinion suggested the holding would have differed if the case had been revived under the alternative, supplemental pleading method.

Today, we disapprove previous decisions of this court holding that an order of revivor is a final, appealable order if rendered under §§ 25-1403 to 25-1420. In *Levin v. Muser, supra*, this court concluded that a revivor order under the predecessor to §§ 25-1403 to 25-1420 was made in a special proceeding and affected a substantial right. But subsequent jurisprudence of this court has shown that neither of those conclusions was correct. We conclude that an order reviving an action, regardless of the method under which revivor was sought, is not a final order and cannot be appealed until a final judgment in the case is rendered.

[5,6] An order of revivor is not made in a special proceeding. A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding within the meaning of § 25-1902. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). Moreover, both methods of revivor are set forth in the civil procedure statutes of chapter 25 of the Nebraska Revised Statutes. And we have found that special proceedings entail civil statutory remedies *not encompassed* in chapter 25. See, e.g., *In re Estate of Rose, ante* p. 490, 730 N.W.2d 391 (2007).

An order reviving an action also does not affect a substantial right. It simply substitutes "one party for another as an incident in the original cause." See *Squire v. Gdn. Tr. Co.*, 147 Ohio St. at 3-4, 68 N.E.2d at 313. Once a case is revived, a representative takes the place of the deceased party and the action continues. The fact that an order of revivor may move the case forward to trial does not mean that the order affects a substantial right of the opposing party. Ordinary burdens of trial do not necessarily affect a substantial right. See *Hart v. Ronspies*, 181 Neb. 38, 146 N.W.2d 795 (1966).

[7] A revivor order "is not final in the sense that it concludes the rights of the parties to the action." See *Blum v. Pulaski County*, 92 Ark. 101, 102, 122 S.W. 109, 110 (1909). An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. *Lund v. Holbrook*, 157 Neb. 854, 62 N.W.2d 112 (1954). We have held that an order substituting a party is generally not an appealable order because it does not determine the rights of the parties in the cause. See *Hall v. Vanier*, 7 Neb. 397 (1878). We have also held that an order granting a motion to bring an additional party into a case is not a final or an appealable order. See *Lund v. Holbrook, supra.*

An order reviving an action is similar to other orders that are not directly appealable because they are merely steps within the overall action. For example, the denial of a summary judgment motion is not a final order and thus is not appealable. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003). Neither is an order granting partial summary judgment immediately appealable; while such order resolves certain issues, others are left unresolved, and the order does not dispose of the whole case. See *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). An order overruling a motion for default judgment is also not a final, appealable order. *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

[8] We now hold that an order reviving an action, whether the order was entered in proceedings under § 25-322 or under §§ 25-1403 to 25-1420, is not a final order from which an appeal may immediately be taken. The order may be reviewed after final judgment in the case. To the extent that *Willis v. Rose*, 223

Neb. 49, 388 N.W.2d 101 (1986); *Keefe v. Grace*, 142 Neb. 330, 6 N.W.2d 59 (1942); *Levin v. Muser*, 107 Neb. 230, 185 N.W. 431 (1921); *Missouri P. R. Co. v. Fox*, 56 Neb. 746, 77 N.W. 130 (1898); and *Hendrix v. Rieman*, 6 Neb. 516 (1877), hold otherwise, they are disapproved.

3. Request for Attorney Fees

Platte Valley contends that the Lasens brought this appeal merely to delay the proceedings against them and requests this court to award it attorney fees and costs for the appeal under Neb. Rev. Stat. § 25-824(4) (Reissue 1995). We decline to do so.

VI. CONCLUSION

Because the district court's order reviving the action was not a final, appealable order, this court is without jurisdiction to address the substantive issue of whether revival was proper. Therefore, we dismiss the Lasens' appeal.

Appeal dismissed.

State of Nebraska, appellee, v.
David L. Archie, appellant.
733 N.W.2d 513

Filed May 25, 2007. No. S-05-1145.

1. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
2. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
3. **Judgments: Jurisdiction: Appeal and Error.** The 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.
4. **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.
5. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
6. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder

of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

7. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
8. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
9. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
10. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.
11. ____: ____: ____. Conduct which is clearly proscribed by a statute will not support a vagueness challenge (1) because the statute is not vague as to the party challenging the statute and (2) because the court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.
12. ____: ____: ____. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.
13. **Criminal Law: Verdicts: Juries: Appeal and Error.** Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidentiary ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant.
14. **Verdicts: Juries: Appeal and Error.** In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error.
15. **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.
16. ____. Consideration of plain error occurs at the discretion of an appellate court.
17. **Courts: Minors: Witnesses.** A trial court has wide discretion in fashioning procedures and modifying standard trial practices to accommodate the special needs of child witnesses.
18. **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.
19. **Verdicts: Jury Instructions.** Objections to the verdict form should be made at the jury instruction conference or at the time the verdict is returned.
20. **Witnesses: Juries: Appeal and Error.** The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review.

21. **Sexual Assault: Proof: Words and Phrases.** The slightest intrusion into the genital opening is sufficient to constitute penetration, and such element may be proved by either direct or circumstantial evidence.
22. **Judges: Motions for New Trial: Evidence: Witnesses: Verdicts.** A trial judge is accorded significant discretion in granting or denying a motion for new trial, because the trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict.
23. **Motions for New Trial: Appeal and Error.** When the granting of a new trial requires a consideration of conflicting evidence, the findings of the trial court thereon will not ordinarily be disturbed on appeal.
24. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
25. **Sentences: Appeal and Error.** When a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed.

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

Dennis R. Keefe, Lancaster County Public Defender, and Christopher Eickholt for appellant.

David L. Archie, pro se.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

GERRARD, J.

David L. Archie, the appellant, was convicted of one count of first degree sexual assault on a child[1] and one count of incest[2] in connection with the sexual abuse of Archie's 6-year-old stepdaughter. Archie was sentenced to 25 to 30 years' imprisonment for first degree sexual assault on a child, and a concurrent term

[1] See Neb. Rev. Stat. § 28-319 (Reissue 1995).

[2] See Neb. Rev. Stat. § 28-703(1) (Reissue 1995).

of 10 to 20 years' imprisonment for incest. Archie appeals. For the reasons that follow, we affirm the judgment of the district court.

BACKGROUND

The victim in this case, D.W., was born January 20, 1998, and was 7 years old at the time of trial. Archie was born on August 6, 1969, and was 35 years old at the time of trial. Miranda S., D.W.'s mother, married Archie on February 14, 2004. Miranda had two other children, both boys, who were respectively 1 year old and 4 years old at the time of trial. Archie is the biological father of the younger boy, but not of the older boy or D.W.

In the summer of 2004, Miranda, Archie, and the three children were living together in a home in Lincoln, Nebraska. Miranda admitted that she and Archie "hadn't been getting along" for "quite a while that summer" and that she was not very happy with their marriage. Miranda was working morning shifts at a local restaurant, but Archie was not working at the time. Archie watched the children while Miranda was at work. D.W., then 6 years old, was in kindergarten.

At some point during the summer of 2004, D.W. told Miranda that "'Daddy sexed with me,'" and that it hurt. "Daddy" was what D.W. called Archie. Miranda confronted Archie about D.W.'s statement, and Archie said that D.W. was lying. Some time later, D.W. made a similar claim. Miranda brought the matter up with Archie again and told Archie that they needed to have a conversation with D.W. because "this is serious, you know." The next day, D.W. told Miranda that she had been lying. However, Miranda testified that she had been to work that day, so Archie had the opportunity to talk to D.W. about the matter earlier. "[A] few weeks, maybe a month" later, Miranda and D.W. had another conversation with Archie. D.W. repeated to Archie everything she had said to Miranda. Miranda testified that Archie accused D.W. of lying and that D.W. responded, "'No, Daddy, you're lying.'"

Because of what D.W. had said, Miranda took her to see Dr. Derrick Anderson, a family practitioner, on August 19, 2004. Miranda said that before taking D.W. to the doctor, she had examined D.W.'s genitals and concluded that D.W. "looked

a little red, like un-normal." Miranda testified that she "told [Anderson] that [D.W.] looked a little red down there, and that was it, pretty much, that she was just reddish. That's what she was being seen for."

Dr. Anderson observed D.W.'s vaginal area and saw mild redness and irritation, but no frank evidence of trauma. Anderson made external observations of D.W.'s vagina, but did not conduct an internal examination. Anderson discussed possible causes of the irritation with Miranda, including soaps and bubble baths, and suggested that if D.W. had any further problems, Miranda should bring D.W. back to be reevaluated.

On September 6, 2004, after Miranda came home from work, she, Archie, and the children went to a park. Eventually, they went home, and while Archie was playing basketball across the street, Miranda played with the children, then bathed D.W. Miranda noticed what appeared to be blood in D.W.'s underwear. Miranda asked D.W. if it was blood or if she had spilled Kool-Aid on herself. D.W. was reluctant to answer the question, and Miranda waited until D.W. was out of the bath to ask again. Miranda had a conversation with D.W. in D.W.'s bedroom and decided to make a doctor's appointment for D.W. Miranda told Archie about the situation, and according to Miranda, Archie replied that "it wasn't really necessary to make her [a doctor's appointment]. Kids fall all [the] time. He said his two older girls bumped and fall [sic], and they had blood in their panties before. It's — it was pretty much nothing to worry about." But the next day, Miranda made the doctor's appointment anyway.

The appointment was made for September 7, 2004, at 3 p.m., with Dr. Anderson. Miranda came home from work early that day, but according to Miranda, Archie determined that the doctor's appointment was less important than visiting an insurance company to obtain coverage so Miranda could get her driver's license reinstated. As a result, they missed the doctor's appointment. Miranda rescheduled the appointment for the next day, with Joan George, a nurse practitioner and physician's assistant. Miranda took D.W. to the rescheduled appointment. George spoke with D.W. while Miranda was out of the room, and after Miranda returned, George called the police.

George testified that she saw D.W. in the late afternoon on September 8, 2004, and "[t]he information on the schedule said that she had had blood in her panties." George conducted a physical examination of D.W. and noticed irritation that she thought was out of the ordinary. George testified that

> [u]sually, on a six-year-old, the folds of tissue over the vaginal opening are together. They're not apart. They're — kind of leaf over each other. Hers were separated a little bit and there was some redness. That can be a normal variance, but it also can be a result of some type of penetration.

George said she asked D.W., "'What do you think caused the bleeding, the blood in your panties?'" D.W. "said that Daddy put his wiener down there and it hurt and it caused the blood." George asked D.W. when it had happened, and D.W. said, "'When Mommy was at work on Monday.'" George asked D.W. how old she had been when this had first happened, and D.W. replied that she had been 5 years old. George said that D.W. did not seem to be afraid or in any acute physical distress and that D.W. was upset "[j]ust when she told me what had happened. She said that it hurt and she — you know, that that — she was upset." George said that when she told Miranda what D.W. had said, Miranda acted surprised. George consulted with Anderson, then contacted Child Protective Services, the Child Advocacy Center (Center), and the police.

After speaking on the telephone with a police officer, Miranda took D.W. to a police station, where she met Investigator Deanna Hager of the Lincoln Police Department, with whom she had spoken. The police referred Miranda to the Center, which Miranda described as "a place where children or young people go to when somebody sexually abuses them or hurts them in any way." Miranda and D.W. went to the Center, where they met Hager and a social worker from the Department of Health and Human Services. Miranda spoke to a Center counselor, Hager, and the social worker, then Hager spoke to D.W. privately.

Hager testified at trial regarding her interview of D.W.; the substance of that testimony is set forth in more detail in our analysis. Summarized, Hager testified regarding the procedure

used to interview D.W., but did not testify about what D.W. told her. Hager was cross-examined about her failure to administer an interview procedure intended to establish that a child knows the difference between the truth and a lie. On redirect examination, Hager explained that that procedure is only necessary when there is a concern that a child is lying, and Hager had no concerns during this interview that D.W. was not telling the truth.

Miranda was asked to consent to a search of the residence she shared with Archie, and Miranda signed a consent form. Miranda was also asked to take D.W. to an emergency room for examination. Miranda took D.W. and her other children to an emergency room, where they met Hager and a Center counselor.

Patricia Heser, a women's health nurse practitioner, was on duty at the hospital where D.W. was taken. Heser is certified as a "Sexual Assault Nurse Examiner." She interviewed D.W. and conducted an examination. Heser collected swabs of vaginal and anal secretions and saliva and took pictures of the opening of the vagina and the anal area. Heser said that there was "a little redness at one area around the vaginal opening" and "above her anus, on her back, there was [sic] a couple little abrasions." But there was no tearing, bruising, or scarring on D.W.'s vagina, and Heser agreed that D.W. was talkative, pleasant, and "acting like a normal child."

Heser testified that the redness between D.W.'s vagina and anus could have been caused by sexual penetration, but admitted on cross-examination that it could have been caused by "numerous things," including a fall. Similarly, although Heser testified that D.W.'s hymen was open, and could have been opened by sexual penetration, there were no tears or lacerations, and Heser admitted that a hymen can be open for several reasons, including rough play, a fall, or congenitally.

Dr. Jeffrey David, a private practice pediatrician with specialized training in child sexual abuse, volunteered at the Center. David examined D.W. on September 20, 2004. David's examination of D.W.'s genitals revealed nothing abnormal, except for a "nonspecific notch" on D.W.'s hymen that David said "you see in 20 percent of normal kids as well." David's examination of D.W.'s anus and perianal area revealed nothing abnormal. However, David testified that there are signs of physical injury

in less than 10 percent of verified cases of child sexual abuse. David said that one "rarely" sees tearing, trauma, or scarring on a person who claims to have been sexually assaulted and only occasionally sees bruising. David also testified that it was not normal for a 6-year-old girl to be bleeding from her vagina.

Dr. David examined the photographs that had been taken of D.W. in the emergency room on September 8, 2004. David testified that girls can injure their genital area by falling down, causing a "straddle injury," characterized by bruises to the skin and even abrasions or tears. However, David opined that there was no indication of a straddle injury in the emergency room photographs of D.W.

Officers of the Lincoln Police Department were assigned by Hager to go to Archie and Miranda's residence, arrest Archie, and search the residence. They took Archie into custody and searched the residence, while Miranda and the children were still at the hospital, looking for particular items Hager had directed them to find. Hager testified that she instructed police to look in Archie and Miranda's bedroom for items D.W. had described during the interview: a pair of young girls' underwear, a bottle of lotion, and tissues.

At trial, Miranda testified about several photographs taken of the inside of her residence by police during their search. In a photograph of the master bedroom, Miranda identified a bottle of white lotion on the dresser. Miranda testified that normally, that bottle of lotion had been kept on the ground floor of the residence, instead of upstairs in the bedroom. Miranda said she had first noticed that the lotion had been moved from downstairs on September 6, 2004, "the night [D.W.] mentioned to me about what had happened," 2 days before the search was conducted. The lotion was taken as evidence.

D.W.'s underwear, in which Miranda had seen what she believed to be bloodstains, was sitting on a shoe box in the master bedroom. Miranda testified that she had left the underwear in a laundry hamper near the bathroom but that Archie had told her he looked at the underwear and moved it to the bedroom. The underwear was taken as evidence.

A roll of toilet paper was on a bedside stand in the master bedroom. Miranda testified that it was not normal for a roll of

toilet paper to be beside the bed. A quantity of crumpled toilet paper was in a blue plastic basket, also sitting on the bedside stand. Miranda said that she had not seen the toilet paper on the bedside stand prior to September 6, 2004. She testified that on September 6, after she had seen stains in D.W.'s underwear,

> I was laying on this end of the bed . . . . I just noticed the toilet paper and some rolled up stuff. And, knowing what [D.W.] had told me, I picked up the paper and felt it, and it felt kind of hard. It did smell like lotion and it had blood on it.

Miranda said that she found the crumpled toilet paper on the front of the bedside stand, and she placed it in the blue basket where it was found by police. The officer conducting the search testified that there were two pieces of toilet paper, crumpled together, and that he seized them.

Hager interviewed Archie on September 8, 2004, in a police station interview room. Archie waived his rights under *Miranda v. Arizona*[3] and agreed to speak to police. A videotaped recording of the interview was played at trial.

In the interview, Archie initially expressed confusion about why he had been arrested. Hager asked if Archie knew where Miranda had taken D.W., and Archie indicated that Miranda had taken D.W. to the doctor because of the blood in her underwear. Archie claimed he was "the one who told [Miranda] to make her a doctor's appointment." Archie said that he did not know anything about how the blood got into D.W.'s underwear, other than what Miranda told him.

Archie initially denied awareness of the accusation that had resulted in D.W.'s August 19, 2004, visit to Dr. Anderson. Later, however, Archie recalled that Miranda had "said something about [D.W.] . . . that [D.W.] came to her and she talked to me and she said something about, uhm, a cover over the head or some shit. Something like that."

Archie claimed that D.W. lied about him, stating that

> she used to always tell me and my wife about [her uncle], uh, the daycare people, uh the, all these other people, the

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> little boys down the street, uh, the boy touched my pee pee, all this and that and half of the time it's come, from, from her ass growing up, she got problems about 2, 3:00 every morning . . . . She'd come and peak [sic] around the corner and watch us have sex.

Archie further explained that when he and Miranda first met, they sometimes had sex in the same room with D.W., although once they knew she was seeing them have sex, they tried to prevent her from seeing them.

Archie admitted that he used the lotion found in the bedroom and that his wife used lotion on the children. Archie also admitted that he put lotion on D.W., but that he did not put any on her genitals. Instead, he said, "I let her do that herself when she, when she use lotion I let her do that herself. I wash, I wipe their legs down with lotion and their arms. Any of their private parts on a female, I let her do that." Archie also discussed an incident in which D.W. had injured her "private area" while riding her bicycle, but stated that D.W. had blamed the injury on a boy down the street. Archie repeatedly denied sexually assaulting D.W.

Miranda testified that D.W. had never identified anyone other than Archie as having "sexed" her or made allegations about anyone else similar to those she had made about Archie. Miranda admitted that D.W. had said that Miranda's brother had "touched" her and that another girl at a daycare provider had "touched" her. However, the incident with Miranda's brother involved roughhousing during which D.W. had been injured, and was not sexual; nor had D.W. said the incident at daycare involved sexual touching. Hager testified that during the course of her investigation, she received no information from any other source indicating that D.W. had made accusations of other people sexually touching her, that D.W. had watched Archie and Miranda having sex, that D.W. had injured herself on her bicycle, or that Archie had encouraged Miranda to take D.W. to the doctor.

On September 23, 2004, Hager took oral swabs from Archie for DNA analysis. Those swabs were sent to the University of Nebraska Medical Center's human DNA identification laboratory, as were the sexual assault kit obtained from D.W., D.W.'s

underwear, and the crumpled pieces of toilet paper collected from Archie and Miranda's house. The laboratory tested samples of fabric from D.W.'s underwear, portions of the toilet paper, and the three swabs obtained from D.W. in the sexual assault kit. For each of the samples, an extraction procedure was used to separate sperm fractions from epithelial cells, the cells "that may be present on someone's skin or other mucosal surfaces such as the lips or the vagina."

Preliminary tests were conducted on each of the five items. In the preliminary tests, D.W.'s underwear and the toilet paper tested positive for blood. A preliminary semen test was inconclusive when performed on D.W.'s underwear and each of the swabs obtained from D.W. A second, confirmatory test for semen was performed on the swabs, and each test was negative. The toilet paper tested positive for semen in both tests.

Genetic profiles were detected on all five items. The samples from the vulva and anal swabs taken from D.W. and the samples from D.W.'s underwear were consistent with only D.W.'s DNA profile. The toilet paper contained a mixture of DNA consistent with Archie's and D.W.'s respective DNA profiles. In the epithelial fraction, Archie's DNA profile was detected in the mixture at all the tested genetic locations, and D.W.'s profile was detected at all the tested genetic locations except one. In the sperm fraction, only Archie's DNA profile was detected at all the genetic locations tested.

Probability statistics were generated for each of the genetic profiles obtained from the toilet paper sample. For the epithelial fraction, the probability of an individual unrelated to Archie or D.W. matching the DNA profile obtained was 1 in 4.87 million in the Caucasian population, 1 in 3.12 million in the African-American population, and 1 in 6.29 million in the American Hispanic population. For the sperm fraction, the probability of a DNA profile unrelated to Archie's matching the DNA profile obtained from the toilet paper sample was 1 in 13.6 septillion in the Caucasian population, 1 in 49.1 quintillion in the African-American population, and 1 in 308 sextillion for American Hispanics. The director of the laboratory opined, to a reasonable degree of scientific certainty, that the DNA profile that matched Archie's was from sperm within seminal fluid.

Archie was charged by information with one count of first degree sexual assault on a child[4] and one count of incest.[5] Archie entered pleas of not guilty to each count. Archie later filed a motion to withdraw his plea with respect to the count of incest, so that he could file a motion to quash that count on the basis that the incest statute[6] was unconstitutionally vague. The district court granted Archie's motion to withdraw his plea and overruled his motion to quash. Archie again pled not guilty to incest.

The case went to a jury trial. In addition to the evidence summarized above, D.W. testified at trial. When D.W. entered the courtroom, the court, without objection, introduced D.W. to the people in the courtroom and had her identify Archie.

The State began its examination of D.W. by asking several questions about the difference between the truth and a lie and about the identification of parts of the body. D.W. identified body parts correctly and indicated awareness of the difference between the truth and a lie. D.W. was then asked whether anyone had ever touched her to make her feel "mad or sad or angry," and D.W. said that Archie had touched her to make her mad.

D.W. explained that she had taken her pants off, because Archie "want[ed] to touch me." She identified the lotion found in the bedroom, and testified that Archie "[p]ut it on his — put it on his pee pee." D.W. said that after Archie applied the lotion to himself, he was "touching" her, with the lotion, on her "pee pee." Asked if it hurt, D.W. said, "[w]hen I go potty, it really hurt." D.W. also identified the roll of toilet paper in the photograph of the bedroom. D.W. said that Archie "wiped [the toilet paper] on my butt" when he was done touching her.

D.W. talked about how blood had come out of her "pee pee," and Miranda had discovered the blood on D.W.'s underwear when D.W. was taking a bath. D.W. said that "[m]y daddy said I can't tell my mom, 'cause he said I can't tell her if — I'd get a whooping." D.W. again identified Archie as the person of whom

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[4] See § 28-319.

[5] See § 28-703(1).

[6] *Id.*

she was speaking, and she said that Archie had "whooped" her before and that it hurt and scared her.

D.W. was given a male and a female doll to reenact the incident. D.W. identified herself as the female doll and took the pants off the doll. D.W. asked, "Where are the covers?" and was given a piece of paper to be a cover. D.W. was asked, "Why did you put the cover on top of you?" and replied, "Because [Archie] didn't want me to see." D.W. took the pants off the male doll and positioned them together, then separated the dolls, with the male doll standing over the female doll.

On cross-examination, defense counsel questioned D.W. about talking to Miranda, in the following colloquy:

> Q . . . And you talked to your mom before you came to court today?
>
> A Yes. This is [what] my mom said, if — if I tell the truth, when I was really brave, I would go somewhere fun.
>
> Q Oh, okay. So your mom told you to come to court today and tell us what you told us?
>
> A Uh-huh (affirmative sound).
>
> . . . .
>
> Q And if you told us what you said today, she would take you someplace really fun?
>
> A Uh-huh (affirmative sound).
>
> Q Is that yes?
>
> A That's a yes.

D.W. was asked about her conversations with the Center counselor, Hager, and the prosecutor, and D.W. answered affirmatively to some of the questions asking whether Hager and the prosecutor had told D.W. what to say in court. D.W. also stated that the prosecutor had, prior to her testimony, shown her the pictures she was shown in court. On redirect, D.W. clarified that Miranda, the Center counselor, and the prosecutor had all told D.W. to testify truthfully.

After D.W.'s testimony, the State rested, and Archie made a motion to dismiss both charges for failure to make a prima facie case. Archie specifically argued that there was insufficient evidence of sexual penetration and repeated his constitutional

claim. The motion was denied. Archie rested without adducing evidence and made a motion for directed verdict on the same grounds as his motion to dismiss, which was also denied.

The jury found Archie guilty on both counts. However, when the verdicts were presented to the court, the court noticed that the verdict form for the count of incest was defective, because the introductory paragraph incorrectly identified the charge as first degree sexual assault of a child, although the actual verdict lines correctly identified the charge as incest. The court explained the problem to the jury and asked the jury to confirm its verdicts, which it did. The jury was polled, and each juror indicated agreement with the verdicts. The court accepted the verdicts without objection.

Archie filed a motion for new trial, supported by two affidavits: one executed by Archie's mother and the other by a former spouse of Archie. The evidence adduced in support of the motion for new trial will be discussed in more detail below, but summarized, the affidavits averred that each affiant had been told, by Miranda, that the State had pressured Miranda to ensure that D.W. testified against Archie. Miranda testified at an evidentiary hearing and generally denied the allegations. The court overruled the motion for new trial, finding that the evidence did not support the allegations of witness or prosecutorial misconduct, or that a witness or prosecutor suborned perjury or interfered with Archie's right to a fair trial.

The matter proceeded to sentencing. The presentence investigation report indicated that Archie has a lengthy criminal history, including a 2000 conviction for attempted robbery. Archie was sentenced to a period of imprisonment of 25 to 30 years for first degree sexual assault on a child, and a concurrent term of imprisonment of 10 to 20 years for incest. Archie appeals.

ASSIGNMENTS OF ERROR

Archie assigns, consolidated and restated, that the district court erred in (1) overruling his motion to quash and motion to dismiss because the incest statute is unconstitutionally vague; (2) permitting Hager to testify that she believed D.W. to be telling the truth during Hager's interview of D.W.; (3) introducing D.W. to the jury and directing D.W. to identify Archie in

the presence of the jury; (4) providing a verdict form that was confusing, misleading, and insufficient to support Archie's conviction because it was unclear and ambiguous; (5) overruling his motions to dismiss and for directed verdict on the basis of insufficient evidence; (6) overruling his motion for new trial; and (7) imposing excessive sentences.

[1] Archie also argues that the district court erred in permitting George to testify that when asked what caused the blood in her underwear, D.W. blamed Archie. However, Archie did not assign this as error. An appellate court does not consider errors which are argued but not assigned.[7] Therefore, we do not consider this argument.

STANDARD OF REVIEW

[2,3] The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.[8] The 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.[9]

[4,5] 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.[10] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[11]

[6] 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

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[7] *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006).

[8] *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

[9] *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001).

[10] *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006).

[11] *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007).

and construed most favorably to the State, is sufficient to support the conviction.[12]

[7] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[13]

[8] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[14]

ANALYSIS

CONSTITUTIONALITY OF § 28-703

Archie contends that the court erred in overruling his various challenges to the constitutionality of the incest statute, § 28-703, which provides in relevant part that "any person who engages in sexual penetration with his or her minor stepchild commits incest," a Class III felony. Archie relies on the dissenting opinion in *State v. Johnson*[15] and argues that § 28-703 is unconstitutionally vague because it does not define the age of a "minor" stepchild.

In *Johnson*, the defendant was acquitted of first degree sexual assault of a child, but convicted of incest, based on alleged sexual acts between the defendant and his stepdaughter. The defendant admitted that he and his stepdaughter had sexual contact when she was 17 years old and sexual intercourse when she was 18 years old. The defendant's stepdaughter, however, testified that they had had sexual contact when she was 12 years old and that sexual intercourse started a year later.[16]

The defendant proposed that the jury be instructed that the stepchild must, as an element of the crime of incest, be less than 16 years old. The trial court, however, instructed the jury that as an element of the crime of incest, the stepchild must be less than 19 years old. The defendant was convicted of incest, and

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

[13] *Floyd, supra* note 11.

[14] *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

[15] *State v. Johnson*, 269 Neb. 507, 695 N.W.2d 165 (2005).

[16] See *id.*

he appealed, arguing in part that § 28-703 is unconstitutionally vague. The Nebraska Court of Appeals concluded as a matter of statutory interpretation[17] that the instruction given by the trial court was correct. We granted the defendant's petition for further review.[18]

This court was divided on the issue of whether § 28-703 is unconstitutionally vague. We agreed that because the defendant had failed to file a motion to quash in the trial court raising his constitutional claim, that issue could only be reached as plain error.[19] Four members of this court were of the opinion that the issue should be considered as plain error and that § 28-703 was unconstitutionally vague.[20] Three members of this court, however, declined to reach the issue and "[w]ithout deciding whether the statute is or is not unconstitutionally vague," concluded that "because the invalidity of the statute is not plainly evident, we cannot . . . consider the constitutionality of the statute where the defendant has failed to properly preserve the issue for appeal."[21] Because "[n]o legislative act shall be held unconstitutional except by the concurrence of five judges,"[22] the opinion of those three justices was the opinion of the court. The opinion further concluded, based upon statutory interpretation, that a "minor" for purposes of § 28-703 is a person under 19 years of age.[23]

In this case, Archie made his constitutional argument in the trial court and preserved it for appeal. He contends, based on the four-judge dissent in *Johnson*, that § 28-703 is unconstitutionally vague. However, Archie does not have standing to make this claim.

[9-12] The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness

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[17] See Neb. Rev. Stat. § 43-2101 (Reissue 2004).

[18] See *Johnson, supra* note 15.

[19] See *id.*

[20] See *id.* (Gerrard, J., dissenting).

[21] *Id.* at 516, 695 N.W.2d at 173.

[22] Neb. Const. art. V, § 2.

[23] See *Johnson, supra* note 15.

that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.[24] To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.[25] Conduct which is clearly proscribed by the statute will not support a vagueness challenge (1) because the statute is not vague as to the party challenging the statute and (2) because the court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.[26] The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.[27]

Here, there is little question that Archie's alleged conduct was clearly prohibited by the statute. Whatever the definition of a "minor stepchild" may be, it certainly includes a 6-year-old girl. Unlike *Johnson*,[28] the facts of this case do not present any ambiguity with respect to whether § 28-703 prohibits the conduct alleged. There is no merit to Archie's first assignment of error.

Hager's Testimony About Interview of D.W.

Archie contends that the district court erred in permitting Hager to testify, over a relevance objection, that she had no concerns during her interview of D.W. at the Center that D.W. was not telling Hager the truth.

At trial, Hager testified at length about the procedures used to investigate family crimes and interview children. Hager said that as a member of the family crimes unit of the Lincoln Police Department, she had received specialized child forensic interview training. Hager explained there is a standard form for interviewing a child interviewee which begins with telling the child interviewee about the interview room and that the interviewer

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[24] *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

[25] *Id.*

[26] *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002).

[27] *Faber, supra* note 24.

[28] *Johnson, supra* note 15.

is a police officer, and permitting the child interviewee to ask questions about those things. Then, the interviewer moves on to discussing a nonabuse event with the child interviewee, to "get the child used to the way we are going to talk." Hager said that after that,

> I'll move to what we call the ground rules, which include I'll say things such as if you don't understand, it's okay to say you don't understand. If I use a big word that you don't understand, just let me know. If you don't remember, it's okay to say that you don't remember.
>
> And also part of the ground rules is what we call the truth or lie ceremony. So it's a way to see if a child knows the difference and can understand the difference between the truth and a lie.
>
> And then we go into the part of the interview where we elicit information regarding the abuse event.
>
> And, after that, we close up usually with another nonabuse event . . . [s]o we end it in what we say is a positive note, to talk about something different.

Hager then testified specifically regarding her interview of D.W. at the Center. Hager agreed that during the course of the interview, she did not have any concerns that D.W. did not understand the difference between the truth and a lie. Although D.W. was "very energetic" and "couldn't sit still for very long," Hager testified that D.W. was able to provide information pertinent to the investigation.

However, Hager said that she departed from the standard sequence for interviewing a child during her interview of D.W. For example, Hager said she did not go through a "body part inventory" with D.W., because D.W. was already using terms to describe body parts and it was unnecessary to identify what D.W.'s terms meant. Hager also said that although she discussed the difference between a truth and a lie with D.W., she did not go through the truth-or-lie ceremony.

Hager was cross-examined regarding the truth-or-lie ceremony. Because it is significant to our analysis of this issue, an extensive section of defense counsel's colloquy with Hager is set forth below.

Q Why do you refer to the form during your interview with the child?

A Those are tools. . . .

Q Okay. And the truth [or] lie portion of the form is also to go over or to determine what?

A If it's age appropriate, meaning there's a certain age that I don't use that form with, that is to establish or to see if they can tell the difference between the truth and a lie.

Q Okay. And you said earlier that you didn't go over this form with [D.W.] before your interview did you?

A Yes.

Q So you did not use the truth/lie part with her when you questioned her, is that right?

A Correct. That form, I did not.

. . . .

Q . . . You testified earlier that you've done a series of child forensic interviews in your profession, is that right?

A Yes.

Q And you were specially trained to question children?

A Yes.

Q All right. And you mentioned something yesterday, you need to make sure, when you're questioning a child, not to mislead, is that right?

A Yes.

Q Because that can be a problem in these kind[s] of cases, can it not?

A When interviewing children, yes, that can be a problem.

. . . .

Q — an idea may be planted in a child's head, inadvertently, by a questioner?

A Can it be?

Q Yes.

A Yes.

Q Okay. Or a child may give a positive response that they suspect maybe the questioner is asking for, is that right?

A Yes, that's possible.

> Q And that's why you have the protocols to determine the truth and lie, make sure a child understands the difference between the truth and lie before you do an interview, is that right, at least part of the reason?
>
> A As part of the interview, we sometimes use that tool, yes.

On redirect examination, the State revisited the subject of the truth-or-lie ceremony. Hager testified that the documents about which she had been questioned were "five separate tools" that might or might not be used in a particular instance. Hager explained that "[i]t all depends upon the age of the child and their [sic] disposition, as far as the interview." Hager said she had spoken to D.W. about the importance of telling her the truth. Hager testified over a relevance objection that she had no concerns D.W. was not telling her the truth and agreed that it was only "at times, when you have children where you may have those concerns [about telling the truth], that's when you definitely need to go through the format of the truth and lie ceremony."

Archie argues, based on *State v. Beermann*,[29] that Hager gave improper testimony as to the credibility of another witness. In *Beermann*, the 10-year-old alleged victim of a sexual assault testified, at trial, regarding five sexual assaults committed by the defendant. Issues were raised regarding inconsistency between the alleged victim's trial testimony and the testimony she gave at a preliminary hearing. Following her trial testimony, the county sheriff's deputy who had investigated the allegations was asked if he had heard the alleged victim's in-court testimony, and he said he had. The deputy testified that the alleged victim's in-court testimony was consistent with what he had been told during the investigation. The deputy was then asked if, based upon his training and experience and his observations of the victim, he had an opinion whether or not the alleged victim had been sexually abused. The deputy testified it was his opinion that the alleged victim had been sexually abused.[30]

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[29] *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989).

[30] See *id.*

On appeal, this court concluded that the testimony had been erroneously admitted, in part based on the principle that "it is totally improper for one witness to testify as to the credibility of another witness."[31] We found that the testimony was precluded by Neb. Evid. R. 701 and 702,[32] because there was no evidence that the deputy was an expert on the subject of his testimony, and the subject was not proper for lay opinion testimony because "'it tended to usurp the jury's role.'"[33] We held that the credibility of a witness is left to the jury's judgment and that "'"[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth."'"[34]

Archie also relies on the Court of Appeals' opinion in *State v. Doan*.[35] In *Doan*, an appeal from a conviction for sexual assault of a child, the State presented expert testimony from a counselor who had treated the alleged victim. The counselor testified to the characteristics typically seen in sexually abused children and that part of her function was to evaluate "'whether or not I believe they've been abused or not.'"[36] The counselor testified about the history she obtained from the alleged victim and described the alleged victim's physical appearance and reactions while the alleged victim described the abuse to the counselor. The counselor concluded that she had received "validation" of the alleged abuse.[37]

The Court of Appeals, noting our holding in *Beermann*, concluded that the opinion testimony should have been excluded for lack of proper foundation. The court found "no showing" that the counselor "had the underlying expertise to validate

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[31] *Id.* at 396, 436 N.W.2d at 509.

[32] Neb. Rev. Stat. §§ 27-701 and 27-702 (Reissue 1995).

[33] *Beermann, supra* note 29, 231 Neb. at 396, 436 N.W.2d at 509.

[34] *Id.*, quoting *State v. Romero*, 147 Wis. 2d 264, 432 N.W.2d 899 (1988). Accord *State v. Smith*, 241 Neb. 311, 488 N.W.2d 33 (1992).

[35] *State v. Doan*, 1 Neb. App. 484, 498 N.W.2d 804 (1993).

[36] *Id.* at 488, 498 N.W.2d at 807.

[37] See *id.*

[the] account of sexual abuse, even if such testimony could be received, which it cannot."[38] The court held that "in a prosecution for sexual assault of a child, an expert witness may not give testimony which directly or indirectly expresses an opinion that the child is believable, that the child is credible, or that the witness' account has been validated."[39]

More recently, in *In re Interest of Kyle O.*,[40] the Court of Appeals addressed a situation in which a 14-year-old defendant was convicted of sexual contact with a 5-year-old alleged victim. The defendant argued that the trial court erred in excluding a letter from the defendant's counselor. The Court of Appeals noted that the letter contained the opinion of the counselor that the defendant was telling the truth in denying the allegations. The Court of Appeals, citing *Beermann*, concluded that the trial court did not abuse its discretion by excluding the letter, because the opinion of the counselor regarding the defendant's credibility was irrelevant.[41]

The circumstances of the instant case, however, are distinguishable from those presented in *Beermann*, *In re Interest of Kyle O.*, and *Doan*. In this case, Hager did not purport to offer an expert opinion as to D.W.'s credibility. Hager's statement consisted of one question and one answer, in which Hager agreed that she did not have "any concerns that [D.W.] wasn't telling [her] the truth." The question and answer were obviously in the context of explaining on redirect examination why Hager did not utilize the truth-or-lie ceremony with this particular child witness. Nonetheless, it is improper for a prosecutor to inquire of a witness whether another person may or may not have been telling the truth in a certain instance. The proper line of inquiry, as was expressed on direct examination, is whether Hager had concerns regarding D.W.'s ability to "understand the difference between the truth and a lie." Hager testified on direct examination that D.W. understood that difference.

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[38] *Id.* at 496, 498 N.W.2d at 812.

[39] *Id.*

[40] *In re Interest of Kyle O.*, 14 Neb. App. 61, 703 N.W.2d 909 (2005).

[41] See *id.* See, also, *State v. Egger*, 8 Neb. App. 740, 601 N.W.2d 785 (1999).

[13] Based on our review of the entire record and the context in which the line of inquiry came about, however, we conclude that Hager's statement did not materially influence the jury in a verdict adverse to the defendant. Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidentiary ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant.[42] Any error in permitting Hager's statement on redirect examination was harmless beyond a reasonable doubt.[43]

In this case, Hager had been cross-examined in depth regarding her decision not to administer the truth-or-lie ceremony to D.W. The evident implication of Archie's cross-examination was that because Hager departed from established protocol, she might have misled D.W., suggested the "right" answers to questions, or even planted ideas in D.W.'s head. This was a legitimate line of inquiry on cross-examination, but by challenging the basis for Hager's departure from the interrogation form, the cross-examination implicated Hager's assessment of whether D.W. understood the concept of telling the truth during the interview. Here, while the form of the question posed to Hager on redirect examination was improper, we must examine the entire context of questioning when assessing prejudice.

[14] Unlike the circumstances presented in *Beermann*, *In re Interest of Kyle O.*, and *Doan*, in this case, Hager did not testify to the substance of D.W.'s own statements or offer expert opinion testimony on the credibility of those statements. Instead, Hager answered a single question during redirect examination that was related to an issue raised by Archie during cross-examination. Read in context, the effect of Hager's single statement was not to vouch for the credibility of a witness, but simply to explain why she departed from the standard interview form in her interview of D.W. In a harmless error review, we look at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather,

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[42] See *State v. McKinney*, *ante* p. 346, 730 N.W.2d 74 (2007).

[43] See *id.*

whether the guilty verdict rendered in the trial was surely unattributable to the error.[44] Considering the context in which Hager's statement was made and based on our review of the entire record, we conclude that the guilty verdict rendered in this trial was surely unattributable to any error in permitting this statement on redirect and that such error was harmless beyond a reasonable doubt.

Introduction of D.W. to Jury

Archie claims that the district court committed plain error when, before D.W. testified, the court introduced D.W. to the people in the courtroom and directed her to identify Archie.

Prior to D.W.'s testimony, before the jury entered the courtroom, the court and counsel discussed how the court would proceed with D.W.'s testimony. The court explained:

> [D.W.] is seven years old. What I would propose to do is, when she comes in, introduce myself to her and explain to her who everybody else in the well is.
>
> I would just say you know who . . . Archie is, if that's not objectionable to [defense counsel]. If that is — I would just say the other people sitting at these tables in suits are attorneys, and they may ask you some questions, let her know who the jurors are and just tell her that they're just going to be listening to what's going on, to what she has to say, who my court reporter is, who I am. And that's it.
>
> And I may just say that the people sitting in the back are people who come in and watch what's going on in courtrooms.
>
> And then what I may very well do is . . . I may ask [the prosecutor] to put something on the monitor there, just a piece of paper that I have, just a blank piece of paper there, one of those pieces of paper that I have in front, just so she knows that he may put things there and she'll be able to see them on her monitor here, and just — then I will ask her — and I'm willing — And then I would ask her what we talked about the other day, telling the difference between telling the truth and telling a lie and good or bad and promise to tell the truth.

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[44] *Id.*

> But I think it's kind of important that she feel that she knows who the players are in the courtroom, coming into a courtroom now. I know she's been in the courtroom before, empty. I think it's different when you come and you see a lot of people, that at least she knows who's here.

The court asked both the State and Archie if they had any objection to this procedure, and both parties affirmatively stated that they had no objection.

The jury was brought into the courtroom, and before D.W. entered, the court explained to the jury the process that would be followed. The court explained, "I just wanted you to know that that's what I'm going to do, because she's a seven-year-old girl." However, the court also instructed the jury at that time that "[D.W.'s] testimony has to be treated just the same as anybody else's testimony. No deference is given to her because she's a seven-year-old girl. I'm just trying to make her feel a little bit more comfortable in this strange environment."

After D.W. entered the courtroom and took the stand, the court generally followed the procedure it had explained to the parties and the jury. The court specifically directed D.W.'s attention to the five people seated at the defendant's table, and asked D.W., "One of them you know, and that's . . . Archie, right?" D.W. nodded, and when prompted by the court to speak aloud, answered, "Yes."

[15,16] Although Archie complains about this procedure on appeal, he did not object at trial, even after being expressly invited to do so. 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.[45] Consideration of plain error occurs, of course, at the discretion of an appellate court,[46] and the scope of our review is obviously limited by an appellant's failure to raise an argument in the trial court.

Archie contends the court committed plain error, as it was "prejudicial for the court to overly accommodate and to

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[45] *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

[46] *State v. Al-Zubaidy*, 257 Neb. 935, 602 N.W.2d 8 (1999).

personalize himself to a witness in a criminal case."[47] Archie argues that the court's conduct "implicitly communicated that this child needed to be treated tenderly as a victim" and this "validated" the State's theory that D.W. had been sexually assaulted.[48] Archie also argues that the court erred by instructing D.W. to identify Archie in the courtroom before her testimony.

[17] We disagree with Archie's characterization of the court's accommodation of D.W.'s testimony. The court's procedure did not show undue favoritism toward D.W.; rather, the court simply recognized that D.W. was a 7-year-old child who might be unfamiliar with, and intimidated by, a courtroom setting. The trial court has broad discretion over the general conduct of trial.[49] The court must also exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence, so as to make the interrogation and presentation effective for the ascertainment of the truth.[50] A trial court has wide discretion in fashioning procedures and modifying standard trial practices to accommodate the special needs of child witnesses. Recognizing the difficulties a particular child may face in trying to testify in a traditional courtroom setting, a judge may require that the environment in which a witness is to give testimony may be made less formal and intimidating.[51]

[18] The district court in this case exercised its discretion to help D.W. testify truthfully without being overwhelmed by her surroundings. As described above, the court carefully explained to the jury what it was doing and why it was being done and instructed the jury that D.W.'s testimony should be treated the same as the testimony of any other witness. Absent evidence to the contrary, it is presumed that a jury followed the instructions

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[47] Brief for appellant at 24.

[48] *Id.*

[49] See *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005), *cert. denied* 546 U.S. 947, 126 S. Ct. 449, 163 L. Ed. 2d 341.

[50] Neb. Evid. R. 611(1)(a), Neb. Rev. Stat. § 27-611(1)(a) (Reissue 1995).

[51] See, *Commonwealth v. Amirault*, 404 Mass. 221, 535 N.E.2d 193 (1989); John E.B. Myers & Nancy W. Perry, Child Witness Law and Practice § 7.4 (1987 & Cum. Supp. 1992).

given in arriving at its verdict.[52] There is no indication that the jury failed to respect its instruction here and no plain error apparent in the court's procedure.

INCEST VERDICT FORM

Archie assigns error to the verdict form for the count of incest. Following the jury instructions, the case was submitted to the jury, and it found Archie guilty on both counts. However, when the verdicts were presented to the court, an issue arose with respect to the verdict form for the count of incest. At the jury instruction conference, the court had provided the parties with drafts of the verdict forms for each count of the information and the parties agreed that the verdict forms were acceptable. However, the verdict form for the count of incest was later found to be defective. Below the caption, the form incorrectly read: "**We, the Jury,** duly impaneled and sworn in the above-entitled cause, do, with respect to the charge of First Degree Sexual Assault of a Child . . . find as follows . . . ." Below that, the form correctly provided the jury with the options of finding Archie "**Guilty** of Incest," "**Guilty** of Attempted Incest," or "**Not Guilty**."

The court noticed the mistake when the bailiff was reading the verdict for the count of incest. The court told the jury:

> We can only read these things for so many times. With first degree sexual assault, find guilty of incest. This is a typographical error, obviously. It says incest. I'm going to have [the bailiff] read it as it says. It says guilty of incest.
>
> Then I'm going to ask them, notwithstanding the . . . differences in what it says, whether in fact the verdict is for guilty of the charge of incest.

The court asked if that procedure was agreeable to the parties, and the parties indicated that it was. The court informed the jury of the mistake, calling it a "scrivener's error," and admitted it was the court's "mistake for not catching that." The court asked the jury, with respect to the count of first degree sexual assault on a child, whether the verdict of guilty was its unanimous verdict, and it indicated it was. The court then asked the jury

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[52] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

with respect to the verdict form for the count of incest, "which has the box checked, 'Guilty of incest,' notwithstanding the fact that the body says, the very introduction says first degree sexual assault of a child, it says incest, guilty of incest, is this your unanimous verdict?" All the jurors indicated that it was. The jury was polled, and each juror indicated agreement with the verdicts.

[19] Archie now claims that he was prejudiced by the erroneous verdict form. However, objections to the verdict form should be made at the jury instruction conference or at the time the verdict is returned.[53] Archie concedes that our review of this issue is for plain error. There is no question that the verdict form contained an error. The issue, then, is whether that error was so prejudicial 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.[54]

We have reviewed the record and examined the verdict forms, and based on that review and observation of the forms, we are convinced that the erroneous verdict form did not mislead the jury and that the verdicts rendered accurately reflected the jury's actual determination of Archie's guilt of both offenses. No plain error is present, and we reject Archie's fourth assignment of error.

Sufficiency of Evidence

Archie argues that the evidence is insufficient to sustain his convictions. First, Archie argues generally that the evidence lacks the probative force to support a finding of guilt. Archie suggests that D.W.'s injuries might have been inflicted by an ordinary childhood accident, that D.W.'s testimony was tainted by suggestions from Miranda and the State, and that the DNA sample on the toilet paper was contaminated because the two pieces of toilet paper were collected and stored together.

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[53] *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002).

[54] See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005).

[20] However, the credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review.[55] The evidence conflicted on how D.W.'s injuries were likely to have been inflicted, and D.W. directly stated that she was injured by Archie. Archie argued to the jury that D.W.'s testimony was unreliable, but the jury obviously found her testimony credible. The evidence does not support Archie's argument that the toilet paper sample was contaminated—rather, the record indicates that the two pieces of toilet paper were crumpled together when they were found and that they were taken as evidence and retained in the same condition in which they were found. In short, taken in the light most favorable to the State, the evidence summarized above is sufficient to support Archie's convictions.

Archie specifically argues that even if the evidence is sufficient to establish sexual contact, there is not enough evidence to support a finding that he subjected D.W. to sexual penetration. At the time the offenses were allegedly committed, § 28-319(1) provided, in relevant part, that "[a]ny person who subjects another person to sexual penetration . . . (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree." Similarly, pursuant to § 28-703(1), "any person who engages in sexual penetration with his or her minor stepchild commits incest." We note that § 28-319 was significantly amended effective July 14, 2006,[56] but that amendment is not applicable to this proceeding.

[21] Obviously, pursuant to §§ 28-319(1) and 28-703, sexual penetration is an element of both offenses, and the jury was so instructed. The jury was also correctly instructed that

> [s]exual 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

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[55] *Robinson, supra* note 45. See, also, *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005); *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

[56] See 2006 Neb. Laws, L.B. 1199.

> can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen.[57]

The slightest intrusion into the genital opening is sufficient to constitute penetration, and such element may be proved by either direct or circumstantial evidence.[58] It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labia is sufficient.[59]

Archie argues that D.W. did not testify directly to sexual penetration. However, taken in the light most favorable to the State, the evidence is sufficient to establish that sexual penetration occurred. The physical examinations of D.W., D.W.'s testimony, and the blood found on D.W.'s underwear and the toilet paper taken from Miranda and Archie's house are indicative of an injury resulting from sexual penetration. This evidence is sufficient to support the jury's conclusion that Archie subjected D.W. to sexual penetration.[60]

We find sufficient evidence in the record to support the jury's findings. Archie's assignment of error is without merit.

Motion for New Trial

Archie contends that the district court erred in overruling his motion for new trial based on alleged witness and prosecutorial misconduct. Before the jury instruction conference, Archie made a motion for mistrial, based on information obtained from Archie's mother, who claimed that she had been contacted by Miranda. According to Archie's mother, Miranda told her that the State had threatened Miranda that unless D.W. had testified the way she did in court, the State would take Miranda's children away from her. The court overruled the motion for mistrial, noting that the issues presented could, if necessary, be raised through a motion for new trial. After conviction, Archie filed a motion for new trial based on the same allegations,

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[57] Neb. Rev. Stat. § 28-318(6) (Cum. Supp. 2004).

[58] See *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994).

[59] *Id.*

[60] Compare *id.*

supported by two affidavits: one executed by Archie's mother, Paulette Archie, and the other by Lisa Merriweather, a former spouse of Archie.

Paulette averred that she had regular contact with Miranda during the pendency of the case and had spoken with Miranda about D.W.'s accusations against Archie. Paulette claimed that following D.W.'s in-court testimony, Paulette and Miranda spoke about the trial, Miranda's testimony, and D.W.'s testimony. Paulette averred that

> [d]uring our conversations, [Miranda] told me that she had been threatened by . . . the state to bring [D.W.] to court and to compel [D.W.] to testify against [Archie] in the manner that [D.W.] did. Further, [Miranda] told me that if she failed to bring [D.W.] to court and to compel [D.W.] to testify in the manner that she did . . . the state threatened to remove [Miranda's] children from her care.

Paulette further stated that Miranda had told Paulette that she had not told the truth during her testimony, instead saying what the prosecutor wanted her to say, but that if questioned by authorities, she would deny what she had said to Paulette.

Similarly, Merriweather averred that she visited Miranda's home approximately 3 weeks after the jury had found Archie guilty and that she and Miranda had discussed the case, Miranda's testimony, and D.W.'s testimony. Merriweather stated that "[d]uring our conversation, [Miranda] told me that she had been threatened by a Brian from Child Protective Services that if she failed to cooperate with the State and did not bring [D.W.] to court, the State could remove her children from her care and/or charge her with child neglect."

On Archie's motion, the court ordered an evidentiary hearing on the allegations set forth in the affidavits. Miranda testified that she spoke with Paulette briefly at the courthouse, on the day that D.W. testified, and spoke with Paulette at home "[a] couple days later," when Paulette came to Miranda's home to pick up Archie's son for a visit. Miranda denied speaking to Paulette about the case on those occasions. Miranda specifically denied making any of the statements attributed to her in Paulette's affidavit.

Miranda admitted she had spoken to Merriweather at around the time Merriweather had claimed. Miranda denied that she and Merriweather conversed about Archie's trial, stating instead that "[s]he talked to me about it" and Miranda "just answered her questions." Miranda said the "question and answer conversation" lasted for 45 minutes to an hour. Miranda denied making the statement attributed to her in Merriweather's affidavit.

Miranda testified that she had told Merriweather, "'I'm lying, I'm lying,'" sarcastically, in response to Merriweather's accusing Miranda of being a liar. Miranda said that she did that "because I just wanted to have her hear what she wanted to hear, I guess." Miranda said that Merriweather had been accusative and had raised her voice. Miranda testified that initially, she insisted to Merriweather that she was telling the truth, but she finally just gave up and told Merriweather that Merriweather was right. According to Miranda, Merriweather called Miranda a liar "[a] lot," and Miranda sarcastically replied, "[l]ike, I'm a liar, like, yeah, I'm lying, like that, yeah."

The court overruled the motion for new trial. After reciting the evidence in detail, the court found that the evidence did not support the allegations of witness or prosecutorial misconduct.

[22,23] A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for "misconduct of the jury, of the prosecuting attorney, or of the witnesses for the state" materially affecting the defendant's substantial rights.[61] A trial judge is accorded significant discretion in granting or denying a motion for new trial, because the trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict.[62] When the granting of a new trial requires a consideration of conflicting evidence, the findings of the trial court thereon will not ordinarily be disturbed on appeal.[63]

In this case, the district court was presented with starkly conflicting evidence from individuals with different interests in

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[61] Neb. Rev. Stat. § 29-2101(2) (Cum. Supp. 2006).

[62] *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

[63] *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995).

the outcome of the proceedings. The court's order demonstrates that it carefully considered that evidence before overruling the defendant's motion for new trial. Miranda testified before the district court that the allegations in the affidavits were false, and the court specifically found that Miranda's testimony was credible and that Miranda did not influence D.W.'s trial testimony. Because these findings are supported by the evidence, the district court did not abuse its discretion in overruling Archie's motion for new trial.

Excessive Sentences

Archie argues that his sentences, of 25 to 30 years' imprisonment for first degree sexual assault of a child, and a concurrent term of 10 to 20 years' imprisonment for incest, were excessive. Archie argues that the district court failed to properly consider that Archie had no prior sexual offenses and that a sexual adjustment inventory test administered to Archie showed no established pattern of sexual interest in children.

However, as previously noted, a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[64] First degree sexual assault on a child is a Class II felony,[65] punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment.[66] Incest is a Class III felony,[67] punishable by a minimum of 1 year's imprisonment and a maximum of 20 years' imprisonment, a $25,000 fine, or both.[68] The sentences imposed in this case were clearly within the statutory limits.

[24,25] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the

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[64] *Davlin, supra* note 14.

[65] § 28-319(2).

[66] Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2006).

[67] § 28-703(2).

[68] § 28-105(1).

amount of violence involved in the commission of the crime.[69] When a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed.[70]

A review of Archie's criminal record reveals a long history of lawbreaking and violence, particularly domestic violence, and the testimony at trial also evidences Archie's propensity for violence.[71] Moreover, the transcript of Hager's interview of D.W., present in the presentence investigation report, contains ample proof of the pain and fear Archie inflicted on D.W. by beating and sexually abusing her. Sexual assault on a child is a serious and deplorable crime, and the injury that results from this type of assault is well established.[72] The record also indicates that Archie subjected D.W. to sexual abuse on more than one occasion. Based on our review of the record, we conclude that the district court did not abuse its discretion in sentencing Archie, and we reject his final assignment of error.

CONCLUSION

For the foregoing reasons, we find no merit to Archie's assignments of error. The judgment of the district court is, therefore, affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[69] *Marrs, supra* note 8.

[70] *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[71] Compare *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004).

[72] See, *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Davis*, 1 Neb. App. 502, 500 N.W.2d 852 (1993).

HOWARD L. MAXON, APPELLANT, V. CITY OF GRAND ISLAND, NEBRASKA, APPELLEE.

731 N.W.2d 882

Filed May 25, 2007. No. S-05-1204.

1. **Constitutional Law: Ordinances: Appeal and Error.** The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Administrative Law: Appeal and Error.** In reviewing the decision of an administrative tribunal on a petition in error, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence.
3. **Constitutional Law: Ordinances: Presumptions: Proof: Appeal and Error.** When passing on the constitutionality of an ordinance, an appellate court begins with a presumption of validity so that the burden of demonstrating a constitutional defect rests with the challenger.
4. **Constitutional Law: Ordinances.** The void-for-vagueness doctrine requires that an ordinance define the prohibited conduct with sufficient definiteness such that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
5. **Employment Security: Words and Phrases.** In the employment context, misconduct is generally defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.
6. **Statutes.** A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Reversed and remanded with directions.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

William A. Harding and Adam J. Prochaska, of Harding, Shultz & Downs, and Douglas R. Walker, Grand Island City Attorney, for appellee.

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

GERRARD, J.

NATURE OF CASE

Howard L. Maxon, a former officer of the City of Grand Island, Nebraska, appeals from the order of the district court affirming the termination of his employment by the city. Pursuant to Grand Island city ordinance § 2-22, an officer of the city, such as Maxon, may be removed from office by the mayor for "misconduct." Because we conclude that the city's allegations against Maxon do not constitute misconduct, we reverse the judgment of the district court and remand the cause to the court with directions to provide relief in a manner that is not inconsistent with this opinion.

STATEMENT OF FACTS

Maxon served as the emergency management director of the City of Grand Island and Hall County for approximately 25 years. As the emergency management director, Maxon was considered an appointive officer of the City of Grand Island.[1]

On February 15, 2005, Gary Greer, the Grand Island city administrator, asked Maxon to come to Greer's office, where Greer took Maxon's keys, asked him to sign a letter of resignation, and then asked him to leave. Maxon refused to sign the letter and ultimately left the building. Greer issued a letter to Maxon, dated February 15, 2005, informing him that he was being suspended with pay, effective immediately. The letter indicated that a copy of the letter would be sent to the mayor and that Greer was requesting that Maxon be discharged at the earliest possible time. The letter set forth specific instances in which Greer considered Maxon's conduct to have been unacceptable for a director of the City of Grand Island.

The following day, February 16, 2005, Maxon wrote a letter to the mayor requesting a hearing to appeal the notice of discharge and asking that he be permitted to continue working pending the outcome of the hearing. Maxon's request to continue working was denied.

On February 25, 2005, in compliance with § 2-22, the mayor signed and filed formal charges of misconduct against Maxon.

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[1] Grand Island City Ordinance, ch. 2, art. II, § 2-21.

The alleged charges of misconduct were divided into four categories: (1) unsatisfactory performance; (2) incompetence; (3) demeaning, disruptive, and uncooperative conduct in the workplace; and (4) insubordination. Instances of each were specified in the charges.

The hearing before the city council was held on March 29, 2005. At the time of the hearing, the city chose to prosecute only three of the four charges of misconduct, removing the third category, "Demeaning, Disruptive and Uncooperative Conduct in the Work Place." During the course of the hearing, both the city and Maxon were allowed to submit evidence and examine witnesses.

Unsatisfactory Performance

In support of its contention that Maxon's job performance was unsatisfactory, the city offered into evidence two of Maxon's performance evaluations that Greer had conducted. The first evaluation occurred on April 27, 2004, and Greer concluded that Maxon had met or exceeded expectations in some areas but needed improvement in other areas, including dependability, productivity, initiative, attitude, self-improvement, leadership, and training.

Greer performed a second performance evaluation of Maxon on February 9, 2005. The results of this evaluation indicated that Maxon's job performance had not improved. The evaluation provided that Maxon still needed improvement in all of the same areas as in his April 2004 evaluation and also needed improvement in the areas of quality, versatility, communication skills, and delegation.

Maxon presented evidence that all his performance evaluations prior to the time Greer became the city administrator were satisfactory. On cross-examination, Greer admitted that his performance evaluations of Maxon were vastly different when compared to the evaluations of prior supervisors. Maxon testified that he was "shocked" when Greer informed him that his performance was unsatisfactory.

Incompetence

With regard to the city's allegation that Maxon was incompetent, the city presented evidence that while Maxon was the

emergency management director, 911 emergency dispatch service surcharges increased from 50 cents per telephone landline to $1 per telephone landline, which should have resulted in an increase in revenue for Maxon's department. David Springer, the finance director for the City of Grand Island, testified that he asked Maxon multiple times if everything was "on track" for the surcharge to be increased starting on January 1, 2002, and that Maxon assured him that it was. However, Springer testified that Maxon failed to implement the surcharge increase for 2002 and that this resulted in a 1-year delay and cost the city an estimated $100,000 to $180,000 in lost revenue.

Maxon testified that he did everything he could to facilitate the 911 surcharge implementation process and that any delay was not his fault, but was the result of the county board's failure to act in a timely manner. Maxon presented evidence that at a July 11, 2000, county board meeting, he and a committee of the Hall County Board of Supervisors recommended increasing the 911 surcharge. The board, however, voted to table the recommendation. The record shows that the next time the county board discussed the increase concerning the 911 surcharge was on November 13, 2001.

The Hall County clerk testified that at this meeting, it was Maxon who brought to the board's attention the notice requirements to be complied with before implementing the surcharge increase. The county board met on December 18, 2001, and again discussed the 911 surcharge increase. The county clerk testified, however, that the board "took no action at that time with respect to the 911 surcharge." The resolution to increase the 911 surcharge was eventually adopted by the county board on July 16, 2002.

With respect to this 1-year delay, Maxon testified that "we thought everything was fine and then at the last minute we found out that the telephone companies . . . had to be notified." When asked about a September 2000 letter generically addressed from Qwest Communications, Inc., to "QWEST Enhanced 911 Customer," which provided information that such notice was required, Maxon testified that he did not recall receiving the letter, and his customary initials acknowledging receipt were not contained on the letter.

Greer also testified that he asked Maxon to configure the telephone system so that National Public Radio would play when a caller was placed on hold. Approximately 1 month after asking Maxon to perform this responsibility, the system had still not been configured. Shortly thereafter, Greer reassigned this responsibility to another department. Maxon testified that after receiving this assignment, he discovered a broken cable which he unsuccessfully attempted to repair. Maxon explained that he contacted a vendor, who then repaired the broken cable shortly before Greer reassigned the project.

INSUBORDINATION

The city's remaining charge against Maxon involved allegations of insubordination. The city presented evidence that Greer interviewed every employee in Maxon's department and then created an interoffice memorandum, addressed to Maxon, that summarized the content of the interviews and made suggestions for correcting certain problems. Greer concluded the memorandum by stating, "I would encourage you to share this memo (post it on the wall) and discuss its contents with department team members." Greer testified that he expressly told Maxon to post this memorandum on the wall, but Maxon failed to do so.

Maxon testified that although he did not post the memorandum on the wall, he did share the memorandum with the department team leaders. In response to why he did not post the memorandum on the wall, Maxon explained that he and another official in his department felt that it "would not further the betterment of the department at that time." Maxon further testified that although the memorandum was not posted on the wall, it was eventually distributed to all of the employees.

The city council voted to affirm the charges of misconduct and the termination of Maxon's employment. Maxon filed a petition in error with the district court seeking review of the city council's determination. The district court affirmed the city council's decision. Maxon appealed.

ASSIGNMENTS OF ERROR

Maxon assigns, restated and renumbered, that the district court erred in (1) finding that § 2-22 is not unconstitutionally

vague, (2) determining that there was sufficient evidence in the record to sustain the formal charges of misconduct against him and that he received proper notice of those charges, (3) failing to find that the city had violated his procedural due process rights, (4) finding that he received proper notice of the charges against him when the city adduced evidence outside of the formal charges, (5) finding that his failure to request a continuance at the hearing waived any procedural defects he may have had regarding the city's failure to formally appoint a special assistant city attorney to prosecute the charges against him, (6) concluding that the interlocal agreement between the city and Hall County allowed the city to unilaterally terminate him, and (7) failing to conclude that the city council was required to make findings of fact and conclusions of law relating to its determination to affirm the charges of misconduct against him.

STANDARD OF REVIEW

[1] The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.[2]

[2] In reviewing the decision of an administrative tribunal on a petition in error, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence.[3]

ANALYSIS

UNCONSTITUTIONALITY OF § 2-22

[3,4] We first consider Maxon's assertion that § 2-22 is unconstitutionally vague. When passing on the constitutionality of an ordinance, this court begins with a presumption of validity. Therefore, the burden of demonstrating the constitutional defect rests with the challenger.[4] The void-for-vagueness doctrine

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[2] *Waste Connections of Neb. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005).

[3] *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004).

[4] *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993).

requires that an ordinance define the prohibited conduct with sufficient definiteness such that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.[5]

Section 2-22 provides in relevant part that the mayor may remove an officer of the city "for misconduct" and establishes the procedure by which an officer may be terminated, including written charges and a hearing before the city council. Maxon argues that because the ordinance neither defines misconduct nor explains the type of behavior that would qualify as misconduct, it is unconstitutionally vague and violates the due process provisions of the U.S. Constitution and the Nebraska Constitution. Accordingly, we must determine whether the term "misconduct" as used in § 2-22 is unconstitutionally vague.

[5] In the context of an employment case involving an employee's request for unemployment benefits, although the term "misconduct" was not defined in the applicable statute, we concluded that the definition of "misconduct" was well established. We explained:

> "While the term 'misconduct' is not specifically defined in the statute, it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations."[6]

While the facts of the present case involve an ordinance dealing with the removal of an employee, as opposed to an employee's ability to receive unemployment benefits, we do not

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[5] *Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001).

[6] *Poore v. City of Minden*, 237 Neb. 78, 80, 464 N.W.2d 791, 793 (1991) (quoting *Stuart v. Omaha Porkers*, 213 Neb. 838, 331 N.W.2d 544 (1983)). See, also, *Douglas Cty. Sch. Dist. 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469 (1998).

find this to be a relevant distinction. There is no logical reason why the generally accepted definition of misconduct in an employment setting should not likewise apply to § 2-22 in the present case.

[6] For an ordinance to meet constitutional standards, it is not necessary that it define or describe every conceivable situation under which misconduct may be found. As we have noted in previous cases, when evaluating an ordinance for vagueness, we do not seek mathematical certainty, but, rather, flexibility and reasonable breadth.[7] Moreover, a statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.[8]

We conclude that the term "misconduct," as used in the context of an employment relationship such as that found in § 2-22, has the same generally accepted meaning as in our prior cases dealing with unemployment benefits. Unlike some other settings where the term "misconduct" has been found to be unconstitutionally vague,[9] we find that the term, as used in an employment context, carries a common enough meaning to satisfy the requirements of due process and, therefore, is not unconstitutionally vague.

Allegations of Misconduct

Maxon next argues that the allegations of misconduct with which he has been charged, specifically, unsatisfactory performance, incompetence, and insubordination, do not constitute misconduct as required by § 2-22. We agree.

Pursuant to the generally accepted definition of "misconduct" previously discussed, in order for the city to remove Maxon, his alleged behavior must include conduct that would evidence wanton and willful disregard of the employer's interests, deliberate

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[7] *Howard v. City of Lincoln*, *supra* note 4.

[8] *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000).

[9] See, e.g., *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966) (statute allowing jury to assess costs against acquitted criminal defendant where it found defendant guilty of "misconduct"); *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969) (university disciplinary proceeding).

violation of rules, disregard of standards of behavior which the employer can rightfully expect from the employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.[10]

The city's allegations of unsatisfactory performance, incompetence, and insubordination are not categories of job performance that are commonly understood to be "misconduct" in an official capacity. While we question whether conduct characterized as unsatisfactory performance or incompetence could ever qualify as misconduct, as that term is commonly understood, on the specific facts presented in this case, they certainly do not. We also recognize that under certain circumstances, insubordination may rise to the level of misconduct. Again, however, the fact that Maxon chose not to post Greer's memorandum on the wall does not satisfy that threshold.

In concluding that Maxon's conduct rises to the level of "misconduct" as required by § 2-22, the dissent relies on its understanding of one aspect of "misconduct," which is "negligence which manifests culpability," or, stated another way, "culpable negligence." The dissent asserts, relying on dictionary definitions of "negligence" and "culpability," that "negligence which manifests culpability," or "culpable negligence," is satisfied upon a mere showing of blame for ordinary negligence. But the same dictionary defines "culpable negligence" as conduct that "while not intentional, involves a disregard of the consequences likely to result from one's actions,"[11] and further explains that culpable negligence "'means something more than negligence'" and "'has been held to amount to more than "blameworthy" conduct . . . .'"[12]

This is consistent with the well-established principle that culpable negligence, as contemplated by § 2-22, requires a showing of conduct that rises above that which would generally qualify

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[10] *Poore v. City of Minden, supra* note 6.

[11] Black's Law Dictionary 1062 (8th ed. 2004).

[12] *Id.* at 1062. Accord 65 C.J.S. *Negligence* § 19 (2000).

as ordinary or simple negligence.[13] Our view of "culpable negligence" fundamentally differs from the dissent's view. While difficult to precisely define, culpable negligence is more than simple negligence and less than an intentional act—but on a sliding scale, culpable negligence is much closer to an intentional disregard of the employer's interests than it is to mere negligence (i.e., neglect of duty). As explained by another court, "culpable negligence" consists of

> acts which are . . . unreasonable and taken in disregard of a known or obvious risk . . . . Thoughtless, heedless, or inadvertent acts do not constitute culpable negligence, nor do mere errors in judgment or simple inattention. Mistakes in judgment resulting from inexperience, excitement, confusion, or inattention likewise do not constitute culpable negligence.[14]

Thus, in order for the city to establish that Maxon's conduct constitutes "negligence which manifests culpability," the city must prove more than ordinary negligence in the performance of duty. Even viewing the evidence in a light most favorable to the city, which we must, the circumstances with regard to the 911 surcharge issue present, at most, a disputed case of ordinary negligence in the performance of duty which, as already discussed, is an insufficient ground for terminating Maxon *for misconduct* under § 2-22.

We note that Maxon is not an elective officer within the scope of Neb. Rev. Stat. § 16-217 (Reissue 1997), and there is nothing that would prevent a municipality from enacting an ordinance that would empower the city to terminate an employee, such as Maxon, for behavior such as incompetence, neglect of duty, insubordination, or even official misconduct, so long as the categories or definitions are sufficient to give persons of common

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[13] See, *Favreau v. Dept. of Employment and Training*, 151 Vt. 170, 557 A.2d 909 (1989); *Bettencourt v. Pride Well Service, Inc.*, 735 P.2d 722 (Wyo. 1987); *Byers v. Ritz*, 890 So. 2d 343 (Fla. App. 2004); *Liberty Mortg. v. National City Bank*, 755 N.E.2d 639 (Ind. App. 2001); *Matter of Coniber v. Hults*, 15 A.D.2d 252, 222 N.Y.S.2d 773 (1962).

[14] *Martin v. Alley Const., Inc.*, 904 P.2d 828, 832 (Wyo. 1995).

intelligence adequate notice of the transgressing conduct.[15] However, § 2-22, as it currently reads, provides no such additional categories. Accordingly, the only behavior for which the city may remove Maxon from office is misconduct, and the city's evidence and allegations of unsatisfactory performance, incompetence, and insubordination do not rise to the level of misconduct as that term is generally understood.

We conclude that the allegations raised against Maxon do not rise to the level of misconduct as required by § 2-22. Because this conclusion is dispositive, we need not address Maxon's other assignments of error.

CONCLUSION

For these reasons, we reverse the judgment of the district court with directions to reverse the decision of the city council and provide relief in a manner that is not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

[15] See *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

CONNOLLY, J., dissenting.

I join the part of the majority opinion that holds that the term "misconduct" is not unconstitutionally vague. But I dissent because I believe Maxon's carelessness in handling the surcharge amounted to misconduct. The majority opinion concludes that the term "misconduct" in the context of an employment relationship includes "'negligence which manifests culpability'." This definition is well established within our unemployment benefits jurisprudence.

Negligence is commonly understood as the "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation,"[1] and culpability means "[b]lameworthiness."[2] Thus, I interpret "negligence which

[1] Black's Law Dictionary 1061 (8th ed. 2004).

[2] *Id.* at 406.

manifests culpability" as an ordinary negligence standard with a showing of blameworthiness. The majority opinion, however, asserts that "negligence which manifests culpability" is equivalent to "culpable negligence," a term of art with a distinct legal definition. But in assuming that these terms are the same, I believe the majority opinion fails to give proper meaning to the selected words.

In construing a statute, words are to be given their ordinary and common meaning, unless they have acquired a technical or special legal meaning, or a different meaning is apparent from the context of the words.[3] I believe the same principle applies when considering language, as developed by case law. It seems to me one would not understand the term "negligence which manifests culpability" (or blameworthiness) to require "'more than negligence'" or conduct which is "'"more than 'blameworthy,'"'" as the majority opinion holds. And the context of this phrase does not suggest that such a meaning is more appropriate than its common meaning. Because we have not used the term "culpable negligence" in defining misconduct, I believe that its technical and legal definition is inapplicable here.

In reviewing the decision of an administrative tribunal on a petition in error, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence.[4] The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did from the testimony and exhibits contained in the record before it.[5] Stated another way, the evidence is "sufficient as a matter of law" if a judge could not, were the trial to a jury, direct a verdict.[6] It is something less

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[3] See 73 Am. Jur. 2d *Statutes* §§ 124 and 152 (2001). See, also, e.g., *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006).

[4] *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004).

[5] *Id.*

[6] See *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 471, 364 N.W.2d 7, 11 (1985).

than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions.[7]

The record shows that Maxon, the emergency management director for the City of Grand Island and Hall County, and a committee of the Hall County Board of Supervisors (County Board) recommended increasing the 911 surcharge from $.50 to $1 per access line per month at a County Board meeting on July 11, 2000. The County Board voted to table the recommendation because it needed more information. The County Board did not address the 911 surcharge again until November 13, 2001.

Maxon testified that he worked on the recommendation during 2001. Springer, the treasurer and finance director of the City of Grand Island, testified that he asked Maxon several times that year if everything was "on track" for the surcharge to be increased starting on January 1, 2002. Maxon assured him that it was and also assured him that he would notify Qwest Communications, Inc., the main service supplier, of the change. But Maxon testified he discovered, "at the last minute," in 2001 that state law required notice to the telephone companies before a surcharge could be changed. The record, however, contains a letter from Qwest Communications, Inc., dated September 2000 that provided information that such notice was required.

Because the telephone companies did not receive proper notice, the 911 surcharge could not be put into effect for 2002 and was delayed until 2003. City officials estimated that Maxon's department lost $100,000 to $180,000 in revenue because of the delay. Maxon claims that he was not responsible for the failure to implement the 911 surcharge increase by 2002 because he "did everything [he] could to facilitate that process." Instead, he places the blame on the County Board for tabling the recommendation. But the testimony from city officials shows that Maxon was in charge of implementing the 911 surcharge. When asked why Maxon would be responsible for the delay and revenue loss, Springer testified, "[H]e was the director of the department . . . and he has the responsibility for that department for the revenues. He budgeted the revenue and he should

[7] See *id.*

have been following up on it." And, as stated above, Maxon had assured Springer that he was on track.

Under our standard of review, I believe that sufficient evidence supports the city council's decision to terminate Maxon's employment because of his mishandling of the 911 surcharge implementation. Maxon was in charge of the 911 surcharge, and he repeatedly assured city officials that he would have it done in time to be implemented in 2002. Nearly 1½ years passed between the first time the surcharge was presented to the County Board and the next time it appeared on the County Board's agenda. Yet, in all that time, Maxon neglected the notice requirements for the public hearing. And while he argues he was not at fault for the County Board's delay, the evidence suggests otherwise.

Despite Maxon's excuses, there was sufficient evidence to support that Maxon was negligent in implementing the 911 surcharge and that his negligence caused the city to lose significant revenue. I believe these facts fit the definition of misconduct as "negligence which manifests culpability." Thus, I would affirm.

WRIGHT, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
DARIN C. YORK, APPELLANT.
731 N.W.2d 597

Filed May 25, 2007. No. S-06-957.

1. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
3. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at

the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

4. **Postconviction: Constitutional Law.** Where an issue of constitutional dimensions has been raised in a direct appeal of a criminal conviction, and that issue was not considered or ruled upon by the Supreme Court in the direct appeal, the issue may properly be raised in a subsequent motion for postconviction relief.
5. **Res Judicata.** The doctrine of res judicata, or claim preclusion, only bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if the former judgment was on the merits.
6. **Effectiveness of Counsel: Appeal and Error.** An ineffective assistance of counsel claim is not procedurally barred if it was raised on direct appeal but not expressly decided on the merits.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a plaintiff seeking postconviction relief has different counsel on appeal than at trial, the plaintiff's motion for postconviction relief is procedurally barred if the plaintiff (1) knew of the issues assigned in the postconviction motion at the time of the plaintiff's direct appeal, (2) failed to assign those issues on direct appeal, and (3) did not assign as error the failure of appellate counsel on direct appeal to raise the issues assigned in the postconviction motion.

Petition for further review from the Nebraska Court of Appeals, CARLSON, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Morrill County: PAUL D. EMPSON, Judge. Reversed and remanded with directions.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly Klein for appellee.

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

GERRARD, J.

NATURE OF CASE

In 2005, Darin C. York was convicted of incest in the district court. On direct appeal, York argued that his trial counsel was ineffective, but conceded that the record was inadequate to review the issue, and the issue was only being raised in order to preserve it for a later postconviction action. The Nebraska Court of Appeals granted the State's motion for summary affirmance, citing Neb. Ct. R. of Prac. 7B(2) (rev. 2001).[1]

[1] See *State v. York*, 14 Neb. App. xlvii (No. A-05-1188, Feb. 27, 2006).

York filed a postconviction motion raising his ineffective assistance of counsel claims. The district court dismissed York's motion without an evidentiary hearing, concluding that the claims were procedurally barred. York appealed. The Court of Appeals granted the State's motion for summary affirmance.[2] The primary issue in this petition for further review is whether the Court of Appeals' summary affirmance on direct appeal was a disposition on the merits of York's ineffective assistance of counsel claims.

STATEMENT OF FACTS

York was convicted, pursuant to a guilty plea, of one count of incest[3] and was sentenced to a term of 4 to 6 years' imprisonment. During his guilty plea and sentencing, York was represented by a private attorney retained by York's family.

York, represented by different counsel, appealed his conviction and sentence to the Court of Appeals. On direct appeal, York claimed, among other things, ineffective assistance of trial counsel. In his brief on direct appeal, York cited two specific instances that he alleged constituted ineffective assistance of his trial counsel. First, York assigned as error that his "plea of guilty was not voluntary because it was based on an assurance from his attorney that he would receive a sentence of probation." Second, York alleged that his trial counsel had a conflict of interest because his attorney was simultaneously representing York's sister, the alleged victim, in a civil personal injury case.

York conceded that his ineffective assistance of counsel claim had not been raised in the trial court and that the record was inadequate to review the issue. York explained that he was nevertheless including this assignment of error in order to preserve the issue for a later postconviction action.

The State filed a motion for summary affirmance, arguing in relevant part that York's ineffective assistance of counsel arguments were without merit. However, the State's motion for summary affirmance "acknowledge[d]," in part, that the court "may find that the record is insufficient to evaluate . . . the assignment

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[2] See *State v. York*, 15 Neb. App. ___ (No. A-06-957, Jan. 18, 2007).

[3] See Neb. Rev. Stat. § 28-703 (Reissue 1995).

of error." Without setting forth a specific basis for its ruling, the Court of Appeals granted the State's motion for summary affirmance, citing only rule 7B(2) in its minute entry.

On April 10, 2006, York, through the same counsel that represented him on direct appeal, filed the postconviction motion that is the subject of this present appeal. In his postconviction motion, York alleged, in relevant part, that he was entitled to postconviction relief because his trial counsel had a conflict of interest, was ineffective in advising him that pleading guilty would result in a sentence of probation, and was ineffective in failing to object when the State violated the plea agreement when it did not remain silent at sentencing.

The State filed a motion to dismiss in the district court, arguing that the issues raised in York's postconviction motion had already been raised and ruled upon in York's direct appeal to the Court of Appeals. The district court granted the State's motion to dismiss without an evidentiary hearing, concluding that the issues raised were procedurally barred. The court determined that the issues relating to the conflict of interest and sentencing advice had been raised on direct appeal and had been "ruled on by the Court of Appeals when [it] granted the [State's] Motion for Summary Affirmance." With respect to the alleged breach of the plea agreement, the court concluded that it was procedurally barred because it had not been raised on direct appeal, but could have been.

York appealed to the Court of Appeals. The State filed a motion for summary affirmance, arguing that the district court correctly determined that the issues raised were procedurally barred. The State asserted that "the granting of the state's motion for summary affirmance [in the direct appeal] constitutes a resolution on the merits" of the ineffective assistance of counsel issues "such as they were," and cited *State v. Lotter*[4] and *State v. Caddy*[5] for the proposition that arguments that were or could have been raised on direct appeal are procedurally barred on postconviction review.

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[4] *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

[5] *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

The Court of Appeals granted the State's motion for summary affirmance with the following minute entry: "Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001)."[6] We granted York's petition for further review.

ASSIGNMENT OF ERROR

York assigns that the Court of Appeals erred in sustaining the State's motion for summary affirmance.

STANDARD OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[7]

ANALYSIS

York argues that he is entitled to an evidentiary hearing on his allegations of ineffective assistance of counsel. York argues that both the district court and the Court of Appeals incorrectly interpreted the Court of Appeals' summary affirmance on direct appeal as being a disposition of his ineffective assistance of counsel claims on the merits.

[2,3] In raising his ineffective assistance of counsel arguments on direct appeal, but noting that the record was insufficient to address the claims, York was following the established procedure in Nebraska for preserving ineffective assistance of counsel claims for later review. We have said that in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.[8] Claims of ineffective assistance of counsel

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[6] *State v. York, supra* note 2.

[7] *State v. Marshall*, 272 Neb 924, 725 N.W.2d 834 (2007).

[8] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.[9]

The State contends that the Court of Appeals' summary affirmance on direct appeal constituted a resolution of York's ineffective assistance of counsel claims on the merits and that thus, these same claims are now procedurally barred on postconviction review. The record does not support this argument.

[4] In *State v. Svoboda*,[10] we held that an issue is not procedurally barred if not "'litigated'" in a prior proceeding. In that postconviction case, we had affirmed the judgment on direct appeal, because the defendant had not made a then-necessary motion for new trial.[11] In a subsequent postconviction proceeding, the State argued that the constitutional issues raised were procedurally barred. We disagreed, explaining that because we had not considered or passed upon the issues raised on direct appeal, they had not been resolved on the merits. We held that where an issue of constitutional dimensions has been raised in a direct appeal of a criminal conviction, and that issue was not considered or ruled upon by this court in the direct appeal, the issue may properly be raised in a subsequent motion for postconviction relief.[12]

[5,6] Although the strict doctrine of res judicata does not apply to a postconviction action,[13] we have applied res judicata principles in determining whether issues are procedurally barred.[14] The doctrine of res judicata, or claim preclusion, only

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[9] *Id.*

[10] *State v. Svoboda*, 199 Neb. 452, 454, 259 N.W.2d 609, 611 (1977).

[11] See *State v. Svoboda*, 194 Neb. 663, 234 N.W.2d 901 (1975).

[12] *Svoboda, supra* note 10. See, also, *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991).

[13] See *State v. Parker*, 180 Neb. 707, 144 N.W.2d 525 (1966).

[14] See *State v. Pilgrim*, 188 Neb. 213, 196 N.W.2d 162 (1972).

bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if the former judgment was on the merits.[15] We conclude that the same principle applies in postconviction actions, and we specifically hold that an ineffective assistance of counsel claim is not procedurally barred if it was raised on direct appeal but not expressly or necessarily decided on the merits.

Applying the foregoing principles to the present case, we determine that the ineffective assistance of counsel claims raised in York's direct appeal brief, specifically, his allegation that trial counsel had a conflict of interest and incorrectly advised him that pleading guilty would result in a sentence of probation, are not procedurally barred. Given our review of the record, which revealed a clear lack of evidence relating to York's claims, and the fact that York conceded in his brief to the Court of Appeals that the record was inadequate, we cannot say that the merits of York's claims were either "directly addressed" or "necessarily included" in the Court of Appeals' nonspecific minute entry sustaining the motion for summary affirmance. Accordingly, the Court of Appeals' summary affirmance on direct appeal cannot be read to have disposed of the merits of the ineffective assistance of counsel claims raised in York's brief, and the district court and Court of Appeals erred in concluding otherwise.

[7] However, York's allegation that his trial counsel was ineffective for failing to object when the State breached an alleged promise to remain silent during sentencing is procedurally barred. Unlike York's other two allegations, this particular claim was not addressed in his brief on direct appeal. Rather, York raised this argument for the first time in his postconviction motion. When a plaintiff seeking postconviction relief has different counsel on appeal than at trial, the plaintiff's motion for postconviction relief is procedurally barred if the plaintiff (1) knew of the issues assigned in the postconviction motion at the time of the plaintiff's direct appeal, (2) failed to assign those issues on direct appeal, and (3) did not assign as error the

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[15] See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

failure of appellate counsel on direct appeal to raise the issues assigned in the postconviction motion.[16]

In the present case, York's appellate counsel knew or should have known about the alleged promise by the State to remain silent during sentencing and trial counsel's failure to make the proper objection. Because trial counsel's ineffectiveness on this issue was not raised on direct appeal, but could have been, it is now procedurally barred.

CONCLUSION

The Court of Appeals' summary affirmance on direct appeal cannot be read to have disposed on the merits the ineffective assistance of counsel claims raised in York's brief. Accordingly, the district court and Court of Appeals erred in concluding that the claims raised by York on direct appeal were procedurally barred. However, York's allegation that his trial counsel was ineffective for failing to object when the State allegedly breached a promise to remain silent during sentencing is procedurally barred.

The judgment of the Court of Appeals is reversed, and the cause remanded to that court with directions to remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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[16] *State v. Caddy, supra* note 5.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JEFFREY E. DORTCH, RESPONDENT.

731 N.W.2d 594

Filed May 25, 2007. No. S-07-093.

Original action. Judgment of disbarment.

HEAVICAN, 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, Jeffrey E. Dortch, a member of the Nebraska State Bar Association. On January 25, 2007, the chairperson of the Committee on Inquiry of the Fourth Disciplinary District filed an application pursuant to Neb. Ct. R. of Discipline 12 (rev. 2002), requesting this court to temporarily suspend respondent from the practice of law because his attorney trust account was overdrawn. On February 14, the court entered an order requiring respondent to show cause why his license to practice law should not be suspended based upon the allegations set forth in the application. Respondent did not respond to the show cause order. On March 14, the court entered an order temporarily suspending respondent's license to practice law in this state until further order of the court.

On February 27, 2007, respondent was formally charged with violating certain disciplinary rules and his 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. 2005), and requested that this court enter an appropriate sanction. We determine that the requirements of disciplinary 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 20, 2001. On February 27, 2007, formal charges were filed by relator against respondent. Count I alleges that on May 19, relator received a letter from Isaac D. Brown alleging that respondent had been appointed to represent Brown in an appeal of a criminal conviction to the Nebraska Court of Appeals and that respondent had failed to file the appellate brief. Relator attempted to contact respondent by letter to gain

respondent's response to Brown's allegations, but respondent failed to respond. Thereafter, in accordance with Neb. Ct. R. of Discipline 9(G) (rev. 2001), relator prepared a complaint, which included allegations regarding respondent's alleged failure to file an appellate brief on behalf of Brown. On December 29, a copy of the complaint was sent to respondent, and respondent was informed he had 10 days to submit a response. Respondent did not submit a response. 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 Neb. Ct. R. of Prof. Cond. (rev. 2005): rules 1.1 (competence), 1.3 (diligence), 1.4 (communications), and 8.4 (misconduct).

Count II alleges that on June 28, 2006, respondent received notification from an Omaha bank that respondent's attorney trust fund account was overdrawn and that four checks written by respondent on that account had been dishonored due to insufficient funds. On June 29, relator sent respondent notice of the overdrawn status of his trust account and instructed respondent to file a written response explaining why his trust account did not have sufficient funds to honor checks presented against it. Respondent did not respond to relator's letter. Thereafter, in accordance with disciplinary rule 9(G), relator prepared a complaint, which included allegations regarding respondent's attorney trust account. On December 29, a copy of the complaint was sent to respondent, and respondent was informed he had 10 days to submit a response. Respondent did not submit a response. The formal charges allege that respondent's actions constitute a violation of respondent's oath as an attorney and Neb. Ct. R. of Prof. Cond. 1.15 (rev. 2005) (safekeeping property) and rule 8.4.

Under disciplinary 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 on March 28, 2007. The court file further reflects that respondent did not file an answer to the formal charges stated above. On April 13, relator moved for judgment on the pleadings pursuant to disciplinary rule 10(I).

ANALYSIS

Initially, we note that conduct alleged in the formal charges occurred after September 1, 2005. Therefore, this case is governed by the Nebraska Rules of Professional Conduct. Nonetheless, we are guided by the principles previously announced in our prior decisions under the Code of Professional Responsibility.

Disciplinary 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 disciplinary 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. Counsel for Dis. v. Lechner*, 266 Neb. 948, 670 N.W.2d 457 (2003). We conclude that by virtue of respondent's conduct, respondent has violated the following provisions of the Nebraska Rules of Professional Conduct: rules 1.1, 1.3, 1.4, 1.15, and 8.4. We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that "the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 981-82, 725 N.W.2d 845, 850 (2007). Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that "each case justifying the discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case." *Petersen*, 272 Neb. at 982, 725 N.W.2d at 851. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.*

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors. *Petersen, supra.*

Pursuant to the formal charges, to which respondent has failed to respond, respondent has engaged in conduct that has violated several disciplinary rules and his oath of office as an attorney. There is no record in the instant case of any mitigating factors. Under the provisions of the Code of Professional Responsibility, we have previously disbarred attorneys who, similar to respondent, had violated the disciplinary rules regarding trust accounts and failed to cooperate with the Counsel for Discipline during the disciplinary proceedings. See, *State ex rel. Counsel for Dis. v. Watts*, 270 Neb. 749, 708 N.W.2d 231 (2005); *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 consider such discipline to be appropriate under similar violations of the Nebraska Rules of Professional Conduct.

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. 2004), and upon failure to do so, respondent shall be

subject to punishment for contempt of this court. Respondent is further directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), disciplinary rule 10(P), and Neb. Ct. R. of Discipline 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF DISBARMENT.

ROMANA I. OLIVOTTO, WIDOW OF JOE OLIVOTTO, APPELLEE AND CROSS-APPELLANT, V. DEMARCO BROTHERS COMPANY, APPELLANT AND CROSS-APPELLEE.

732 N.W.2d 354

Filed June 1, 2007. No. S-05-1526.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
3. **Workers' Compensation: Proof.** In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of or occurring in the course of the employment proximately caused an injury which resulted in disability compensable under the act.
4. **Workers' Compensation: Evidence: Appeal and Error.** When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.
5. **Workers' Compensation: Rules of Evidence.** The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure.
6. **Workers' Compensation: Evidence: Appeal and Error.** Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
7. **Workers' Compensation: Appeal and Error.** On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.

8. **Workers' Compensation: Rules of Evidence.** Given the beneficent purposes of workers' compensation law in Nebraska, the compensation court is empowered to admit evidence not normally admissible under the rules of evidence applicable in the trial courts of this state.
9. **Workers' Compensation: Evidence: Expert Witnesses: Testimony.** In a workers' compensation case, a witness must qualify as an expert and the testimony must assist the trier of fact to understand the evidence or determine a fact in issue. The witness must have a factual basis for the opinion, and the testimony must be relevant.
10. **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 Nebraska Workers' Compensation Court. Affirmed as modified.

Thomas F. Hoarty, Jr., of Byam & Hoarty, for appellant.

Michael J. Lehan for appellee.

Jerald L. Rauterkus and Patrick R. Guinan, of Erickson & Sederstrom, P.C., L.L.O., for Cornhusker Casualty Company, workers' compensation carrier for appellant.

Ronald E. Frank, of Sodoro, Daly & Sodoro, for St. Paul Fire & Marine Insurance Company, workers' compensation carrier for appellant.

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

WRIGHT, J.

NATURE OF CASE

Joe Olivotto (Olivotto) worked for DeMarco Brothers Company (DeMarco) as a terrazzo installer from 1954 to 1980. During this time, Olivotto was allegedly exposed to asbestos. He died in 2004 from malignant pleural mesothelioma. In this workers' compensation action, Romana I. Olivotto (Mrs. Olivotto) sought from DeMarco death benefits and compensation for medical bills. The trial court awarded her a weekly indemnity benefit, medical expenses, and burial expenses. A review panel of the Workers' Compensation Court affirmed the award of medical and burial expenses but concluded the trial court erred in finding that Mrs. Olivotto was entitled to a

weekly indemnity benefit. DeMarco appeals, and Mrs. Olivotto has cross-appealed.

SCOPE OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005).

[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 the trial judge who conducted the original hearing. *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005).

FACTS

Olivotto was employed by DeMarco from 1954 to 1980 as a terrazzo installer, working in new construction and remodeling jobs in the Midwest. Terrazzo is a cement-based product that is mixed with marble chips and then ground to a marble-like finish.

Olivotto retired sometime in 1980 due to a heart condition not related to any occupational injury or disease. In November 2002, Olivotto began experiencing difficulties with the accumulation of fluid in his lungs. He was first seen at Nebraska Methodist Hospital in January 2003. He was diagnosed in July with malignant pleural mesothelioma, and he underwent a surgical procedure to drain his pleural effusion. In August, he underwent a second surgery at the Mayo Clinic to address complications.

On December 15, 2003, Olivotto filed a petition in the Workers' Compensation Court seeking compensation and benefits for medical expenses. He alleged that during his employment with DeMarco, he was injuriously exposed to asbestos while working as a terrazzo installer.

The president of DeMarco testified that the tiling materials, terrazzo marble, and grout used in the trade did not contain asbestos. His company did extensive tilework in schools, offices, airports, hospitals, and shopping malls. The construction was primarily new construction rather than remodeling, where one normally encountered asbestos. He testified that terrazzo installers generally did not work alongside other tradesmen such as asbestos insulators.

DeMarco denied that Olivotto sustained any occupational disease or resulting disability arising out of or in the course of his employment and alleged that if there was any injurious exposure, it did not occur during Olivotto's employment with DeMarco. Olivotto died on April 24, 2004, and the parties stipulated that the petition could be amended to reflect Olivotto's death and substitute Mrs. Olivotto as the named plaintiff.

The trial court found by a preponderance of the evidence that Mrs. Olivotto sustained her burden of proof that her husband was exposed to asbestos in the work environment from 1954 to 1980. The court relied on the testimony of Olivotto and a coworker, John DePellegrin, that throughout the course of their employment as terrazzo installers, they were exposed at various times to asbestos materials used by other contractors and tradesmen. DeMarco objected to this testimony on the bases of hearsay and foundation, but the court found that while there was some technical merit to such objections, the Workers' Compensation Court was not bound by the usual common-law or statutory rules of evidence pursuant to Neb. Rev. Stat. § 48-168 (Reissue 2004). The court concluded that Olivotto and DePellegrin, having worked in the construction trade for a combined total of more than 75 years, had the requisite experience and knowledge to identify the existence of asbestos in their work environment.

The trial court noted Olivotto had testified that in the course of his career as a terrazzo installer, other tradesmen would be working at some of the same job locations installing asbestos. He did not recall any specific job where asbestos was used but stated that when he worked on a job at a post office sometime in the 1970's, workers in the same area sprayed asbestos. He testified that he was told to leave the area because asbestos was being sprayed and because the asbestos made the worksite

dangerous. He also remembered the spraying of asbestos in the 1960's. He testified that he removed floor tiles in a doctor's office sometime in the 1960's or 1970's and that there was asbestos in the tiles. However, Olivotto, who had limited ability to read English, admitted on cross-examination that he could not read the word "asbestos" and that he did not recall any one specific exposure.

Olivotto's coworker, DePellegrin, testified that he had worked for DeMarco from 1952 to his retirement in 1999 and that he had worked with Olivotto most of the time Olivotto worked for DeMarco. DePellegrin testified that they worked on a variety of construction and remodeling projects, including a post office, numerous schools, and hospitals. There was often a powdery substance in the air. DePellegrin said there were bags on the worksite which had the word "asbestos" on them. He could not remember exactly the dates or locations where asbestos was sprayed, because he did not pay much attention to it. He was sure there had been asbestos at a post office job.

DePellegrin stated on cross-examination that at the time he was working with Olivotto, asbestos was in almost every building. He stated that when asbestos was sprayed, it created dust, which the workers inhaled. The asbestos insulators were sometimes close to where he and Olivotto were working. On many occasions, DePellegrin saw bags of asbestos materials being mixed for use as insulation.

In spite of DePellegrin's difficulty remembering dates and jobs performed, the trial court determined that he was a credible witness and that although DePellegrin did not remember specific occasions when asbestos insulators were working nearby, he knew they had been present. The court found by a preponderance of the evidence that Mrs. Olivotto had sustained her burden of proof that her husband was exposed to asbestos in the work environment from 1954 to 1980.

The trial court found sufficient evidence that Olivotto's malignant pleural mesothelioma was caused by asbestos exposure on the job. It also found that there was sufficient authority to allow Mrs. Olivotto to bring a claim for outstanding medical expenses. DeMarco was ordered to pay medical expenses incurred for the treatment of Olivotto's mesothelioma in the sum of $113,594.25

and to reimburse Mrs. Olivotto for her insurance deductible of $4,800, as well as expenses for transportation and lodging at the Mayo Clinic of $726.28.

As to an indemnity benefit and burial expenses, the trial court determined that Olivotto was "injured" within the meaning of the Nebraska Workers' Compensation Act when he became disabled and sought treatment with Dr. Matthew McLeay, a pulmonologist, on January 29, 2003. The court stated that the evidence concerning Olivotto's exposure to asbestos from the beginning of 1954 until his retirement in 1980 made it difficult to pinpoint the last injurious exposure. The court found that Olivotto experienced a generalized exposure to asbestos in the work environment and that the last injurious exposure occurred on the final day Olivotto worked for DeMarco, which was September 30, 1980. The court found that Olivotto was entitled to a weekly indemnity benefit from the date of his injury, which was January 29, 2003. Mrs. Olivotto was therefore entitled as the surviving spouse to a weekly indemnity benefit from the date of Olivotto's death on April 24, 2004, in the amount of $297.76 per week during the pendency of her widowhood. The court awarded reasonable burial expenses not to exceed $6,000.

A Workers' Compensation Court review panel heard the case on July 26, 2005. Before the review panel, DeMarco assigned 12 errors concerning the trial court's award. Eight of the errors related to findings of fact made by the trial court or the admission of evidence at trial. The review panel affirmed the trial court's factual determination that Mrs. Olivotto sustained her burden of showing by a preponderance of the evidence that Olivotto's death from mesothelioma was the result of his exposure to asbestos while employed by DeMarco. The review panel found there was sufficient evidence which, if believed by the trier of fact, would support the trial court's finding of medical causation and its finding of the date of Olivotto's last injurious exposure. The review panel affirmed the trial court's findings as to compensation for Olivotto's medical bills and the right of Mrs. Olivotto to proceed without filing a separate action for revivor.

However, the review panel concluded that the trial court had erred in its determination that Mrs. Olivotto was entitled to a

weekly indemnity benefit. It opined that under the Nebraska Workers' Compensation Act, an injury has occurred as the result of an occupational disease when violence has been done to the physical structure of the body and a disability has resulted. Olivotto retired from DeMarco for reasons unrelated to mesothelioma, which did not manifest itself until shortly before his death. At that time, Olivotto had been retired for 23 years. Because he did not work after his retirement from DeMarco, it followed that Mrs. Olivotto was not entitled to a weekly indemnity benefit because no earnings were being accrued by Olivotto at the time the occupational disease resulted in injury.

The review panel therefore affirmed the award of the trial court in all respects except for its finding that Mrs. Olivotto was entitled to a weekly indemnity benefit. DeMarco appeals, and Mrs. Olivotto has cross-appealed.

ASSIGNMENTS OF ERROR

DeMarco's assignments of error claim that the trial court erred (1) in determining that Mrs. Olivotto met her burden to prove by a preponderance of the evidence that Olivotto suffered an accident or occupational disease arising out of or occurring in the course of his employment with DeMarco; (2) in admitting the testimony of DePellegrin and Olivotto concerning Olivotto's alleged exposure to asbestos-containing materials; (3) in receiving the opinion testimony of Drs. P. James Connor and Claude Deschamps concerning the causal relationship, if any, between Olivotto's development of mesothelioma and his work for DeMarco; (4) in finding that Olivotto's development of mesothelioma was causally related to his work for DeMarco; (5) in finding that Olivotto's last injurious exposure to asbestos occurred on September 30, 1980; (6) in refusing to admit the summary of the court's compliance officer dated January 2, 2004, concerning insurance coverage for DeMarco and the letter of insurance counsel regarding the policy information; and (7) in its calculation of medical expenses incurred by Olivotto and in awarding reimbursement for those medical expenses to Mrs. Olivotto in her capacity as a widow.

On cross-appeal, Mrs. Olivotto asserts that the review panel erred in failing to affirm the award of a weekly indemnity benefit

and that the trial court erred in affirming that the last date of injurious exposure was September 30, 1980.

ANALYSIS

[3,4] Our review is governed by the following legal principles: 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 the trial judge who conducted the original hearing. *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005). In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of or occurring in the course of the employment proximately caused an injury which resulted in disability compensable under the act. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998). When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

ADMISSION OF EVIDENCE

DeMarco claims that the trial court erred in concluding Olivotto suffered an occupational disease arising out of his employment and that it was error to admit Olivotto's and DePellegrin's testimony to prove Olivotto's exposure to asbestos. DeMarco asserts that the testimony lacked foundation and was hearsay and that Olivotto and DePellegrin did not have the requisite personal knowledge to render an opinion concerning the existence of asbestos at any worksite.

DePellegrin testified that he saw bags marked "asbestos" at one or more of the worksites. DeMarco argues this testimony was hearsay because it was an out-of-court statement offered to prove that Olivotto was exposed to asbestos during his employment with DeMarco.

[5-7] The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence or by any

technical or formal rules of procedure. § 48-168. See, *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996); Workers' Comp. Ct. R. of Proc. 10A (2006). Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001). On appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005).

[8] In *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 258 N.W.2d 922 (1977), we discussed the scope of the Nebraska Workers' Compensation Act. We stated that the act was one of general interest, not only to the worker and his employer, but to the state as well, and that the act should be construed so that technical refinements of interpretation would not be permitted to defeat it. Given the beneficent purposes of workers' compensation law in Nebraska, the compensation court is empowered to admit evidence not normally admissible under the rules of evidence applicable in the trial courts of this state. See *id.* The court can admit such evidence in order to investigate cases in the manner it judges is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act. See *id.* The act permits the compensation court to admit evidence that, over a proper objection, could not be introduced in a trial court in this state. See *id.*

In the case at bar, the question is whether the trial court abused its discretion in the admission of Olivotto's and DePellegrin's testimony. We conclude that it did not. There was sufficient foundation for testimony about exposure to asbestos because the trial court found that Olivotto and DePellegrin were skilled tradesmen and had the requisite experience and knowledge from more than 75 years of working in the construction trade to know the existence of asbestos in their immediate work environment. Such a determination was not an abuse of discretion by the trial court.

DePellegrin testified to various jobsites such as a post office, numerous schools, and hospitals where there was powder "flying"

around. He said there were bags on the worksite bearing the word "asbestos." Olivotto testified that when he worked on a job at a post office sometime in the 1970's, asbestos was sprayed and he was told to leave because the asbestos made the worksite dangerous.

DeMarco next argues there was no foundation for the evidence of causation. It claims that the medical history given to Olivotto's doctors was not consistent with his knowledge of exposure to asbestos. The trial court found by a preponderance of the evidence that Olivotto had sustained his burden of proof that he was exposed to asbestos in the work environment from 1954 to 1980. As the trial court noted, one of Olivotto's difficulties was that nearly a quarter of a century had passed from the date of his retirement until the first symptoms of mesothelioma appeared and he was diagnosed in 2003. We will not disturb the findings of fact by the compensation court unless they are clearly wrong. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005). The evidence was sufficient to support these findings of fact, and they were not clearly wrong.

MEDICAL CAUSATION

DeMarco argues that the trial court erred in finding that Olivotto's development of mesothelioma was causally related to his work for DeMarco. In its findings of medical causation, the trial court relied primarily upon the opinion of Dr. Connor. DeMarco claims that Dr. Connor's opinion was contrary to the evidence and was based upon testimony which should have been excluded for lack of proper foundation. DeMarco argues that Dr. Connor's testimony was not competent expert testimony of a causal connection between Olivotto's mesothelioma and his employment. DeMarco claims that Dr. Connor had no factual basis for his opinion because the documents upon which Dr. Connor relied were devoid of any information concerning the nature of Olivotto's employment with DeMarco and/or the potential exposure to asbestos in the course of Olivotto's employment.

The trial court found that Dr. Connor's report dated July 26, 2004, the medical records and reports of Dr. Deschamps, the depositions of Drs. Connor and Deschamps, and the affidavit of

Dr. Connor provided a "sufficient statement of medical causation" to establish that Olivotto's mesothelioma was due to asbestos exposure at work.

Prior to preparing his report, Dr. Connor reviewed a letter from Olivotto's attorney stating that Olivotto had previously testified in a deposition about his employment with DeMarco from 1954 to 1980. Dr. Connor was told that Olivotto and a coworker had previously testified concerning exposure to asbestos at various jobsites; that Olivotto had begun experiencing physical symptoms in 2002 and subsequently began a course of treatment which resulted in a diagnosis of malignant pleural mesothelioma following a biopsy at Nebraska Methodist Hospital; and that Olivotto sought treatment at the Mayo Clinic, where the diagnosis of mesothelioma was confirmed. Dr. Connor was also furnished with medical records from the office of Dr. McLeay, records from the Mayo Clinic, letters from Dr. Deschamps, and itemized bills incurred by Olivotto.

In a document labeled "Plaintiff's Rule 10 Medical Report," Dr. Connor stated that he had examined Olivotto's medical records and opined that the records reflected agreement with the medical community that mesothelioma was almost always asbestos related. He said that in cases in which the disease had not appeared to be asbestos related, the exposure may not have been remembered or observed. He was aware that the records included a history showing Olivotto had worked as a terrazzo installer on both new construction and remodeling projects in locations where plumbing, heating, insulation, and installation of wallboard containing asbestos was also underway. Dr. Connor reported that Olivotto had provided a history stating he knew he had been exposed to asbestos fiber in his occupation and that a coworker had given a similar history.

Dr. Connor stated that he had examined all of Olivotto's x rays, including CAT scans, that were available at Nebraska Methodist Hospital. He opined that the most dramatic film was that of a CAT scan showing Olivotto's right lung almost completely encased in a 1- to 2-centimeter-thick layer of mesothelioma. He noted that in reviewing records dating as far back as 2000, there had been evidence of thickened pleura, which could have been the result of asbestos exposure, and there were

instances where pleural calcification also might have been present, which was typical of asbestos exposure.

Dr. Connor also noted an area of rounded atelectasis in the lung base that he associated with asbestos exposure. Olivotto's pulmonary function test was consistent with asbestos-induced restrictive lung disease. There was also evidence of minimal obstruction, which Dr. Connor described as one of the earliest abnormalities found in people exposed to asbestos before clinical findings reveal any disease. Dr. Connor testified that he had reviewed the billing records for Olivotto's medical care and that all were related to care for mesothelioma and its associated complications.

It was Dr. Connor's opinion, based upon a reasonable degree of medical certainty, that the mesothelioma was caused by exposure to asbestos during Olivotto's work as a terrazzo installer.

[9] In a workers' compensation case, a witness must qualify as an expert and the testimony must assist the trier of fact to understand the evidence or determine a fact in issue. The witness must have a factual basis for the opinion, and the testimony must be relevant. *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004). From our review of the record, we conclude that Dr. Connor had a factual basis for his opinion.

Dr. Deschamps also gave a medical opinion that Olivotto's diagnosis of mesothelioma was related to occupational exposure to asbestos. Deschamps stated that occupational exposure to asbestos was a well-known factor in mesothelioma. The records attached to Dr. Deschamps' report showed that Olivotto had been a construction worker and had significant exposure to environmental hazards such as insulation, ceramics, and flooring over a 26-year period.

A determination concerning the sufficiency of the foundation for an expert's opinion is left to the discretion of the trial court. We conclude there was sufficient evidence to support the medical opinions of Drs. Connor and Deschamps, and the trial court did not abuse its discretion in admitting such evidence.

DATE OF LAST INJURIOUS EXPOSURE

DeMarco argues that the trial court erred in finding that Olivotto's date of last injurious exposure to asbestos was September 30, 1980. DeMarco was unable to locate any of its

insurance records for the period of 1954 through 1980. The records of the compensation court disclose only certain periods of coverage.

The trial court found that Olivotto experienced a generalized exposure to asbestos in the work environment from the beginning of his employment until his retirement in 1980. It concluded that the last injurious exposure occurred on the final day Olivotto worked for DeMarco, which the court found was September 30, 1980.

This court addressed the issue of the date of last injurious exposure in *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003). Barbara Morris ceased her employment with Nebraska Health System on October 9, 1998, when she suffered a reaction to latex that required her to seek emergency medical treatment. She had noticed symptoms later associated with an allergy to latex in the 1980's, but the allergy was not diagnosed until 1997, when her employer was the University of Nebraska Medical Center. In determining her date of last injurious exposure, we stated it was necessary to first determine the date of disability and then search backward to find the last causal relationship between the exposure and the disability.

We determined that the date of disability was October 9, 1998, the date of the injury resulting in Morris' disability. We concluded that the record supported the trial court's findings that the exposure on October 9 bore the requisite causal relationship to her disability and that the trial court's finding that Nebraska Health System was responsible for her benefits was not clearly wrong. Because Morris' employment with Nebraska Health System on the date of her disability exposed her to latex, that employer was properly held liable for her compensation benefits under the "last injurious exposure rule."

In *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 290-91, 307 N.W.2d 514, 520 (1981), we stated:

> The last injurious exposure, to be "injurious," must indeed bear a causal relationship to the disease. However, according to the authorities, this means simply that the exposure must be *of the type which could* cause the disease, given prolonged exposure. As described in *Mathis v. State Accident Insurance Fund*, 10 Or. App. 139, 499 P.2d

1331 (1972), an exposure which will support imposition of liability under this rule need not be proved to have been a "material contributing cause" of the disease. Indeed, to so require would bring the employee back to Square One by requiring "proof of the unprovable and litigation of the unlitigable." *Holden v. Willamette Industries, Inc., supra* at 301. As Larson notes at 17-87: "[O]nce the requirement of some contributing exposure has been met, courts . . . will not go on to weigh the relative amount or duration of the exposure under various employers . . . . As a result, in some cases carriers and employers that have been on the risk for relatively brief periods, perhaps only a few weeks, have nevertheless been charged with full liability for a condition that had developed over a number of years."

In *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995), the employee suffered from contact dermatitis due to substances in the workplace in 1960 and 1987 through 1990. The occupational disease did not manifest itself to a level of disability until March 1989. We stated:

> Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee becomes disabled and entitled to compensation. . . . Thus, the date that determines liability is the date that the employee becomes disabled from rendering further service. . . .
>
> . . . .
>
> The mere date of disability, however, does not end the inquiry. The second issue is the nexus between the exposure to the injury and the disability.
>
> In the case of occupational disease, liability is most frequently assigned to the carrier who was covering the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease. The employer or insurer at the time of the most

> recent exposure which bears a causal relation to the disability is generally liable for the entire compensation.

Id. at 719-20, 529 N.W.2d at 789 (citations omitted).

Olivotto was injured within the meaning of the Nebraska Workers' Compensation Act when he became disabled and sought treatment on January 29, 2003. Because he was not employed on that date, the trial court relied on the last injurious exposure rule to determine the date of the last causal relationship between his disability and his work-related exposure. There was no evidence that Olivotto was exposed to asbestos in any situation not related to his work for DeMarco. The trial court therefore determined that the last injurious exposure was the final date of Olivotto's employment with DeMarco, September 30, 1980. This finding of fact has the effect of a jury verdict and will not be disturbed unless it is clearly wrong. See *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005). Although DeMarco asks us to find that the last injurious exposure was December 31, 1979 (the last date of record that DeMarco had workers' compensation insurance on Olivotto before he retired), we decline to do so.

Award of Expenses

DeMarco claims the trial court erred in its calculation of the medical expenses incurred by Olivotto and in awarding Mrs. Olivotto medical expenses incurred by her deceased spouse. DeMarco argues that absent an action for revivor, the workers' compensation statutes do not provide Mrs. Olivotto with a basis upon which to recover Olivotto's medical expenses and/or disability benefits.

Neb. Rev. Stat. § 48-122(3) (Reissue 2004) provides that upon the death of an employee from injuries covered by the workers' compensation statutes, reasonable expenses of burial, not exceeding $6,000, shall be paid to his dependent or personal representative. The trial court awarded Mrs. Olivotto funeral expenses of $6,000. DeMarco asserts that § 48-122 does not provide for payment of any other medical, travel, or lodging expenses to a surviving spouse.

This court has previously affirmed the award of medical and hospital expenses to a surviving spouse. See, *Anderson v. Bituminous Casualty Co.*, 155 Neb. 590, 52 N.W.2d 814 (1952);

Cole v. M. L. Rawlings Ice Co., 139 Neb. 439, 297 N.W. 652 (1941). Neb. Rev. Stat. § 48-120(1) (Cum. Supp. 2006) states that the employer is liable for all reasonable medical, surgical, and hospital services. Section 48-122(3), in providing for burial expenses, states that the amount for those expenses shall not exceed $6,000, "without deduction of any amount previously paid or to be paid for compensation or *for medical expenses*." (Emphasis supplied.) Section 48-122 therefore identifies the ongoing obligation of the employer to pay medical expenses to a dependent following the death of the employee.

The record shows that DeMarco entered into a stipulation providing that the petition could be amended to reflect Olivotto's death and substitute Mrs. Olivotto as the named plaintiff. DeMarco cannot complain on appeal about the failure to file a revivor action when it stipulated in the trial court that Mrs. Olivotto could be substituted as the named plaintiff. There was no error on the part of the trial court in awarding medical expenses to Mrs. Olivotto as Olivotto's widow.

DeMarco also argues that the trial court erred as a matter of fact in including in the award $4,800 as reimbursement to Mrs. Olivotto for a medical deductible paid. The trial court awarded Mrs. Olivotto a total of $119,120.53. This figure included medical expenses of $113,594.25, a "[r]eimbursement to widow for medical deductible paid" of $4,800, and transportation and lodging expenses of $726.28. Mrs. Olivotto testified that the $4,800 deductible was part of the $113,594.25 total for medical expenses. Thus, allowing her to recover that amount twice constituted double recovery. DeMarco's argument on this point appears to be correct, and we conclude that the award for medical expenses should be reduced by $4,800.

ADMISSION OF INSURANCE RECORD

[10] DeMarco does not argue the assigned error related to the admission of a summary from the Workers' Compensation Court compliance officer concerning insurance coverage. 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. *City of Gordon v. Montana Feeders, Corp., ante* p. 402, 730 N.W.2d 387 (2007). We therefore will not consider this assigned error.

SUMMARY OF APPEAL

Pursuant to § 48-185, an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005). The evidence is sufficient to support the award in all respects, as modified by the review panel, except for the $4,800 described above.

CROSS-APPEAL

In her cross-appeal, Mrs. Olivotto assigns as error the decision of the review panel reversing the award of indemnity benefits and affirming the date of last injurious exposure as September 30, 1980.

The review panel concluded that the trial court erred as a matter of law in finding Mrs. Olivotto entitled to a weekly indemnity benefit based on Olivotto's average weekly wage on the date of his retirement on September 30, 1980. The panel cited *Ludwick v. Triwest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004), for the proposition that an injury has occurred as the result of an occupational disease when violence has been done to the physical structure of the body and a disability has resulted. The panel noted that Olivotto retired for reasons unrelated to mesothelioma and that he had been retired for 23 years at the time the mesothelioma manifested itself. Olivotto did not work after his retirement and was not earning any wages at the time of his injury. Therefore, the panel determined that Mrs. Olivotto was not entitled to a weekly indemnity benefit because no earnings were being accrued by Olivotto at the time of his injury.

In *Ludwick*, 267 Neb. at 899, 678 N.W.2d at 526, we held:

> [A] worker becomes disabled, and thus injured, from an occupational disease at the point in time when a permanent medical impairment or medically assessed work restrictions result in labor market access loss. . . . An employee's

> disability caused by an occupational disease is determined by the employee's diminution of employability or impairment of earning power or earning capacity.

(Citations omitted.)

Olivotto had been retired for more than 20 years at the time his work-related disability developed. He did not work at any other job during that time. Thus, he suffered no loss of access to the labor market and had no diminution of employability or impairment of earning capacity. The review panel was correct in reversing the trial court's award of indemnity benefits.

Mrs. Olivotto also objects to the trial court's finding that Olivotto's date of last injurious exposure was September 30, 1980. That issue has been resolved earlier in this opinion. There is no merit to her cross-appeal.

CONCLUSION

The judgment of the review panel is affirmed except that we reduce the award for medical expenses by $4,800. The cross-appeal is dismissed.

AFFIRMED AS MODIFIED.

CONNOLLY, J., participating on briefs.

DENNIS D. ROHDE AND ALINE I.M. ROHDE, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES, V. CITY OF OGALLALA, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

731 N.W.2d 898

Filed June 1, 2007. No. S-06-149.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.

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

George M. Zeilinger for appellants.

Jerrod M. Gregg, of McQuillan & McQuillan, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Dennis D. Rohde and Aline I.M. Rohde sued Kenneth Knoepfel and the City of Ogallala, Nebraska (City), for damages based on erroneous advice Knoepfel, the City's zoning director, provided concerning the subdivision of a tract of land. The Keith County District Court dismissed the action with prejudice, finding that the City had immunity from liability for damages under Neb. Rev. Stat. § 13-910(4) (Cum. Supp. 2002). The Rohdes appeal, and the City cross-appeals.

SCOPE OF REVIEW

[1] In actions brought pursuant to the Political Subdivisions Tort Claims Act (PSTCA), the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *McGrath v. City of Omaha*, 271 Neb. 536, 713 N.W.2d 451 (2006).

FACTS

In 2001, the Rohdes purchased a 5-acre tract of land within the city limits of Ogallala. The property included a house that the Rohdes were going to refurbish for relatives. They also planned to build a new house on the property, and they contacted Knoepfel for advice on subdividing the property. Knoepfel told the Rohdes they needed to have a survey completed and to subdivide the property into two equal tracts of 2½ acres.

A registered land surveyor performed a survey, which was submitted to the Ogallala Planning Commission and approved on September 10, 2001. The subdivision was approved by the city council on September 25. Two days later, the Rohdes were informed by the City that it had made a mistake and that the

Rohdes could not be granted a permit to build a new house on the property because city ordinances required that lots be a minimum of 3 acres. The Rohdes and their attorney went to the city council meeting on October 23. Knoepfel apologized for giving improper advice, but the city council later rescinded its approval of the subdivision.

The Rohdes sued, alleging that Knoepfel was negligent and provided them with incorrect information. They alleged damages of $35,000. The City and Knoepfel asserted that the claim was barred by § 13-910(1) through (4). The district court sustained a motion to dismiss on the basis of § 13-910(4) and also found that there was no duty owed to the Rohdes.

The Rohdes appealed, and the Nebraska Court of Appeals reversed the judgment and remanded the cause for further proceedings. See *Rohde v. Knoepfel*, 13 Neb. App. 383, 693 N.W.2d 564 (2005). The appellate court determined that the case could not be resolved on a motion to dismiss because there were issues concerning whether Knoepfel was acting at a policy level or functional level and whether approval of subdivisions was a ministerial act by a political subdivision.

Upon remand, the Rohdes argued that the Court of Appeals opinion was binding upon the district court and established as the law of the case that Knoepfel's actions were negligent and were not taken in the exercise of a discretionary function and that the City was liable for damages. Following a bench trial, the court found generally in favor of the City and against the Rohdes.

The district court determined that the Court of Appeals' decision "merely established that this Court was in error in sustaining the . . . Motion to Dismiss, thereby depriving the [Rohdes] of their right to a contested trial." The court found that Knoepfel was acting within the scope of his employment as the zoning director for the City, that Knoepfel was negligent in advising the Rohdes that they could subdivide the 5-acre tract into two equal tracts, and that the Rohdes were damaged.

However, the district court concluded that the City was immune from suit. Under § 13-910(4), the PSTCA does not apply to any claim based upon the revocation of a permit. The City had rescinded its prior approval of the subdivision when

it discovered the errors made by Knoepfel, the City's planning commission, and the city council. The court sustained a motion to dismiss filed by Knoepfel, dismissed the complaint with prejudice, and taxed all costs to the Rohdes.

ASSIGNMENTS OF ERROR

The Rohdes assign as error the district court's finding that their claim against the City was barred by § 13-910(4) and the dismissal of the action with prejudice.

ANALYSIS

At all times relevant to this case, § 13-910 provided in part: "The Political Subdivisions Tort Claims Act . . . shall not apply to: . . . (4) Any claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order."

The issue is whether the district court correctly determined that the City was exempt from liability under § 13-910(4). The Rohdes sought permission to subdivide their property into two sections. They were erroneously told by Knoepfel that subdivision was permissible and that each half should be 2½ acres. The City's ordinances required such plots to be a minimum of 3 acres in size. The City rescinded its original approval of the subdivision.

[2-4] Statutory interpretation presents a question of law. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Knapp v. Village of Beaver City, ante* p. 156, 728 N.W.2d 96 (2007). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *State ex rel. Columbus Metal v. Aaron Ferer & Sons*, 272 Neb. 758, 725 N.W.2d 158 (2006).

Section 13-910(4) is clear and unambiguous. Political subdivisions are not liable under the PSTCA for actions based upon the revocation of a permit or license. The City revoked its decision to issue a permit allowing the Rohdes to subdivide

their property because such division did not comply with City ordinances.

The Rohdes argue they were damaged as a result of the opinion of Knoepfel, who erroneously advised them concerning subdivision of their property. They claim Knoepfel was negligent at the operational level, and they rely upon *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996). In *Talbot*, this court held that actions carried out by an attorney related to collecting delinquent child support were operational activities which fell outside the scope of the discretionary function exemption of the PSTCA. *Talbot* concerned § 13-910(2) and did not mention § 13-910(4).

In actions brought pursuant to the PSTCA, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *McGrath v. City of Omaha*, 271 Neb. 536, 713 N.W.2d 451 (2006). Section 13-910(4) clearly provides that a political subdivision has immunity from suit for any claim based upon the revocation of a permit. The district court was correct in dismissing the action on this basis.

CROSS-APPEAL

In its cross-appeal, the City asserts that the district court erred in finding that the City owed a duty to the Rohdes, in finding that the actions of Knoepfel and the City were the proximate cause of the damages suffered by the Rohdes, and in finding that § 13-910(1) and (2) did not bar the Rohdes' claim. Having determined that the district court was correct in finding that the City was immune from liability under § 13-910(4), we do not address these claims.

CONCLUSION

The district court was correct in finding that the City was immune from suit for damages pursuant to § 13-910(4). Dismissal of the Rohdes' complaint was correct, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA ON BEHALF OF MINOR CHILD KAYLA T. ET AL., APPELLEES AND CROSS-APPELLANTS, V. LYLE D. RISINGER, APPELLANT AND CROSS-APPELLEE.

731 N.W.2d 892

Filed June 1, 2007. No. S-06-1089.

1. **Actions: Paternity: Child Support: Equity.** While a paternity action is one at law, the award of child support in such an action is equitable in nature.
2. **Paternity: Child Support: Appeal and Error.** A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
3. **Paternity: Appeal and Error.** In a de novo review in a filiation proceeding, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Parent and Child: Child Support: Public Policy.** A private agreement between parents that would deprive a child of support from one parent contravenes the public policy of this state.
5. **Judgments.** A decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty by the judgment debtor.
6. **Child Support.** Child support payments ordinarily vest as they accrue.

Appeal from the District Court for Rock County: MARK D. KOZISEK, Judge. Affirmed as modified.

Rodney J. Palmer, of Palmer & Flynn, P.C., for appellant.

Avery L. Gurnsey, Rock County Attorney, for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Lyle D. Risinger appeals a decree of paternity and child support order entered by the district court for Rock County. The court established Risinger as the father of Kayla T. and ordered him to pay child support and retroactive child support. The court rejected Risinger's assertion that he was not liable for child support because he had an agreement with Kayla's mother that she would not seek child support in return for his giving up all contact with Kayla. We affirm the district court's decree of paternity and support, but, as requested in the State's

cross-appeal, we modify the decree to reflect that retroactive child support was due upon entry of the judgment rather than payable in future installments.

STATEMENT OF FACTS

Kayla was born to Linda T. on June 9, 1988. Risinger had been in a sexual relationship with Linda in 1987, but the relationship ended prior to Kayla's birth. On March 31, 2005, the State of Nebraska filed a petition on behalf of Kayla and Linda against Risinger seeking to establish paternity, child support, and medical reimbursement. The State sought, inter alia, retroactive child support from the date of Kayla's birth.

Risinger filed an initial answer and two amended answers. In the filings, Risinger admitted paternity but affirmatively stated that he had been repudiated by Linda and told that he could not be involved in Kayla's life. Risinger asserted that Linda agreed to refrain from seeking child support in exchange for his agreeing not to see Kayla. Risinger denied that he should be required to pay child support until he had the opportunity to establish a relationship with Kayla. Risinger requested that he be given such opportunity and agreed that he should be required to pay reasonable child support after such relationship had been established. Risinger further asserted, however, that because of the agreement, Linda should be equitably estopped from collecting retroactive child support.

At a hearing on the State's petition, Risinger testified that in late 1987, after he learned that Linda was pregnant, he and Linda had a conversation in which they determined that their relationship was over. Risinger testified that he reluctantly agreed to Linda's request that because they were no longer involved, she did not want him to have anything to do with the baby. Risinger testified that Linda agreed that if he stayed out of the baby's life, she would not seek child support.

In her testimony at the hearing, Linda denied any such agreement. She testified that after a telephone call from Risinger in February 1988, she did not hear from him again until August 1997, when he called, asking to see Kayla. She told him supervised visits could be arranged if he paid all retroactive child support, but Risinger refused and stated he would wait until Kayla turned 18.

The district court entered a decree of paternity and child support order on September 6, 2006. The decree established Risinger as Kayla's father. With regard to support, the court noted the conflicting testimonies regarding the existence of an agreement by which Linda would not seek child support if Risinger stayed away from Kayla. The court found that the evidence supported Linda's version of events and that there was no agreement. The court determined that because Risinger did not carry his burden of establishing the existence of an agreement, equitable estoppel was not applicable.

The court ordered Risinger to pay child support of $591 per month beginning October 1, 2006. The court also determined that Risinger owed retroactive child support in the amount of $60,119, calculated from Kayla's birth until the date of the decree. The court ordered Risinger to pay the retroactive child support at a rate of $25 per month from October 1, 2006, through June 1, 2007, and then at a rate of $350 per month commencing July 1, 2007, and continuing each month thereafter until paid in full. The court ordered that there would be no interest on installments timely made but that interest would accrue on unpaid installments 30 days past due.

Risinger appeals the decree of paternity and support, and the State cross-appeals, challenging the payment schedule.

ASSIGNMENTS OF ERROR

Risinger asserts that the court erred in (1) finding that there was no agreement between him and Linda by which he would not see or visit Kayla in exchange for Linda's not seeking child support and (2) failing to find that Linda was equitably estopped from seeking child support.

In its cross-appeal, the State asserts that the district court erred in ordering Risinger to pay the retroactive child support in monthly installments rather than entering judgment for the full amount due with interest to accrue on the full amount from the date of judgment.

STANDARDS OF REVIEW

[1,2] While a paternity action is one at law, the award of child support in such an action is equitable in nature. *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 554 N.W.2d 769 (1996). A trial

court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *Id.*

ANALYSIS

Appeal: Equitable Estoppel Does Not Apply to Prevent the State From Seeking Child Support on Behalf of Kayla.

Risinger asserts that the district court erred in failing to find that Linda should be equitably estopped from seeking child support. Risinger's argument in favor of equitable estoppel relies at least in part on the existence of an agreement between Risinger and Linda by which Linda would not seek child support. Risinger therefore also asserts that the court erred in finding that there was no such agreement. We determine that the court did not err in finding that there was no agreement; that even if such agreement did exist, the agreement was against public policy; and that because the right to support belonged to Kayla, any agreement made or actions taken by Linda would not be the basis for equitable estoppel in this paternity and child support action brought by the State on Kayla's behalf. We therefore reject Risinger's assignments of error.

[3] We note that the evidence regarding the existence of an agreement between Risinger and Linda included Risinger's testimony that an agreement was made and Linda's conflicting testimony that no agreement was made. We have stated that in a de novo review in a filiation proceeding, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004). Similarly, in the present case, we consider and give weight to the fact that the district court heard and observed the testimonies of both Risinger and Linda and, based on its assessment of such testimonies and other evidence, accepted Linda's testimony over Risinger's testimony regarding the existence of an agreement. The court did not err in finding that there was no agreement between the parties that Risinger would not see or visit Kayla in exchange for Linda's not seeking child support.

More fundamentally, we determine that even if such an agreement were made, the agreement was against public policy and therefore could not be the basis for equitable estoppel in this case. Although Risinger's argument in favor of equitable estoppel relies heavily on the existence of an agreement, he also argues that even if an agreement was not actually made, Linda should be equitably estopped from seeking child support because her actions were consistent with such an agreement and she prevented Risinger from seeing or visiting Kayla. We note that courts in various other states have held that an agreement between parents that would deprive a child of his or her right to support is void as against public policy. See, *Hoover-Reynolds v. Superior Court*, 50 Cal. App. 4th 1273, 58 Cal. Rptr. 2d 173 (1996); *Straub v. B.M.T. by Todd*, 645 N.E.2d 597 (Ind. 1994); *State Dept. of Human Services v. T.D.G.*, 861 P.2d 990 (Okla. 1993); *Berryhill v. Rhodes*, 21 S.W.3d 188 (Tenn. 2000); *Hurlbut v. Scarbrough*, 957 P.2d 839 (Wyo. 1998). See, also, *Susan H. v. Keith L.*, 259 Neb. 322, 609 N.W.2d 659 (2000) (applying Oklahoma law).

[4] We determine that a private agreement between parents that would deprive a child of support from one parent contravenes the public policy of this state. In this regard, we note that Neb. Rev. Stat. § 43-1405 (Reissue 2004) provides a procedure whereby the liability of a father for child support may be discharged by a voluntary settlement agreement between the father and the mother in which "the father promises to make adequate provision for the support of the child." The statute provides that such agreement is binding on the parties and bars all other remedies only when such agreement "is approved by the court having jurisdiction to compel the support of the child." The statute further requires that "[t]he court shall approve such settlement only if it shall find and determine that adequate provision is made for the support of the child . . . ." Because Nebraska statutes provide a procedure by which parents may agree to discharge a father's liability for a child where adequate provision is made, we determine that the public policy of this state would forbid the enforcement of a private agreement that purported to discharge a parent's liability for child support if the agreement did not follow the statutory requirements for court approval and

failed to adequately provide for the support of the child. We therefore conclude that even if the purported agreement existed and even if Linda's actions were consistent with the existence of such agreement, as a matter of public policy, such agreement could not form the basis of an equitable estoppel.

We further note in this regard that the present proceeding to establish the paternity of Kayla was brought by the State pursuant to Neb. Rev. Stat. § 43-1411 (Reissue 2004). Under § 43-1411, the mother or the alleged father may bring an action either during pregnancy or within 4 years after the child's birth, while "the guardian or next friend of such child or the state" may bring an action either during pregnancy or within 18 years after the child's birth. We have characterized actions brought by the State or by the guardian or next friend of the child as "'cause[s] of action brought on the child's behalf . . . to establish paternity and secure the child's rights.'" *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 883, 510 N.W.2d 53, 56 (1994) (quoting *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984)). Because the present action was not brought by Linda within 4 years after Kayla's birth but instead was brought by the State within 18 years of Kayla's birth, this was clearly an action brought on Kayla's behalf in order to secure her rights, including child support. Even though the State fashioned the action as one brought on behalf of both Linda and Kayla, at least with regard to issues of support, this action is one brought on behalf of Kayla to secure her right to support. Therefore, whether or not Linda should be equitably estopped from seeking any sort of relief for herself, the State was not estopped from seeking support on Kayla's behalf in this action.

Although based on somewhat different reasoning than that of the district court, we determine that the district court did not err in awarding child support and we reject Risinger's assignments of error.

Cross-Appeal: Retroactive Child Support Due Upon Entry of Judgment.

The State asserts on cross-appeal that the district court erred in ordering Risinger to pay the retroactive child support in monthly installments rather than entering judgment for the full amount due with interest to accrue from the date of judgment.

We agree that the court should have entered judgment for the full amount due with interest to accrue from the date of judgment rather than ordering Risinger to pay in monthly installments, and we therefore modify the decree of paternity and support to so provide.

[5] In *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002), we faced a similar issue with regard to an order of retroactive alimony. In *Bowers*, the district court, in a March 13, 2001, order, determined that a certain amount of alimony was due from the husband to the wife retroactive from April 1997 through March 2001. The court ordered the husband to pay the judgment in monthly installments of $500 starting April 1, 2001, and continuing until the judgment was paid in full. On appeal, we concluded that the court erred in limiting the wife's ability to collect the alimony to a periodic basis. We noted that "a decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty by the judgment debtor." *Id.* at 470, 648 N.W.2d at 299. We further noted that alimony payments ordinarily vest as they accrue, and we concluded that "a judgment for retroactive alimony, i.e., alimony that should have vested and accrued in prior months, is one which is immediately due and collectible by the judgment debtor." *Id.* at 471, 648 N.W.2d at 300. We therefore modified the decree in *Bowers* to allow the wife to collect the entire alimony judgment in such manner as allowed by law.

[6] Similarly, in the present case, we conclude that the district court erred in ordering the retroactive child support of $60,119 to be paid in future monthly installments. Like alimony payments, child support payments ordinarily vest as they accrue. See, *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999); *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991). We conclude that the judgment in this case for child support that should have vested and accrued in prior months is a judgment which was immediately due and collectible upon entry of the decree of paternity and support. We determine that the district court abused its discretion in ordering the retroactive child support to be paid in future monthly installments. Thus, we conclude that the order should be modified and judgment entered for the full

amount due, with interest to accrue on the full amount from the date of judgment.

CONCLUSION

We conclude that the district court did not err in finding Risinger liable for child support and that the purported agreement by which Risinger would avoid child support in exchange for not contacting Kayla would contravene public policy and be unenforceable. We are aware of the economic burden placed on Risinger as a result of the outcome in this case, but we are nevertheless constrained by the child's best interests. Thus, we reject Risinger's assignments of error. Further, as urged by the State on cross-appeal, we conclude that the court erred in ordering Risinger to pay retroactive child support in future monthly installments. We therefore affirm the decree of paternity and child support order, but we modify the decree to reflect that the retroactive child support of $60,119 became due and payable upon entry of the decree on September 6, 2006.

AFFIRMED AS MODIFIED.

AARON M. FERER, APPELLANT, V. AARON FERER & SONS CO., A NEBRASKA CORPORATION, ET AL., APPELLEES.

732 N.W.2d 667

Filed June 8, 2007. No. S-05-730.

1. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that 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. **Gifts: Intent.** To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee.
3. **Gifts: Proof.** The person asserting the gift must prove all the essential elements by clear, direct, positive, express, and unambiguous evidence.
4. **Gifts: Intent.** One of the essential elements of a gift is the intention to make it.
5. ____: ____. A clear and unmistakable intention on the part of the donor to make a gift of his or her property is an essential element of the gift, and this contention must be inconsistent with any other theory.

6. ____: ____. To constitute a valid inter vivos gift, the donor must have a present donative intent.
7. **Gifts: Proof.** The mere preparation of a donative document does not effect a present transfer necessary to perfect a gift.
8. **Gifts: Intent.** Where the intention to make a gift is not clearly manifested, subsequent acts may aid in clarifying that intention.
9. ____: ____. The mere intention to make a gift in the future is insufficient to constitute a completed gift.
10. **Stock: Gifts: Intent.** Notwithstanding the fact that a stock transfer has been recorded on the books of the company, if there is a lack of donative intent, the gift of stock will not be considered valid.
11. **Trial: Witnesses.** A trial court is allowed broad discretion in permitting or refusing a request to ask leading questions.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

James D. Sherrets, Theodore R. Boecker, Jr., and Jason M. Bruno, of Sherrets & Boecker, L.L.C., for appellant.

Steven E. Achelpohl for appellee Aaron Ferer & Sons Co.

Michael A. Nelsen, of Hillman, Forman, Nelsen, Childers & McCormack, for appellees Matthew Ferer and Whitney Ferer.

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

GERRARD, J.

NATURE OF CASE

In 1995, Harvey Ferer decided to make a gift of stock in the family corporation, Aaron Ferer & Sons Co., to each of his three sons. Stock certificates and transfer documents were prepared, signed, and placed in the company safe, and corresponding notations were made in the stock record books. Before the stock certificates were presented to his sons, however, Harvey decided later in 1995 not to give any stock to one of his sons. The question presented in this appeal is whether Harvey made a completed gift of stock to that son sometime in 1995.

STATEMENT OF FACTS

Aaron Ferer & Sons Co. (hereinafter AFSCO) is a family-owned business engaged in metals trading. Harvey, who managed

AFSCO for most of his adult life, had three sons: Aaron Ferer, Matthew Ferer, and Whitney Ferer. The appellees, Matthew and Whitney, have worked for AFSCO virtually their entire adult lives. The appellant, Aaron, worked for AFSCO until he terminated his employment on September 27, 1995.

Harvey's First Gift of Stock to His Sons in 1994

In late 1994, Harvey met with Aaron, Matthew, and Whitney to discuss, among other things, the future of AFSCO. Harvey announced his plans to start making annual gifts of AFSCO stock to each of his three sons, up to the annual gifting limit. At this meeting, Harvey handed each of his sons a stock certificate representing 11,764 shares and explained that he would give a similar gift each year, so long as the sons remained actively involved in and employed at the company. At the time of this gift, all three sons were actively involved and employed at AFSCO.

Preparation and Distribution of 1995 Stock Certificates and Stock Power

On June 30, 1995, Harvey and Matthew met with two attorneys from the Erickson & Sederstrom law firm (E&S). At this time, Harvey informed one of the attorneys, Charles Sederstrom, that he was "contemplating" making a gift of stock to each of his sons for 1995, similar to the gift he made in 1994. After this meeting, pursuant to Harvey's instructions, Matthew contacted E&S and requested that stock certificates be filled out and forwarded to AFSCO.

As a result of the June 30, 1995, meeting and Matthew's request, Connie Bitzes, a legal secretary for E&S, was asked to prepare four unsigned stock certificates and an unsigned stock power. At that time, E&S maintained at its office four maroon books that contained the blank AFSCO stock certificates and stock stubs and also contained the stock stubs or receipts for AFSCO stock certificates that had previously been issued. E&S did not have any presigned stock certificates or stock powers, nor did it have a facsimile signature stamp for any of the officers or directors of AFSCO.

Accordingly, when AFSCO wanted to issue new stock certificates, an AFSCO representative would contact E&S, which would then prepare both an unsigned stock power and the unsigned stock certificates with the corresponding stock stubs. The stock certificates would be removed from the maroon books and, along with the stock power, sent to AFSCO. In addition to sending AFSCO the stock power and stock certificates, E&S would request that both the stock power and the original stock certificate, from which the gift stock originated, be returned to E&S.

The stock stubs from the newly issued stock remained in the maroon books and provided the following information: the number of shares issued on that particular stock certificate, to whom the certificate was issued, and the stock number of the original stock certificate from which the shares originated. At the time E&S prepared and issued the new stock certificate, it would mark "cancelled" on the stock stub corresponding to the original stock certificate which was the original source of the stock gift, even though the original stock certificate had not yet been returned to E&S. Once the original stock certificate and the signed stock power were returned, E&S would attach the stock power and stock certificate to the corresponding stock stub in one of the maroon books.

Consistent with the above-described procedure, and in accordance with Matthew's request, E&S sent a letter addressed to Matthew, dated July 6, 1995, attached to which was an unsigned stock power and four unsigned stock certificates. Bitzes testified that although the date on the stock certificates and the stock power was February 2, 1995, neither the stock power nor the certificates were in existence on that date, but were actually prepared by her on July 6, 1995. Bitzes further testified that although she had not yet received Harvey's original stock certificates, she marked "cancelled" on the stock stubs in the maroon books.

The July 6, 1995, letter explained that the issuance of the four stock certificates had been noted in "the stock record book" (the four maroon books). The letter also directed Harvey to return his original stock certificate so that it could be canceled. It was necessary that Harvey's original stock certificate be

returned and canceled because Harvey's original certificate was the source from which he was going to be giving his sons their gifts of stock. The letter further instructed Harvey to sign and return the enclosed stock power. The stock power stated:

> FOR VALUE RECEIVED, the undersigned hereby assigns and transfers by gift unto Matthew D. Ferer 11,764 shares, Aaron M. Ferer 11,764 shares and Whitney H. Ferer 11,764 shares of the common capital stock of Aaron Ferer & Sons Co., a Nebraska corporation, standing in the name of Harvey D. Ferer on the books of said corporation represented by certificate No. 0460. The undersigned does hereby irrevocably constitute and appoint the Secretary of the corporation as attorney to transfer the stock on the books of the corporation with full power of substitution in the premises.
>
> Dated this 2nd day of February, 1995.
>
> _____
> Harvey D. Ferer

Matthew received the unsigned stock certificates, showed them to Harvey, and then, pursuant to Harvey's instructions, acquired the necessary signatures on the stock certificates and locked them in the company safe.

Aaron Quits AFSCO

In approximately 1993, Aaron began expressing his dissatisfaction with his employment at AFSCO. During this period of time, Aaron frequently voiced his complaints and his desire to leave the company in the presence of Harvey, Matthew, and Whitney. On September 27, 1995, Aaron terminated his employment with AFSCO.

Return of Items and Cancellation of Stock Certificate

In late September or early October 1995, Matthew and Harvey again met with Sederstrom. Both Sederstrom and Matthew testified that during this meeting, Harvey specifically told Sederstrom that he was not going to be making any gifts of stock to Aaron for 1995 because Aaron no longer worked for AFSCO. Sederstrom told Harvey that if he was not going to be giving Aaron the gift of stock, then Harvey needed to return

to E&S his original stock certificate and the new stock certificates and stock power that had been sent to him. Harvey told Sederstrom that he would return these items to E&S.

Matthew testified that in late 1995 or early 1996, Harvey told him and Whitney that Aaron would not be receiving a stock gift for 1995 and that Matthew should return the stock certificate that had been drawn up in Aaron's name to E&S. Accordingly, on January 17, 1996, Matthew sent to E&S the certificate and a letter requesting that the certificate be canceled and reissued in Harvey's name. The letter explained that the certificate should be canceled and reissued, as the stock had not been gifted to Aaron because Aaron had left the company. Upon receiving the stock certificate and the letter, E&S stamped "cancelled" on the certificate, placed it in one of the four maroon books, and reissued the shares back to Harvey.

The record is clear that the stock certificate was returned to E&S on January 17, 1996. However, the record is less clear as to when Harvey's stock power and original stock certificate were returned to E&S. Bitzes testified that she did not know when these items were eventually returned, but testified that when they were returned, they were placed in the maroon books. In this regard, Sederstrom testified that although he did not know the exact date that the stock power and original stock certificate were returned, the items could have come back at anytime between October 1995, when he told Harvey to return the items, and January 17, 1996, the date of Matthew's letter requesting the cancellation of the certificate in Aaron's name.

Harvey's Desire That Stock Remain With Family Members Engaged in Business

A substantial amount of evidence was presented at trial relating to Harvey's alleged desire that AFSCO stock be held only by family members who are actively employed in the business. Matthew testified that from 1986 to 1995, Harvey had expressed at various times to Aaron, Matthew, and Whitney that the only way they would receive stock from Harvey would be if they were actively employed and involved in the company. Aaron testified that he was aware of Harvey's "general philosophy" that if one of them was not actively working at the

company, they would not get a gift of stock, but claims that this was not "a hard and fast rule."

Harvey's will, which was executed in 1994, provided that Aaron would not inherit any AFSCO shares if he was not a "full-time employee" of AFSCO at the time of Harvey's death. Whitney also testified that on at least two occasions in August or September 1995, Aaron made comments to him to the effect that Matthew and Whitney should be happy that he was leaving the company because that would mean they would get all of Harvey's stock. Matthew testified that in November 1995, he was having dinner at Harvey's house with Harvey and Aaron. Matthew testified that Harvey specifically told Aaron that he would not be receiving a gift of stock for 1995 because he had left the company. Aaron denies that this dinner meeting ever occurred.

Gifts of Stock Given to Matthew and Whitney in 1995 Through 1998

In late 1995, or early 1996, Harvey met with Matthew and Whitney and gave each of them a stock certificate. Harvey explained that this was the second of his stock gifts to them and that Aaron would not be receiving a stock gift.

In his 1995 gift tax return filed with the Internal Revenue Service (IRS), Harvey reported giving only two gifts of stock for 1995, one gift to Matthew and the other to Whitney. The tax return reports no gift of stock to Aaron. Following these gifts, Harvey gave equal stock gifts to Matthew and Whitney in 1996 through 1998, at which point, all of his stock in AFSCO had been given away. Harvey died on August 29, 2001.

Complaint and District Court Decision

Aaron's operative complaint, filed on October 27, 2003, against AFSCO, Matthew, and Whitney (collectively the appellees), alleges that a gift was made by Harvey to Aaron in 1995 for 11,764 shares of AFSCO stock. From this allegation, Aaron asserted five claims: (1) a declaratory judgment determining that the stock certificate prepared in his name and the entries made on the books of E&S constituted a completed gift; (2) the creation of a constructive trust in favor of Aaron;

(3) a finding of a breach of fiduciary duty against Matthew and Whitney and request for the fair value of his claimed stock interest, distributions with respect to the stock, and other damages; (4) a finding of wrongful registration of the stock in the names of Matthew and Whitney; and (5) unjust enrichment and related remedies.

The appellees denied all of the material allegations in Aaron's complaint and alternatively alleged that no gift had occurred for failure of delivery, acceptance, and no donative intent on the part of Harvey; that the gift was also not completed for failure of a condition; and that Aaron's claims are barred by equitable estoppel, laches, the statute of limitations, and unclean hands.

The district court found that Harvey's actions did not constitute a completed gift to Aaron. Accordingly, the court determined that neither Matthew nor Whitney had breached his fiduciary duty. The court further concluded that Aaron's claims are barred by the statute of limitations, laches, and equitable estoppel. Aaron appealed.

ASSIGNMENTS OF ERROR

On appeal, Aaron assigns, summarized, restated, and renumbered, that the district court erred in (1) failing to find that Harvey made a valid completed gift to Aaron; (2) refusing to grant a declaratory judgment in favor of Aaron finding that he is the legal and/or equitable owner of the stocks at issue in this case; (3) failing to impose a constructive trust on the appellees for fraudulently concealing the cancellation of the stocks which he claims belonged to him; (4) failing to conclude that the appellees breached their fiduciary duties to Aaron; (5) failing to find that the appellees were unjustly enriched; (6) receiving, over Aaron's objection, leading testimony on cross-examination of favorable witnesses to the appellees and refusing to strike such testimony; (7) finding Aaron's claims to be barred by the statute of limitations, laches, and equitable estoppel; and (8) referring to Harvey as "the rightful defendant" in its order.

STANDARD OF REVIEW

[1] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that 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.[1]

ANALYSIS

[2,3] The primary issue presented in this case is whether Harvey made a valid inter vivos gift of AFSCO stock to Aaron in 1995. To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee.[2] The person asserting the gift must prove all the essential elements by clear, direct, positive, express, and unambiguous evidence.[3]

[4-8] We begin our analysis by addressing the question whether Harvey had the required present donative intent to make a gift of stock to Aaron. One of the essential elements of a gift is the intention to make it.[4] A clear and unmistakable intention on the part of the donor to make a gift of his or her property is an essential element of the gift, and this contention must be inconsistent with any other theory.[5] It is well established that to constitute a valid inter vivos gift, the donor must have a present donative intent.[6] The "mere preparation of a donative document does not effect a present transfer necessary to perfect a gift."[7] Where the intention to make a gift is not

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[1] *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004).

[2] *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

[3] *Masonic Temple Craft v. Stamm*, 152 Neb. 604, 42 N.W.2d 178 (1950).

[4] *In re Estate of Lamplaugh, supra* note 2.

[5] *Id.*

[6] See *Masonic Temple Craft v. Stamm, supra* note 3. See, also, *Schultz v. Schultz*, 637 S.W.2d 1 (Mo. 1982); *Matter of Estate of Lewis*, 97 Idaho 299, 543 P.2d 852 (1975); *Sinclair v. Travis*, 231 N.C. 345, 57 S.E.2d 394 (1950); *Rock v. Rock*, 309 Mass. 44, 33 N.E.2d 973 (1941); *Millman v. Streeter*, 66 R.I. 341, 19 A.2d 254 (1941); *Myers v. Weems*, 128 Or. App. 444, 876 P.2d 861 (1994); *Sullivan v. American Telephone & Telegraph Co.*, 230 So. 2d 18 (Fla. App. 1969).

[7] Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2, comment *u.* at 51 (2003).

clearly manifested, subsequent acts may aid in clarifying that intention.[8]

Aaron argues that the February 2, 1995, stock power, prepared by E&S at Harvey's request, sufficiently establishes Harvey's donative intent to make a gift of stock to Aaron in 1995. Aaron notes that the stock power, which was eventually signed and returned by Harvey to E&S, states that Harvey "assigns and transfers by gift unto . . . Aaron M. Ferer 11,764 shares" and uses the term "irrevocably" in describing the transfer. Aaron asserts that given this language and Harvey's signature on the document, the element of donative intent has been satisfied. We are not persuaded by Aaron's argument. We find, as did the district court, that Harvey lacked the requisite donative intent to make a present gift of stock to Aaron.

The record evidences conduct on Harvey's part that is entirely inconsistent with the present donative intent required to make a valid completed gift inter vivos. Both Sederstrom and Matthew testified that the unsigned stock power and unsigned stock certificates were prepared in July 1995, by E&S, because Harvey was "contemplating" making a gift of stock to each of his sons. After receiving the stock certificates and having them signed, Harvey, rather than presenting the certificates to his sons, or at least informing them that a gift had been made, directed that the certificates be locked in the company safe. This evidence indicates that at the time the stock power and certificates were prepared, Harvey did not intend to make a present gift of stock to his sons and, instead, intended to maintain dominion and control over the certificates.

Also relevant to the question of Harvey's donative intent is the evidence relating to Harvey's desire that stock in AFSCO be given only to family members who are actively employed in the company. Between 1986 to 1995, Harvey had repeatedly expressed that the only way Aaron, Matthew, and Whitney would receive stock would be if they were actively employed and involved in the company. Aaron testified that he was aware

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[8] See *Crowell v. Milligan*, 157 Neb. 127, 59 N.W.2d 346 (1953), *overruled in part on other grounds, White v. Ogier*, 175 Neb. 883, 125 N.W.2d 68 (1963).

of this "general philosophy." In addition, the provisions in Harvey's 1994 will are persuasive evidence of Harvey's intent that Aaron should not receive AFSCO stock if he was not employed with the company.

The record further shows that following Aaron's decision to leave the company, Harvey told several individuals, including Aaron, that he was not going to be giving a gift of stock to Aaron in 1995 because Aaron had left the company. These statements by Harvey are significant because they demonstrate that at the time the statements were made, Harvey was not under the impression that he had already made a completed gift of stock to Aaron. Harvey's statements do not suggest a desire to revoke or undo a gift that he believed had already been given. Rather, these statements evidence Harvey's intent to forgo a gift of stock to Aaron in the future that would have otherwise been made. And Harvey could not have believed the gift to be incomplete had he intended to complete it earlier.

Aaron suggests that the fact that the stock power was signed and returned to E&S conclusively establishes Harvey's donative intent to make a gift. However, the evidence shows that Harvey did not return the signed stock power to E&S until after he had specifically told Sederstrom that he was not going to be making a gift of stock to Aaron in 1995. Moreover, Sederstrom testified he told Harvey that if Harvey was not going to be giving the gift of stock to Aaron, then Harvey needed to return to E&S, among other things, the stock power; and that is exactly what Harvey did.

Furthermore, the record contained two gift tax returns prepared by Harvey for 1995. One return reported a gift of stock to all three of his sons, while the other return reported only a gift of stock to Matthew and Whitney. The evidence presented at trial showed that the tax return reporting a gift to all three sons was only a draft, prepared by Harvey in early 1995, and was never signed by Harvey. The undisputed evidence was that the actual gift tax return, signed by Harvey and filed with the IRS for 1995, was the gift tax return reporting that a gift had been made only to Matthew and Whitney, and not Aaron.

Finally, the record indicates a pattern of gift giving followed by Harvey, both before and after Aaron left the company. In

late 1994, while all three of his sons were working at AFSCO, Harvey gave each of them a stock certificate and explained that a similar gift would be made each year, so long as the sons remained actively employed and involved in the company. The following year, in late 1995 or early 1996, consistent with what he had done the year before, Harvey gave Matthew and Whitney, but not Aaron, gifts of stock for 1995. Harvey gave similar gifts of stock to Whitney and Matthew in 1996 through 1998, at which point, all of Harvey's stock in AFSCO had been given away. Harvey's established pattern of giving his sons annual gifts of stock at the end of the year, or the beginning of the next year, further supports our determination that Harvey did not have a present intent to convey an interest in the stock to Aaron in July 1995, when the stock power and certificates were prepared.

[9] In sum, when considering the foregoing evidence, it is apparent that at no time in 1995, either before or after Aaron left AFSCO, did Harvey have a clear and unmistakable intent to make a present gift of stock to Aaron. There is no evidence in the record that Harvey, at any time other than the 1994 gift, believed that he had completed a gift of AFSCO stock to Aaron. Rather, the evidence at best reveals that Harvey intended to make a gift of stock to Aaron at some point in the future. However, the law is well established that the mere intention to make a gift in the future is insufficient to constitute a completed gift.[9] Accordingly, Aaron has failed to carry his burden of showing that Harvey made a completed gift of stock to him in 1995.

Aaron argues that Harvey's alleged 1995 gift was complete and irrevocable when the transfers were noted by E&S in the maroon books. Assuming without deciding that the maroon books were the official stock records of AFSCO and that recording the transfer in those books could constitute constructive delivery, we nonetheless conclude that the gift was defeated by Harvey's lack of a present donative intent.

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[9] See, *Tucker v. Addison*, 265 Ga. 642, 458 S.E.2d 653 (1995); *Fuisz v. Fuisz*, 527 Pa. 348, 591 A.2d 1047 (1991); *Figuers v. Sherrell*, 181 Tenn. 87, 178 S.W.2d 629 (1944); *In re Estate of Shivers*, 105 N.J. Super. 242, 251 A.2d 771 (1969); *Harmon v. Schmitz*, 26 S.W.2d 289 (Tex. Civ. App. 1930).

The Oklahoma Supreme Court in *Davis v. National Bank of Tulsa*[10] addressed a situation very similar to the one presented in this case. In *Davis*, a father reissued 80,000 shares of his stock, with 20,000 shares being issued in the names of each of his children. There was no evidence in the record that the stock certificates had been delivered to the children, or to anyone on their behalf. The father retained exclusive possession and control of the stock certificates and the proceeds of sales thereof for many years.

In determining that the father had not made a valid gift inter vivos to his children, the court stated that "'[i]t is elementary that a gift cannot be made to take effect in possession in futuro'" and that "'[s]uch a transaction amounts only to a promise to make a gift,'" and is not legally enforceable.[11] The court continued, "'[t]he fact that the stock was registered upon the books of the corporation in the names of the plaintiffs, in the light of all the facts in this case, is not sufficient to establish a completed gift.'"[12] The court concluded by explaining that the father had "retained possession, control and dominion over the stock and the proceeds of the sale thereof. There was never a completed gift. The most that may be said of the facts and circumstances is that [the father] evidenced an intent to make a gift in the future."[13]

[10] Courts in other jurisdictions have similarly concluded that notwithstanding the fact that a stock transfer has been recorded on the books of the company, if there is a lack of donative intent, the gift of stock will not be considered valid.[14] We agree. In this case, Harvey never had the present intent to convey an interest in the stock to Aaron. Therefore, we reject

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[10] *Davis v. National Bank of Tulsa*, 353 P.2d 482 (Okla. 1960).

[11] *Id.* at 487.

[12] *Id.*

[13] *Id.* at 488.

[14] See, *Owens v. Owens*, 207 Minn. 489, 292 N.W. 89 (1940); *Lichtenstein v. Eljohnan, Inc.*, 161 A.D.2d 397, 555 N.Y.S.2d 331 (1990); *Sullivan v. American Telephone & Telegraph Co.*, *supra* note 6; *Nolan v. American Tel. & Tel. Co.*, 326 Ill. App. 328, 61 N.E.2d 876 (1945).

Aaron's claim that Harvey made a completed gift of stock to him in 1995.

[11] Aaron also assigns error to the admissibility of certain portions of Bitzes' testimony. Aaron argues that the district court erred in allowing, over his objection, opposing counsel to lead favorable witnesses through their examinations. Specifically, Aaron contends that Bitzes was "spoon-fed answers with leading questions" and that her testimony was "dramatically different than her sworn deposition testimony."[15] Given the broad discretion allowed to a trial court in permitting or refusing a request to ask leading questions, and having reviewed the testimony at issue, we find that the trial court did not abuse its discretion.[16]

Our conclusion that Harvey did not make a valid inter vivos gift of stock to Aaron in 1995 is otherwise dispositive of this appeal. We need not, and do not, address Aaron's remaining assignments of error.

CONCLUSION

We conclude that Harvey did not make a gift of stock in 1995 to Aaron because Harvey lacked the requisite donative intent to make a present gift of stock to Aaron. Furthermore, the district court did not abuse its discretion in overruling Aaron's objections and allowing the testimony of Bitzes. The judgment of the district court is affirmed.

AFFIRMED.

McCORMACK, J., not participating.

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[15] Brief for appellant at 40.

[16] See *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987).

MONICA REID, APPELLANT, V.
DONALD EVANS, APPELLEE.
733 N.W.2d 186

Filed June 8, 2007. No. S-05-1503.

1. **Statutes: Appeal and Error.** The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

2. **Appeal and Error.** An appellate court's analysis of a case on appeal is framed by the manner in which the case was litigated and decided below.
3. **Limitations of Actions: Dismissal and Nonsuit.** Pursuant to Neb. Rev. Stat. § 25-217 (Cum. Supp. 2006), an action is dismissed by operation of law as to any defendant who is named and who is not served with process within 6 months after the complaint is filed.

Appeal from the District Court for Douglas County, JOSEPH S. TROIA, Judge, on appeal thereto from the County Court for Douglas County, JANE H. PROCHASKA, Judge. Judgment of District Court affirmed.

Timothy L. Ashford, P.C., L.L.O., for appellant.

Patrick S. Cooper, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

PER CURIAM.

NATURE OF CASE

Monica Reid, appellant, filed a negligence action arising from a December 26, 2000, automobile accident in which she was a passenger in a car driven by Donald Evans, appellee. The complaint was filed on September 27, 2004, in the county court for Douglas County and named Donald as the defendant. Reid was unaware that Donald had died prior to the filing of the action. A copy of the complaint naming Donald as the sole defendant was served on Thomas Evans, the special administrator of Donald's estate, on March 19, 2005. Thus, service was not completed on Donald and a complaint naming his estate as defendant was not served within the 6-month statutory timeframe for service of a complaint. See Neb. Rev. Stat. § 25-217 (Cum. Supp. 2006).

On April 15, 2005, counsel for Donald filed a motion under § 25-217 seeking an order formally recognizing the dismissal of Reid's lawsuit by operation of law. In response, Reid filed a pleading entitled "Motion for Revivor to Amend the Complaint," by which she sought to amend her complaint to add Thomas as special administrator of Donald's estate as the defendant.

Reid claimed her proposed amendment was proper because it would relate back to the original filing date under Nebraska's relation-back statute, Neb. Rev. Stat. § 25-201.02 (Cum. Supp. 2006). The county court determined that because Reid's complaint naming Donald as the sole defendant had not been served on the only-named party defendant within the 6-month service of process period, Reid's action stood dismissed by operation of law on March 28, 2005. The county court also denied relief to Reid on her motion to amend. Upon appeal, the district court for Douglas County affirmed the county court's decision. Reid appeals.

We conclude that the district court did not err in affirming the county court's decision that Reid's action stood dismissed by operation of law under § 25-217. We further determine, as did the district court, that because Reid's action stood dismissed, Reid's motion invoking relation back to amend the dismissed complaint was a nullity. Accordingly, we affirm.

STATEMENT OF FACTS

On December 26, 2000, Reid was a passenger in an automobile driven by Donald. Reid was allegedly injured when she and Donald were involved in an accident in Omaha. Donald died sometime in 2003, a fact of which Reid was unaware. On September 27, 2004, Reid filed a negligence action against Donald, captioned "Monica Reid, Plaintiff, vs. Donald Evans, Defendant," in the county court for Douglas County. Reid made several unsuccessful attempts to serve Donald with the summons and a copy of the complaint. On March 19, 2005, Reid served the summons and complaint upon Thomas, Donald's son, who had been named the special administrator of Donald's estate. At the time Reid served Thomas, the complaint named Donald as the only defendant. Neither Thomas nor Donald's estate was named as a party.

On April 15, 2005, counsel for Donald filed a motion to formally recognize the dismissal of Reid's lawsuit against Donald in accordance with § 25-217, which provides that an "action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed." The 6-month service time period had expired by March 28, 2005.

In response, on May 2, Reid filed a pleading entitled "Motion for Revivor to Amend the Complaint," by which Reid sought leave to amend her complaint to name Thomas as the defendant, in his capacity as the special administrator of Donald's estate. Reid asserted that such an amendment would date back to the original filing date of her complaint under Nebraska's relation-back statute, § 25-201.02, and in so doing, Reid claimed the action would avoid being time barred under Nebraska's 4-year statute of limitations for negligence, Neb. Rev. Stat. § 25-207 (Reissue 1995), suspended by 2 months under Neb. Rev. Stat. § 30-2484 (Reissue 1995).

Section 25-201.02 provides in pertinent part as follows:

> (2) If the amendment [to a pleading] changes the party or the name of the party against whom a claim is asserted, the amendment relates back to the date of the original pleading if (a) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading, and (b) within the period provided for commencing an action the party against whom the claim is asserted by the amended pleading (i) received notice of the action such that the party will not be prejudiced in maintaining a defense on the merits and (ii) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The parties' motions came on for hearing on May 5, 2005. In an order filed May 20, the county court granted the motion to formally recognize the dismissal of Reid's lawsuit under § 25-217, denied Reid's motion, and ordered that Reid's lawsuit stood dismissed as of March 28, 2005.

Reid appealed the county court's order to the district court. In an order filed November 17, 2005, the district court affirmed the county court's decision that under the provisions of § 25-217, Reid's lawsuit against Donald stood dismissed by operation of law on March 28. The district court further determined that because Reid's lawsuit was dismissed on March 28, the county court was thereafter without jurisdiction to consider Reid's motion to amend and relate back. Reid appeals.

ASSIGNMENTS OF ERROR

On appeal, Reid assigns numerous errors that can be summarized as claiming that the district court erred in (1) affirming the county court's decision that Reid's lawsuit stood dismissed on March 28, 2005, by operation of law under § 25-217 and (2) determining that because Reid's lawsuit was dismissed, the county court lacked jurisdiction to rule on Reid's motion to amend the complaint and relate back under § 25-201.02.

STANDARD OF REVIEW

[1] The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

ANALYSIS

[2] This case was treated as one subject to dismissal under § 25-217 by the lower courts, and our analysis on appeal is framed by the manner in which the case was litigated and decided below. See *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000). Compare *Babbitt v. Hronik*, 261 Neb. 513, 623 N.W.2d 700 (2001) (analyzing and affirming district court's grant of summary judgment when plaintiff failed to timely commence action against estate).

For her first assignment of error, Reid claims that the district court erred in affirming the county court's decision that her lawsuit against Donald was dismissed by operation of law pursuant to the provisions of § 25-217 because she had not served Donald, the sole defendant named in the complaint, within 6 months of filing the lawsuit. Reid claims that her service of summons and the complaint upon Thomas was sufficient to satisfy the requirements of § 25-217, even though neither Thomas nor the estate was named as a defendant in the lawsuit. We reject Reid's argument.

[3] Central to our analysis of Reid's first assignment of error is the language of § 25-217, which provides that "[a]n action is commenced on the date the complaint is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint

was filed." We have construed this language to mean that an action is dismissed by operation of law as to any defendant who is named and who is not served with process within 6 months after the complaint is filed. We have recently stated that "[u]nder § 25-217 . . . the expression 'any defendant' . . . mean[s] that dismissal is indicated as to that defendant who [is named and] is 'not served'. . . ." *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 447, 684 N.W.2d 14, 21-22 (2004) (determining that dismissal affects only those named defendants who are not properly served).

Reid's lawsuit was "commenced" on September 27, 2004, the day she filed her complaint. See § 25-217. Reid failed to obtain service of process upon Donald, the only defendant named in her lawsuit, on or before March 27, 2005, which was 6 months after her lawsuit was filed. As a result, Reid's lawsuit against Donald stood dismissed by operation of law on March 28. See *Vopalka v. Abraham*, 260 Neb. 737, 746, 619 N.W.2d 594, 601 (2000) (stating that "[d]ismissal by operation of law effectuates the mandatory language of the statute"). See, also, *Kovar v. Habrock*, 261 Neb. 337, 342, 622 N.W.2d 688, 692 (2001) (stating that "[t]he language of § 25-217 . . . is self-executing and mandatory").

Reid argues that Thomas received notice of the lawsuit within the 6-month service period provided under § 25-217 and that "but for a mistake concerning the identity of the proper party, the action would have been brought against the party Thomas Evans as Special Administrator of the Estate of Donald Evans." Brief for appellant at 12.

We find Reid's argument unpersuasive. Thomas was not a named defendant in the lawsuit, and thus, any service of process upon him is of no effect. See, *Lydick v. Smith*, 201 Neb. 45, 266 N.W.2d 208 (1978) (discussing that strict compliance with requirements of service of process is mandatory and jurisdictional); *Wilson v. Smith*, 193 Neb. 433, 436, 227 N.W.2d 597, 598 (1975) (stating that "'[s]tatutes [governing] service of summons are mandatory and must be strictly pursued,'" quoting *Erdman v. National Indemnity Co.*, 180 Neb. 133, 141 N.W.2d 753 (1966)). Contrary to the requirements in the relevant probate statute regarding commencement of actions against an

estate, Neb. Rev. Stat. § 30-2404 (Reissue 1995), Reid named only Donald in her complaint, and she failed to obtain service of process upon Donald within 6 months of the filing of her lawsuit. "[T]he plain language of § 25-217 requires [that] as to any defendant not served within 6 months of filing, the action stands dismissed." *Fox v. Nick*, 265 Neb. 986, 990, 660 N.W.2d 881, 885 (2003). We affirm the decision of the district court that affirmed the county court's decision that Reid's lawsuit against Donald stood dismissed by operation of law on March 28, 2005.

For her second assignment of error, Reid claims that the district court erred in determining that because Reid's lawsuit stood dismissed, the county court lacked authority to rule on Reid's motion to amend the complaint in an attempt to take advantage of Nebraska's relation-back statute. Reid claims that under § 25-201.02, she should have been allowed to amend her complaint to name Thomas as the defendant and that such an amendment would have been effective as of the date she commenced her lawsuit, thereby making service of process on Thomas timely under § 25-217 and within the statute of limitations. Section 25-201.02 provides in pertinent part as follows:

> (2) If the amendment [of a pleading] changes the party or the name of the party against whom a claim is asserted, the amendment relates back to the date of the original pleading if (a) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading, and (b) within the period provided for commencing an action the party against whom the claim is asserted by the amended pleading (i) received notice of the action such that the party will not be prejudiced in maintaining a defense on the merits and (ii) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Counsel for Donald responds that Reid's relation-back argument is inapplicable because once the case was dismissed by operation of law under § 25-217, the district court was without authority to consider Reid's motion. Counsel for Donald further argues that even if the relation-back statute did apply, it would

not assist Reid because the version of the relation-back statute adopted by Nebraska, which is derived from a now-superseded version of Fed. R. of Civ. P. 15(c), only allows an amendment to relate back to the original filing date if the party who is being added by the amendment was aware of the claim during "the period provided for commencing an action" against such party, see § 25-201.02(2)(b), and this latter phrase has been interpreted to mean prior to the expiration of the statute of limitations, see *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986). Compare *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002) (applying federal jurisprudence under revised rule 15(c) prior to adoption of § 25-201.02). Counsel for Donald argues that because Thomas was not served with notice of Reid's lawsuit against Donald until March 19, 2005, Thomas did not receive notice prior to the expiration of the statute of limitations, and therefore, Reid cannot benefit from the relation-back statute. We agree with counsel's initial argument that relation back is inapplicable in this case.

We have stated that

> [a]fter dismissal of an action by operation of law pursuant to § 25-217, there is no longer an action pending and the district court has no jurisdiction to make any further orders except to formalize the dismissal. . . . If orders are made following the dismissal, they are a nullity, as are subsequent pleadings.

Kovar v. Habrock, 261 Neb. 337, 342, 622 N.W.2d 688, 692 (2001). Because Reid's lawsuit had been dismissed, her subsequent motion to amend and take advantage of relation back was a nullity, as would have been any order entered by the county court on that motion. Once Reid's lawsuit had been dismissed, the county court lacked jurisdiction to make any further orders other than to formalize the dismissal. See *id.* The district court did not err in determining that the county court lacked jurisdiction to consider Reid's motion to amend, and we affirm the district court's decision.

CONCLUSION

We conclude that the district court did not err in affirming the county court's decision that Reid's lawsuit was dismissed

by operation of law pursuant to § 25-217. We further conclude, as did the district court, that because Reid's lawsuit stood dismissed on March 28, 2005, the county court lacked jurisdiction to consider Reid's motion to amend. Accordingly, we affirm the district court's decision.

AFFIRMED.

MILLER-LERMAN, J., concurring.

I agree with the opinion of the court that the case stood dismissed by operation of law under Neb. Rev. Stat. § 25-217 (Cum. Supp. 2006) and that once the case stood dismissed, Reid's subsequent motion to amend and relate back was a nullity. I write separately to expand on additional reasons why Reid's invocation of relation back would be unavailing and to point out that the version of Fed. R. of Civ. P. 15(c) adopted by the Legislature is less forgiving than the current version of rule 15(c) adopted by the federal courts.

In his brief, counsel for Donald correctly notes that in adopting Neb. Rev. Stat. § 25-201.02 (Cum. Supp. 2006), Nebraska adopted language from a version of rule 15(c) of the Federal Rules of Civil Procedure governing relation back that has since been superseded. In 1991, Fed. R. of Civ. P. 15(c) was modified, and it presently allows for an amendment to a complaint to relate back to the original filing date of the lawsuit if the party added by the amendment received notice of the lawsuit during the period allowed for service of process, even if that time period extends beyond the statute of limitations. 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1107 (3d ed. 2002 & Supp. 2007). However, because Nebraska has adopted language derived from the previous rather than the current version of Fed. R. of Civ. P. 15(c), even if Reid's relation-back argument had application, it would be unavailing.

In addition, there is a more fundamental reason in relation-back jurisprudence why Reid's motion to amend by invoking relation back was inapplicable. Relation back is a concept that facilitates amendments to pleadings, and relation back is inapplicable to a lawsuit that has already been dismissed. In order for an amendment to relate back to the original filing date, there must be an action pending at the time the proposed amendment

is filed. If a lawsuit has already been dismissed, there is nothing for a subsequent amendment to relate back to. See, *Marsh v. Soares*, 223 F.3d 1217, 1219 (10th Cir. 2000) (stating that subsequent pleading "'cannot relate back to a previously filed petition that has been dismissed . . . because there is nothing for the [pleading] to relate back to'"); *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999) (stating that because "original . . . action was dismissed . . . there was no pending petition to which [the new pleading] could relate back or amend"). See, also, *Hayes v. U.S.*, 73 Fed. Cl. 724, 729 (2006) (stating that "[b]ecause . . . case was dismiss[ed] . . . present claim cannot relate back to that dismissed case"); *Holloway v. U.S.*, 60 Fed. Cl. 254 (2004) (stating that subsequent pleading could not relate back to earlier complaint that had been dismissed); *Frazer v. U.S.*, 49 Fed. Cl. 734, 736 (2001) (stating that once complaint had been dismissed, subsequent pleading "st[ood] alone. And standing alone, it is time-barred"). Reid's action stood dismissed by operation of law on March 28, 2005, and Reid did not file her motion to amend until May 2. Because Reid's lawsuit had been dismissed, there was nothing for her proposed amendment to relate back to.

If the Legislature was to revise § 25-201.02 to provide language similar to the current version of rule 15(c) of the Federal Rules of Civil Procedure, a plaintiff seeking to amend and take advantage of relation back who files a motion after the statute of limitations has run but during the period allowed for service, and who otherwise meets statutory requirements, would be able to amend the complaint. Revisions to § 25-201.02 could marginally enhance the utility of statutory relation back in Nebraska.

McCormack, J., joins in this concurrence.

DONALD R. BURNS, JR., APPELLEE, V. JOHN D. NIELSEN AND BARBARA NIELSEN, DOING BUSINESS AS DIAMOND HILL FARMS, APPELLEES, AND FEDERAL EXPRESS CORPORATION, APPELLANT.

732 N.W.2d 640

Filed June 8, 2007. No. S-06-030.

1. **Workers' Compensation: Judgments: Appeal and Error.** Distribution of the proceeds of a judgment or settlement under Neb. Rev. Stat. § 48-118.04 (Cum. Supp. 2006) is left to the trial court's discretion and reviewed for an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Workers' Compensation: Subrogation: Tort-feasors.** Neb. Rev. Stat. § 48-118 (Cum. Supp. 2006) grants an employer who has paid workers' compensation benefits to an employee injured as a result of the actions of a third party a subrogation interest against payments made by the third party.
5. **Workers' Compensation: Subrogation: Insurance: Equity.** The term "fair and equitable distribution," as used in Neb. Rev. Stat. § 48-118.04 (Cum. Supp. 2006), does not permit the subrogation interest of an employer or workers' compensation insurer to be subject to equitable defenses.
6. **Statutes: Words and Phrases.** As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.
7. **Workers' Compensation: Courts.** Neb. Rev. Stat. § 48-118.04 (Cum. Supp. 2006) does not authorize the district court to punish an employer beyond the penalties expressly prescribed by the workers' compensation statutes.
8. **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.
9. **Workers' Compensation.** The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job and should be construed to accomplish that purpose.
10. **Equity: Estoppel.** The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.
11. **Forbearance: Estoppel.** The doctrine of promissory estoppel is based upon a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee which does in fact induce such action or forbearance.
12. **Estoppel.** The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.

13. ____. The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.
14. ____. Absent judicial acceptance of an inconsistent position, the application of the doctrine of judicial estoppel is unwarranted because no risk of inconsistent results exists.
15. **Trial: Evidence: Damages.** The collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Reversed and remanded with directions.

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

Patrick M. Connealy, of Crites, Shaffer, Connealy, Watson & Harford, P.C., L.L.O., for appellee Donald R. Burns, Jr.

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

GERRARD, J.

Donald R. Burns, Jr., was injured in a work-related accident on the premises of a third party, and settled both a workers' compensation claim and a third-party negligence claim. Burns' employer, the appellant, sought to enforce a subrogation interest in the proceeds of the negligence settlement. The question presented in this appeal is whether the employer was barred from asserting its subrogation interest by equitable principles, based on its allegedly wrongful conduct in the course of contesting Burns' workers' compensation claim.

BACKGROUND

Burns suffered an accidental injury arising out of and in the course of his employment with the Federal Express Corporation (FedEx). Burns was employed as a courier and was picking up a letter at Diamond Hill Farms on September 30, 1999. Burns stepped onto a walkway made of wooden pallets, and a plank in one of the pallets broke, causing Burns to fall and injure his neck, back, foot, and ankle.

FedEx voluntarily paid $134,647.36 in medical benefits and a total of $43,377.72 in disability benefits through 2004. But FedEx did not pay all of the medical expenses Burns claimed, and questioning causation, FedEx denied further benefits. Burns filed a workers' compensation claim on January 21, 2004. Before trial, however, the parties agreed to settle the claim for benefits already paid, plus a lump-sum payment of $207,500. The settlement was approved by the Workers' Compensation Court.

In the meantime, Burns had filed a complaint in the district court against John D. Nielsen and Barbara Nielsen, doing business as Diamond Hill Farms, alleging that his injuries were caused by their negligence. In an amended complaint filed February 23, 2004, Burns named FedEx as a defendant to determine its subrogation interest.[1] The negligence claim also ended in settlement. The Nielsens' insurer agreed to make a lump-sum payment of $143,052.82 to Burns, and a lump-sum payment of $156,947.18 to the clerk of the court, pending resolution of the subrogation issues. The Nielsens' insurer also agreed to pay Burns $800 monthly for 20 years and a total of $115,139 in lump-sum payments to be made at 5-year intervals beginning September 25, 2009. The agreement provided that

> [n]othing in this Section shall limit [FedEx's] claim against . . . Burns for reimbursement of its subrogation interest and its claim that the payments to be made pursuant [to] these sections shall be treated as advance payments of workers' compensation benefits by [FedEx] to the extent that the Nebraska Workers' Compensation Court determines that [FedEx] is liable for any additional workers' compensation benefits to or on behalf of [Burns] and the Box Butte County District [Court] shall determine whether or to what extent any credit may be allowed or disallowed.

The agreement was approved by Burns, the Nielsens' insurer, and FedEx. The court dismissed Burns' negligence complaint with prejudice on the parties' stipulation for dismissal.

The case then proceeded in district court to a determination of FedEx's subrogation interest and a "fair and equitable

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[1] See Neb. Rev. Stat. § 48-118 (Cum. Supp. 2006).

distribution of the proceeds of [the] settlement"[2] of the negligence claim. Burns argued that FedEx should not receive any part of the settlement, contending that FedEx had engaged in intentional misconduct against Burns, had unclean hands, and was equitably estopped from asserting its subrogation interest. The essence of Burns' argument was that FedEx had behaved inequitably in resisting the workers' compensation claim, in part because the experts it retained and relied upon were not reliable. Burns contended that FedEx had "flip-flopped on causation" by voluntarily paying benefits, then denying benefits, then, after the settlement of the workers' compensation claim, asserting a subrogation interest in the proceeds of the negligence settlement.

The district court agreed with Burns. In a journal entry, the court stated that it was "abundantly clear, this is a gross understatement, that [FedEx] has changed [its] position like a merry-go-round throughout the history of . . . Burns' case." The court stated that it "clearly believe[d] that FedEx comes before this Court with unclean hands for numerous reasons and finds that the conduct of FedEx meets the elements of equitable estoppel." The court adopted and entered a memorandum order prepared by Burns' counsel.

The memorandum order asserted that "[t]his [was] a proceeding in equity and equitable principles apply." Of the money deposited with the clerk of the district court, the order directed payment of $62,734.94 in fees and expenses to Burns' counsel in the negligence claim, leaving "a balance of $98,468 to be '*fairly and equitably*' divided by the court." (The total sum, $161,203.87, apparently was composed of the $156,947.18 originally paid to the clerk of the district court, plus interest accrued during the proceedings.)

In addition to restating the journal entry's conclusions with respect to unclean hands and estoppel, the order rejected FedEx's argument that Burns' Social Security disability benefits and disability insurance benefits should be considered in determining what was a "fair and equitable distribution." The order stated that it would strain the workers' compensation statutes to allow

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[2] See Neb. Rev. Stat. § 48-118.04 (Cum. Supp. 2006).

FedEx's subrogation claim to attach, indirectly, to those benefits. The order also stated that consideration of Social Security and insurance disability benefits would violate the collateral source rule. As with the journal entry, the order concluded that FedEx was barred from recovering any of the negligence settlement proceeds.

ASSIGNMENTS OF ERROR

FedEx assigns, consolidated and restated, that the court erred in (1) determining, based on the application of equitable principles, that FedEx was not entitled to recover any of its subrogation interest in the proceeds of the negligence settlement; (2) determining that the collateral source rule barred consideration of other benefits Burns received as a result of his accident; and (3) determining that of the total negligence settlement, only $161,203.87 was subject to distribution among the parties.

FedEx also assigns that the court erred in not utilizing a "rule of proportionality" to determine a fair and equitable distribution of the negligence settlement proceeds. However, we recently rejected an identical argument in *Turco v. Schuning*,[3] which we decided after FedEx's brief was filed. We decline to reconsider *Turco*, and do not further consider this argument.

STANDARD OF REVIEW

[1,2] Distribution of the proceeds of a judgment or settlement under § 48-118.04 is left to the trial court's discretion and reviewed for an abuse of that discretion.[4] A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.[5]

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[6]

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[3] See *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

[4] *Id.*

[5] *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006).

[6] *Livengood v. Nebraska State Patrol Ret. Sys.*, *ante* p. 247, 729 N.W.2d 55 (2007).

ANALYSIS

FAIR AND EQUITABLE DISTRIBUTION OF SETTLEMENT PROCEEDS

[4] Before considering the precise issues presented by this appeal, it will be helpful to review the general framework in which those issues arise. Section 48-118 provides:

> When a third person is liable to the employee or to the dependents for the injury or death of the employee, the employer shall be subrogated to the right of the employee or to the dependents against such third person. . . .
>
> . . . .
>
> Nothing in the Nebraska Workers' Compensation Act shall be construed to deny the right of an injured employee or of his or her personal representative to bring suit against such third person in his or her own name or in the name of the personal representative based upon such liability, but in such event an employer having paid or paying compensation to such employee or his or her dependents shall be made a party to the suit for the purpose of reimbursement, under the right of subrogation, of any compensation paid.

In short, § 48-118 grants an employer who has paid workers' compensation benefits to an employee injured as a result of the actions of a third party a subrogation interest against payments made by the third party.[7]

Prior to 1994, an employer would have been entitled to dollar-for-dollar recovery of its subrogation interest.[8] However, 1994 Neb. Laws, L.B. 594, changed the law in that regard. Those changes are now codified in § 48-118.04, which provides in relevant part that

> [i]f the employee or his or her personal representative or the employer or his or her workers' compensation insurer do not agree in writing upon distribution of the proceeds of any judgment or settlement, the court, upon application,

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[7] *Turco, supra* note 3; *Combined Insurance v. Shurter*, 258 Neb. 958, 607 N.W.2d 492 (2000).

[8] See *Jackson v. Branick Indus.*, 254 Neb. 950, 581 N.W.2d 53 (1998).

> shall order a fair and equitable distribution of the proceeds of any judgment or settlement.

The legislative history of L.B. 594 reveals that the purpose of what is now § 48-118.04 was to prevent a fair and reasonable settlement between the employee and third-party tort-feasor from being delayed because the parties could not agree on how the proposed settlement should be distributed. As the introducing senator explained, workers' compensation cases

> sometimes . . . move slowly through the court for no other reason other than [that] third parties, when you have a lot of parties involved you can't seem to get the cases settled. . . . Oftentimes, in determining either under the doctrine of subrogation or third party medical providers or what have you can't agree on a settlement amount, what percentage should be paid, or whatever in a disputed claim, and because of that the case itself slows down. This would allow the court to step in at that time and say, this is a reasonable settlement figure, it ought to go. This is a reasonable distribution of those proceeds.[9]

As further explained before the Committee on Business and Labor,

> often a lawsuit involving subrogation claims move[s] slowly through the court system because parties to a lawsuit cannot resolve conflicts as to how a proposed settlement offer should be distributed among the parties. LB 594 would . . . authorize district court judges before whom an action is pending involving workers' compensation subrogation to order a fair and equitable distribution of a settlement offered to the parties entitled thereto if the court determines that the settlement offer is adequate and in the best interest of the parties.[10]

Because § 48-118.04 directs the district court, when the parties cannot agree, to order a "fair and equitable distribution" of settlement proceeds, we have said that the changes made by

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[9] Floor Debate, L.B. 594, Committee on Business and Labor, 93d Leg., 2d Sess. 8098-99 (Jan. 18, 1994).

[10] Committee on Business and Labor Hearing, L.B. 594, 93d Leg., 1st Sess. 59 (Feb. 22, 1993).

L.B. 594 called for application of the law of equity to the statutory right of subrogation.[11] However, subrogation in workers' compensation cases is still based on statute, and not in equity.[12]

Thus, in *Turco v. Schuning*,[13] we applied statutory subrogation, and rejected the argument that the statute had adopted pure equitable subrogation. Specifically, in *Turco*, the district court had applied principles of equitable subrogation and denied a workers' compensation insurer's subrogation claim because the employee had not been "made whole" by his settlement with the third-party tort-feasor's insurer. We applied statutory subrogation and declined to read into the statute a requirement that the employee be "made whole."[14] We explained that while the language now set forth in § 48-118.04 provided for a fair and equitable distribution, it did not adopt the "made whole" doctrine or adopt any other specific rule for determining how to fairly and equitably distribute the settlement.[15] That distribution was left to the court's discretion.[16]

[5] It is in this context that the present case arises. FedEx argues that the district court in this case erred by applying equitable principles to bar it from recovering on its subrogation interest. We agree. We conclude, based on our consideration of the statutory scheme, that the phrase "fair and equitable distribution," as used in § 48-118.04, was not intended to permit the subrogation interest of an employer or workers' compensation insurer to be subject to equitable defenses such as those relied upon by the district court.

[6] First, we observe that § 48-118 provides, in definitive language, that when a third person is liable to an employee or employee's dependents for the injury or death of the employee, "the employer *shall* be subrogated to the right of the employee

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[11] *Jackson, supra* note 8.

[12] See, *Turco, supra* note 3; *Combined Insurance, supra* note 7.

[13] *Turco, supra* note 3.

[14] *Id.*

[15] *Id.*

[16] *Id.*

or to the dependents against such third person."[17] As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.[18] There is no indication, either in the statutory language or the legislative history, that § 48-118.04 was intended to infringe on the right of subrogation guaranteed by § 48-118 beyond the extent necessary to effectuate a reasonable settlement.

We also note that the Nebraska Workers' Compensation Act,[19] of which § 48-118.04 is a part, provides for compensation and penalties for wrongful conduct on the part of an employer—none of which affect an employer's subrogation interest. In particular, when an employer fails to pay compensation within 30 days of the notice of disability or entry of an award, the employer may be subject to a penalty of 50 percent of the delinquent payment.[20] An employer who fails to pay compensation or medical benefits is subject to an award of attorney fees and interest on the final award obtained.[21] And an employer who willfully fails to secure the payment of compensation, or who conceals property or records with the intent to avoid payment of compensation, may be found guilty of a Class I misdemeanor.[22]

[7] In other words, the Nebraska Workers' Compensation Act expressly provides the sanctions to be imposed when an employer fails to comply with its requirements. 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.[23] But those sanctions are imposed by

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[17] § 48-118 (emphasis supplied).

[18] *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005).

[19] Neb. Rev. Stat. ch. 48, art. 1 (Reissue 2004 & Cum. Supp. 2006).

[20] § 48-125(1).

[21] § 48-125(2) and (3).

[22] §§ 48-125.01 and 48-145.01(1).

[23] *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved in part on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

the Workers' Compensation Court, in a workers' compensation proceeding. We do not read § 48-118.04 as implicitly authorizing the district court to punish an employer beyond the penalties expressly prescribed by the workers' compensation statutes.

[8,9] Nor would it be wise public policy to punish an employer by barring it from asserting a subrogation interest. The purpose of the Nebraska Workers' Compensation Act's penalty provisions is to encourage prompt payment of benefits.[24] A subrogation interest is acquired by *paying* benefits to an injured employee—conduct that is hardly wrongful and that the Nebraska Workers' Compensation Act is intended to encourage. Section 48-118 serves this purpose, encouraging prompt payment of benefits, even when a third party is liable for the injury, by providing an employer or insurer with the means to recover at least a portion of its payout. But an employer or insurer unable to secure subrogation will be less likely to pay benefits in the first instance, contrary to the intent of the statute. 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.[25] The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job and should be construed to accomplish that purpose.[26] The district court's interpretation of § 48-118.04 is contrary to the purpose of the workers' compensation statutes.

In particular, the equitable doctrines relied upon by the district court—unclean hands and estoppel—are inapplicable under these circumstances. Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.[27] But the doctrine is specifically predicated upon *equitable* rights, and is enforceable against a

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[24] *Id.*

[25] *Pepitone v. Winn*, 272 Neb. 443, 722 N.W.2d 710 (2006).

[26] See *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005).

[27] *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003); *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002).

party seeking equitable relief.[28] An employer or workers' compensation insurer asserting subrogation under § 48-118 is not seeking equitable relief, and the doctrine of unclean hands has no application.

[10,11] The district court specifically identified "equitable estoppel" as another basis for barring FedEx from receiving a share of the settlement proceeds. But the doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.[29] The related doctrine of promissory estoppel is based upon a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee which does in fact induce such action or forbearance.[30] There is no suggestion in this case, nor evidence to support a finding, that Burns acted in reliance upon a representation or promise made by FedEx. Neither of these doctrines of estoppel is applicable.

[12,13] Closer to the district court's reasoning is the doctrine of judicial estoppel, which holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.[31] The district court asserted that FedEx had "changed its positions" and taken "inconsistent positions" to meet the exigencies of this case and Burns' workers' compensation proceedings. The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.[32]

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[28] See *Fritz v. Jungbluth*, 141 Neb. 770, 4 N.W.2d 911 (1942).

[29] *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997); *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

[30] *Goff-Hamel v. Obstetricians & Gyns., P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999).

[31] *Stewart v. Bennett, ante* p. 17, 727 N.W.2d 424 (2007).

[32] *Id.*

[14] But absent judicial acceptance of the inconsistent position, the application of the rule is unwarranted because no risk of inconsistent results exists.[33] Here, the Workers' Compensation Court never endorsed the allegedly inconsistent assertion of FedEx that Burns' injury was not compensable. Nor is it necessarily inconsistent for an employer to contest the compensability of an injury before the Workers' Compensation Court but claim a subrogation interest in the proceeds of a third-party settlement.

If there is a reasonable controversy as to the compensability of an injury, an employer is entitled to litigate that issue in the compensation court. An employer's subrogation interest in the proceeds of a third-party settlement is contingent solely upon the employer's paying workers' compensation benefits to an employee injured as a result of the actions of a third party.[34] To protect its subrogation interest, the employer is not required to concede the merits of the employee's compensation claim or make an affirmative statement to the district court endorsing the employee's demand for compensation. An employer may voluntarily pay benefits to an injured employee, yet contest some or all of the injured employee's claims before the compensation court. The employer may even prevail in the compensation court and still assert a subrogation interest based on whatever workers' compensation benefits it has already paid. It is simply not inconsistent for an employer to defend against a workers' compensation claim, yet claim subrogation based on workers' compensation benefits it has nonetheless paid. Whether the employer's defense against the workers' compensation claim is reasonable is determined by the Workers' Compensation Court under the Nebraska Workers' Compensation Act, not in the district court by resort to equitable principles.

In short, the district court's duty under § 48-118.04 to "order a fair and equitable distribution of the proceeds of any judgment or settlement" simply requires the court to determine a reasonable division of the proceeds among the parties. The court in

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[33] *Id.*

[34] See, § 48-118; *Combined Insurance, supra* note 7.

this case erred in applying equitable principles to bar FedEx from recovering any of its subrogation interest. FedEx's first assignment of error has merit.

Remaining Assignments of Error Not Ripe for Consideration

[15] FedEx's second assignment of error takes issue with the district court's statement that "consideration of [Burns'] social security and insurance disability benefits would violate the collateral source rule." The collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.[35] However, because the district court determined that FedEx was equitably barred from recovering any of the proceeds of the settlement, the court never directly confronted whether the determination of a "fair and equitable distribution" of the settlement proceeds permits or requires the court to consider an employee's other sources of support, such as Social Security or disability benefits. In the absence of argument on that point and a record directly implicating the issue, we decline to address it in this appeal.

Finally, FedEx assigns that the district court erred in "determining that out of the $475,000.00 tort settlement, only $161,203.87 was subject to distribution among the parties." But we do not read the court's order as necessarily making such a determination. Rather, we understand the court's order as disposing of $161,203.87 because that was the amount of money that the court had to dispose of. Obviously, the court's conclusion that FedEx was not entitled to *any* of the settlement proceeds meant that the court did not have to consider whether FedEx's "fair and equitable" share of the proceeds was greater than the sum paid to the clerk of the court for distribution. Again, in the absence of a record squarely implicating the issue FedEx raises, we decline to consider it.

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[35] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). See, also, §§ 48-130 and 48-147.

CONCLUSION

The district court erred in concluding that equitable principles barred FedEx from recovering its subrogation interest in the proceeds of Burns' third-party settlement. The judgment of the court is reversed, and the cause is remanded with directions for the court to order a "fair and equitable distribution of the proceeds" of the settlement, consistent with the interpretation of § 48-118.04 articulated in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STACY LANE VANHORN, APPELLANT, V. NEBRASKA STATE RACING COMMISSION AND DENNIS OELSCHLAGER, EXECUTIVE SECRETARY OF NEBRASKA STATE RACING COMMISSION, APPELLEES.

DOUGLAS L. BRUNK, APPELLANT, V. NEBRASKA STATE RACING COMMISSION AND DENNIS OELSCHLAGER, EXECUTIVE SECRETARY OF NEBRASKA STATE RACING COMMISSION, APPELLEES.

732 N.W.2d 651

Filed June 8, 2007. Nos. S-06-103, S-06-105.

1. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Courts: Appeal and Error.** Where an appellate court reverses a judgment and remands a cause to the district court for a special purpose, on remand, the district court has no power or jurisdiction to do anything except to proceed in accordance with the mandate as interpreted in the light of the appellate court's opinion.
4. ____: ____. A trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. No judgment other than that directed or permitted by the appellate court's mandate may be rendered in the district court upon remand of a cause.
5. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** The granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) which is limited to a facial attack on the pleadings is subject to the same de novo standard of review as a motion brought under rule 12(b)(6).

Appeals from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Appeals dismissed.

O. William VonSeggern for appellants.

David T. Schroeder, on brief, for appellant Douglas L. Brunk.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

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

WRIGHT, J.

NATURE OF CASE

Stacy Lane VanHorn and Douglas L. Brunk, equine veterinarians, were found by the Nebraska State Racing Commission (Commission) to have violated rules regarding the administration of medications to racehorses. VanHorn and Brunk appealed the Commission's assessment of disciplinary sanctions, and the Lancaster County District Court modified the penalties. The Commission appealed from that determination. This court affirmed the district court's order as to the penalties imposed on VanHorn. We affirmed the district court's order as to Brunk, with a modification of the penalties imposed. See *Brunk v. Nebraska State Racing Comm.*, 270 Neb. 186, 700 N.W.2d 594 (2005).

After the mandates from this court were issued, VanHorn and Brunk each filed an "Application for Damages, Costs and Fees" in the district court. The district court concluded it lacked subject matter jurisdiction and sustained the motions to dismiss filed by the Commission and Dennis Oelschlager, the Commission's executive secretary (hereinafter collectively referred to as "Commission"). VanHorn and Brunk appeal.

SCOPE OF REVIEW

[1] When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

FACTS

VanHorn and Brunk served as veterinarians during the 2001 horseracing season at Fonner Park in Grand Island, Nebraska. The Commission determined that VanHorn and Brunk violated Commission rules regarding the administration of medications to racehorses and the handling, packaging, and reporting of medications. It ordered each veterinarian to pay a fine of $2,000 and ruled them ineligible for licensing until January 1, 2006.

VanHorn and Brunk sought review of the Commission's decisions. The district court affirmed the Commission's findings, except the court determined there was insufficient evidence (1) to support the determination that Brunk failed to cooperate with the Commission during its investigation and (2) to find that VanHorn and Brunk were responsible for the administration of Clonidine, a human blood pressure medication, to racehorses. The court shortened VanHorn's period of disqualification from licensure to July 1, 2003, and Brunk's period of disqualification to July 1, 2004.

The Commission appealed to this court, and VanHorn and Brunk cross-appealed. See *Brunk v. Nebraska State Racing Comm., supra*. We concluded the district court was correct in finding that there was insufficient evidence to support the Commission's determination that VanHorn and Brunk violated the Commission's rules concerning the administration of certain medications. However, we reversed the district court's finding that Brunk cooperated with the Commission's investigation. We held that the penalties assessed by the district court were proportionate to the seriousness of the offenses, except as to the issue of Brunk's cooperation with the Commission. We concluded that Brunk's disqualification period should be extended by 6 months, to January 1, 2005.

This court's opinion was filed on July 22, 2005, and the mandates were issued on August 25. Subsequently, VanHorn and

Brunk each filed an "Application for Damages, Costs and Fees" in the district court. They alleged that after the Commission perfected its appeals, they were advised by the Commission that the modification of their suspensions from licensure was stayed pending appeal pursuant to Neb. Rev. Stat. §§ 25-21,213 and 25-21,216 (Reissue 1995). Because the Commission's orders of December 31, 2002, remained in effect pending appeal, VanHorn and Brunk were allegedly unable to acquire licensure until the mandate of this court was issued in August 2005. They claimed the Commission's appeals denied them the opportunity to practice their trade at horseracing events until after this court's decision. VanHorn claimed lost income of $294,000 for the 2004 and 2005 racing seasons, and Brunk claimed lost income of $250,000 for the 2005 racing season.

The Commission moved to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003), asserting that the district court lacked jurisdiction over the subject matter and/or that the complaints failed to state a claim upon which relief could be granted. The cases were consolidated for argument.

In summary, VanHorn and Brunk claimed they were deprived of income because the Commission appealed the district court's earlier decisions. They asserted that if a supersedeas bond had been required, they would have been entitled to damages from the Commission for any further damages that might result from an appeal. VanHorn and Brunk requested monetary damages for lost earnings during the pendency of the appeals. They argued that if the State had not appealed, VanHorn could have applied for a license for the racing seasons of 2004 and 2005 and Brunk would have been permitted to apply for a license for the racing season of 2005. They claimed that the statutes, which acted as a supersedeas, deprived them of the opportunity to work and that they should be compensated accordingly.

The district court noted that under § 25-21,213, when the State is a party, no appeal or supersedeas bond is required and the filing of a notice of intention to appeal operates as a supersedeas. The record showed that VanHorn and Brunk had not asked either the district court or this court for damages as a result of the Commission's appeals. The district court determined it did not have jurisdiction to consider the requests for

damages, and it sustained the Commission's motions to dismiss. The court also concluded it lacked jurisdiction to award attorney fees or costs on appeal except as directed by the mandates of an appellate court, and the mandates here did not include an award of attorney fees.

ASSIGNMENTS OF ERROR

VanHorn and Brunk assert that the district court erred in determining that it lacked jurisdiction to consider their requests for damages and in sustaining the Commission's motions to dismiss.

ANALYSIS

When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006). The district court here concluded it lacked authority to take any action other than that stated in the mandates issued by this court. The mandates informed the district court that its earlier decisions concerning VanHorn and Brunk had either been affirmed or affirmed as modified, and the mandates directed the district court to, "without delay, proceed to enter judgment in conformity with the judgment and opinion of [the Nebraska Supreme Court]."

This court has stated:

> When an appellate court remands a cause with directions, the judgment of the appellate court is a final judgment in the cause, and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on or taken from it. That order is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by it can have any effect, even though it may be such as the appellate court ought to have directed.

K N Energy, Inc. v. Cities of Broken Bow et al., 248 Neb. 112, 115, 532 N.W.2d 32, 34 (1995) (*K N Energy, Inc., II*).

In *K N Energy, Inc., II*, the district court had, in part, enjoined certain municipalities from continuing to enforce gas rate ordinances which were subsequently challenged by K N Energy. The Nebraska Court of Appeals reversed the judgment and remanded the cause for a new trial. See *K N Energy, Inc. v. Cities of Broken Bow et al.*, Nos. A-91-848 through A-91-851, 1992 WL 322016 (Neb. App. Nov. 10, 1992) (not designated for permanent publication). Upon further review, this court reversed the judgment of the Court of Appeals and remanded with direction to reinstate the enforcement of rates prescribed by the municipalities' ordinances. *K N Energy, Inc. v. Cities of Broken Bow et al.*, 244 Neb. 113, 505 N.W.2d 102 (1993) (*K N Energy, Inc., I*). Subsequently, using the same docket and page numbers in the district court as those in the earlier actions, the municipalities filed motions for refunds to ratepayers. *K N Energy, Inc., II*. The district court found it lacked jurisdiction and dismissed the motions. *Id.* On appeal, this court determined that our opinion reinstating the district court's order was a final judgment and that, therefore, the district court lacked jurisdiction to grant motions that sought to supplement the appellate court's order when the motions were filed in a fully adjudicated cause of action. *Id.*

In *Gates v. Howell*, 204 Neb. 256, 282 N.W.2d 22 (1979) (*Gates I*), we held that statutes which defined a mobile home as a motor vehicle were unconstitutional. We reversed the judgment of the lower court and remanded the cause with directions to enter a judgment in accordance with our opinion. Following the mandate, the appellants filed a document entitled "'Application,'" in which they sought an order from the trial court regarding matters which were beyond the issues covered by our opinion. *Gates v. Howell*, 211 Neb. 85, 87, 317 N.W.2d 772, 774 (1982) (*Gates II*). We concluded that the appellants were attempting to reopen the case and obtain further relief beyond that provided by *Gates I*. The trial court entered an order which followed the mandate of this court, and the appellants filed an appeal, claiming that the trial court erred in failing to provide all the relief they had requested.

In *Gates II*, we denied the appellants any further relief and directed the trial court to enter a judgment in accordance with

Gates I. We stated that if the appellants had a further cause of action arising out of the decision in *Gates I*, they needed to file a new lawsuit and present evidence. "They may not, however, simply extend their request for relief beyond that which was initially determined by this court." *Gates II*, 211 Neb. at 90, 317 N.W.2d at 775.

[3,4] In *State ex rel. Hilt Truck Line v. Jensen*, 218 Neb. 591, 593, 357 N.W.2d 455, 457 (1984), we stated:

> Where the Supreme Court reverses and remands a cause to the district court for a special purpose, on remand the district court has no power or jurisdiction to do anything except to proceed in accordance with the mandate as interpreted in the light of the Supreme Court's opinion. . . .
>
> A trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. No judgment other than that directed or permitted by the Supreme Court's mandate may be rendered in the district court upon remand of a cause.

(Citations omitted.)

In the cases at bar, the prior actions were fully adjudicated when the district court spread the mandates as directed. The district court had no authority to take additional action in the cases. By filing their requests for damages after the mandates were entered, VanHorn and Brunk were attempting to obtain further relief, which they had not previously requested from the district court. Such matters were outside the mandates of this court, and the district court lacked jurisdiction to take any action other than that directed by the mandates.

[5] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006). The granting of a motion to dismiss for lack of subject matter jurisdiction under rule 12(b)(1) which is limited to a facial attack on the pleadings is subject to the same de novo standard of review as a motion brought under rule 12(b)(6). *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005).

Upon de novo review, we conclude that the district court properly found it lacked jurisdiction over the issues of damages, costs, and fees because the court had already entered judgment in accordance with this court's mandates. As noted earlier, this court cannot determine the merits of an issue when the lower court lacked subject matter jurisdiction. See *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006). This court has no power to consider the merits of the requests by VanHorn and Brunk for damages, costs, and fees.

CONCLUSION

Because the district court lacked jurisdiction over these matters, so too does this court. The appeals are dismissed for lack of jurisdiction.

APPEALS DISMISSED.

SAIF SAYAH ET AL., APPELLANTS, V. METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, A RHODE ISLAND CORPORATION, APPELLEE.

733 N.W.2d 192

Filed June 8, 2007. No. S-06-162.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law. In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts.** An insurance policy is a contract, and its terms provide the scope of the policy's coverage.
4. **Insurance: Contracts: Intent: Appeal and Error.** When an appellate court reviews an insurance policy, it construes the policy as any other contract to give effect to the parties' intentions when the writing was made.
5. **Contracts.** When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
6. **Contracts: Insurable Interest.** A claimant under an insurance contract must show an interest in the contract that would be recognized and protected by the courts.
7. **Property: Insurable Interest.** Under Nebraska law, to have an insurable interest, the claimant must have some legally enforceable right that would be recognized and enforced in the property at issue.

8. ____: ____. Neither family use of property nor the family relationship alone gives automatic rise to an insurable property interest.
9. **Parent and Child: Property.** A parent has no legal recourse in an adult child's property simply by being a parent, without some other legally enforceable right.
10. **Insurable Interest.** When no legally enforceable interest exists, no insurable interest exists.

Appeal from the District Court for Lancaster County: EDWARD E. HANNON, Court of Appeals Judge, Retired. Affirmed.

Stanley D. Cohen, of Law Office of Stan Cohen, for appellants.

Dean J. Sitzmann and Renee Eveland, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

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

CONNOLLY, J.

The appellants, Saif Sayah and his parents, Ali Sayah and Fadhila Haddad, sued Metropolitan Property and Casualty Insurance Company (Metropolitan). Metropolitan denied the appellants' claims for physical damage involving a Jeep owned by Saif. The district court granted Metropolitan's motion for summary judgment. It found that the physical damage portion of the policy covered only automobiles owned by Ali and Fadhila. In addition, the court found that Ali and Fadhila did not have an insurable interest in Saif's automobile and that the policy did not cover Saif's automobile for physical damage because he was not a named insured. We affirm because (1) Saif did not have a contract of insurance for physical damage with Metropolitan and (2) Ali and Fadhila did not have an insurable interest in Saif's Jeep.

BACKGROUND

Saif purchased a 1999 Jeep Grand Cherokee Laredo. After he bought the Jeep, Saif spent $5,000 on wheels, tires, and spinners. Ali and Fadhila purchased an insurance policy with Metropolitan that covered the Jeep and two other vehicles. The policy listed Ali and Fadhila as the named insured and household drivers, but

it listed Saif only as a household driver. The policy did not cover a household driver for physical damage.

The police found Saif's stolen Jeep burned, on blocks, and with its wheels, tires, and spinners missing. Metropolitan initially denied the claim because of "inconsistencies in the facts of the loss reported by [Saif] with the physical evidence [they] have gathered." Metropolitan later denied the claim, asserting that Ali and Fadhila did not have an insurable interest in the Jeep.

The appellants sued Metropolitan, claiming $22,950 in damages. In his affidavit, Ali averred that he sometimes drove Saif's Jeep; that he gave Saif money to help make payments for the Jeep; that he notified his insurance agent he wanted Saif's wheels, tires, and spinners added to the policy; and that when the Jeep was stolen, Saif lived at home. Neither Ali nor Fadhila, however, had a security interest in the Jeep, and their names were not on the Jeep's title.

Metropolitan moved for summary judgment because Saif was the sole owner of the Jeep and Ali and Fadhila had no insurable interest. The district court granted Metropolitan's motion for summary judgment, finding the physical damage part of the policy covered only automobiles owned by Ali and Fadhila. The court also found that Ali and Fadhila did not have an insurable interest in Saif's Jeep and that Saif was not a named insured. The court found the appellants did not have a cause of action and that Metropolitan was entitled to judgment as a matter of law.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in granting Metropolitan's motion for summary judgment.

STANDARD OF REVIEW

[1] The interpretation of an insurance policy is a question of law. In reviewing questions of law, we resolve the question independently of the lower court's conclusion.[1]

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[1] See *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

[2] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

SAIF HAD NO INSURANCE POLICY WITH METROPOLITAN FOR PHYSICAL DAMAGE

[3-5] Saif alleges he had a valid claim for physical damage and that Metropolitan wrongly denied it. An insurance policy is a contract, and its terms provide the scope of the policy's coverage. When we review an insurance policy, we construe the policy as any other contract to give effect to the parties' intentions when the writing was made. When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.[3]

Here, the policy's plain language shows that Metropolitan did not insure Saif's Jeep for physical damage. Ali and Fadhila were the only named insureds on the policy. The policy's physical damage coverage only insured vehicles owned by them. In contrast, the policy named Saif as a household driver. Under the policy, household drivers had different rights than named insureds. As a household driver, the policy provided Saif with liability coverage, but it did not provide his Jeep with physical damage coverage.

Metropolitan had a right to limit its liability by including limitations in the policy. The only named insureds on the policy were Ali and Fadhila, and the contract for physical damage was with only them. The policy did not cover Saif's Jeep for physical damage, and Metropolitan was under no duty to pay Saif for a claim not covered by the policy.

ALI AND FADHILA DO NOT HAVE AN INSURABLE INTEREST IN SAIF'S JEEP

Ali and Fadhila claim that the policy obligated Metropolitan to pay for the physical damage claim because they had had an

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[2] *Geddes v. York County*, *ante* p. 271, 729 N.W.2d 661 (2007).

[3] *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005).

insurable interest in the Jeep. Ali and Fadhila argue that they had an insurable interest in the Jeep because they paid for the Jeep's insurance, Ali occasionally used the Jeep, and Metropolitan issued the policy with the understanding that the family would be using the Jeep.

[6] But a claimant under an insurance contract must show an interest in the contract that would be recognized and protected by the courts.[4] An insurable interest is "every interest in property or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured."[5]

[7-10] Section 44-375 provides: "[w]hen the name of the party intended to be insured is specified in a policy, such insurance can be applied only to his own proper interest." Under Nebraska law, to have an insurable interest, the claimant must have some legally enforceable right that would be recognized and enforced in the property at issue.[6] Neither family use of property nor the family relationship alone gives automatic rise to an insurable property interest.[7] A parent has no legal recourse in an adult child's property simply by being a parent, without some other legally enforceable right. Nor does Nebraska law recognize Ali's occasional use of Saif's Jeep as a legal interest. When no legally enforceable interest exists, no insurable interest exists.[8] Without having had an insurable interest in the property

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[4] Neb. Rev. Stat. § 44-375 (Reissue 2004); *Wriedt v. Beckenhauer*, 183 Neb. 311, 159 N.W.2d 822 (1968); *Bassett v. Farmers & Merchants Ins. Co.*, 85 Neb. 85, 122 N.W. 703 (1909).

[5] Neb. Rev. Stat. § 44-103(13)(a) (Reissue 2004).

[6] See *id.* See, also, *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004); *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995); *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993); *Howard v. State Farm Mut. Auto. Ins. Co.*, 242 Neb. 624, 496 N.W.2d 862 (1993); *Wriedt v. Beckenhauer, supra* note 4; *Krug Park Amusement Co. v. New York Underwriters Ins. Co.*, 129 Neb. 239, 261 N.W. 364 (1935); *Bassett v. Farmers & Merchants Ins. Co., supra* note 4.

[7] See *Bassett v. Farmers & Merchants Ins. Co., supra* note 4.

[8] § 44-375; *Wriedt v. Beckenhauer, supra* note 4; *Bassett v. Farmers & Merchants Ins. Co., supra* note 4.

sought to be covered, Ali and Fadhila did not have property insurance on Saif's Jeep.

THE DOCTRINE OF MENDING ONE'S HOLD DOES NOT APPLY

Metropolitan initially denied the appellants' claim because it was based on "inconsistencies in the facts of the loss reported by [Saif] with the physical evidence [they] have gathered." Metropolitan later denied the claim, asserting that Ali and Fadhila did not have an insurable interest in the Jeep.

The appellants argue that Metropolitan cannot raise the insurable interest defense because of the doctrine of mending one's hold. The appellants cite this court's opinion in *Howard v. State Farm Mut. Auto. Ins. Co.* that "'it has long been the rule in this state that an insurer which gives one reason for its conduct and decision as to a matter of controversy cannot, after litigation has begun, defend upon another and different ground.'"[9]

In *Design Data Corp.*, however, we refined the doctrine:

> While the rule as to "mending one's hold" *may* be alive and well as to conditions of forfeiture, generally it has no application to matters relating to coverage, and estoppel cannot be invoked to expand the scope of coverage of an insurance contract absent a showing of detrimental good faith reliance upon statements or conduct of the party against whom estoppel is invoked which reasonably led an insured to believe coverage was present.[10]

The appellants did not suffer detrimental reliance when Metropolitan asserted the insurable interest defense because the appellants had notice that Metropolitan could assert the defense. First, the insurance policy addressed the insurable interest issue. The policy provides no coverage if an insured does not have an insurable interest in the covered automobile. Second, Metropolitan expressly reserved the right to assert additional defenses in its denial letter. The appellants, therefore, had

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[9] *Howard v. State Farm Mut. Auto. Ins. Co.*, *supra* note 6, 242 Neb. at 637, 496 N.W.2d at 870.

[10] *Design Data Corp. v. Maryland Cas. Co.*, *supra* note 6, 243 Neb. at 957, 503 N.W.2d at 560.

notice that Metropolitan reserved the right to assert additional defenses. The district court properly found that Metropolitan was not estopped from asserting its insurable interest defense.

CONCLUSION

We conclude that Metropolitan was under no duty to pay for the property stolen from Saif's Jeep because Saif had no insurance policy with Metropolitan for physical damage and Ali and Fadhila had no insurable interest in Saif's Jeep. Also, the district court properly found that Metropolitan was not estopped from asserting its insurable interest defense. We, therefore, affirm the district court's decision to grant Metropolitan's motion for summary judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOE R. CLAPPER, APPELLANT.
732 N.W.2d 657

Filed June 8, 2007. No. S-06-406.

1. **Constitutional Law: Criminal Law: Jury Trials.** Whether a criminal defendant has been denied a constitutional right to a jury trial presents a question of law.
2. **Judgments: Appeal and Error.** When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions.
3. **Sentences: Restitution.** When a court orders restitution to a crime victim under Neb. Rev. Stat. § 29-2280 (Reissue 1995), restitution is a criminal penalty imposed as punishment and is part of the criminal sentence imposed by the sentencing court.
4. **Constitutional Law: Criminal Law: Jury Trials.** Both the Sixth Amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution guarantee a criminal defendant the right to trial by an impartial jury for serious offenses.
5. **Constitutional Law: Jury Trials.** The 6th Amendment's jury trial guarantee is made applicable to the states by the 14th Amendment.
6. **Criminal Law: Sentences: Prior Convictions: Proof.** Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.
7. **Constitutional Law: Restitution: Jury Trials.** The Sixth Amendment's jury trial guarantee does not extend to restitution hearings because a judge's factfinding required for restitution does not result in a sentence that exceeds a statutory maximum.

8. **Restitution: Sentences.** A sentencing court's factfinding to determine restitution does not expose the defendant to any greater punishment than Neb. Rev. Stat. § 29-2280 (Reissue 1995) authorizes, which is for the full amount of the victim's actual damages.
9. **Restitution: Courts.** The U.S. Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), does not apply to a judge's factfinding to determine restitution.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

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

PER CURIAM.

After Joe R. Clapper pleaded guilty to third degree assault, the district court overruled Clapper's demand for a jury trial and ordered him to pay restitution. In *Blakely v. Washington*,[1] the U.S. Supreme Court held that a criminal sentence violates a defendant's Sixth Amendment right to a jury trial if it exceeds the "statutory maximum." The Court defined "statutory maximum" as the maximum sentence a court may impose without any additional findings beyond those supported by the jury's verdict or the defendant's admissions. Relying on *Blakely*, Clapper argues that because Nebraska's restitution statutes[2] allow the district court to find facts that increase a criminal sentence beyond the statutory maximum, restitution facts must be determined by a jury.

We affirm. We determine that restitution does not increase a defendant's sentence beyond what his or her conviction authorizes because the conviction itself authorizes the court to impose restitution.

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[1] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[2] Neb. Rev. Stat. §§ 29-2280 to 29-2289 (Reissue 1995).

BACKGROUND

In 2003, under a plea agreement, Clapper pled guilty to a reduced charge of third degree assault. The charges arose from a bizarre incident in which Clapper attempted suicide and the bullet ricocheted off his skull and struck his girlfriend in the chest. The court sentenced Clapper to 1 year in the county jail and ordered him to pay $18,862.72 in restitution to the victim for medical expenses. The Nebraska Court of Appeals, in an unpublished memorandum opinion, vacated the restitution order and remanded the cause for further proceedings.[3] It determined that the record showed insufficient evidence to support either the amount of the restitution or Clapper's ability to pay it.

On remand, in June 2004, Clapper filed an "Objection to Restitution Hearing," alleging that the restitution statutes were unconstitutional under Neb. Const. art. VII, § 5(1). That provision states (with certain exceptions not applicable here) that "all fines, penalties, and license money arising under the general laws of the state . . . shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue." After a hearing, the district court overruled Clapper's motion to quash. It found that § 29-2280 provides for restitution as compensation only and therefore is not a penalty. The court then set a date for the restitution hearing.

Before the restitution hearing, Clapper moved for a jury trial. The State argued that *Blakely*[4] did not apply to restitution. Clapper countered that because restitution is a criminal penalty, under *Blakely*, a jury must determine restitution. The court overruled Clapper's demand for a jury trial.

Clapper appealed the court's order denying him a jury trial, but the Court of Appeals summarily dismissed the appeal for lack of jurisdiction under Neb. Ct. R. of Prac. 7(A)2 (rev. 2001).[5] On remand, in March 2006, the State agreed that Clapper could stipulate to the facts at the restitution hearing without waiving

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[3] *State v. Clapper*, 12 Neb. App. xxii (No. A-03-1308, June 14, 2004).

[4] *Blakely v. Washington, supra* note 1.

[5] *State v. Clapper*, 13 Neb. App. liv (No. A-05-075, Mar. 18, 2005).

his right to a jury to determine restitution. Clapper stipulated that the victim would testify that she had incurred $749.52 in medical expenses and that he could pay $500 in restitution. At the hearing, the court approved the stipulation and later ordered $500 in restitution.

ASSIGNMENTS OF ERROR

Clapper assigns, restated, that the district court erred in (1) ruling that restitution under § 29-2280 is not a penalty; (2) failing to conclude that under the federal and Nebraska Constitutions, he had a right to have a jury determine restitution as provided for in §§ 29-2280 to 29-2289; and (3) overruling his demand for a jury trial on the issue of restitution.

STANDARD OF REVIEW

[1,2] Whether a criminal defendant has been denied a constitutional right to a jury trial presents a question of law.[6] When we review questions of law, we resolve the questions independently of the lower court's conclusions.[7]

ANALYSIS

Clapper argues that under *Blakely*,[8] restitution is a penalty above the prescribed statutory maximum for his offense and that a jury must therefore determine restitution. The State, however, argues that restitution does not increase a defendant's punishment beyond what is authorized by a defendant's conviction.

Nebraska's restitution statute provides in relevant part:

> A sentencing court may order the defendant to make restitution for the actual . . . loss sustained by the victim as a direct result of the offense for which the defendant has been convicted. . . . Whenever the court believes that restitution may be a proper sentence . . . the court shall order that the presentence investigation report include

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[6] See *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005).

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

[8] *Blakely v. Washington*, *supra* note 1.

> documentation regarding the nature and amount of the actual damages sustained by the victim.[9]

In addition, "[t]o determine the amount of restitution, the court may hold a hearing at the time of sentencing."[10]

[3] We agree with Clapper that restitution is criminal punishment in this jurisdiction. This court has held that when a court orders restitution to a crime victim under § 29-2280, restitution is a criminal penalty imposed as punishment and is part of the criminal sentence imposed by the sentencing court.[11]

Sixth Amendment's Jury Trial Requirement

[4,5] Both the Sixth Amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution guarantee a criminal defendant the right to trial by an impartial jury for serious offenses.[12] The 6th Amendment's jury trial guarantee is made applicable to the states by the 14th Amendment.[13] And the U.S. Supreme Court established the contours of the Sixth Amendment's guarantee in three recent cases.

In *Apprendi v. New Jersey*,[14] the U.S. Supreme Court first held that a sentence violates a defendant's constitutional rights if the sentencing court has imposed a greater sentence than the maximum it could have imposed without the challenged finding. The defendant pled guilty to the possession of a firearm for an unlawful purpose. The sentencing court then found by a preponderance of the evidence that the defendant's actions warranted an enhanced sentence under the state's hate crime statute. The defendant had not admitted that his actions were racially

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[9] § 29-2280.

[10] § 29-2281.

[11] *State v. Dittoe*, 269 Neb. 317, 693 N.W.2d 261 (2005); *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000).

[12] *State v. Cozzens*, 241 Neb. 565, 490 N.W.2d 184 (1992). See, also, *Blanton v. North Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989).

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

[14] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

motivated. The Court determined that the enhanced sentence violated the Sixth Amendment's jury trial guarantee. It held that "[o]ther 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."[15]

Four years later, in *Blakely*,[16] the U.S. Supreme Court decided whether a defendant is entitled to have a jury determine the aggravating factors. The facts admitted in the defendant's guilty plea authorized the court to sentence him to a standard sentencing range. The sentencing court, however, increased the maximum standard sentence by more than 3 years. It found that the defendant had acted with deliberate cruelty, an aggravating factor for an exceptional sentence under the sentencing statutes. The Court held that this enhanced sentence also violated the Sixth Amendment right to a jury trial. It clarified that

> the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment" . . . and the judge exceeds his proper authority.[17]

[6] Finally, in *United States v. Booker*,[18] the Court applied its holding in *Blakely* to the federal sentencing guidelines. The Court stated: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict

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[15] *Id.*, 530 U.S. at 490.

[16] *Blakely v. Washington*, *supra* note 1.

[17] *Id.*, 542 U.S. at 303-04 (emphasis in original).

[18] *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[19] The sentencing court found the defendant possessed a larger quantity of drugs than the quantity presented to the jury. The larger quantity was a fact that enhanced his sentence under the guidelines.

In a separate, remedial opinion, a majority of the Court in *Booker* concluded it could preserve the federal sentencing guidelines by severing and deleting the statutory provision that made the guidelines mandatory.[20] It reasoned that engrafting its constitutional jury trial requirements onto sentencing statutes would prevent a sentencing court from relying on any information that a prosecutor had not alleged and proved to a jury beyond a reasonable doubt. The Court noted that the prohibition could extend even to information in a presentence report. This result would undermine the purpose of the guidelines, which was to ensure "similar sentences for those who have committed similar crimes in similar ways."[21]

But, in *Cunningham v. California*,[22] the Court recently reiterated that

> broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted . . . does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

In *Cunningham*, the Court concluded that the defendant's sentence violated the Sixth Amendment. The state court had sentenced him to the upper term of a three-tiered sentencing statute after it found the existence of aggravating circumstances.

[7] *Apprendi* and *Blakely* did not involve restitution, and all federal courts of appeals have held that they do not apply to

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[19] *Id.*, 543 U.S. at 244.

[20] *United States v. Booker, supra* note 18.

[21] *Id.*, 543 U.S. at 252.

[22] *Cunningham v. California*, 549 U.S. 270, 290, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007), citing *Blakely v. Washington, supra* note 1.

restitution orders.[23] Although we reject the rationale that *Blakely* has no application because restitution is a civil remedy,[24] we agree that the U.S. Supreme Court did not intend to extend the Sixth Amendment's jury trial guarantee to restitution hearings. We reach this conclusion because we agree that a judge's factfinding for restitution does not result in a sentence that exceeds a statutory maximum.

The "hate crime" statute in *Apprendi* authorized an additional punishment if the sentencing court found there was racial animus, just as Nebraska's restitution statute authorizes additional punishment if the sentencing court concludes that that sentence is proper.[25] And, as noted, under Nebraska's restitution statutes, a court may engage in factfinding to determine restitution.[26] But the critical distinction is that for restitution, the sentencing court is not required to make any additional finding of fact regarding the defendant's conduct or offense.

The U.S. Supreme Court's holdings in *Apprendi*, *Blakely*, and *Booker* focused on a defendant's conduct or motivations, or other facts related to the crime, such as a victim's vulnerability. The Court's Sixth Amendment decisions responded to an increased emphasis on sentencing factors by legislatures. This has meant that for sentencing, the jury's role in finding guilt is diminished.[27] "As the enhancements became greater, the jury's finding of the underlying crime became less significant.

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[23] See, *U.S. v. Milkiewicz*, 470 F.3d 390 (1st Cir. 2006); *U.S. v. Reifler*, 446 F.3d 65 (2d Cir. 2006); *U.S. v. Leahy*, 438 F.3d 328 (3d Cir. 2006) (en banc); *U.S. v. Nichols*, 149 Fed. Appx. 149 (4th Cir. 2005); *U.S. v. Garza*, 429 F.3d 165 (5th Cir. 2005); *U.S. v. Sosebee*, 419 F.3d 451 (6th Cir. 2005); *U.S. v. Swanson*, 394 F.3d 520 (7th Cir. 2005); *U.S. v. Carruth*, 418 F.3d 900 (8th Cir. 2005) (rehearing en banc denied); *U.S. v. Bussell*, 414 F.3d 1048 (9th Cir. 2005); *U.S. v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005); *U.S. v. Williams*, 445 F.3d 1302 (11th Cir. 2006).

[24] See, *U.S. v. George*, 403 F.3d 470 (7th Cir. 2005); *U.S. v. Carruth, supra* note 23; *U.S. v. Visinaiz, supra* note 23.

[25] See § 29-2280.

[26] See § 29-2281.

[27] See *United States v. Booker, supra* note 18.

And the enhancements became very serious indeed."[28] Thus, all the facts found by trial judges that rendered the sentences unconstitutional were facts that made the defendant's offense more serious or culpable and hence exposed the defendant to a greater sentencing range.

In contrast, a court's factfinding regarding restitution is limited to determining the victim's actual damages and the defendant's ability to pay. When a sentencing court concludes the punishment warrants restitution, it does so based only on the fact of conviction. As federal courts have noted, it is the conviction that authorizes restitution.[29]

Section 29-2280 authorizes a court to order restitution for "actual . . . loss sustained by the victim as a direct result of the offense *for which the defendant has been convicted*." (Emphasis supplied.) Therefore, the district court could properly order restitution because Clapper admitted that he had recklessly caused bodily injury to the victim.

[8,9] Further, a sentencing court's factfinding in determining restitution does not expose the defendant to any greater punishment than § 29-2280 authorizes, which is for the full amount of the victim's actual damages.[30] "[W]hen the court determines the amount of loss, it is merely giving definite shape to the restitution penalty born out of the conviction."[31] Thus, "a restitution order for the amount of loss cannot be said to 'exceed the statutory maximum' provided under the penalty statutes."[32] We determine that because a defendant's conviction authorizes restitution for the full amount of the victim's losses, a judge's factfinding to determine restitution does not result in punishment that exceeds any statutory maximum imposed on the defendant's

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[28] *Id.*, 543 U.S. at 236.

[29] See, *U.S. v. Milkiewicz, supra* note 23; *U.S. v. Reifler, supra* note 23; *U.S. v. Leahy, supra* note 23.

[30] See § 29-2281. See, also, *U.S. v. Reifler, supra* note 23; *U.S. v. Leahy, supra* note 23.

[31] *U.S. v. Leahy, supra* note 23, 438 F.3d at 337.

[32] *U.S. v. Sosebee, supra* note 23, 419 F.3d at 462.

punishment. Thus, the U.S. Supreme Court's holding in *Blakely v. Washington* does not apply.

CONCLUSION

We conclude that Clapper's Sixth Amendment right to a jury trial was not violated by the district court's order of restitution. We join the majority of courts which have considered this issue and conclude that the U.S. Supreme Court's decision in *Blakely v. Washington*[33] does not apply to restitution.

AFFIRMED.

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[33] *Blakely v. Washington, supra* note 1.

CONNOLLY, J., dissenting.

I concede that all federal courts of appeals have concluded that either *Blakely v. Washington*[1] or *United States v. Booker*[2] does not require a jury to determine the facts supporting restitution.[3] But, under *Blakely*, I believe that allowing a sentencing court to order restitution without the defendant's admitting the facts or a jury's deciding the facts supporting restitution violates a defendant's constitutional right to have a jury find any fact "'which the law makes essential to the punishment.'"[4]

Although the U.S. Supreme Court has not yet decided whether a defendant has a right to a jury trial to determine restitution,

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[1] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[2] *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

[3] See, *U.S. v. Milkiewicz*, 470 F.3d 390 (1st Cir. 2006); *U.S. v. Reifler*, 446 F.3d 65 (2d Cir. 2006); *U.S. v. Leahy*, 438 F.3d 328 (3d Cir. 2006) (en banc); *U.S. v. Nichols*, 149 Fed. Appx. 149 (4th Cir. 2005); *U.S. v. Garza*, 429 F.3d 165 (5th Cir. 2005); *U.S. v. Sosebee*, 419 F.3d 451 (6th Cir. 2005); *U.S. v. Swanson*, 394 F.3d 520 (7th Cir. 2005); *U.S. v. Carruth*, 418 F.3d 900 (8th Cir. 2005) (rehearing en banc denied); *U.S. v. Bussell*, 414 F.3d 1048 (9th Cir. 2005); *U.S. v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005); *U.S. v. Williams*, 445 F.3d 1302 (11th Cir. 2006).

[4] *Blakely v. Washington, supra* note 1, 542 U.S. at 304.

it seems to me that many courts are too quick to apply their *Apprendi* rationales and too reluctant to consider the effect of *Blakely* on restitution. Because we have held that restitution is criminal punishment, this court should decline to join the parade.

Restitution under Neb. Rev. Stat. § 29-2280 (Reissue 1995) is a criminal penalty imposed as punishment for a crime and is part of the criminal sentence.[5] Under Neb. Rev. Stat. § 29-2281 (Reissue 1995), before restitution can be properly ordered, the trial court must consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying.[6]

These factors indisputably require factfinding.[7] And we have held that because restitution is punishment, "'the certainty and precision prescribed for the criminal sentencing process applies to criminal sentences containing restitution ordered pursuant to § 29-2280.'"[8]

In contrast, some of the federal courts of appeals that have concluded *Blakely* does not require a jury to find the facts supporting restitution have reasoned that restitution is a civil remedy.[9] In *U.S. v. Carruth*, a three-judge panel of the Eighth Circuit reached this conclusion,[10] despite the court's earlier holding that restitution is a criminal penalty.[11]

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[5] *State v. Dittoe*, 269 Neb. 317, 693 N.W.2d 261 (2005); *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000).

[6] *State v. Holecek, supra* note 5.

[7] See, *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999); *State v. McLain*, 238 Neb. 225, 469 N.W.2d 539 (1991); *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990).

[8] *State v. Holecek, supra* note 5, 260 Neb. at 981, 621 N.W.2d at 104, quoting *State v. McGinnis*, 2 Neb. App. 77, 507 N.W.2d 46 (1993).

[9] See, *U.S. v. George*, 403 F.3d 470 (7th Cir. 2005); *U.S. v. Carruth, supra* note 3; *U.S. v. Visinaiz, supra* note 3.

[10] See *U.S. v. Carruth, supra* note 3.

[11] See *U.S. v. Ross*, 279 F.3d 600 (8th Cir. 2002).

The dissent in *Carruth* argued that "there is no principled basis on which to distinguish punishment for Ex Post Facto Clause and Sixth Amendment purposes."[12] It concluded that in *Blakely*, the term "statutory maximum" dictated "a conclusion that any dispute over the amount of restitution due and owing a victim of crime must be submitted to a jury and proved beyond a reasonable doubt."[13] I agree. I also note that the U.S. Supreme Court has recently characterized restitution as criminal punishment.[14]

As the majority opinion states, the U.S. Supreme Court held in *Apprendi v. New Jersey*[15] that any fact, other than a prior conviction, that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi* was intended as a bright-line rule protecting the right to a jury trial under the Sixth Amendment.[16] In commenting on the Sixth Amendment's protection in *Blakely*, the Court distinguished civil law traditions and explained that the right to a jury trial is a fundamental reservation of power in our constitutional structure to ensure the people's control in the judiciary branch: "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict."[17]

In the wake of *Apprendi*, some circuit courts rejected challenges to a judge's factfinding for determining restitution. They concluded that any statutory maximum must be found in the applicable restitution statute and that these statutes do not have a

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[12] *U.S. v. Carruth*, *supra* note 3, 418 F.3d at 905 (Bye, Circuit Judge, dissenting).

[13] *Id.*

[14] See *Pasquantino v. United States*, 544 U.S. 349, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005).

[15] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[16] See *Blakely v. Washington*, *supra* note 1.

[17] *Id.*, 542 U.S. at 306.

prescribed statutory maximum.[18] For example, in *U.S. v. Ross*,[19] after the jury convicted the defendant of wire fraud, the court ordered restitution of $2.7 million "to victims beyond those affected by the specific wire transactions submitted to the jury to prove wire fraud." The defendant argued that the order violated *Apprendi* because a jury did not determine the facts regarding restitution. The Eighth Circuit rejected that argument and held that an order of restitution does not increase the penalty for the crime of wire fraud beyond the prescribed statutory maximum because the restitution statute had no definite amount that could be exceeded.[20]

After the U.S. Supreme Court decided *Blakely*[21] and *Booker*,[22] many circuit courts adopted the same rationale that restitution statutes contained no statutory maximum; most of those circuits cited to their sister circuits or omitted any comprehensive analysis of the *Blakely* definition of "statutory maximum."[23] Only two of these circuit courts even stated or discussed the *Blakely* definition of "statutory maximum."[24] Of these two courts, the Second Circuit conceded that "[t]he matter of whether the substantive holding of *Booker* applies to orders of restitution is not entirely clear from some of the language of *Blakely* and *Booker*." [25]

But as the dissent in *Carruth* concluded, the U.S. Supreme Court's decision in *Blakely* meant that "the notion *Apprendi*

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[18] See, e.g., *U.S. v. Syme*, 276 F.3d 131 (3d Cir. 2002); *U.S. v. Bearden*, 274 F.3d 1031 (6th Cir. 2001); *U.S. v. Ross, supra* note 11.

[19] *U.S. v. Ross, supra* note 11, 279 F.3d at 608.

[20] *U.S. v. Ross, supra* note 11.

[21] *Blakely v. Washington, supra* note 1.

[22] *United States v. Booker, supra* note 2.

[23] See, *U.S. v. Milkiewicz, supra* note 3; *U.S. v. Nichols, supra* note 3; *U.S. v. Garza, supra* note 3; *U.S. v. Sosebee, supra* note 3; *U.S. v. Swanson, supra* note 3; *U.S. v. Carruth, supra* note 3; *U.S. v. Bussell, supra* note 3; *U.S. v. Williams, supra* note 3.

[24] See, *U.S. v. Reifler, supra* note 3; *U.S. v. Leahy, supra* note 3.

[25] *U.S. v. Reifler, supra* note 3, 446 F.3d at 115.

does not apply to restitution because restitution statutes do not prescribe a maximum amount . . . is no longer viable."[26] There now exists "a completely different understanding of the term prescribed statutory maximum."[27] It is difficult to ignore what the Court emphatically stated in *Blakely*:

> [T]he relevant "statutory maximum" [for *Apprendi* purposes] is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment.'. . ."[28]

"That right [to have the jury find the existence of any particular fact that the law makes essential to a defendant's punishment] is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'"[29]

Under our case law, we do know this: There is no question that restitution is the infliction of punishment, nor is there any question under our statutes that a jury does not find the relevant facts regarding restitution. I conclude that other courts' nuanced dances around *Blakely* are not persuasive.

First, I disagree with the observation made in *U.S. v. Leahy* that a distinction exists between restitution and prison sentences for *Blakely* purposes: "orders of restitution have little in common with the prison sentences challenged by the defendants in *Jones*,[30] *Apprendi*, *Blakely* and *Booker*."[31] I do not read

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[26] *U.S. v. Carruth*, *supra* note 3, 418 F.3d at 906 (Bye, Circuit Judge, dissenting).

[27] *Id.*

[28] *Blakely v. Washington*, *supra* note 1, 542 U.S. at 303-04 (emphasis in original).

[29] *United States v. Booker*, *supra* note 2, 543 U.S. at 232, quoting *Blakely v. Washington*, *supra* note 1.

[30] *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).

[31] *U.S. v. Leahy*, *supra* note 3, 438 F.3d at 338.

Blakely as limited to statutory sentencing schemes with multiple offense levels; it applies to "punishment" broadly. As the dissent in the Third Circuit case noted, the majority's reasoning does not comport with the U.S. Supreme Court's reasoning in *Pasquantino*[32]: "'The purpose of awarding restitution [for the crime of wire fraud was] not to [benefit the foreign government defrauded of tax revenues], but to mete out appropriate criminal punishment for that conduct.'"[33]

Before finishing, I note the U.S. Supreme Court has held that restitution imposed as a condition of probation in a criminal sentence may not be discharged as a debt in bankruptcy under a provision that preserves debts for criminal fines, penalties, and forfeiture:

> The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. . . . Although restitution does resemble a judgment "for the benefit of" the victim . . . the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.[34]

Because the Court has equated restitution with criminal fines and penalties, it seems unlikely that it would exempt restitution under *Blakely* as a type of punishment that does not invoke a defendant's right to a jury trial.

The relevant question under *Blakely* is whether the sentencing court has imposed punishment without making any findings in addition to those supported by the jury's verdict or the defendant's admissions. That question must be answered affirmatively when a court, on its own findings, imposes restitution, regardless of whether restitution is considered an enhancement to a term of imprisonment or is simply part of the sentence. Restitution is unquestionably punishment that is part of the defendant's

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[32] *Pasquantino v. United States, supra* note 14.

[33] *U.S. v. Leahy, supra* note 3, 438 F.3d at 341 (McKee, Circuit Judge, concurring in part, and in part dissenting; Rendell, Ambro, Smith, and Becker, Circuit Judges, join).

[34] *Kelly v. Robinson*, 479 U.S. 36, 52, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986).

sentence, and "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment."[35] I would reverse.

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[35] *Blakely v. Washington, supra* note 1, 542 U.S. at 313 (emphasis in original).

OTTACO ACCEPTANCE, INC., A MICHIGAN CORPORATION, APPELLEE, V. TERESA G. LARKIN ET AL., APPELLEES, AND SIGMA INVESTMENTS, INC., APPELLANT.

733 N.W.2d 539

June 22, 2007. No. S-05-854.

1. **Equity: Quiet Title.** A quiet title action 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, provided that 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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Actions: Parties: Standing.** Before a court can exercise jurisdiction, a party must have standing, and either a party or the court can raise a question of standing at any time during the proceeding.
6. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
7. **Tax Sale: Deeds: Title: Proof.** In order to question title under a tax deed, the party questioning title must show that it had title to the property at the time of the sale or acquired it after the sale from this state or the United States after the sale and that all taxes due upon the property had been paid.
8. **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.
9. **Deeds: Intent.** In the construction of a deed, courts will give effect to the intent of the parties.

10. **Deeds.** A mistake, even though a material one, does not render a deed void, but at most, voidable in equity.
11. ____. Where it appears that a mistake has been made, a court will order the cancellation or the reformation of a deed.
12. **Statutes.** It is not within the province of an appellate court to read a meaning into a statute which is not there.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Thomas J. Young for appellant.

Robert S. Lannin and Patrick M. Driver, of Shively Law Offices, P.C., L.L.O., for appellee Ottaco Acceptance, Inc.

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

MCCORMACK, J.

I. NATURE OF CASE

Sigma Investments, Inc. (Sigma), appeals from a judgment entered against it by the Douglas County District Court. Ottaco Acceptance, Inc. (Ottaco), sought to quiet title to real property located in Omaha, Nebraska, claiming that it was the owner of the property by virtue of a treasurer's tax deed. Sigma, which was issued a trustee's deed on the property, claimed title adverse to Ottaco's title. Sigma argued that its lien on the property was not extinguished by the issuance of Ottaco's tax deed and that Ottaco's tax deed was void or voidable. The district court found that Ottaco's tax deed was not void and that Sigma failed to prove it had redeemed the property.

II. BACKGROUND

1. STATUTORY FRAMEWORK

This case involves the "certificate method" for handling delinquent real estate taxes. Under the certificate method, when a county treasurer sells real property for delinquent taxes under chapter 77, article 18, of the Nebraska Revised Statutes, the purchaser receives a certificate commonly known as a "tax certificate" or "tax sale certificate." This certificate describes the property, the amount paid by the purchaser, and the date that

the purchaser will be entitled to a deed.[1] Tax certificates can be assigned by endorsement, and the assignee steps into the shoes of the purchaser.[2]

As we explained in *INA Group v. Young*,[3] the owner of the property can redeem the property before delivery of a deed by paying the treasurer the amount shown on the certificate and all subsequent taxes, along with the interest specified by Neb. Rev. Stat. § 45-104.01 (Reissue 2004). If the property is not redeemed, the owner of the certificate may proceed in one of two ways: The owner can wait and obtain a deed of conveyance for the property, commonly known as a tax deed, or can obtain an order of foreclosure and compel the sale of the property.[4] In this case, Ottaco followed the first course of action.

Under the first course of action, obtaining a tax deed, the holder of the certificate must wait 3 years from the date of the sale of the property. At any time within 6 months after the 3-year period expires, the treasurer can, upon request, issue a deed of conveyance to the holder of the certificate.[5] If the certificate holder waits longer than 3 years 6 months from the sale, the certificate ceases to be valid and the lien of taxes for which the property was sold is discharged.[6]

2. Factual Background

On March 3, 1997, Equifunding, Inc., was issued the tax certificate for the property in question by the Douglas County treasurer. Although the assignment of the tax certificate is not contained in the record, it is undisputed in the present appeal that Equifunding assigned the tax certificate to Ottaco. Pursuant to Neb. Rev. Stat. § 77-1831 (Reissue 2003), in April and May

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[1] See, *INA Group v. Young*, 271 Neb. 956, 716 N.W.2d 733 (2006); *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004).

[2] *INA Group v. Young, supra* note 1.

[3] *Id.*

[4] *Id.*

[5] *Id.* See Neb. Rev. Stat. § 77-1837 (Reissue 1996).

[6] *INA Group v. Young, supra* note 1. See Neb. Rev. Stat. § 77-1856 (Reissue 2003).

2000, notice was personally served upon Martin Sylvester and Connie Sylvester, the tenants of the property. Notice was sent via certified mail on December 7, 1999, to Teresa Larkin, record title owner of the property; on January 3, 2000, to Industry Mortgage Company, L.P. (Industry Mortgage), a beneficiary under a trust deed issued on the property; and on January 3 to Steffi Swanson, trustee under the trust deed. In a letter dated August 25, 2000, Ottaco requested a tax deed for the property from the Douglas County treasurer. On September 5, the treasurer issued a tax deed to Ottaco. The deed states in pertinent part that the property in question was sold for nonpayment of taxes to Ottaco on March 3, 1997. The tax deed was recorded on September 7, 2000.

On August 29, 2000, Swanson, as trustee, sold the property to Sigma at a trustee's sale for $29,000 pursuant to the trust deed for breach and default under the terms of the deed. Sigma, as purchaser, was issued a trustee's deed on August 29, and the same was recorded on September 6. The record reflects that Kiely Sindelar, a shareholder of Sigma, had researched the property on the computerized Douglas County information system prior to Sigma's purchase of the property at the trustee's sale and knew the property was subject to a tax sale certificate for delinquent taxes.

On August 31, 2000, Ottaco filed a petition with the district court requesting (1) an accounting of the amount due under the tax certificate; (2) that its lien be adjudged a first lien; (3) that the property be sold for satisfaction of the lien; (4) that the rights of various defendants, including Larkin, the Sylvesters, Industry Mortgage, Swanson, and Sigma, be determined and found to be subsequent to Ottaco's; (5) that the defendants be foreclosed from redemption; and (6) that Ottaco recover its costs. Pursuant to a request by Sigma, the court, in July 2001, entered an order authorizing Sigma to make repairs to the property and authorizing the sale of the property. Sigma claims to have spent approximately $36,818.25 to repair the property which was then sold to a third party for $66,295.73. The proceeds of the sale were paid to the clerk of the district court to be held in a trust account. After the issuance and filing of its tax deed, Ottaco filed the operative petition, wherein Ottaco

requests that title to the property be quieted in its name and that all proceeds from the sale of the property be distributed to it.

Swanson disclaimed any interest in the property, and default judgment was entered against Larkin, Industry Mortgage, and the Sylvesters. Sigma is the only remaining defendant. In its answer, Sigma alleged that Ottaco's tax deed was void because Ottaco failed to provide Sigma with notice pursuant to § 77-1831 and because Ottaco failed to produce to the treasurer its tax certificate pursuant to § 77-1837. Sigma also alleged that Ottaco's tax deed represented a lien for the taxes paid, interest, attorney fees, and costs. Sigma claimed that it was entitled to reimbursement for the $29,000 it purchased the property for at the trustee's sale and the $36,818.25 it expended for repairs, because (1) Ottaco did not notify it of Ottaco's intent to seek a tax deed; (2) Ottaco's interest in the tax deed is a lien interest in the property; (3) Sigma's interest, in the property is derivative of Industry Mortgage's interest, and Sigma's interest should be considered superior; and (4) it would be unjust and unfair for Ottaco to benefit at Sigma's expense. Sigma also counterclaimed, alleging unjust enrichment on the part of Ottaco for the amount expended by Sigma, and cross-claimed against Industry Mortgage and Swanson. Sigma's cross-claim is not at issue in this case.

On June 2, 2004, the district court held a bifurcated trial on what it described as the issue of the validity of Ottaco's tax deed. Evidence adduced at trial included the testimony of Sindelar. Sindelar testified that on August 29, 2000, he mailed a check in the amount of $6,491.35 to the Douglas County treasurer's office to redeem the property, but that the check was never cashed. Aside from Sindelar's testimony and copies of Sindelar's August and September 2000 bank statements, no other evidence was submitted to the court evidencing Sindelar's attempted redemption of the property. Sindelar also testified that in April 2004, he again tendered payment for taxes on the property to the treasurer's office, but that the treasurer's office returned his check to him with a letter stating the taxes had been paid.

On February 16, 2005, the district court entered an order in favor of Ottaco. In response to an assertion by Ottaco that Sigma failed to meet its burden of proof to raise its challenges to Ottaco's tax deed, the court found that under Neb. Rev. Stat.

§ 77-1843 (Reissue 2003), Sigma was required to prove that it had properly redeemed the property. The court found that Sigma failed to meet its burden under § 77-1843 and, therefore, could not defeat Ottaco's tax deed. The court further found that even assuming that Sigma did meet its burden to prove that the property was properly redeemed, Sigma had not proved that Ottaco's deed was invalid. Sigma had argued to the court that Ottaco's deed was invalid because Larkin had not been personally served notice, Sigma had not been served notice prior to Ottaco's application for the tax deed, Ottaco failed to produce the tax certificate to the county treasurer, the tax deed lacks a legible seal, and the deed does not accurately identify Equifunding as the original purchaser. The district court also found that Sigma's allegation that Ottaco's interest in the property is limited to a lien interest is without merit because Nebraska law provides that a deed creates in the holder a more significant interest than a lien. With regard to Sigma's claim for reimbursement for repairs and maintenance on the property, the court found that Sigma had previously been reimbursed for $10,000. Finally, with regard to Sigma's claim for reimbursement for the purchase price paid for the property, the court found that Sigma failed to identify any viable basis for a claim that Ottaco should somehow repay Sigma for an amount paid to third-party defendant, Industry Mortgage. The court found that because Ottaco received no benefit from the purchase price, Sigma was not entitled to recover any of that amount from Ottaco. The district court then ordered that title be quieted in Ottaco in fee simple absolute. At this juncture, we point out that the district court's determinations as to Sigma's claims for reimbursement for repairs and maintenance on the property and the purchase price paid for the property have not been assigned as error by Sigma in the matter presently before this court.

On June 20, 2005, the district court entered an order of final judgment in favor of Ottaco and against Sigma pursuant to Neb. Rev. Stat. §§ 25-1315 (Cum. Supp. 2006) and 25-1902 (Reissue 1995).

III. ASSIGNMENTS OF ERROR

Sigma's assignments of error, consolidated, restated, and renumbered for our review, are that the district court erred in

(1) failing to determine that treasurer's tax deeds only convey title and do not extinguish lien interests; (2) determining that Sigma was required to comply with § 77-1843 and Neb. Rev. Stat. § 77-1844 (Reissue 2003); (3) failing to determine that the tax deed issued to Ottaco was void or voidable; (4) not determining that the treasurer's tax deed issued to Ottaco, as it related to Sigma, only represented a lien for taxes, interest, attorney fees, and costs; (5) failing to determine Sigma's interest was derivative of Industry Mortgage and was not extinguished by the treasurer's tax deed issued in Ottaco's favor; and (6) failing to determine that a purchaser at a trust deed liquidation of a mortgage, which occurs within the last 3 months during which a tax sale certificate holder could request a treasurer's tax deed, retains the lien interest of the mortgage.

IV. STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity.[7] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that 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.[8]

[3] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[9]

V. ANALYSIS

1. Does Ottaco's Tax Deed, as It Relates to Sigma, Only Represent Lien for Taxes, Interest, Attorney Fees, and Costs?

Sigma first contends that Ottaco's tax deed merely represented a lien on the property. Section 77-1837 provides that during the 6 months after the expiration of 3 years from the date

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[7] *Ottaco Acceptance, Inc. v. Huntzinger, supra* note 1.

[8] *Id.*

[9] *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006).

of the tax sale, the treasurer shall, upon the production of the tax sale certificate, execute and deliver to the purchaser or his or her heirs or assigns a deed of conveyance for the real property de scribed in the tax certificate if the property has not been redeemed. "Conveyance" has been defined by Black's Law Dictionary[10] as "[t]he voluntary transfer of a right or of property," as well as "[t]he transfer of an interest in real property from one living person to another, by means of an instrument such as a deed."

Considering what we described in *Strunk v. Chromy-Strunk*[11] as the "well-understood legal meaning of the term 'convey,'" it is clear that a tax deed conveys title to the property in question, and not merely a lien interest in the property. We, therefore, conclude that the tax deed conveyed title to Ottaco and not merely a lien interest in the property.

2. Was Sigma Obligated to Comply With §§ 77-1843 and 77-1844?

[4] Sigma next contends that it was not required to comply with §§ 77-1843 and 77-1844 because Ottaco's tax deed was void or voidable. We disagree. Section 77-1843 sets forth those conditions precedent a party seeking to *defeat* title conveyed under a treasurer's deed must prove. Section 77-1844 sets forth those conditions precedent a party seeking to *question* title conveyed under a treasurer's deed must prove. 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.[12] It is clear from the language of §§ 77-1843 and 77-1844 that even if title under a tax deed is void or voidable, the conditions precedent set forth in those statutes must be met in order to first question and then defeat title. As we explain more fully below, Sigma's contentions that Ottaco's tax deed is void or voidable are without merit. However, even assuming that Ottaco's tax

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[10] Black's Law Dictionary 357-58 (8th ed. 2004).

[11] *Strunk v. Chromy-Strunk*, 270 Neb. 917, 941, 708 N.W.2d 821, 841 (2006).

[12] *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

deed was void or voidable, Sigma was required to show that it satisfied the conditions precedent in §§ 77-1843 and 77-1844. We now address whether Sigma has satisfied the requirements of those statutes.

[5,6] Because title must be questioned before it may be defeated, we first address § 77-1844. Before doing so, we point out that the district court did not address whether Sigma was required to comply with § 77-1844. However, before a court can exercise jurisdiction, a party must have standing, and either a party or the court can raise a question of standing at any time during the proceeding.[13] In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.[14]

[7] Section § 77-1844 provides:

> No person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property had been paid by such person or the persons under whom he claims title as aforesaid.

Larkin, the titleholder to the property at the time of the tax certificate sale, defaulted under the terms of a trust deed which named Swanson as trustee and Industry Mortgage as beneficiary. As a result of Larkin's default, the property was sold at a trustee's sale by Swanson and title was transferred by trustee's deed to Sigma. Sigma's trustee's deed was recorded on September 6, 2000, 1 day before Ottaco's tax deed was recorded. Sigma, as the grantee under the trustee's deed, obtained title to the property. We conclude, therefore, that for purposes of § 77-1844, Sigma stands in the shoes of Larkin and that Sigma has satisfied the title requirement of § 77-1844.

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[13] *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005).

[14] *Spring Valley IV Joint Venture v. Nebraska State Bank*, 269 Neb. 82, 690 N.W.2d 778 (2005).

In *Ottaco Acceptance, Inc. v. Huntzinger*,[15] and before that, in *Cornell v. Maverick Loan & Trust Co.*,[16] we explained that "'[t]he "showing" of taxes paid is at the trial, and if all taxes are paid before or during the trial, or before final judgment, that is enough. The "showing" is made by the evidence, and not by the pleadings alone.'" We have held, however, that the tender of payment of taxes to the treasurer is sufficient to lay foundation for the institution of a suit to redeem property from a tax sale.[17] The evidence presented at trial showed that Sigma tendered payment in the amount of $7,458.09 to the county treasurer, but that Sigma's payment was rejected. This evidence is sufficient under § 77-1844. Because Sigma has satisfied both requirements of § 77-1844, Sigma may question Ottaco's title.

We next turn to the determination of whether Sigma may defeat Ottaco's title. Section 77-1843 enumerates the conditions precedent to defeat title "[i]n all controversies and suits involving the title to real property claimed and held under and by virtue of a deed made substantially by the treasurer in the manner provided by sections 77-1831 to 77-1842 . . . ." Sigma contends that Ottaco's tax deed is void for the following reasons: (1) Ottaco failed to personally serve notice to the record titleholder, (2) Ottaco failed to submit the original tax sale certificate to the treasurer, (3) the tax deed fails to identify the original purchaser, and (4) the tax deed lacks a legible treasurer's seal. As we read it, these assertions also go to whether Ottaco's tax deed was made "substantially by the treasurer in the manner provided by sections 77-1831 to 77-1842." Accordingly, before we address whether Sigma may defeat Ottaco's title under § 77-1843, we must determine whether Ottaco's tax deed substantially complies with the aforesaid sections.

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[15] *Ottaco Acceptance, Inc. v. Huntzinger, supra* note 1, 268 Neb. at 262, 682 N.W.2d at 236 (emphasis omitted).

[16] *Cornell v. Maverick Loan & Trust Co.*, 95 Neb. 842, 147 N.W. 697 (1914).

[17] *Brokaw v. Cottrell*, 114 Neb. 858, 211 N.W. 184 (1926).

(a) Ottaco's Failure to Personally Serve Notice to Record Titleholder

Sigma first argues that Ottaco failed to personally serve notice on Larkin pursuant to § 77-1831, Neb. Rev. Stat. § 77-1832 (Reissue 1996), and article VIII, § 3, of the Nebraska Constitution.

[8] "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."[18] In *In re Petition of SID No. 1*, objectors to the formation of a sanitary and improvement district argued that the district court lacked personal jurisdiction over proceedings to form the sanitary and improvement district because service was not properly served on individuals who were not objectors. We held that the objectors could not assert a claim based on defective service to other parties.

Here, Sigma does not assert on appeal that service of process on it was defective. Rather, it asserts that service on Larkin was defective. Because Sigma cannot assert a claim based on improper service to another party, we do not address Sigma's claim.

(b) Ottaco's Failure to Submit Original Tax Certificate

Sigma next argues that Ottaco failed to submit the original tax certificate to the treasurer as required by § 77-1837. Section 77-1837 provided in part that if real property has not been redeemed, "the county treasurer, on request, on production of the certificate of purchase, and upon compliance with the provisions of sections 77-1801 to 77-1837, shall execute and deliver to the purchaser . . . a deed of conveyance for the real estate described in such certificate." As early as 1884, this court stated that the presentation of the tax certificate is a condition precedent to the execution of the tax deed and unless a tax certificate is presented to the county treasurer, the treasurer has

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[18] *In re Petition of SID No. 1*, 270 Neb. 856, 861, 708 N.W.2d 809, 815 (2006).

no authority to execute a tax deed.[19] "In other words, the law makes the return of the certificate the evidence upon which the treasurer has authority to act."[20]

In this case, Ottaco did not return the original tax certificate to the treasurer because the original tax certificate was already in the treasurer's possession. Instead, Ottaco presented the treasurer with a copy of the tax certificate. As indicated by this court in *Thompson v. Merriam*,[21] the presented tax certificate is the evidence upon which the treasurer has authority to issue a tax deed. Where the original tax certificate is in the possession of the treasurer, we conclude that the holder of the certificate is not obligated to undertake the formalistic procedure of requesting the return of the original tax certificate only to "present" the tax certificate back to the treasurer.

(c) Tax Deed's Failure to Identify Original Purchaser

Neb. Rev. Stat. § 77-1839 (Reissue 2003) provides that the conveyance by a tax deed shall be substantially in the form set forth in that statute. Among other things, the form in § 77-1839 identifies to whom the property was sold at the tax sale.

Sigma asserts that Ottaco's deed incorrectly identifies Ottaco as the purchaser of the property in question on March 3, 1997. In fact, Equifunding was the purchaser of the property on that date and later assigned its interest in the property to Ottaco.

[9-11] In the construction of a deed, courts will give effect to the intent of the parties.[22] A mistake, even though a material one, does not render a deed void, but at most, voidable in equity.[23] Where it appears that a mistake has been made, a court will order the cancellation or the reformation of a deed.[24]

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[19] See *Thompson v. Merriam*, 15 Neb. 498, 20 N.W. 24 (1884).

[20] *Id.* at 499, 20 N.W. at 25.

[21] *Id.*

[22] *Anson v. Murphy*, 149 Neb. 716, 32 N.W.2d 271 (1948).

[23] 23 Am. Jur. 2d *Deeds* § 184 (2002). See, also, *Woodring v. Swieter*, 180 N.C. App. 362, 637 S.E.2d 269 (2006).

[24] 23 Am. Jur. 2d, *supra* note 23.

> The cancellation of a deed is permissible when there exists a mutual mistake between the parties to the conveyance. In order to be entitled to a decree rescinding a deed on the grounds of mutual mistake, it must appear that the mistake was such that, if the true facts had been known, the deed would not have been executed . . . . Reformation is the appropriate remedy when a deed is not drafted in conformity with the parties' intentions and is marred by mistake which becomes mutual when the deed is executed and accepted by the parties.[25]

Ottaco's tax deed misidentifies Ottaco as the purchaser of the property at the March 3, 1997, sale. There is no indication in the record that either Ottaco or the treasurer was unaware that Equifunding was the original purchaser at the tax sale or that the tax deed would not have been executed had Equifunding been properly identified. At most, the misidentification of Ottaco as the purchaser at the tax sale necessitates reformation of the tax deed. We, therefore, conclude that notwithstanding the tax deed's misidentification of Ottaco as the purchaser of the property at the tax sale, the tax deed is made in compliance with § 77-1839.

(d) Lack of Legible Treasurer's Seal on Tax Deed

Finally, Sigma argues that Ottaco's tax deed lacks a legible treasurer's seal as required by Neb. Rev. Stat. § 77-1857 (Reissue 2003). Section 77-1857 provides that the county treasurer shall affix an impression or representation of its official seal to every tax sale certificate and tax deed made by him or her. This official seal is called for in the form set forth in § 77-1839.

[12] Sections 77-1839 and 77-1857 merely require that the treasurer's seal be affixed. They do not require that the treasurer's seal be entirely legible. Because it is not within the province of this court to read a meaning into the statute which is not there,[26] we conclude that Ottaco's tax deed is substantially in compliance with § 77-1839.

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[25] *Id.* at 197-98.

[26] See *KN Energy v. Village of Ansley*, 266 Neb. 164, 663 N.W.2d 119 (2003).

Because we have determined that Sigma's contentions are without merit, we find that Ottaco's tax deed was made substantially in the manner provided by Neb. Rev. Stat. §§ 77-1831 to 77-1842 (Reissue 1996). We now turn to the question of whether Sigma may defeat Ottaco's title under § 77-1843.

Section 77-1843 provides that in order to defeat title under a tax deed,

> the person claiming the title adverse to the title conveyed by such deed shall be required to prove, in order to defeat the title, either (1) that the real property was not subject to taxation for the years or year named in the deed; (2) that the taxes had been paid before the sale; (3) that the property has been redeemed from the sale . . . and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state; or (4) that there had been an entire omission to list or assess the property, or to levy the taxes, or to sell the property.

Sigma does not argue, nor has it presented any evidence, that any of the four conditions in § 77-1843 have been satisfied. Because Sigma has not satisfied the requirements of § 77-1843, we conclude that Sigma cannot defeat Ottaco's title.

3. Remaining Assignments of Error

In its three remaining assignments of error, Sigma argues that the district court erred in (1) failing to determine that tax deeds only convey title and do not extinguish lien interests, (2) failing to determine Sigma's interest was derivative of Industry Mortgage and was not extinguished by the treasurer's tax deed issued in Ottaco's favor, and (3) failing to determine that a purchaser at a trust deed liquidation of a mortgage, which occurs within the last 3 months during which a tax sale certificate holder could request a treasurer's tax deed, retains the lien interest of the mortgage. The bifurcated trial was held only on the issue of the validity of Ottaco's tax deed. Accordingly, these claims were not passed upon by the district court. We, therefore, do not reach these assignments of error.

VI. CONCLUSION

For the reasons discussed above, we affirm the decision of the district court.

AFFIRMED.

WILLIAM JAPP AND MARI JAPP, HUSBAND AND WIFE, ET AL., APPELLANTS, V. PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION OF NEBRASKA, APPELLEE, AND SHADOW LAKE DEVELOPMENT, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, INTERVENOR-APPELLEE.

733 N.W.2d 551

June 22, 2007. No. S-06-045.

1. **Judgments: Statutes: Appeal and Error.** Concerning questions of law and statutory interpretation, an appellate court resolves the issues independently of the lower court's conclusion.
2. **Natural Resources Districts: Political Subdivisions: Legislature.** A natural resources district, as a political subdivision, has only that power delegated to it by the Legislature, and courts strictly construe a grant of power to a political subdivision.
3. **Natural Resources Districts.** A natural resources district possesses and can exercise the following powers and no others: (1) those granted in express words; (2) those implied in or incident to the powers expressly granted; and (3) those essential to the declared objects and purposes of the district, not simply convenient, but indispensable.
4. **Statutes: Appeal and Error.** In construing a statute, a court will give it its plain and ordinary meaning. And a court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Natural Resources Districts.** Under Neb. Rev. Stat. § 2-3235(1) (Cum. Supp. 2006), a natural resources district has express authority to cooperate, enter agreements, and furnish aid to private developers and landowners to carry out projects that benefit the district.
6. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the rules control the admissibility of evidence; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
7. ____: ____. When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.

8. ____: ____. Because the exercise of judicial discretion is implicit in determinations of relevancy, an appellate court will not reverse the trial court's decision absent an abuse of discretion.
9. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
10. **Rules of Evidence: Words and Phrases.** Under Neb. Rev. Stat. § 27-401 (Reissue 1995), 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.
11. **Evidence.** Evidence which is not relevant is inadmissible.
12. **Constitutional Law: States: Debtors and Creditors: Guaranty.** Neb. Const. art. XIII, § 3, prevents the state or any of its governmental subdivisions from extending the state's credit to private enterprise; it is designed to prohibit the state from acting as a surety or guarantor of the debt of another.
13. **Constitutional Law: Proof.** To establish a violation of Neb. Const. art. XIII, § 3, a plaintiff must prove three elements: (1) The credit of the state (2) was given or loaned (3) in aid of any individual, association, or corporation.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

LeRoy W. Sievers, Kevin R. McManaman, and Jocelyn Walsh Golden, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellants.

Paul F. Peters, P.C., L.L.O., of Taylor, Peters & Drews, for appellee.

David L. Welch, of Pansing, Hogan, Ernst & Bachman, L.L.P., for intervenor-appellee.

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

CONNOLLY, J.

The appellants are resident landowners and taxpayers within the Papio-Missouri River Natural Resources District (District). They object to a development agreement in which the District agreed to provide funds to construct two dams in a private commercial and residential development in Papillion, Sarpy County, Nebraska. The district court denied the appellants' complaint for a declaratory judgment and an injunction. The appellants argue the agreement calls for illegal expenditures that benefit

private developers. This appeal presents two questions: whether the District (1) had statutory authority to enter the agreement and (2) violated article XIII, § 3, of the Nebraska Constitution, which prohibits the state from giving or lending its credit to private parties. We affirm because (1) Neb. Rev. Stat. § 2-3235(1) (Cum. Supp. 2006) gives the District authority to enter contracts with private developers to fulfill its statutory purposes and (2) the District would not give or loan the state's credit under the agreement.

BACKGROUND

The Developments

Shadow Lake Development, LLC (SLD), a Nebraska limited liability company, develops real estate. SLD owns land located between 72d and 84th Streets north of Capehart Road in Sarpy County, which is the site of a residential development known as Shadow Lake. SLD formed sanitary and improvement district No. 264 of Sarpy County to construct, operate, and maintain public infrastructure in its development.

Another private developer, 370 LLC, owns the land north of Shadow Lake and south of Nebraska State Highway 370 and has plans for a commercial development for that site known as Shadow Lake Towne Center (Towne Center). Sanitary and improvement district No. 267 of Sarpy County was formed by 370 LLC to construct, operate, and maintain public infrastructure in its development. Midlands Creek, a tributary of the west branch of Papillion Creek, flows through Shadow Lake and Towne Center.

Water Projects and the Cooperative Agreement

The District and the U.S. Department of Agriculture's Natural Resources Conservation Service, a federal agency involved in water resource projects, had previously planned a grade stabilization structure at the proposed developments. The District also wanted to incorporate flood control into the plan at that location. Marlin J. Petermann, the assistant general manager for the District, testified that increased development in the area had created a greater need for flood control. In addition,

the city of Papillion has required the construction of dams and reservoirs as flood control and grade stabilization structures in the developments.

After negotiations, the District, the city of Papillion, the developers, and the sanitary and improvement districts drafted a "Cooperative Agreement" (Agreement) providing for the construction of the dams and reservoirs. The proposed Agreement requires that SLD and sanitary and improvement district No. 264 build two dams: the Midlands Lake dam at Shadow Lake, and the Shadow Lake dam, which would span both Shadow Lake and Towne Center. The reservoirs created by these dams would be primarily in Shadow Lake.

The Agreement would require the District to contribute to the costs of design, construction, project administration, permits, and project land rights. The District agreed to pay 75 percent of the cost of the Shadow Lake dam and 100 percent of the engineering and construction costs of the Midlands Lake dam, up to a maximum of $3,357,278. The Agreement also required the District to permanently operate and maintain the dams; SLD, 370 LLC, and the sanitary improvement districts would contribute the land rights required for the project and the remaining costs.

Petermann testified that the Shadow Lake project is a multipurpose project and that its purposes include "[f]lood control, water quality, recreation, [and] sediment/erosion control . . . ." The appellants' expert, an engineer employed by an environmental management consulting firm, opined that the proposed dams could help control erosion and would provide some flood control for the area. The Agreement does not include requirements for recreational facilities, but Petermann stated that the plan includes about 60 acres around the reservoirs that would be accessible to the public. The city of Papillion would determine the specific details about access and facilities.

The Appellants Object to the Agreement

In May 2005, the appellants learned that the District planned to enter the Agreement to construct the Shadow Lake and Midlands Lake dams. They wrote letters to the District's board of directors (Board) objecting that it would be an illegal expenditure of taxpayer money. They also attended Board meetings to

voice their complaints. Nevertheless, on June 9, the Board voted to authorize the District's general manager to execute the Agreement. On June 10, the appellants sued the District, seeking an injunction and a declaration that the Agreement violates Nebraska's statutes and constitution. They contended that Nebraska law does not permit the District to enter development agreements with private developers.

ASSIGNMENTS OF ERROR

The appellants assign, restated and consolidated, that the district court erred in (1) finding that the District had statutory authority to enter the development agreement, (2) failing to admit a proposed legislative bill (L.B. 552) into evidence, and (3) finding that the District had constitutional authority to enter the development agreement.

STANDARD OF REVIEW

[1] Concerning questions of law and statutory interpretation, we resolve the issues independently of the lower court's conclusion.[1]

ANALYSIS

The District Has Statutory Authority to Enter the Agreement

The appellants contend that the District lacks statutory authority to enter development agreements with private developers. They argue that § 2-3235 does not allow the District to contract with private developers, either expressly or impliedly.

Regarding the power of a natural resources district (NRD) to contract with outside parties, § 2-3235(1) provides:

> Each district shall have the power and authority to cooperate with or to enter into agreements with and, within the limits of appropriations available, to furnish financial or other aid to any cooperator, any agency, governmental or otherwise, or any owner or occupier of lands within the district for the carrying out of projects for benefit of the

[1] See *Gilbert & Martha Hitchcock Found. v. Kountze*, 272 Neb. 251, 720 N.W.2d 31 (2006).

> district as authorized by law, subject to such conditions as the board may deem necessary.

[2,3] An NRD, as a political subdivision, has only that power delegated to it by the Legislature,[2] and we strictly construe a grant of power to a political subdivision.[3] An NRD possesses and can exercise the following powers and no others: (1) those granted in express words; (2) those implied in or incident to the powers expressly granted; and (3) those essential to the declared objects and purposes of the district, not simply convenient, but indispensable.[4]

Neb. Rev. Stat. § 2-3229 (Reissue 1997) lists the purposes of NRD's. Under this section, NRD's may develop and execute plans, facilities, works, and programs relating to

> (1) erosion prevention and control, (2) prevention of damages from flood water and sediment, (3) flood prevention and control, (4) soil conservation, (5) water supply for any beneficial uses, (6) development, management, utilization, and conservation of ground water and surface water, (7) pollution control, (8) solid waste disposal and sanitary drainage, (9) drainage improvement and channel rectification, (10) development and management of fish and wildlife habitat, (11) development and management of recreational and park facilities, and (12) forestry and range management.

The record shows that the Shadow Lake and Midlands Lake projects will achieve several of these purposes. Petermann testified that these projects would provide flood control, sediment and erosion control, recreation, and water quality benefits. The appellants acknowledge that regarding these purposes, the

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[2] *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996); *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995); *In re Applications A-15145, A-15146, A-15147, and A-15148*, 230 Neb. 580, 433 N.W.2d 161 (1988).

[3] *Metropolitan Utilities Dist. v. Twin Platte NRD, supra* note 2; *Wagoner v. Central Platte Nat. Resources Dist., supra* note 2; *In re Applications A-15145, A-15146, A-15147, and A-15148, supra* note 2.

[4] See, *Metropolitan Utilities Dist. v. Twin Platte NRD, supra* note 2; *Wagoner v. Central Platte Nat. Resources Dist., supra* note 2.

projects are within the District's judgment. Thus, we do not pass on the wisdom of the projects.[5]

But the appellants contend that although the projects fulfill the District's statutory purposes, it could not contract with private developers to accomplish these purposes. They argue that § 2-3235(1) does not include "developers" among the parties with which the District may contract and provide financial aid. And they urge us to consider the historical context in construing this statute, citing *Allen v. Tobin*.[6] Historically, NRD's assisted farmers and rural landowners under § 2-3235(1).

[4,5] In construing a statute, we will give it its plain and ordinary meaning. And we will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[7] Here, we need not look to history for the meaning of § 2-3235(1) because its language is clear. It applies to any "owner or occupier of lands within the district." An "owner" is "[o]ne who has the right to possess, use, and convey something . . . ."[8] However transient their ownership may be, SLD and 370 LLC are the owners of the project lands. Thus, under § 2-3235(1), the District has express authority to cooperate, enter agreements, and furnish aid to them to carry out projects that benefit the District.

Principled adherence to statutory interpretation need not prevent a court from questioning the policy and breadth of a statute. Reasonable minds may disagree whether it is good policy for NRD's to contract with private developers. That decision, however, is for the Legislature.

The District Court Properly Excluded Evidence of L.B. 552

The appellants offered into evidence L.B. 552, which the District introduced to the Nebraska Legislature in 2005. L.B. 552 would have allowed an NRD encompassing a metropolitan

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[5] See *Winter v. Lower Elkhorn Nat. Resources Dist.*, 206 Neb. 70, 291 N.W.2d 245 (1980).

[6] *Allen v. Tobin*, 155 Neb. 212, 51 N.W.2d 338 (1952).

[7] *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

[8] Black's Law Dictionary 1137 (8th ed. 2004).

class city to "enter into cost-sharing agreements with landowners, *developers*, and other cooperators in connection with . . . dam and reservoir projects." (Emphasis supplied.) The Legislature did not pass the bill. The district court excluded the evidence as irrelevant. The appellants argue that L.B. 552 was relevant as an admission by the District that it lacks authority to enter into the Agreement with the private developers. Appellee SLD argues, however, "The only fact LB 552 may have made more probable was that [the District] was concerned that a court may not interpret the Nebraska statutes as expressly granting [the District] authority to enter into agreements" with developers.[9]

[6-9] In proceedings where the Nebraska Evidence Rules apply, the rules control the admissibility of evidence; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[10] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion.[11] Because the exercise of judicial discretion is implicit in determinations of relevancy, we will not reverse the trial court's decision absent an abuse of discretion.[12] An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[13]

[10,11] Under Nebraska law, 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.[14] Evidence which is not relevant is inadmissible.[15]

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[9] Brief for appellee SLD at 18.

[10] See *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006).

[11] See *id.*

[12] *Id.*

[13] *Id.*

[14] Neb. Rev. Stat. § 27-401 (Reissue 1995); *Curran v. Buser, supra* note 10.

[15] See Neb. Rev. Stat. § 27-402 (Reissue 1995).

Whether the District believed, or even questioned, that it lacked authority to enter agreements with private developers is not relevant to whether it had such authority under current Nebraska law. The district court did not abuse its discretion in excluding L.B. 552.

THE DISTRICT WOULD NOT VIOLATE THE NEBRASKA CONSTITUTION BY ENTERING THE AGREEMENT

The appellants contend that the proposed Agreement between the District and the private developers violates article XIII, § 3, of the Nebraska Constitution. With certain exceptions not applicable here, article XIII, § 3, provides that "[t]he credit of the state shall never be given or loaned in aid of any individual, association, or corporation . . . ." The appellants argue that the Agreement requires the District to extend its credit for the sole benefit of a private entity.

[12] Article XIII, § 3, of the Nebraska Constitution prevents the state or any of its governmental subdivisions from extending the state's credit to private enterprise.[16] It is designed to prohibit the state from acting as a surety or guarantor of the debt of another.[17]

[13] In *Haman v. Marsh*,[18] we addressed the constitutionality of legislation that would have provided state tax money to depositors who suffered losses from failed industrial loan and investment companies. The Legislature passed 1990 Neb. Laws, L.B. 272A, to fulfill the guaranties made to depositors by a private corporation. We stated that a plaintiff must prove three elements: (1) The credit of the state (2) was given or loaned (3) in aid of any individual, association, or corporation.[19] Regarding the first element, "credit of the state," we stated,

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[16] *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991); *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981); *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956). See, also, *State ex rel. Beck v. City of York*, 164 Neb. 223, 82 N.W.2d 269 (1957).

[17] *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995); *Haman v. Marsh, supra* note 16.

[18] *Haman v. Marsh, supra* note 16.

[19] *Id.* See, also, *Callan v. Balka, supra* note 17.

> The state's credit is inherently the power to levy taxes and involves the obligation of its general fund. . . . There is a distinction between the loaning of state funds and the loaning of the state's credit. When a state loans funds it is in the position of creditor, whereas the state is in the position of debtor upon a loan of credit.[20]

We decided that there was "no question" the legislation in *Haman* unconstitutionally involved the state's credit.[21] L.B. 272A would have obligated the state's general fund to pay off the guaranties of a private corporation.

We have also found an extension of state credit when the state has agreed to obtain property for a private project financed by issuing revenue bonds in its name. In *State ex rel. Beck v. City of York*,[22] we explained that issuance of bonds by the state or a political subdivision gives the bonds greater marketability and value and acts as an inducement to gain financing. Thus, if the bonds are used for a private project, the city has loaned its credit for the benefit of the private party.

In summary, article XIII, § 3, seeks to prevent the state from loaning its credit to an individual, association, or corporation with the concomitant possibility that the state might ultimately pay that entity's obligations. In addressing a similar constitutional provision, the New York Court of Appeals in *Wein v. Levitt*[23] concisely summarized that "[s]ubsidy by loan of credit was the evil sought to be eradicated" by such a prohibition.

Here, the District did not lend or give state credit by agreeing to pay for the Shadow Lake and Midlands Lake dams. The District did not use its credit to secure capital for a private project or agree to act as a guarantor for a private company. Instead, the District agreed to provide funds for a project that

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[20] *Haman v. Marsh*, *supra* note 16, 237 Neb. at 719-20, 467 N.W.2d at 850.

[21] *Id.*, 237 Neb. at 720, 467 N.W.2d at 850.

[22] *State ex rel. Beck v. City of York*, *supra* note 16. Compare *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979).

[23] See *Wein v Levitt*, 42 N.Y.2d 300, 306, 366 N.E.2d 847, 850, 397 N.Y.S.2d 758, 762 (1977).

would carry out its statutory purposes. The appellants contend that the Agreement would cause the District to become a debtor of sanitary and improvement district No. 264 because under the Agreement, the District is obligated to reimburse it for project costs. But this arrangement did not involve the use of the state's credit. The state merely agreed to *expend funds*; it did not pledge its credit as an inducement to gain benefit or provide financial backing for the private developers.[24]

Because the appellants have failed to meet the first prong of the *Haman* test, further analysis is unnecessary.[25] The expenditure did not violate article XIII, § 3, of the Nebraska Constitution.

CONCLUSION

Section 2-3235(1) expressly permitted the District to enter into the Agreement with private developers to construct the Shadow Lake and Midlands Lake dams. And the proposed L.B. 552 was not relevant evidence to show that the District lacked authority to enter the Agreement. Further, the District did not extend its credit to the private developers by agreeing to pay for the construction of the dams. We affirm.

AFFIRMED.

STEPHAN, J., not participating.

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[24] See *State ex rel. Beck v. City of York*, *supra* note 16.

[25] See *Callan v. Balka*, *supra* note 17.

WILLIAM STEVENSON, APPELLANT AND CROSS-APPELLEE, V. MICHAEL WRIGHT, APPELLEE AND CROSS-APPELLANT.

733 N.W.2d 559

Filed June 22, 2007. No. S-06-320.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against

whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Convictions: Evidence: Proof.** Generally, evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, is admissible to prove any fact essential to sustain the judgment.
4. **Convictions: Motor Vehicles: Evidence: Damages.** Evidence of conviction for a traffic infraction is not admissible in a civil suit for damages arising out of the same traffic infraction.
5. **Convictions: Rules of Evidence: Collateral Estoppel: Res Judicata.** The rules of evidence with respect to the admissibility of a conviction as evidence for the trier of fact do not determine the collateral estoppel or res judicata effect to which such a judgment may be entitled.
6. **Judgments: Collateral Estoppel: Words and Phrases.** Collateral estoppel means that when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.
7. **Judgments: Collateral Estoppel.** Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation.
8. **Criminal Law: Collateral Estoppel.** Prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was distinctly put in issue and directly determined in the criminal action.
9. **Collateral Estoppel: Res Judicata: Proof.** For application of the doctrines of collateral estoppel or res judicata, the party relying on either of those principles in a present proceeding has the burden to show that a particular issue was involved and necessarily determined in a prior proceeding.
10. **Pleadings: Notice.** The key to determining the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the defense.

Appeal from the District Court for Lancaster County, JODI NELSON, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with directions.

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

Cathy S. Trent and Melanie J. Whittamore-Mantzios, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

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

GERRARD, J.

William Stevenson and Michael Wright were involved in a traffic accident in Lincoln, Nebraska, and Wright was found guilty of operating his vehicle in a careless, reckless, or negligent manner, in violation of Lincoln Mun. Code § 10.14.290 (1990). Stevenson then brought a civil action against Wright for the damage to Stevenson's vehicle. The issues presented in this appeal are whether Wright's conviction for the traffic infraction of operating his vehicle in a careless, reckless, or negligent manner (1) is admissible against him in the civil action as evidence of negligence or (2) collaterally estops him from denying negligence or alleging Stevenson's negligence.

BACKGROUND

After the accident, Wright was ticketed for operating his vehicle in a careless, reckless, or negligent manner. Wright pleaded not guilty, and the matter went to trial in the county court.

At trial, Stevenson testified that on November 29, 2003, he was driving his Chevrolet Suburban west on Vine Street toward his residence, which was on the north side of Vine Street between East Avon and Colony Lanes. Vine Street, at the time of the accident, had three lanes at that location: one traffic lane in each direction and a middle turn lane. Stevenson testified that he signaled a right turn and was in the right lane, turning into his driveway, when his vehicle was struck on the right side by another vehicle that approached from behind. Stevenson's son, who was waiting in a parking lot across the street for his father to pull into the driveway, testified that he witnessed the accident, and he corroborated his father's testimony.

Wright, the driver of the other vehicle, testified that he was driving west on Vine Street behind Stevenson when Stevenson's vehicle went into the middle turn lane. Wright said he did not see a turn signal. Wright testified that Stevenson made a right turn from the middle lane and that Wright was unable to stop, resulting in a collision in the right lane. Essentially, Wright's theory was that in order for Stevenson's Chevrolet Suburban to make a 90-degree right turn into his driveway, Stevenson had been required to take his vehicle into the center lane and make a wide right turn, causing the collision.

The county court found Wright guilty of operating his vehicle in a careless, reckless, or negligent manner in violation of § 10.14.290 and fined him $60 plus court costs. Later, Stevenson brought a civil action against Wright in the county court for the damages allegedly caused to Stevenson's vehicle by Wright's negligence. Wright denied that he was negligent, alleged as an affirmative defense that Stevenson's own negligence was the cause of the accident, and specifically alleged the ways in which he claimed Stevenson was negligent. Stevenson filed a motion for summary judgment based on the traffic infraction conviction.

The county court found that the issue of Wright's negligence as the proximate cause of Stevenson's damages was finally resolved in the traffic infraction proceeding. The county court concluded that Wright was collaterally estopped from asserting that Stevenson's negligence was the cause of the collision. Because Wright had admitted that the amount of Stevenson's damages was $2,708.70, the county court entered summary judgment in that amount, plus court costs and postjudgment interest.

On appeal, the district court partly reversed the judgment of the county court. The district court found that although evidence of the traffic infraction conviction was admissible, the issues in that proceeding were not identical to those in the civil action, because the issues of contributory negligence and allocation of liability were not presented in the traffic infraction proceeding. The district court also noted that although Stevenson testified in the traffic infraction proceeding, he was not a party to that proceeding. The district court concluded that collateral estoppel was inapplicable and affirmed the county court's order with respect to the admissibility of the conviction, but reversed the order with respect to the summary judgment.

ASSIGNMENTS OF ERROR

Stevenson assigns that the district court erred in (1) concluding that collateral estoppel was not applicable because Stevenson was not a party to the traffic court prosecution, (2) concluding that contributory negligence and comparison of negligence were issues to be resolved in the county court civil action, and (3) failing to conclude that the factual findings of the traffic court necessarily result in a finding that Stevenson

was not negligent or a cause of the collision with Wright. On cross-appeal, Wright contends that the district court erred in affirming the county court's decision to receive into evidence, for purposes of the summary judgment motion, evidence of Wright's traffic infraction conviction.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

Admissibility of Conviction for Traffic Infraction as Evidence of Negligence

We begin with the issue presented by Wright's cross-appeal—the admissibility of Wright's conviction as evidence of negligence. Wright relies on Neb. Rev. Stat. § 60-693 (Reissue 2004), which provides that "[n]o evidence of the conviction of any person for any violation of any provision of the Nebraska Rules of the Road[3] shall be admissible in any court in any civil action." Had Wright been convicted of violating a Nebraska state traffic regulation, § 60-693 would be dispositive of this issue. But Wright was convicted of violating a Lincoln city ordinance. Strictly speaking, § 60-693 does not apply to a conviction for violating a municipal ordinance. But the rule stated in § 60-693 is representative of the general rule followed by the overwhelming majority of jurisdictions to have considered the admissibility of a traffic conviction in a subsequent civil

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[1] *Malolepszy v. State, ante* p. 313, 729 N.W.2d 669 (2007).

[2] *Id.*

[3] See Neb. Rev. Stat. ch. 60, art. 6 (Reissue 2004 & Cum. Supp. 2006).

proceeding. The general rule is that traffic convictions are not admissible in later civil proceedings as evidence of the facts that serve as a basis for the conviction.[4] As explained by the Illinois Supreme Court:

> Ultimately, the danger of unfair prejudice from a traffic conviction outweighs its probative value. . . . A conviction conveys a deceptive sense of certainty to the jury in a civil case that is difficult to challenge. "[J]uries may have difficulty grasping the distinction between a prior judgment offered as evidence and one that is conclusive, giving the judgment binding effect even if this is contrary to substantive law." . . . The jury in a civil action may substitute the opinion of the police officer who issued the ticket or the opinion of the traffic judge for its own. . . . Traffic court may therefore become "the cornerstone of a significant civil action filed after the conclusion of the criminal proceedings."[5]

[3] Generally, evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of

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[4] See, *Hadley v. Maxwell*, 144 Wash. 2d 306, 27 P.3d 600 (2001); *Johnson v. Leuthongchak*, 772 A.2d 249 (D.C. 2001); *Thurmond v. Monroe*, 159 Ill. 2d 240, 636 N.E.2d 544, 201 Ill. Dec. 112 (1994); *Williams v. Brown*, 860 S.W.2d 854 (Tenn. 1993); *O'Neal v. Joy Dependent School Dist.*, 820 P.2d 1334 (Okla. 1991); *Briggeman v. Albert*, 322 Md. 133, 586 A.2d 15 (1991); *Eaton v. Eaton*, 119 N.J. 628, 575 A.2d 858 (1990); *Ruthardt v. Tennant*, 252 La. 1041, 215 So. 2d 805 (1968); *Kirkendall v. Korseberg*, 247 Or. 75, 427 P.2d 418 (1967); *Loughner, Appellant v. Schmelzer*, 421 Pa. 283, 218 A.2d 768 (1966); *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E.2d 36 (1966); *Garver v. Utyesonich*, 235 Ark. 33, 356 S.W.2d 744 (1962); *Anderson v. Saunders*, 16 Wis. 2d 55, 113 N.W.2d 831 (1962); *Friesen v. Schmelzel*, 78 Wyo. 1, 318 P.2d 368 (1957); *Utah Farm Bureau Ins. Co. v. Chugg*, 6 Utah 2d 399, 315 P.2d 277 (1957); *Ripple v. Brack*, 132 Colo. 125, 286 P.2d 625 (1955); *Stevens v. Duke*, 42 So. 2d 361 (Fla. 1949); *Warren v. Marsh*, 215 Minn. 615, 11 N.W.2d 528 (1943); *Myers v. Barnard*, 180 Ga. App. 192, 348 S.E.2d 733 (1986); *Lucas v Carson*, 38 Mich. App. 552, 196 N.W.2d 819 (1972); *Hannah v. Steel Co.*, 120 Ohio App. 44, 201 N.E.2d 63 (1963). But see, *Durham v. Farabee*, 481 So. 2d 885 (Ala. 1985); *Asato v. Furtado*, 52 Haw. 284, 474 P.2d 288 (1970). See, generally, Annot., 73 A.L.R.4th 691 (1989 & Supp. 2006).

[5] *Thurmond, supra* note 4, 159 Ill. 2d at 247, 636 N.E.2d at 548, 201 Ill. Dec. at 116 (citations omitted).

a crime punishable by death or imprisonment in excess of 1 year, is admissible to prove any fact essential to sustain the judgment.[6] But traffic infractions, including violation of the municipal ordinance under which Wright was convicted, are not punishable by imprisonment in excess of 1 year.[7] And this rule is based on the valid distinction between a conviction for a more serious offense and for a relatively minor matter such as a traffic infraction.[8] "Especially in traffic violations, expediency and convenience, rather than guilt, often control the defendant's 'trial technique.'"[9]

Stevenson points out, correctly, that unlike a conviction based on a plea or payment of a fine, Wright's conviction was based on a trial in the county court. But it is unrealistic and impractical to examine a prior conviction to determine whether the defendant vigorously defended himself, and to do so would amount to penalizing individuals who exercised their right to defend against the charges against them. Wright should not be penalized for having an attorney to defend him.[10] And we note that this case does not involve a plea of guilty and, thus, does not implicate the use, in a subsequent action, of a plea of guilty entered by the defendant in a criminal action as an admission that the defendant committed the acts charged.[11]

Fundamentally, there is no principled reason for us to distinguish a traffic infraction conviction under state law from one under a municipal ordinance. While municipal ordinances regulating traffic are not technically part of the Nebraska Rules of the Road, such ordinances exist only because they are *authorized*

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[6] See Neb. Evid. R. 803(21), Neb. Rev. Stat. § 27-803(21) (Reissue 1995).

[7] See, § 60-689; Lincoln Mun. Code §§ 10.06.160 and 10.14.300 (1990).

[8] See Fed. R. Evid. 803 advisory committee note.

[9] *Loughner, Appellant, supra* note 4, 421 Pa. at 285, 218 A.2d at 769. See, also, *Ruthardt, supra* note 4.

[10] See *Thurmond, supra* note 4.

[11] See, *Schaefer v. McCreary*, 216 Neb. 739, 345 N.W.2d 821 (1984); *Remmenga v. Selk*, 150 Neb. 401, 34 N.W.2d 757 (1948); *Piechota v. Rapp*, 148 Neb. 442, 27 N.W.2d 682 (1947); *Wisnieski v. Vanek*, 5 Neb. (Unoff.) 512, 99 N.W. 258 (1904).

by those rules.[12] And the admissibility of a conviction should not depend on the charging authority's decision whether to prosecute an alleged offender under state law or a functionally equivalent local ordinance. In this case, Wright was convicted of violating § 10.14.290, which provides:

> It shall be unlawful for any person to drive, use, operate, park, cause to be parked, or stop any vehicle (a) in a careless manner, or (b) in a reckless manner, or (c) in a negligent manner, or (d) in such manner as to endanger life, limb, person, or property, or (e) in such a manner as to endanger or interfere with the lawful traffic or use of the streets, or (f) in such a condition as to endanger or interfere with the lawful traffic or use of the streets.

Section 10.14.290 has no precise analog in the Nebraska Rules of the Road, but § 60-6,212 provides that "[a]ny person who drives any motor vehicle in this state carelessly or without due caution . . . shall be guilty of careless driving." And we have held that "[t]he words 'carelessly or without due caution' are synonymous with 'negligently or without due care . . . .'"[13] Wright could just as easily have been charged with violating state law, and it would make little sense to give greater effect to his conviction under local law for the same conduct.

[4] But more importantly, while § 60-693 "'may not be literally applicable, [it is] clearly indicative of legislatively approved public policy,'" and this determination is one that we are bound to respect.[14] Based on the policy underlying § 60-693, and the overwhelming weight of authority from other jurisdictions, we hold that evidence of conviction for a traffic infraction[15] is not admissible in a civil suit for damages arising out of the same traffic infraction. The district court erred in concluding that Wright's conviction under § 10.14.290 was admissible against him as evidence of negligence.

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[12] See § 60-680(1)(x).

[13] *State v. Merithew*, 220 Neb. 530, 533, 371 N.W.2d 110, 112 (1985).

[14] See *Munstermann v. Alegent Health*, 271 Neb. 834, 846, 716 N.W.2d 73, 84 (2006).

[15] See § 60-672 (defining "traffic infraction").

COLLATERAL ESTOPPEL IS INAPPLICABLE UNDER THESE CIRCUMSTANCES

[5] We turn now to Stevenson's appeal, which presents a similar, but analytically distinct issue—whether operating his vehicle in a careless, reckless, or negligent manner collaterally estops him from denying his liability in the instant case. Although implicating some similar policy concerns, the rules of evidence with respect to the admissibility of a conviction as evidence for the trier of fact do not determine the collateral estoppel or res judicata effect to which such a judgment may be entitled.[16]

[6-8] Collateral estoppel means that when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.[17] Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation.[18] Prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was distinctly put in issue and directly determined in the criminal action.[19]

[9] But for application of the doctrines of collateral estoppel or res judicata, the party relying on either of those principles in a present proceeding has the burden to show that a particular issue was involved and necessarily determined in a prior proceeding.[20] Here, we agree with the district court that the issues

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[16] See *Lichon v American Ins Co*, 435 Mich. 408, 459 N.W.2d 288 (1990). See, also, *Robinson v. Globe Newspaper Co.*, 26 F. Supp. 2d 195 (D. Me. 1998); *Banek v. Thomas*, 733 P.2d 1171 (Colo. 1986); *Pattershall v. Jenness*, 485 A.2d 980 (Me. 1984); *Crowall v. Heritage Mut. Ins. Co.*, 118 Wis. 2d 120, 346 N.W.2d 327 (Wis. App. 1984).

[17] *State v. Gerdes*, 233 Neb. 528, 446 N.W.2d 224 (1989).

[18] *Id.*

[19] See *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981).

[20] See *Gerdes, supra* note 17.

presented in the present case were not determined in the traffic infraction proceedings. While the contributory acts of a victim are usually immaterial to the issue of criminal guilt, the contributory negligence of an injured or damaged party in a civil action is vital to the ultimate issue of a defendant's liability.[21] And the proximate relation of the traffic infraction to the accident is not involved in the criminal proceeding, whereas it is an important issue in the civil case.[22]

Stevenson argues that the county court judge, in the traffic infraction proceeding, was required to decide that Stevenson was not negligent or a cause of the collision. Stevenson claims that the court "affirmatively rejected" Wright's "testimony and contention that the sole cause of the accident was . . . Stevenson's conduct."[23] We disagree. In order to convict Wright of the offense with which he was charged, the court was required to conclude only that Wright operated his vehicle in a careless, reckless, or negligent manner.[24] The court was not required to consider whether Stevenson was also negligent, nor was the court required to consider whose negligence was the cause (or greater cause) of the accident. The court could well have believed Wright's testimony about the accident, but still concluded that Wright's inability to stop his vehicle before the collision was evidence of negligence. And in point of fact, collateral estoppel is not based on what the trier of fact in the prior proceeding may have believed, but what findings were necessary to the judgment rendered.[25]

[10] Stevenson also contends that his own negligence, if any, was not at issue in *this* proceeding, because Wright "completely failed to affirmatively set forth the defense of contributory negligence in his answer."[26] Again, we disagree. The key to

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[21] *O'Neal, supra* note 4. See, *Warren, supra* note 4; *Nationwide Ins. Co. v. Isreal*, 116 Ohio App. 3d 671, 688 N.E.2d 1126 (1996).

[22] *Warren, supra* note 4.

[23] Brief for appellant at 14.

[24] See § 10.14.290.

[25] See *Gerdes, supra* note 17.

[26] Brief for appellant at 11.

determining the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the defense.[27] In this case, Wright's answer denied his own negligence, but alleged as an "affirmative defense" that Stevenson's negligence was the cause of the accident, and specified the ways in which Stevenson was allegedly negligent. That was sufficient to give fair notice to Stevenson that his own negligence was at issue and plead the defense of contributory negligence.[28]

The district court correctly concluded that on the facts of this case, collateral estoppel was not applicable. We are aware that some jurisdictions have concluded that even where identical issues were decided in a prior criminal proceeding, a conviction for a minor offense is insufficient to support collateral estoppel, because the defendant may lack incentive to vigorously defend, and the conviction may not derive from full and fair litigation.[29] We do not find it necessary to decide that question in this case. Stevenson also contends that the district court erred in concluding that collateral estoppel was not applicable because Stevenson was not a party to the traffic infraction proceedings. But, given our disposition of this appeal, we have no need to consider that question.

CONCLUSION

The district court correctly determined that collateral estoppel was inapplicable in this case and correctly reversed the county court's summary judgment. The district court erred, however, in concluding that Wright's traffic infraction conviction was admissible evidence of negligence. The district court's

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[27] See, Neb. Ct. R. of Pldg. in Civ. Actions 8(a) (rev. 2003); *Wyshak v. City Nat. Bank*, 607 F.2d 824 (9th Cir. 1979); *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

[28] See, e.g., *Fidelity & Deposit Co. of Md. v. Bank of Bladenboro*, 596 F.2d 632 (4th Cir. 1979); *American Motorists Ins. Co. v. Napoli*, 166 F.2d 24 (5th Cir. 1948); *Brown v. Billy Marlar Chevrolet, Inc.*, 381 So. 2d 191 (Ala. 1980). Cf., *Woodfield v. Bowman*, 193 F.3d 354 (5th Cir. 1999); *Weeder, supra* note 27.

[29] See, *Hadley, supra* note 4; *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986).

decision is affirmed in part and in part reversed, and the cause is remanded with directions to remand the case to the county court for further proceedings.

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

MELVIN R. CERNY AND LINDA CERNY, APPELLANTS AND CROSS-APPELLEES, AND GEOTECHNICAL SERVICES, INC., A NEBRASKA CORPORATION, APPELLEE, V. TODCO BARRICADE COMPANY, APPELLEE AND CROSS-APPELLANT.

733 N.W.2d 877

Filed June 29, 2007. No. S-05-877.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Final Orders: Appeal and Error.** A trial court's decision to certify a final judgment pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) is reviewed for an abuse of discretion.
3. **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.
4. ____: ____. An appellate court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction.
5. **Final Orders: Words and Phrases.** The term "final judgment" as used in Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) is the functional equivalent of a "final order" within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
6. **Jurisdiction: Final Orders: Appeal and Error.** A "final order" is a prerequisite to an appellate court's obtaining jurisdiction of an appeal initiated pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).
7. **Actions: Parties: Final Orders: Appeal and Error.** With the enactment of Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.
8. **Final Orders: Appeal and Error.** To be appealable, an order must satisfy the final order requirements of Neb. Rev. Stat. § 25-1902 (Reissue 1995) and, additionally, where implicated, Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).
9. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable.

10. **Courts: Judgments: Words and Phrases.** In deciding whether to grant Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) certification, a trial court must address two distinct issues. A trial court must first determine that it is dealing with a "final judgment." It must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action. Once having found finality, the trial court must go on to determine whether there is any just reason for delay.
11. **Judgments: Parties: Appeal and Error.** Certification of a final judgment must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.
12. **Judges: Judgments.** The power Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) confers upon the trial judge should only be used in the infrequent harsh case as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.
13. ____: ____. When a trial court concludes that entry of judgment under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order.
14. **Courts: Judgments.** A trial court considering certification of a final judgment should weigh factors such as (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.
15. **Courts: Judgments: Appeal and Error.** As a starting point for considering certification of a final judgment, it is appropriate for the trial court to consider whether the claims under review are separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would ever have to decide the same issues more than once even if there were subsequent appeals.
16. **Claims: Courts: Appeal and Error.** The potential that claims remaining in the trial court could obviate claims in the appellate court is a consideration against immediate appealability.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Order vacated, and appeal dismissed.

James D. Sherrets and Theodore R. Boecker, of Sherrets & Boecker, L.L.C., for appellants and appellee Geotechnical Services, Inc.

Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellee Todco Barricade Company.

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

GERRARD, J.

Melvin R. Cerny and Linda Cerny appeal from a partial summary judgment order of the district court, which entered judgment against some of their claims, but reserved one claim for trial. The court certified its partial summary judgment as a final judgment pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), but we conclude that the court abused its discretion in doing so. We vacate the court's certification of final judgment and dismiss the appeal.

BACKGROUND

Melvin Cerny was injured in a traffic accident in Omaha, Nebraska, on August 7, 1998. At the time, Interstate 680 was under reconstruction, and Melvin was driving on one of the temporary entrance ramps that had been built to facilitate the project. Melvin slowed his vehicle in order to merge with traffic on Interstate 680 and was struck from behind by a vehicle driven by Curt Coffman. Melvin was seriously injured and suffered permanent disability. Generally summarized, the Cernys claim that the design and implementation of the temporary entrance ramp was a proximate cause of the accident.

The project, including the temporary ramp, was planned by the State Department of Roads (the State). Hawkins Construction Company (Hawkins) was the State's general contractor with respect to the temporary entrance ramp. Todco Barricade Company (Todco), the defendant in this action, was a subcontractor hired by Hawkins and approved by the State to perform work on the temporary entrance ramp.

In other proceedings, Melvin and his wife, Linda (hereinafter collectively Cerny), sued Coffman and his wife, Tammy Coffman (collectively Coffman). Cerny also sued Hawkins and the State. Cerny settled his claims with Coffman, Hawkins, and the State; as part of the settlement, each of those defendants assigned Cerny their claims for contribution and indemnity from Todco. Cerny brought the instant case against Todco as assignee

of those claims. In other words, this case involves six claims—a claim for contribution and a claim for indemnity on behalf of each of the three assignors.

Todco moved for summary judgment, which was granted in part by the district court. With respect to the contribution claims, the court found it was undisputed that Todco's alleged negligence, in the placement of temporary signs and barricades on the entrance ramp, was done at the express direction of Hawkins or the State. The court reasoned that Hawkins and the State were estopped from seeking contribution from Todco for acts performed at their direction, and entered judgment against Cerny on those assigned claims. Because that reasoning did not extend to Coffman, the court denied summary judgment on Coffman's assigned claim for contribution.

The court entered judgment against Cerny on all of the assigned indemnity claims. The court reasoned that Coffman was not contractually obligated to indemnify Todco, and a common-law indemnity claim failed because Coffman was actively negligent. The court concluded that under Todco's contract with Hawkins, Todco was required to indemnify Hawkins and the State only for damages resulting from breach of the contract, and Todco had not breached the contract. Although Todco deviated from the original plans for the entrance ramp without receiving a written change order, the court concluded that Hawkins and the State had waived any such requirement under the contract and had caused Todco to deviate from the plans by directing it to do so. In short, the court concluded that Hawkins and the State were estopped from seeking contribution from Todco for a breach of contract that they ordered, approved, and accepted.

After entering the partial summary judgment described above, the court entered an order, pursuant to § 25-1315(1), stating that there was no just reason for delay and directing the entry of final judgment with respect to the claims against which summary judgment had been entered. The court's order did not articulate the basis for this conclusion. The court further concluded that the remaining claim, Coffman's assigned claim for contribution from Todco, was an equitable claim that would be tried to the court, and not to a jury. Cerny appeals.

ASSIGNMENTS OF ERROR

Cerny assigns, consolidated, that the court erred in (1) admitting portions of the affidavits offered by Todco at the summary judgment hearing, (2) concluding Todco was entitled to partial summary judgment on the indemnity and contribution claims assigned by Hawkins and the State, and (3) finding Cerny was not entitled to a jury trial on the Coffman contribution claim. Although Cerny also assigned error to the partial summary judgment on the Coffman indemnity claim, the argument in Cerny's appellate brief does not discuss that issue, so we do not discuss it either.[1] On cross-appeal, Todco assigns that the court erred in denying Todco's motion for summary judgment on the Coffman contribution claim because (1) Coffman is not entitled to contribution and (2) Coffman's contribution claim should have been decided in the underlying lawsuit.

STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2] A trial court's decision to certify a final judgment pursuant to § 25-1315(1) is reviewed for an abuse of discretion.[3]

ANALYSIS

Lack of Final Order on Coffman Contribution Claim

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.[4] In this case, Todco argues that Cerny's assignment of error with respect to a jury trial on the Coffman contribution claim is not properly presented on appeal, because it was not part of the partial summary judgment that the district court certified for appeal under § 25-1315(1). Our inquiry into

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[1] See *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006).

[2] *Cumming v. Red Willow Sch. Dist. No. 179, ante* p. 483, 730 N.W.2d 794 (2007).

[3] See *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003).

[4] *Betterman v. Department of Motor Vehicles, ante* p. 178, 728 N.W.2d 570 (2007).

jurisdiction, however, is broader than Todco's argument. An appellate court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction.[5] The procedural posture of this case presents several issues arising under § 25-1315(1).

Section 25-1315(1) provides that

> [w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Section 25-1315 permits a judgment to become final only under the limited circumstances set forth in the statute.[6] By its terms, § 25-1315(1) is implicated only where multiple causes of action are presented or multiple parties are involved, and a final judgment is entered as to one of the parties or causes of action.[7]

[5-8] The term "final judgment" as used in § 25-1315(1) is the functional equivalent of a "final order" within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995). Thus, a "final order" is a prerequisite to an appellate court's obtaining jurisdiction of an appeal initiated pursuant to § 25-1315(1).[8] With

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[5] *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994). See, also, *Gerardi v. Pelullo*, 16 F.3d 1363 (3d Cir. 1994); *Spiegel v. Trustees of Tufts College*, 843 F.2d 38 (1st Cir. 1988).

[6] *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

[7] *Id.*

[8] *Bailey, supra* note 3.

the enactment of § 25-1315(1), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a "final order" within the meaning of § 25-1902 as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.[9] In other words, to be appealable, an order must satisfy the final order requirements of § 25-1902 and, additionally, where implicated, § 25-1315(1).[10]

Neither Cerny's assignment of error with respect to the denial of a jury trial on the Coffman contribution claim nor Todco's cross-appeal with respect to the denial of its motion for summary judgment on the Coffman contribution claim is properly appealable pursuant to §§ 25-1902 and 25-1315(1). The district court did not enter a "final judgment," i.e., final order, with respect to the Coffman contribution claim. The district court's order directing final judgment pursuant to § 25-1315(1) expressly directed that "the summary judgments previously entered herein" should be considered final judgments, but did not direct a final judgment with respect to the Coffman contribution claim.[11] Nor could it have done so.

[9] A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable.[12] The court's denial of a jury trial did not determine the action and prevent a judgment, was not made during a special proceeding, and was not made on summary application in an action after judgment had been rendered.[13] Nor do the issues raised on appeal with respect to the Coffman contribution claim bear

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[9] *Id.*

[10] *Malolepszy, supra* note 6.

[11] See *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

[12] *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

[13] See, § 25-1902; *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

directly on the correctness of the claims against which a final judgment was directed.[14] In short, because no final order was entered on the Coffman contribution claim as required by § 25-1902, the court could not have directed a final judgment as to that claim within the meaning of § 25-1315(1), and no issue bearing on that claim is before us in this appeal.

Abuse of Discretion in Certifying Final Judgment on Other Claims

The contribution and indemnification claims assigned by Hawkins and the State present more difficult issues. Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.[15] Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay, or has agreed to pay, unless the party making the payment is barred by the wrongful nature of his or her conduct.[16] Indemnification is distinguishable from the closely related remedy of contribution in that the latter involves a sharing of the loss between parties jointly liable.[17]

It is questionable whether contribution and indemnity are separate causes of action, as opposed to theories of recovery,[18] and our research has revealed no authority helpful to deciding whether similar claims that had previously belonged to separate parties remain separate "claims for relief" when they are assigned to one party. But we do not find it necessary to decide these issues in this proceeding, because we conclude that even if the district court's partial summary judgment *could* be designated as a final judgment pursuant to § 25-1315(1), the court

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[14] See, *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

[15] *Smith v. Kellerman*, 4 Neb. App. 178, 541 N.W.2d 59 (1995).

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

[17] *Id.*

[18] See *Saunders County v. City of Lincoln*, 263 Neb. 170, 638 N.W.2d 824 (2002). See, also, *Sussex Drug Products v. Kanasco, Ltd.*, 920 F.2d 1150 (3d Cir. 1990).

abused its discretion in doing so.[19] Although Todco has not challenged the certification on appeal, we address the issue because our ability to review the merits of the appeal depends on whether it was properly certified.[20]

[10] In deciding whether to grant § 25-1315(1) certification, a trial court must address two distinct issues. A trial court must first determine that it is dealing with a "final judgment." It must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action.[21] Once having found finality, the trial court must go on to determine whether there is any just reason for delay. Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims.[22] It is left to the trial court's discretion, to be exercised in the interest of sound judicial administration, to determine the appropriate time when each final decision in a multiple claims action is ready for appeal.[23]

We have not previously considered a trial court's determination that there is no just reason to delay the entry of a final judgment. Because § 25-1315(1) is substantially similar to Fed. R. Civ. P. 54(b), we look to federal cases applying rule 54(b), and state cases arising under similar rules, for guidance in applying § 25-1315(1).[24]

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[19] See *Bailey, supra* note 3. See, also, *Gerardi, supra* note 5; *Kersey v. Dennison Mfg. Co.*, 3 F.3d 482 (1st Cir. 1993).

[20] See, *Credit Francais Intern., S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698 (1st Cir. 1996); *Monument Mgt. Ltd. Partnership v. Pearl, Miss.*, 952 F.2d 883 (5th Cir. 1992); *Indiana Harbor Belt R. Co. v. American Cyanamid*, 860 F.2d 1441 (7th Cir. 1988); *Spiegel, supra* note 5; *Long v. Wickett*, 50 Mass. App. 380, 737 N.E.2d 885 (2000).

[21] *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980).

[22] *Id.*

[23] See *id.*

[24] See *Malolepszy, supra* note 6.

Prior to the enactment of § 25-1315, an order that effected a dismissal with respect to one of multiple parties was a final, appealable order, and the complete dismissal with prejudice of one of multiple causes of action was a final, appealable order, but an order dismissing one of multiple theories of recovery, all of which arose from the same set of operative facts, was not a final order for appellate purposes.[25] Section 25-1315 was an evident attempt by the Legislature to simplify the issue and clarify many of the questions regarding final orders when there are multiple parties and claims.[26] In other words, § 25-1315(1) was intended to *prevent* interlocutory appeals, not make them easier.[27] It attempts to strike a balance between the undesirability of piecemeal appeals and the potential need for making review available at a time that best serves the needs of the parties.[28]

[11,12] Therefore, it is well established in every other jurisdiction to have considered a similar rule that certification of a final judgment must be reserved for the "unusual case" in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.[29] The power § 25-1315(1) confers upon the trial judge should only be used "'"in the infrequent harsh case"'" as an instrument for the improved administration of justice, based on the likelihood of injustice or

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[25] *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

[26] *Id.*

[27] See, *Astro-Med, Inc. v. R. Moroz, Ltd.*, 811 A.2d 1154 (R.I. 2002); *Planning Board v. Mortimer*, 310 Md. 639, 530 A.2d 1237 (1987).

[28] See, *Corrosioneering v. Thyssen Environmental Systems*, 807 F.2d 1279 (6th Cir. 1986); *Jasmin v. Dumas*, 726 F.2d 242 (5th Cir. 1984); *Noble v. Colwell*, 44 Ohio St. 3d 92, 540 N.E.2d 1381 (1989); *Cox v. Howard, Weil, Labouisse, et al.*, 512 So. 2d 897 (Miss. 1987).

[29] See *Morrison-Knudsen Co., Inc. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). Accord, e.g., *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162 (11th Cir. 1997); *Spiegel, supra* note 5; *Peterson v. Zerr*, 443 N.W.2d 293 (N.D. 1989). See, also, *Dzwonkowski v. Sonitrol of Mobile, Inc.*, 892 So. 2d 354 (Ala. 2004); *Cox, supra* note 28.

hardship to the parties of a delay in entering a final judgment as to part of the case.[30]

As a general principle, in deciding whether there are no just reasons to delay the appeal of individual final judgments, a trial court must take into account judicial administrative interests as well as the equities involved.[31] Consideration of the former is necessary to ensure that application of § 25-1315(1) effectively preserves the general policy against piecemeal appeals.[32] Plainly, sound judicial administration does not require that certification requests be granted routinely.[33] Therefore, entry of judgment under § 25-1315(1) should not be indulged as a matter of routine.[34] Section 25-1315(1) was simply not meant to be employed in the absence of sufficiently compelling circumstances.[35]

But there is nothing in the record in this case supporting a conclusion that this is a special case deserving of certification as a final judgment.[36] Nothing in the record "suggests a pressing, exceptional need for immediate appellate intervention, or grave injustice of the sort remediable only by allowing an appeal to be taken forthwith, or dire hardship of a unique kind."[37]

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[30] See *Corrosioneering, supra* note 28, 807 F.2d at 1282, quoting Fed. R. Civ. P. 54 advisory committee note. See, e.g., *Ebrahimi, supra* note 29; *Bank of Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944 (7th Cir. 1980); *Davis v. Farmland Mut. Ins. Co.*, 669 N.W.2d 713 (S.D. 2003); *Weinstein v. Univ. of Mont., at Missoula*, 271 Mont. 435, 898 P.2d 101 (1995); *Noble, supra* note 28; *Peterson, supra* note 29; *Planning Board, supra* note 27.

[31] *Curtiss-Wright Corp., supra* note 21. See, also, *Cox, supra* note 28.

[32] See *Curtiss-Wright Corp., supra* note 21. See, also, *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

[33] See *Curtiss-Wright Corp., supra* note 21.

[34] See, *Spiegel, supra* note 5; *Hardie v. Cotter and Co.*, 819 F.2d 181 (8th Cir. 1987); *Corrosioneering, supra* note 28; *Long, supra* note 20; *Sundial Press v. City of Albuquerque*, 114 N.M. 236, 836 P.2d 1257 (N.M. App. 1992); *Allstate Ins. Co. v. Angeletti*, 71 Md. App. 210, 524 A.2d 798 (1987).

[35] See, *Spiegel, supra* note 5; *Long, supra* note 20.

[36] See *Hardie, supra* note 34. See, also, *Long, supra* note 20.

[37] See *Spiegel, supra* note 5, 843 F.2d at 45-46. Accord *Peterson, supra* note 29.

There is no evidence, or even argument, establishing any injustice or hardship to the parties from a delay in entering final judgment, and as will be explained more fully below, the interrelationship of the issues remaining for trial weighs heavily against certification.

[13] We note, however, that our review of the district court's certification would have been greatly assisted had the district court explained its reasoning for concluding that there was no just reason to delay the entry of final judgment. When a trial court concludes that entry of judgment under § 25-1315(1) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order.[38] The reason for this is twofold: it helps the trial judge to sort out and weigh the competing considerations in his or her own mind, and it permits an appellate court to effectively review the ruling.[39] Here, the district court's order simply quoted the statutory language, but did not explain why, on the facts of this case, the court concluded certification was appropriate. It is difficult to review the trial court's exercise of discretion when the court does not explain its reasoning.[40]

The record does contain Cerny's motion requesting certification, and in the absence of any other explanation, we assume that the trial court adopted Cerny's reasoning. But the grounds for Cerny's motion not only fail to show that certification was appropriate, they affirmatively demonstrate that it was not. Cerny contended that the "remaining claims pending pursuant to [Coffman's] assignment arise out of the same incident, and would be predicated on the same witnesses and testimony, including expert witness testimony, as the claims assigned by the State . . . and Hawkins." Courts have uniformly held that the

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[38] See *id.* See, also, *Corrosioneering, supra* note 28; *Davis, supra* note 30; *Cox, supra* note 28; *Cole v. Peterson Realty, Inc.*, 432 A.2d 752 (Me. 1981); *Sundial Press, supra* note 34; *Acme Engineering & Mfg. v. Airadyne Co., Inc.*, 9 Mass. App. 762, 404 N.E.2d 693 (1980).

[39] See, *Spiegel, supra* note 5; *Brunswick Corp. v. Sheridan*, 582 F.2d 175 (2d Cir. 1978).

[40] See *Corrosioneering, supra* note 28.

presence of such overlapping claims counsels against certification, not in favor of it.[41]

[14] As previously explained, certification of a final judgment requires a court to determine whether the case is the "unusual case" in which potential hardship to the litigants outweighs the strong policy against piecemeal appeals.[42] Courts considering certification of a final judgment have weighed factors such as (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.[43]

[15] The U.S. Supreme Court has observed that as a starting point, it is appropriate for the trial court to consider whether the claims under review are separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would ever have to decide the same issues more than once even if there were subsequent appeals.[44] The trial court should carefully compare the dismissed and unadjudicated claims for indications of substantial overlap to ensure that the appellate court is not confronted in successive appeals with common issues of law or fact, to the

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[41] See *Kersey, supra* note 19.

[42] See, *Ebrahimi, supra* note 29; *Spiegel, supra* note 5; *Morrison-Knudsen Co., Inc., supra* note 29; *Dzwonkowski, supra* note 29; *Peterson, supra* note 29; *Cox, supra* note 28.

[43] See, e.g., *Corrosioneering, supra* note 28; *Bank of Lincolnwood, supra* note 30; *Urban Renewal v. Oklahoma City*, 110 P.3d 550 (Okla. 2005); *Davis, supra* note 30; *Weinstein, supra* note 30; *Fleet Bank of Maine v. Hoff*, 580 A.2d 690 (Me. 1990); *Peterson, supra* note 29.

[44] *Curtiss-Wright Corp., supra* note 21.

detriment of judicial efficiency.[45] An appellate court must then scrutinize the trial court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units.[46]

A court should be particularly cautious in certifying as final a judgment on a claim which is not truly distinct from the claims on remaining issues, for even if the certified judgment is inherently final, the facts underlying the claim resulting in that judgment may be intertwined with the remaining issues.[47] In a case in which the issues are intertwined, the trial court might wish to reconsider its dismissal of certain claims on the complete fact record developed at trial—an option permanently foreclosed by certification of a final judgment.[48] A complete factual record will also assist in final appellate review and decrease the likelihood of inconsistent decisions.[49] When the dismissed and surviving claims are factually and legally overlapping or closely related, fragmentation of the case is to be avoided except in "'unusual and compelling circumstances.'"[50]

[16] Furthermore, judicial administrative interests may not be served if the possibility exists that the need to review the issues appealed may be mooted by future developments in the trial court.[51] The potential that claims remaining in the trial court

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[45] See, *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946 (9th Cir. 2006); *Kersey, supra* note 19; *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir. 1984); *Urban Renewal, supra* note 43; *Davis, supra* note 30; *Astro-Med, Inc., supra* note 27; *Peterson, supra* note 29.

[46] *Sussex Drug Products, supra* note 18. See, also, *Astro-Med, Inc., supra* note 27.

[47] *Gerardi, supra* note 5.

[48] *Interstate Power v. Kansas City Power*, 992 F.2d 804 (8th Cir. 1993). See, also, *Milbank Mut. Ins. Co. v. Carrier Corp.*, 112 Idaho 27, 730 P.2d 947 (1986).

[49] See *Davis, supra* note 30. See, also, *Peterson, supra* note 29.

[50] *Long, supra* note 20, 50 Mass. App. at 389, 737 N.E.2d at 896, quoting *Spiegel, supra* note 5, and *Kersey, supra* note 19. Accord *Astro-Med, Inc., supra* note 27.

[51] See, *Gerardi, supra* note 5; *Cole, supra* note 38; *Long, supra* note 20.

could obviate claims in the appellate court is a consideration against immediate appealability.[52] Another factor that has been considered is whether, notwithstanding the entry of partial judgment, the action remains pending for trial below as to all of the parties. This alone counsels hesitation in the use of § 25-1315(1). It will be a rare case where § 25-1315(1) can appropriately be applied when the contestants on appeal remain, at the same time, contestants below.[53]

When these principles are applied to the instant case, it appears that the district court did not fully consider the interrelationship between the claims when it certified its partial summary judgment. When Cerny explains that the disposition of the claims assigned by Hawkins and the State "would effect [sic] the trial and the manner" in which the Coffman claim is adjudicated, Cerny is confirming an interrelationship among the claims that militates *against* certification of a final judgment.[54] "It does not strike us as betokening sound judicial administration for an appellate court and a trial court to be simultaneously passing upon different legal theories in a situation involving the same parties and, basically, the same facts."[55] Relying on such considerations would lead to requests of appellate courts to render advisory opinions in order to facilitate settlement or speed the process in trial courts.[56] This is beyond the scope of § 25-1315(1), and trial courts should resist the temptation to certify difficult issues for interlocutory review.[57]

Cerny also contended that certification of a final judgment would potentially resolve one of Todco's defenses to the Coffman contribution claim and would "likely give guidance to the question as to whether or not the matter should be

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[52] See, *Spiegel, supra* note 5; *Fleet Bank of Maine, supra* note 43; *Peterson, supra* note 29; *Sundial Press, supra* note 34.

[53] See *Spiegel, supra* note 5. See, also, *Brunswick Corp., supra* note 39.

[54] See *Spiegel, supra* note 5.

[55] *Id.* at 45. Accord *Urban Renewal, supra* note 43.

[56] See *Weinstein, supra* note 30. See, also, *Cole, supra* note 38.

[57] See *id.*

tried as one in equity or at law to a jury." This is incorrect. As previously explained, the Coffman contribution claim could not be certified as a final judgment, even if a summary judgment as to other claims could be properly certified. As we have stated, § 25-1315(1) "does not . . . provide 'magic words,' the invocation of which transforms any order into a final judgment for purposes of appeal."[58]

Cerny also contended that permitting an interlocutory appeal would prevent the need for a retrial, should a reversal result from an appeal of a judgment disposing of all the claims alleged. But such a potential is rarely, if ever, a sufficient basis for a § 25-1315(1) certification, because virtually *any* interlocutory appeal from a dispositive ruling said to be erroneous contains the potential for requiring a retrial.[59] Every party seeking certification may eventually appeal the judgment in question. If the promise of an appeal were seriously considered in analyzing every request for certification, then virtually every party seeking certification would be successful. But the benefit of potentially avoiding a retrial is generally outweighed by the certainty of fracturing the case's appellate review with an interlocutory appeal.

Simply stated, while there are variations among the assigned claims that Cerny alleges, the underlying issues are basically the same: Did Todco act wrongfully and did Todco's actions cause damages to Cerny that other parties were compelled to pay? The court's findings with respect to Todco's negligence could, conceivably, moot the issues raised in this appeal, and render our judgment advisory. Furthermore, where multiple tort-feasors are alleged, apportionment issues are presented that make it difficult, if not impossible, to separate the claims with respect to the different alleged tort-feasors.[60]

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[58] *Keef, supra* note 25, 262 Neb. at 629, 634 N.W.2d at 758.

[59] See, *Kersey, supra* note 19; *Spiegel, supra* note 5; *Weinstein, supra* note 30; *Peterson, supra* note 29.

[60] See, generally, Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995); *Harsh International v. Monfort Indus.*, 266 Neb. 82, 662 N.W.2d 574 (2003); *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001); *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999).

That situation is even more pronounced in this case, because it seems clear that Todco's defense, even to the Coffman contribution claim, will involve the extent to which it could justifiably rely on instructions it claims to have received from Hawkins or the State. The questions we are asked to decide now, on a summary judgment record, are in effect still pending for a trial that will, presumably, further illuminate the issues, both for the trial court and this court. "The interlocking factual relationship of the various counts leading to the likelihood that a subsequent appeal would again seek review of the issues presented here also suggests that it was not in the interests of sound judicial administration for the district court to certify this judgment as final."[61] Because the claims have so much factual overlap, for the purpose of requiring their adjudication prior to an appeal, they should be treated as the functional equivalent of nonseverable claims.[62]

In short, we conclude that the court abused its discretion in certifying its partial summary judgment as final under § 25-1315(1). There is nothing in the record suggesting unusual hardship for the parties in the absence of an immediate appeal, and the interrelationship of the factual and legal issues presented in the adjudicated and pending claims is too pronounced for this to be the unusual case in which the general policy against piecemeal appeals is outweighed.[63] Since § 25-1315(1) was erroneously applied, there is no final order present in this case. We vacate the court's order certifying a final judgment and, lacking jurisdiction, dismiss this appeal.

CONCLUSION

For the reasons stated above, we vacate the district court's certification of final judgment and dismiss the appeal.

ORDER VACATED, AND APPEAL DISMISSED.

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[61] *Sussex Drug Products, supra* note 18, 920 F.2d at 1156. See *Factory Mut. Ins. Co. v. Bobst Group USA, Inc.*, 392 F.3d 922 (7th Cir. 2004).

[62] See *Urban Renewal, supra* note 43.

[63] See, *Curtiss-Wright Corp., supra* note 21; *Morrison-Knudsen Co., Inc., supra* note 29.

STATE OF NEBRASKA, APPELLANT, V. JUNEAL DALE PRATT, APPELLEE.

733 N.W.2d 868

Filed June 29, 2007. No. S-05-1207.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
3. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
4. **Postconviction: DNA Testing: Collateral Attack.** An action under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2006), is a collateral attack on a conviction and is therefore similar to a postconviction action and is not part of the criminal proceeding itself.
5. **Postconviction.** Postconviction relief is not part of a criminal proceeding and is considered civil in nature.
6. **DNA Testing.** The purpose of the DNA Testing Act is to provide an opportunity for persons who may have been wrongfully convicted to establish their innocence through DNA testing.
7. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
8. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
9. **Pretrial Procedure: Appeal and Error.** Ordinarily, an order regarding discovery against a person not a party to the action is not appealable.
10. **Final Orders: Appeal and Error.** To fall within the collateral order doctrine, an order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Appeal dismissed.

Jon Bruning, Attorney General, J. Kirk Brown, Donald W. Kleine, and Susan J. Gustafson for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Juneal Dale Pratt was convicted in 1975 of sodomy, forcible rape, and two counts of robbery. The victims of Pratt's crimes were sisters, and we will refer to them throughout this opinion individually as "Victim A" and "Victim B."

In June 2004, Pratt filed a motion under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2006). The Douglas County District Court authorized DNA testing of the victims' clothing still remaining in the custody of the State. After receiving these test results, Pratt sought a certification from the district court authorizing an out-of-state deposition with a subpoena duces tecum of Victim A in order to obtain a known sample of her DNA. The district court granted Pratt's motion, and from this order, the State appeals.

SCOPE OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

[2] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004).

FACTS

Pratt was convicted in 1975 of sodomy, forcible rape, and two counts of robbery. See, generally, *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977) (affirming convictions and sentences on direct appeal); *State v. Pratt*, 224 Neb. 507, 398 N.W.2d 721 (1987) (affirming denial of motion for postconviction relief).

In June 2004, Pratt filed his operative motion requesting DNA testing. In accordance with the DNA Testing Act, the State filed an inventory of evidence in the State's custody. Pratt then moved the district court to authorize DNA testing of the victims' clothing that was within the control and custody of the State. He alleged that the results of such testing could exclude him as the assailant.

The district court authorized DNA testing, and the University of Nebraska Medical Center's human DNA identification laboratory conducted tests on shirts worn by the victims the day of the crime. The laboratory employed an extraction procedure to separate epithelial fractions from sperm fractions. Only one specimen generated an inconclusive, partial DNA profile coming from sperm. DNA profiles from epithelial (skin) cells were detected and referenced against a buccal swab sample provided by Pratt. Pratt was excluded as the source of the only specimen that generated an epithelial DNA profile most consistent with a profile originating from a male individual. Several specimens generated partial epithelial DNA profiles consistent with originating from a mixture of female and male individuals. Given the absence of female reference profiles, results concerning any male contributors were inconclusive.

After receiving the results from the DNA tests, Pratt filed a motion in June 2005 seeking certification for an out-of-state witness under Neb. Rev. Stat. §§ 29-1904 and 29-1906 to 29-1911 (Reissue 1995). He asked the district court to authorize a deposition duces tecum of Victim A, who resided in Colorado, in order to obtain a known sample of her DNA. Pratt alleged that the prior DNA test results showed the presence of mixed samples of DNA and that known DNA profiles from the victims would make it possible to determine which alleles on the victims' clothing could have been left by the assailant and whether Pratt could be excluded as the source of the male component of the mixed samples. The State moved the court for a protective order, alleging that the requested deposition would cause annoyance, embarrassment, and an undue burden on Victim A.

At a hearing, Pratt introduced the DNA test results and a copy of a Colorado statute that prescribed the manner in which

a resident could be summoned to testify in another state in a pending criminal prosecution or an ongoing grand jury investigation. Pratt's attorney explained that he wanted to obtain DNA profiles from the victims so their DNA could be eliminated from the mixed samples. Pratt's attorney asserted that if the court authorized the requested deposition of Victim A, she would be asked to provide a DNA swab from the inside of her cheek and would be asked for the current address of Victim B, her sister.

The State argued that DNA samples from the victims were unnecessary because the test results had already excluded Pratt as the donor of the tested epithelial cells. The State claimed however that the DNA test results failed to exculpate Pratt from the crime because the laboratory had tested skin cells on shirts that had been handled by many people, possibly including police officers, prosecutors, or jurors. It argued that additional evidence in the record, including evidence that Pratt was found with a ring belonging to one of the victims, proved Pratt was the perpetrator.

The district court sustained Pratt's motion and issued an order captioned "Certification for Out-of-State Witness [Victim A]." Therein, the district court requested that the appropriate court of record in the State of Colorado issue a subpoena duces tecum, along with a copy of the district court's certificate, ordering Victim A to attend a deposition and provide a sample of DNA. (We note that on page 3 of the order, the court incorrectly made reference to Victim B.)

The State appealed the district court's order to the Nebraska Court of Appeals. We granted Pratt's petition to bypass review by the Court of Appeals, and the appeal was transferred to our docket.

ASSIGNMENTS OF ERROR

The State asserts that the district court erred (1) in finding that the DNA Testing Act provides for obtaining and testing new evidence that has not been in the custody and control of the State and (2) in finding that criminal procedure rules are applicable to proceedings under the DNA Testing Act.

ANALYSIS

Final Order Rule

Under Nebraska law, an appellate court acquires no jurisdiction if no final order has been entered by the court from which the appeal was taken. Discovery orders are generally not considered final orders and, therefore, are not normally appealable. The district court sustained Pratt's motion for certification for an out-of-state witness, which was a discovery request. The question is whether the order for discovery was a final, appealable order, conferring appellate jurisdiction on this court.

[3] Pratt argues that no appellate jurisdiction exists because the order appealed from was not a final order. The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003). The State concedes that the order at issue did not determine the action and prevent a judgment. Nor was the order made on summary application in an action after a judgment was issued. Accordingly, the order in this case was a final order only if it affected a substantial right and was made during a special proceeding. We begin by considering the proceeding in which the order was entered.

Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes and have also been described as every special statutory remedy which is not in itself an action. *Bronson, supra.* In *Bronson*, we concluded that a hearing under § 29-4123(2) is a "special proceeding" within the meaning of the final order statute. Subsection 29-4123(2) provides for a hearing under the DNA Testing Act if test results exonerate or exculpate a person. It is important to note that there has been no hearing in this case to vacate or set aside the judgment, as described under the DNA Testing Act in § 29-4123(2). Rather, Pratt alleged that he

intended to use the results of the requested DNA testing of new evidence to vacate his convictions pursuant to § 29-4123 or to seek a new trial pursuant to Neb. Rev. Stat. § 29-2101(6) (Cum. Supp. 2006).

Pratt argues that the district court order to secure the attendance of an out-of-state witness was not made in a special proceeding because he alleges that proceedings under the DNA Testing Act are criminal in nature, not civil. We have addressed whether proceedings under the DNA Testing Act are civil or criminal only indirectly.

[4,5] In *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006), a defendant moving for postconviction DNA testing asserted that he was deprived of his right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution. This court rejected that assertion and found no constitutional right to counsel in an action under the DNA Testing Act. We reasoned that an "action under the DNA Testing Act is a collateral attack on a conviction and is therefore similar to a postconviction action and is not part of the criminal proceeding itself." *Poe*, 271 Neb. at 865, 717 N.W.2d at 469. In *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993), we held that postconviction relief is not part of the criminal proceeding and is considered civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. See, also, *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) (finding that prisoners have no constitutional right to attorney when mounting collateral attacks upon their convictions).

[6] Using such reasoning, we conclude that the action before us is a collateral attack upon Pratt's convictions. The purpose of the DNA Testing Act is to provide an opportunity for persons who may have been wrongfully convicted to establish their innocence through DNA testing. See § 29-4117. Accordingly, Pratt's argument that the proceedings were criminal in nature is without merit. The proceedings were civil in nature, and we conclude that the certification order was made in a special proceeding.

[7,8] Because we have determined that this was a special proceeding, the certification to secure an out-of-state witness was an appealable order if it affected a substantial right. A

substantial right is an essential legal right, not a mere technical right. *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003). A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999).

The State asserts that the order requiring Victim A to supply a DNA sample affected a substantial right and that the order could not be meaningfully reviewed at the conclusion of this action. The State claims the order affected the subject matter of the litigation—DNA testing of biological material under the DNA Testing Act—because if the order is allowed to stand, the State's defense will be diminished. The State further claims that the DNA testing requested by Pratt falls outside the bounds of the act. It also claims that the victims have a constitutional right to privacy, which will be undermined if they are compelled to provide DNA samples.

In the present case, it is difficult to determine what substantial right exists *in favor of the State* to oppose the discovery request, as compared to the right which may exist *in favor of the victim* to object to the discovery request. While there may be merit to the State's argument that the DNA Testing Act does not provide for Pratt's discovery request, under our long-established approach to discovery issues, we do not reach that issue in this appeal.

Orders requiring or denying discovery generally do not constitute a final disposition of the proceedings and, therefore, are not normally appealable. *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000). In *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989), plaintiffs in a breach-of-contract action filed a notice to take the deposition of a nonparty and a subpoena duces tecum was issued. The defendant objected and alleged that an attorney-client relationship existed between the nonparty and the defendant and that the plaintiffs sought to discover privileged information. The trial court found that the attorney-client privilege had been waived and ordered the deposition. The defendant appealed, and the issue before this court was whether a final order existed.

[9] We concluded that the order directing the nonparty to testify at the deposition was interlocutory and dismissed the appeal. In reaching this determination, we reviewed the general rules applicable to discovery orders and found:

> "A discovery order . . . is normally merely an interlocutory order in the course of proceedings and is not appealable. . . .
>
> "Ordinarily an order regarding discovery against a person not a party to the action is not appealable. The order is interlocutory insofar as it affects the party seeking discovery. It is final so far as the nonparty is concerned but if discovery is denied he has no need for review and if discovery is granted it is said that his remedy is to defy the order and appeal from a contempt judgment against him. . . ."

Brozovsky, 231 Neb. at 734, 437 N.W.2d at 800. Accord 8 Charles Alan Wright et al., Federal Practice and Procedure § 2006 (2d ed. 1994). We further opined that "'[i]nterlocutory appeals in civil cases will place an undue burden on the courts and delay the ultimate disposition of the litigation.'" *Id.* at 736, 437 N.W.2d at 801.

We conclude that the certification order was not a final, appealable order.

Collateral Order Doctrine

[10] At oral argument, the State argued that if the order compelling discovery was not a final order, then it should nevertheless be immediately reviewable under the collateral order doctrine. To fall within the collateral order doctrine, an order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

The collateral order doctrine is not applicable in the present case. The issue involved—i.e., obtaining a DNA sample from Victim A—is not completely separate from the merits of the action. The certification order arose from proceedings initiated by Pratt under the DNA Testing Act. Pratt maintains that he is

entitled to obtain the testing under the DNA Testing Act. Thus, the issue is enmeshed in the merits of the action, not separate from them. The order regarding the discovery is effectively reviewable on appeal from the final judgment in this action. The State has no right of appeal at this point in the proceedings. Ordinarily, an order regarding discovery against a person not a party to the action is not appealable.

The U.S. Supreme Court has emphasized the narrow application of the collateral order doctrine:

> [T]he "narrow" exception should stay that way and never be allowed to swallow the general rule . . . that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994).

CONCLUSION

The certification to secure the attendance of an out-of-state witness entered by the district court was not a final, appealable order. Therefore, this appeal is dismissed.

APPEAL DISMISSED.

HEAVICAN, C.J., concurring.

In its discovery order, the district court allowed the certification of an out-of-state witness for purposes of obtaining a DNA sample from that witness. The purported authority for such order was the DNA Testing Act.[1] Though I concur with the result reached by the majority that we are not presented with a final order, I write separately to comment upon the parameters of the DNA Testing Act.

This court has held that any rights conferred for postconviction DNA testing are statutory, not constitutional or from the common law.[2] Thus, a criminal defendant's right to such testing is limited to that which is provided for by statute. Section 29-4120(1) provides that a person in custody may request DNA testing of biological material only if the biological material

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[1] Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2006).

[2] See *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

> (a) [i]s related to the investigation or prosecution that resulted in such judgment;
>
> (b) [i]s 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) [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.

Absent a showing to the contrary, an appellate court will give statutory language its plain and ordinary meaning.[3] Generally, the word "and," used properly, is conjunctive.[4] It is therefore clear that under § 29-4120, all three threshold requirements must be met; unless all three requirements are met, no testing is permitted.

It is also clear that the intent of the DNA Testing Act was to provide a mechanism for DNA testing of evidence retained from the original investigation and prosecution. Section 29-4120(1)(a) specifically provides that the material must be "related to the investigation or prosecution that resulted in such judgment." In its findings, the Legislature noted that "DNA testing has emerged as the most reliable forensic technique for identifying persons *when biological material is found at a crime scene* or transferred from the victim to the person responsible and *transported from the crime scene*."[5] The Legislature also found "a compelling need to ensure the *preservation* of biological material for postconviction DNA testing."[6]

A review of the DNA Testing Act reveals no provision permitting the taking of depositions, as was requested by Pratt in the instant case. Nor does the act include any mechanism by which new evidence may be gathered and tested. There is no mention in the act of granting criminal defendants the ability to

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[3] *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[4] See *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995).

[5] § 29-4118(1) (emphasis supplied).

[6] § 29-4118(7) (emphasis supplied).

take genetic samples from victims or witnesses, or any indication that the definition of biological materials was intended to include anything other than those materials collected in connection with the original prosecution. As such, there was no statutory basis to support the granting of Pratt's motion for certification of an out-of-state witness.

MILLER-LERMAN, J., concurring.

Although I concur in the result reached by the majority opinion to dismiss this appeal, I write separately to comment on what I believe is a fundamental problem in this matter. The proceeding giving rise to this appeal was filed under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Cum. Supp. 2006). We have stated that a proceeding under the DNA Testing Act is a collateral attack on a conviction and is, therefore, similar to a postconviction action and is not part of the criminal proceeding itself. *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006). Therefore, the instant matter is not a criminal proceeding.

On June 20, 2005, Juneal Dale Pratt, appellee, filed a pleading in connection with his DNA Testing Act proceeding entitled "Motion for Certification for Out-of-State Witness," stating that the "motion is filed pursuant to Neb. Rev. Stat. § 29-1904 (Reissue 1995), Neb. Rev. Stat. § 29-1906 *et seq.* (Reissue 1995)." Article 19, chapter 29, of the Nebraska Revised Statutes relating to criminal cases is entitled "Preparation for Trial," and, importantly, Neb. Rev. Stat. §§ 29-1906 to 29-1911 (Reissue 1995) are cited as the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings," § 29-1911. I would conclude that a motion under §§ 29-1904 and 29-1906 to 29-1911 may be filed in a criminal proceeding, but not in a DNA Testing Act proceeding which is not a part of the criminal proceeding itself. Given this conclusion, the motion filed by Pratt giving rise to this appeal was not an authorized motion in the noncriminal DNA Testing Act proceeding in connection with which it was filed. Nevertheless, the order on appeal may be characterized as an interlocutory, nonappealable discovery order and I, therefore, agree with the decision of the majority opinion which concludes that in the absence of an appealable order, this court lacks jurisdiction.

STEPHAN, J., joins in this concurrence.

IN RE ESTATE OF LLOYD E. POTTHOFF, DECEASED. MARIANNE K. POTTHOFF, APPELLANT, V. ELVIRA M. POTTHOFF, APPELLEE.

733 N.W.2d 860

Filed June 29, 2007. No. S-05-1299.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court.
2. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002) are reviewed for errors appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
6. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
7. ____: ____. A substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment.
8. **Joint Tenancy.** Each tenant in a joint tenancy owns the whole of the property from the time at which the interest is created.
9. **Wills: Joint Tenancy.** Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not pass by virtue of the provisions of the will of the first joint tenant to die.
10. **Joint Tenancy.** An existing estate in joint tenancy can be destroyed by an act of one joint tenant which is inconsistent with joint tenancy, and such act has the effect of destroying the right of survivorship incidental to it.
11. ____. At common law, a joint tenancy must contain the four unities of time, title, interest, and possession.
12. ____. Any act of a joint tenant which destroys one or more of its coexisting unities operates as a severance and extinguishes the right of survivorship.

Appeal from the County Court for Red Willow County: CLOYD CLARK, Judge. Affirmed.

Terry L. Rogers, of Terry L. Rogers Law Firm, for appellant.

Ronald D. Mousel, and, on brief, Nancy S. Johnson, of Mousel & Garner, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The county court for Red Willow County determined that Lloyd E. Potthoff did not sever the joint tenancies in personal and real property he held with his estranged wife, Elvira M. Potthoff, by the execution of two documents entitled "Notice of Severance of Joint Tenancy." Marianne K. Potthoff, the daughter of Lloyd and Elvira, appeals the county court's decision.

BACKGROUND

Lloyd filed a petition for dissolution of marriage from Elvira, and, on May 28, 2002, the district court for Red Willow County issued an order prohibiting Lloyd and Elvira from "transferring, encumbering, hypothecating or in any manner disposing of" any real or personal property. On August 27, 2002, Lloyd executed and had notarized two identical "Notice[s] of Severance of Joint Tenancy" which purported to sever the joint tenancies he held with Elvira in all personal property and two separate tracts of land which are located in Red Willow County, Nebraska, and Hitchcock County, Nebraska. One of the notices was filed with the county clerk's office in Red Willow County, and the other notice was filed with the county clerk's office in Hitchcock County.

In December 2003, while Lloyd and Elvira's divorce proceeding was still pending, Lloyd died and the dissolution action was dismissed. Although Lloyd's will is not contained in the record, the parties do not dispute that Lloyd died testate. In January 2004, Marianne filed a petition in the county court for Red Willow County to commence formal probate proceedings of Lloyd's estate. It appears from the record that Elvira requested the statutory allowances and exemptions set forth in Neb. Rev. Stat. §§ 30-2322 through 30-2325 (Reissue 1995 & Cum. Supp. 2006), but did not request an elective share of the augmented estate.

During the probate proceedings, a question arose as to whether the notices to sever joint tenancies executed by Lloyd were effective to sever the joint tenancies of property held by Lloyd and Elvira. The county court found that the notices were not effective and awarded Elvira, as the surviving joint tenant, all property held by her and Lloyd in joint tenancy. Marianne now appeals.

ASSIGNMENT OF ERROR

Marianne assigns, restated, that the county court erred in finding that the "Notice[s] of Severance of Joint Tenancy," which Lloyd filed with the offices of the county clerks of Red Willow and Hitchcock Counties, were ineffective to sever the joint tenancies held by Lloyd and Elvira in the property described in those notices.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court.[1]

[2,3] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002) are reviewed for errors appearing on the record.[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3]

ANALYSIS

Was County Court's Order Final?

[4,5] Before reaching the legal issues presented for review, we first address whether this court has jurisdiction. It is the power and duty of an appellate court to determine whether it has

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[1] *In re Estate of Rose, ante* p. 490, 730 N.W.2d 391 (2007).

[2] *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

[3] *Id.*

jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.[5]

In *In re Estate of Rose*, we recently considered whether a determination by a county court as to a family allowance and the inclusion of certain property in an augmented estate was a final order where the county court retained jurisdiction to determine the size of the augmented estate, which would serve as a basis for an award of a spouse's elective share. Of the three types of final orders,[6] the county court's order in *In re Estate of Rose* could only have been one that was made during a special proceeding and affected a substantial right. We determined that the court's order was made during a special proceeding, but that it did not affect a substantial right. We explained that although the court's determination as to the family allowance and inclusion of certain property in the augmented estate both decreased and increased the augmented estate, the size of the augmented estate had not yet been determined. We further explained that the rights affected in the county court's order could be considered in an appeal from which the augmented estate is finally established.

As in *In re Estate of Rose*, the order in the present case did not determine an action and prevent a judgment, nor was it made on summary application in an action after judgment was rendered. Accordingly, in order to be final and appealable, the order in this case must have affected a substantial right and been made during a special proceeding.[7] Our case law has established that a proceeding under the Nebraska Probate Code is a special proceeding.[8] We are, therefore, left to determine whether the order in this case affected a substantial right.

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[4] *In re Estate of Rose, supra* note 1.

[5] *Id.*

[6] See Neb. Rev. Stat. § 25-1902 (Reissue 1995).

[7] See *id.*

[8] See *In re Estate of Rose, supra* note 1.

The record before this court does not reflect that Elvira has made a claim for an elective share. Thus, unlike *In re Estate of Rose*, the computation of the augmented estate is not the fundamental issue in this case. Rather, the fundamental issue before the county court was the computation of the probate estate.

[6,7] We have observed that a substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.[9] We have further observed that a substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment.[10] In that regard, we held in *In re Estate of Rose* that because the ultimate issue had yet to be determined, the rights involved in the court's ruling could be effectively considered in an appeal from the final judgment in which the augmented estate is finally established.

That is not true in the present case. Here, the county court determined that Lloyd's notices of severance of joint tenancy were not effective and, therefore, upon Lloyd's death, the property, including Lloyd's prior interest in it, became Elvira's as the surviving joint tenant. This finding by the court resolved the separate issue of whether Lloyd's interest in the property was part of the probate estate, and following the county court's order, there was nothing left to be determined on that issue. Moreover, unlike *In re Estate of Rose*, the rights involved in this case cannot be effectively considered in an appeal from the final judgment in which the probate estate is finally established. It is not uncommon for the probate of an estate to remain open for years. If that were to be the case here, by the time the probate estate is finally settled, the property in question may have been disposed of or the value of the property may be substantially reduced. Accordingly, we determine that the court's ruling in this case does affect a substantial right and is, therefore, a final, appealable order.

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[9] *Id.*

[10] *In re Estate of Rose, supra* note 1.

WERE NOTICES TO SEVER JOINT TENANCY EFFECTIVE?

[8,9] Each tenant in a joint tenancy owns the whole of the property from the time at which the interest is created.[11] Property owned in a joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not pass by virtue of the provisions of the will of the first joint tenant to die.[12]

[10-12] We have explained that an existing estate in joint tenancy can be destroyed by an act of one joint tenant which is inconsistent with joint tenancy and that such act has the effect of destroying the right of survivorship incidental to it.[13] At common law, a joint tenancy must contain the four unities of time, title, interest, and possession.[14] Thus, any act of a joint tenant which destroys one or more of its coexisting unities operates as a severance and extinguishes the right of survivorship.[15] In Nebraska, the common law requirement of the four unities persists subject to its modification by Neb. Rev. Stat. § 76-118 (Reissue 2003).[16]

Section 76-118 provides:

> (1) Any person or persons owning property which he, she, or they have power to convey, may effectively convey such property *by a conveyance naming himself, herself, or themselves and another person or persons, as grantees*, and the conveyance has the same effect as to whether it creates a joint tenancy, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property to the persons named as grantees in the conveyance. (2) Any two or more persons owning

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[11] See *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005).

[12] *Id.*

[13] See, *id.*; *Krause v. Crossley*, 202 Neb. 806, 277 N.W.2d 242 (1979).

[14] See, *Krause v. Crossley, supra* note 13; *Giles v. Sheridan*, 179 Neb. 257, 137 N.W.2d 828 (1965).

[15] *In re Estate of Rosso, supra* note 11; *Giles v. Sheridan, supra* note 14.

[16] See, e.g., *In re Estate of Rosso, supra* note 11; *White v. Ogier*, 175 Neb. 883, 125 N.W.2d 68 (1963).

> property which they have power to convey, may effectively convey such property *by a conveyance naming one, or more than one, or all such persons, as grantees*, and the conveyance has the same effect, as to whether it creates a separate ownership, or a joint tenancy, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property, to the persons named as grantees in the conveyance. (3) Any person mentioned in this section may be a married person, and any persons so mentioned may be persons married to each other. (4) The *conveyance of all of the interest of one joint tenant to himself or herself as grantee*, in which the intention to effect a severance of the joint tenancy expressly appears in the instrument, severs the joint tenancy.

(Emphasis supplied.)

Marianne contends that Lloyd's execution of the notices of severance severed Lloyd's joint tenancies with Elvira. While courts vary on their opinion of whether certain actions taken by a joint tenant or tenants sever a joint tenancy, court decisions reveal, as was summarized in Powell on Real Property,[17] that in order to be effective, "[t]he act [of severance] must clearly and unequivocally signify an intent to sever. Nonetheless, mere expression of intent to sever without a legally sufficient act does not effectuate a severance."

For example, most courts agree that a joint tenancy may be severed when title to the property is changed. Such a change may result from a conveyance of a joint tenant's or tenants' full interest to a third party or directly to himself, herself, or themselves as grantee or grantees, or in some jurisdictions, the conveyance of a lesser interest, such as a life estate or lease. Courts, including ours, also agree that a joint tenancy may be severed by a final judgment or decree of partition. Other acts found in some, but not all, jurisdictions to effectuate a severance of a joint tenancy include the mutual agreement of the joint tenants; the lease of a joint tenant's interest; the filing of a bankruptcy petition by a joint tenant or the sale of a joint tenant's interest

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[17] 7 Richard R. Powell & Michael Allan Wolf, Powell on Real Property § 51.04[1] at 51-16 (2001).

in bankruptcy; divorce; the mortgage of a joint tenant's interest, particularly in those states where a mortgage or a deed of trust transfers title to the mortgagee or trustee, i.e., title-theory jurisdictions; and actions by a joint tenant or tenants which changes the nature of the property held in joint tenancy.[18]

As to the question now before us, whether the execution of a unilateral written notice of severance is effective to sever a joint tenancy, there is a notable lack of discussion by both courts and commentators. Most predominately, authority addressing the question of whether joint tenancy may be severed by a written declaration comes from California, which has a statutory provision allowing the severance of a joint tenancy by less than all the joint tenants by the recordation and execution of a written declaration.[19] Aside from cases from California, the only other case law we were able to locate addressing a situation similar to that presented here comes from Pennsylvania. Although these cases are not directly on point, they do provide guidance.

In *Kern v. Finnegan et al.*,[20] and in *Stop 35, Inc. v. Haines*,[21] the Superior Court of Pennsylvania addressed whether agreements between husbands and their wives severed the spouses' tenancies by the entireties. In *Kern*, the court held that the agreement did not. The *Kern* court explained that no authority had been cited to the court and that the court was not able to find any to support a conclusion that the written declaration in that case could convert a tenancy by the entireties to a tenancy in common with the same force and legal effect as a deed executed and recorded by the parties. In *Stop 35, Inc.*, the husband and his estranged wife recorded an agreement which provided that the net proceeds of real estate held by tenancy by the entireties would be divided equally if the property were sold. In finding

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[18] See, 48A C.J.S. *Joint Tenancy* § 19 (2004); 7 Powell & Wolf, *supra* note 17; William B. Stoebuck & Dale A. Whitman, The Law of Property § 5.4 (3d ed. 2000) (collecting cases).

[19] See Cal. Civ. Code § 683.2 (West 2007). See, e.g., *In re Estate of Powell*, 83 Cal. App. 4th 1434, 100 Cal. Rptr. 2d 501 (2000).

[20] *Kern v. Finnegan et al.*, 192 Pa. Super. 611, 162 A.2d 93 (1960).

[21] *Stop 35, Inc. v. Haines*, 374 Pa. Super. 604, 543 A.2d 1133 (1988).

that the agreement in that case did not sever the tenancy by the entireties, the court stated, "'It is obvious that the effect on the title to this property by the recording of this Agreement would be chaotic. Certainly, grantor and grantee cannot merely by their own declaration effectuate the recording of a Deed affecting title to property.'"[22]

Here, Lloyd's intent to sever his joint tenancies with Elvira is clear. Nevertheless, we must conclude that the execution of the notices in this case was not a legally sufficient act to sever Lloyd and Elvira's joint tenancies. Section 76-118 authorizes the severance of a joint tenancy by way of a conveyance of the property. The notices in question here did not convey the property held in joint tenancy and, therefore, did not sever the joint tenancy under § 76-118. That leaves us with the question of whether any of the four unities of time, title, interest, or possession were destroyed by the notices of severance. In *In re Estate of Rosso*,[23] we addressed the question of whether the disposal and failure to replace stock certificates purportedly held in joint tenancy were actions inconsistent with the joint tenancy that extinguished the right of survivorship. We noted that the disposal of the stock certificates would do nothing to alter any aspect of the stock's ownership because the certificate was merely a token of ownership, and there was no evidence to suggest that they were destroyed in an attempt to affect actual ownership of the corporation. Because the certificates did not affect the actual ownership of the stock, we concluded in *In re Estate of Rosso* that the unities of joint tenancy had not been affected. As in *In re Estate of Rosso*, the notices in this case did not affect actual ownership of the property and, therefore, did not affect the unities of joint tenancy. Accordingly, we must conclude that the joint tenancies Lloyd held with Elvira were not severed.

CONCLUSION

For the reasons discussed above, we affirm.

AFFIRMED.

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[22] *Id.* at 609, 543 A.2d at 1136.

[23] *In re Estate of Rosso, supra* note 11.

STATE OF NEBRASKA, APPELLEE, V. DEAN R. MINER, APPELLANT.

733 N.W.2d 891

Filed June 29, 2007. No. S-06-187.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. **Postconviction: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.
3. **Constitutional Law: Criminal Law: Right to Counsel.** A defendant has the right under U.S. Const. amends. VI and XIV, and Neb. Const. art. I, § 11, to be represented by an attorney in all critical stages of a criminal prosecution.
4. **Constitutional Law: Right to Counsel.** An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
6. **Effectiveness of Counsel: Proof.** Where a defendant is unable to demonstrate sufficient prejudice in establishing a claim for ineffectiveness of counsel, no examination of whether counsel's performance was deficient is necessary.
7. ____: ____. The prejudice component of the ineffective assistance of counsel test focuses on whether counsel's performance rendered the results of the proceeding unreliable or fundamentally unfair by depriving a defendant of a substantive or procedural right.
8. **Effectiveness of Counsel: Proof: Words and Phrases.** To prove prejudice for a claim of ineffective assistance of counsel, 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.
9. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
10. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.

11. **Double Jeopardy: Pleadings.** A defendant may raise a double jeopardy claim by filing a plea in bar.
12. **Theft: Value of Goods.** An act of theft involving multiple items of property stolen simultaneously at the same place constitutes one offense, in which the value of the individual stolen items may be considered collectively for the aggregate or total value of the property stolen to determine the grade of the theft offense.
13. **Double Jeopardy: Juries.** In a case tried to a jury, jeopardy attaches when the jury is impaneled and sworn.
14. **Effectiveness of Counsel: Proof.** In order to demonstrate that his or her counsel's performance was deficient in support of a claim for ineffective assistance of counsel, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
15. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
16. **Criminal Law: Trial: Attorney and Client.** An appellate court gives due deference to defense counsel's discretion in formulating trial tactics.

Appeal from the District Court for Holt County: MARK D. KOZISEK, Judge. Reversed and remanded with directions.

Ronald E. Temple, of Fitzgerald, Vetter & Temple, for appellant.

Jon Bruning, Attorney General, Kimberly A. Klein, and Stacy Foust, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

Following a bench trial, Dean R. Miner was convicted in the district court for Holt County of theft by unlawful taking of 62 steers belonging to Wynn Hipke from the Atkinson Livestock Market. His conviction and sentence were affirmed on appeal.[1] In this postconviction proceeding, Miner contends that he was denied effective assistance of counsel. Specifically, he alleges that his trial counsel failed to file a plea in bar to assert a double jeopardy defense, based on a prior conviction in Nance County for theft by receiving some of the same cattle. The district court denied Miner's motion for postconviction relief, reasoning that a plea in bar would have had no merit because there was no

[1] *State v. Miner*, 2004 WL 1091996, No. A-02-933 (Neb. App. May 18, 2004) (not designated for permanent publication).

double jeopardy violation. On appeal from that order, we conclude that Miner's double jeopardy defense would have been meritorious if timely raised and that he is entitled to postconviction relief because of his trial counsel's failure to assert his constitutional right not to be placed in jeopardy twice for the same offense.

BACKGROUND

On March 19, 2001, Hipke consigned cattle including 66 steers to the Atkinson Livestock Market in Holt County. The following morning, market employees discovered that 62 of the Hipke steers were missing. An investigation by a State official determined that some of the Hipke steers had been sold through a livestock market in Boone County. The remaining steers were sold through a livestock market in Nance County. The evidence showed that all of the steers recovered had purple ear tags with "D.R. Miner" printed on them. All except one steer had the Miner brand placed over the top of the Hipke brand. Separate criminal charges were filed against Miner in the district courts for Nance and Holt Counties.

Nance County Prosecution

Miner was charged in Nance County with theft by receiving stolen property in violation of Neb. Rev. Stat. § 28-517 (Reissue 1995), a Class III felony. In an amended information filed March 22, 2002, the State alleged that on March 23, 2001, in Nance County, Miner received, retained, or disposed of stolen movable property consisting of "26 head of black and black white-faced steers from the Atkinson Livestock Market." The State further alleged that Miner knew or believed that the steers had been stolen and that they had a value of over $1,500. Miner was also charged with one count of disposing of livestock without evidence of ownership in violation of Neb. Rev. Stat. § 54-1,123 (Reissue 2004), a Class III felony. On March 25, a jury found him guilty on both counts. On June 7, he received concurrent sentences of not less than 3 and not more than 6 years' imprisonment. The convictions and sentences were summarily affirmed by this court.[2]

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[2] See *State v. Miner*, 265 Neb. xxi (No. S-02-666, Jan. 3, 2003).

HOLT COUNTY PROSECUTION

In June 2001, Miner was charged in Holt County with theft by unlawful taking in violation of Neb. Rev. Stat. § 28-511 (Reissue 1995), a Class III felony. The information specifically alleged that on or about March 20, 2001, in Holt County, Miner did "take or exercise control over movable property of another with the intent to deprive him or her thereof, to-wit: 62 black and black baldy steers belonging to Wynn Hipke, from the Atkinson Livestock Market, said property having a value of more than $ 1,500.00." Following a bench trial at which he was represented by counsel, the court found Miner guilty of the charged offense. On July 22, 2002, he was fined $5,000 and sentenced to 60 to 120 months' imprisonment, to be served consecutively to any other existing sentence.

Miner perfected a direct appeal pro se, but he was subsequently represented in the appeal by an attorney who did not represent him at trial. His claims on appeal included an assertion that the district court erred in imposing a consecutive sentence instead of a concurrent sentence and a claim that his trial counsel was ineffective for failing to file a plea in bar. Regarding sentencing, Miner argued that the presentence investigation report showed that he had previously been convicted and sentenced in Nance County for theft of some of the same steers. The Court of Appeals rejected this argument, noting that

> although the presentence investigation report contains both a letter from defense counsel and other information indicating that Miner was convicted and sentenced in Nance County for theft by receiving stolen property and disposing of livestock without evidence of ownership, the report does not show that these convictions involved the same cattle as the case at bar.[3]

The Court of Appeals further determined that the evidence was "insufficient to establish that Miner was convicted and sentenced in Nance County as he claims."[4] The court also determined that the record was insufficient to adequately review Miner's claim

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[3] *State v. Miner*, *supra* note 1, 2004 WL 1091996 at *5.

[4] *Id.*

of ineffective assistance of trial counsel, and accordingly did not reach that issue. It affirmed Miner's conviction and sentence.

Postconviction Proceeding

Miner then initiated this action for postconviction relief. He is represented by the same attorney who represented him on direct appeal. He alleged that his trial counsel was ineffective for failing to file a plea in bar to the charges and failing "to offer evidence or remarks to the Court, at the time of sentencing, reflecting that the defendant had been sentenced in another county for charges relating to the same cattle upon which he was charged and sentenced in Holt County." He prayed for an order dismissing the charges or for a new sentencing hearing.

An evidentiary hearing was held on the postconviction motion. The district court received evidence consisting of the record from the Holt County prosecution and appeal, portions of the record from the Nance County prosecution, and the deposition of Miner's trial counsel in the Holt County prosecution. The State offered no evidence.

Subsequently, the district court entered an order denying Miner's motion for postconviction relief. The court noted that the State had conceded in its brief that "the 26 head for which the defendant was convicted of receiving in Nance County were part of the 62 head the defendant was convicted of taking in Holt County and the evidence adduced at the hearing on the defendant's motion indicates the same." However, it concluded that these facts did not subject Miner to double jeopardy in the Holt County case, reasoning:

> In this case the defendant was convicted of taking 62 steers in Holt County having a value of $39,501.60 . . . and receiving 26 steers in Nance County having a value of $16,427.37. . . . The defendant was convicted of taking an additional 36 steers in Holt County. This distinction was recognized by defendant's trial counsel. . . . Because the Holt County case required proof of the taking of an additional 36 head of steers with a value in excess of $1,500 that the Nance County case did not, the court finds that any plea in bar filed on that basis would not have been sustained. There was no double jeopardy violation regarding the additional 36 head of steers taken in Holt County.

> Trial counsel's failure to file a plea in bar did not subject the defendant to any prejudice under the second prong of the *Strickland* [*v. Washington*[5]] test.

The district court also rejected Miner's sentencing claim, noting the record showed that the court was aware of the Nance County conviction at the time of sentencing on the Holt County conviction.

Miner perfected this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[6]

ASSIGNMENTS OF ERROR

Miner assigns, restated, that the district court erred in rejecting his claims that (1) his trial counsel was ineffective for failing to file a plea in bar asserting double jeopardy and (2) his trial counsel was ineffective for failing to offer evidence of Miner's conviction and sentence in Nance County at the time of his sentencing in Holt County.

STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[7] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[8] an appellate court reviews such legal determinations independently of the lower court's decision.[9]

ANALYSIS

[2-5] The Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation

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

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

[7] *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

[8] *Strickland v. Washington, supra* note 5.

[9] *State v. Sims, supra* note 7; *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

of his or her constitutional rights.[10] A defendant has the right under U.S. Const. amends. VI and XIV, and Neb. Const. art. I, § 11, to be represented by an attorney in all critical stages of a criminal prosecution.[11] An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.[12] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[13] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[14] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[15]

[6] In this case, the district court focused on the second prong of the test and concluded that the alleged performance deficiency of Miner's trial counsel did not result in prejudice. Specifically, the district court determined that counsel's failure to file a plea in bar had no adverse consequence because the convictions in Nance and Holt Counties did not subject Miner to double jeopardy. We begin our analysis with this issue, because where a defendant is unable to demonstrate sufficient prejudice in establishing a claim for ineffectiveness of counsel, no examination of whether counsel's performance was deficient is necessary.[16]

Prejudice: Double Jeopardy

[7,8] The prejudice component of the ineffective assistance of counsel test focuses on whether counsel's performance rendered

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[10] *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

[11] *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

[12] See *Strickland v. Washington*, *supra* note 5.

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

[14] *Id.*

[15] *Id.*

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

the results of the proceeding unreliable or fundamentally unfair by depriving a defendant of a substantive or procedural right.[17] To prove prejudice for a claim of ineffective assistance of counsel, 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.[18] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[19]

[9-11] The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[20] The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.[21] A defendant may raise a double jeopardy claim by filing a plea in bar.[22]

We agree with the reasoning of the district court that trial counsel's failure to file a plea in bar could have prejudiced Miner only if there had been a meritorious double jeopardy defense. In order to address that issue, we must decide whether the prosecutions in Nance and Holt Counties were for the same offense.

One of Miner's convictions in Nance County was for theft by receiving stolen property, which is committed when a person "receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed

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[17] *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

[18] *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[19] *Id.*

[20] *State v. Molina, supra* note 9; *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003).

[21] *State v. Molina, supra* note 9; *State v. Winkler, supra* note 20. See Neb. Const. art. I, § 12.

[22] See, Neb. Rev. Stat. § 29-1817 (Reissue 1995); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

with intention to restore it to the owner."[23] In Holt County, Miner was convicted of theft by unlawful taking, which is committed when a person "takes, or exercises control over, movable property of another with the intent to deprive him or her thereof."[24] Although the two offenses are codified separately, §§ 28-511 and 28-517 must be read in conjunction with Neb. Rev. Stat. § 28-510 (Reissue 1995), which provides:

> Conduct denominated theft in sections 28-509 to 28-518 constitutes a single offense embracing the separated offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under sections 28-509 to 28-518, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the court to [e]nsure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

In *State v. Jonusas*,[25] we observed that § 28-510 mirrored A.L.I., Model Penal Code and Commentaries § 223.1(1) (1980). We wrote:

> In effect, § 28-510 has subsumed various forms of unlawful acquisitive behavior into a single offense of theft which may be committed by taking part in any one of several activities described in §§ 28-509 to 28-517. The unifying concept in all these crimes is that each involves the involuntary transfer of property. In each case, the actor appropriates the property of the victim without his or her consent or with a consent that was obtained by fraud or coercion.[26]

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[23] § 28-517.

[24] § 28-511(1).

[25] *State v. Jonusas*, 269 Neb. 644, 694 N.W.2d 651 (2005).

[26] *Id.* at 649, 694 N.W.2d at 656 (citing A.L.I., Model Penal Code and Commentaries § 223.1, comment 2 (1980)).

The authors of the Model Penal Code note that consolidation of theft offenses "reduces the opportunity for technical defenses based upon legal distinctions between the closely related activities of stealing and receiving."[27]

> One who is found in possession of stolen goods may be either the thief or the receiver. If the prosecution can prove the requisite state of mind to deprive the true owner of the property, it makes little difference whether the jury infers that the defendant took directly from the owner or acquired the goods from another person who committed the act of taking.[28]

However, "[c]onsolidation also has a consequence favorable to the defense by precluding conviction of both offenses for the same transaction."[29] Other courts in jurisdictions having consolidated theft statutes derived from the Model Penal Code have held that a defendant cannot be convicted of theft by taking and theft by receiving the same property.[30] Because the Legislature has unambiguously defined theft as a single offense which can be committed in several different ways, we do not employ the double jeopardy analysis established by *Blockburger v. United States*.[31]

In this case, the district court distinguished Miner's two theft convictions by concluding that they did not involve the same property. The court reasoned that although the same 26 head of cattle were involved in each case, the Holt County case involved an additional 36 head which were not the subject of the Nance County prosecution. The court concluded that there was "no double jeopardy violation regarding the additional 36

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[27] Model Penal Code and Commentaries, *supra* note 26, § 223.6, comment 1 at 232.

[28] *Id.* at 232-34.

[29] *Id.* at 234.

[30] See, *People v. Palisoc*, 2002 Guam 9 (2002); *Gibson v. State*, 643 N.E.2d 885 (Ind. 1994); *State v. Esslinger*, 357 N.W.2d 525 (S.D. 1984), *overruled on other grounds, State v. LaPlante*, 650 N.W.2d 305 (S.D. 2002).

[31] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). See *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

head of steers taken in Holt County." In effect, the district court treated the Holt County conviction as being based on 36 head and the Nance County conviction as being based on the remaining 26 head, thus constituting two separate offenses.

[12] This reasoning is contrary to Neb. Rev. Stat. § 28-518 (Reissue 1995), which provides that theft may be classified as a Class III or IV felony or a Class I or II misdemeanor, depending on the value of the stolen property. However, § 28-518(7) adds: "Amounts taken pursuant to one scheme or course of conduct from one person may be aggregated in the indictment or information in determining the classification of the offense, *except that amounts may not be aggregated into more than one offense*." (Emphasis supplied.) Similarly, this court has held that an act of theft involving multiple items of property stolen simultaneously at the same place constitutes one offense, in which the value of the individual stolen items may be considered collectively for the aggregate or total value of the property stolen to determine the grade of the theft offense under § 28-518.[32]

The record reflects that 62 head of cattle were taken pursuant to "one scheme or course of conduct from one person" on the same day. Accordingly, § 28-518(7) permits the value of all items of property, in this case steers, to be aggregated in order to determine the classification of the theft offense. However, the same statute specifically prohibits aggregation of individual values "into more than one offense." Thus, Miner could not have been charged with one count of theft involving 26 head and a second count involving the remaining 36 head. For that reason, the district court erred in treating the two convictions as involving separate lots of cattle and therefore separate offenses for purposes of double jeopardy.

[13] In a case tried to a jury, jeopardy attaches when the jury is impaneled and sworn.[33] Although the record before us does not reflect the precise date on which the jury in the Nance

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[32] *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992).

[33] *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005); *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000).

County prosecution was sworn, we can reasonably infer that it was prior to March 25, 2002, when the jury, having been "duly impanelled and sworn," returned its guilty verdict on the charge of theft. Trial in the Holt County prosecution began on April 30. A meritorious plea in bar could have been filed after jeopardy had attached in the Nance County case and before the commencement of trial in Holt County.

Performance of Trial Counsel

[14-16] In order to demonstrate that his or her counsel's performance was deficient in support of a claim for ineffective assistance of counsel, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.[34] In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.[35] An appellate court gives due deference to defense counsel's discretion in formulating trial tactics.[36]

Miner's trial counsel represented him only in the Holt County prosecution. However, he was aware of the Nance County conviction and understood that it involved some, but not all, of the cattle which had been stolen in Holt County. His primary strategy was to defend on the basis that the State's circumstantial evidence was insufficient to connect Miner to the "actual taking" in Holt County. He did not file a plea in bar or research the double jeopardy issue, and he had no discussions with Miner on that subject.

At the time of his defense of Miner in 2002, counsel was charged with knowledge of the legal principles with respect to consolidation of theft offenses in Nebraska.[37] Counsel's belief that the State's evidence may have been insufficient to obtain a conviction did not preclude a pretrial filing of a plea in bar to assert the double jeopardy issue in the trial court and, if

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[34] *State v. Moyer*, *supra* note 18.

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

[36] *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

[37] See, §§ 28-510 to 28-518; *State v. Garza*, *supra* note 32.

unsuccessful there, in an immediate appeal.[38] We conclude that trial counsel's failure to file a plea in bar constituted deficient performance under the *Strickland* standard which was prejudicial to Miner because it deprived him of a meritorious double jeopardy defense.

CONCLUSION

Having established both prongs of the *Strickland* standard, Miner has shown that he received ineffective assistance of trial counsel in violation of his rights secured by the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution which rendered the judgment of conviction void or voidable. Because of the nature of this violation, Miner was deprived of his federal and state constitutional rights not to be placed in jeopardy twice for the same offense. Accordingly, we reverse the judgment of the district court and remand the cause with directions to set aside the judgment of conviction in Holt County and discharge Miner from the sentence imposed in this cause.

REVERSED AND REMANDED WITH DIRECTIONS.

[38] See *State v. Rubio*, 261 Neb. 475, 623 N.W.2d 659 (2001) (holding that plea in bar filed in accordance with statutory requirements is final, appealable order).

IN RE ADOPTION OF KAILYNN D.
DAVID E. AND JENNIFER E., APPELLEES, V. RICHARD D. AND JOHN J. KOHL, GUARDIAN AD LITEM FOR RICHARD D., APPELLEES, AND SARPY COUNTY, NEBRASKA, APPELLANT.

733 N.W.2d 856

Filed June 29, 2007. No. S-06-1278.

1. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.
2. **Adoption: Statutes.** The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Statutes: Legislature: Appeal and Error.** In reading 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.

5. **Statutes: Legislature: Intent.** It is a court's duty to discover, if possible, legislative intent from the statute itself.
6. **Statutes: Appeal and Error.** It is not within an appellate court's province to read a meaning into a statute that is not there.
7. **Legislature: Intent.** The intent of the Legislature is expressed by omission as well as by inclusion.
8. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated under Neb. Ct. R. of Prac. 9D(4) (rev. 2006) if affirmative relief is to be obtained.

Appeal from the County Court for Sarpy County: TODD HUTTON, Judge. Reversed and remanded for further proceedings.

Nicole O'Keefe, Deputy Sarpy County Attorney, for appellant.

Michael L. Smart for appellee David E.

John J. Kohl, of Raynor, Rensch & Pfeiffer, pro se.

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

STEPHAN, J.

This is a private adoption proceeding in which the husband of the biological mother sought to adopt her child, alleging abandonment by the biological father. The county court for Sarpy County appointed a guardian ad litem for the biological father, who was incarcerated. The sole issue in the appeal is whether Sarpy County can be required to pay the fee of the guardian ad litem in a private adoption. We conclude that it cannot.

FACTS

Kailynn D., born October 22, 1998, is the biological child of Richard D. and Jennifer E., who never married. Jennifer married David E. on March 5, 2005. In January 2006, David filed a petition to adopt Kailynn, in which Jennifer joined. The petition filed in Sarpy County Court identified Richard as the biological father and alleged that he was incarcerated in West

Virginia. The petition requested appointment of a guardian ad litem for the child, but did not request that a guardian ad litem be appointed for Richard.

After he was served with a copy of the petition for adoption, Richard sent a letter to the court requesting that counsel be appointed to represent him and that he be subpoenaed to attend all hearings in the matter. Richard did not specifically request appointment of a guardian ad litem. The court denied Richard's request for appointment of counsel, but appointed attorney John J. Kohl to serve as his guardian ad litem pursuant to Neb. Rev. Stat. § 43-104.18 (Reissue 2004).

After Kohl filed a report, a hearing was held at which he, counsel for David and Jennifer, and the guardian ad litem for Kailynn agreed that Kohl had performed all of his statutory duties and should be discharged. The court subsequently entered an order finding that Kohl had performed all of the duties of the guardian ad litem for Richard under Neb. Rev. Stat. § 43-104.19 (Reissue 2004) and that upon notice to Richard, Kohl's appointment would terminate. In a separate order, the court granted Kohl's motion for leave to withdraw as guardian ad litem for Richard.

After his withdrawal from the case, Kohl filed an application for fees and expenses, which he served on the Sarpy County Attorney. Sarpy County filed a resistance to the application. Following a hearing, the court entered a written order awarding Kohl a fee of $2,516. By handwritten interlineation on the order, the court stated that it was "for G.A.L. Services Rendered" and was "to be submitted to Sarpy County for payment." Sarpy County timely appealed; we moved the appeal to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENT OF ERROR

Sarpy County assigns, restated, that the county court erred in ordering Sarpy County to pay the guardian ad litem fee for Richard in this private adoption matter.

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

STANDARD OF REVIEW

[1] Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.[2]

ANALYSIS

[2] In Nebraska, the matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.[3] The adoption statutes codified at Neb. Rev. Stat. §§ 43-101 to 43-116 (Reissue 2004) do not make a county a necessary party to an adoption proceeding. In this case, Sarpy County had no involvement until it was served with Kohl's application for fees.

Kohl was appointed pursuant to § 43-104.18, which provides that under certain circumstances, the court may appoint a guardian ad litem to "represent the interests of the biological father." The statute further provides that the guardian ad litem is to be "chosen from a qualified pool of local attorneys" and "shall receive reasonable compensation for the representation, the amount to be determined at the discretion of the court."[4] The statute does not specify who is responsible for paying the fee.

[3-6] Statutory interpretation presents a question of law.[5] In reading 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.[6] It is a court's duty to discover, if possible, legislative intent from the statute itself.[7] It is not within an appellate court's province to read a meaning into a statute that is not there.[8] We find no language in § 43-104.18 which would obligate a county to pay the fee of a guardian ad litem

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[2] *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002).

[3] *Id.*

[4] § 43-104.18.

[5] *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[6] *In re Interest of Jeffrey K., ante* p. 239, 728 N.W.2d 606 (2007).

[7] *Knapp v. Village of Beaver City, ante* p. 156, 728 N.W.2d 96 (2007).

[8] *City of Elkhorn v. City of Omaha, supra* note 5.

appointed for a biological father in a private adoption proceeding to which it is not a party.

The Nebraska Court of Appeals addressed a similar issue in *In re Guardianship of Suezanne P.*[9] There, an attorney was appointed to represent a minor's parent in a guardianship proceeding initiated by the minor's great-grandmother. The court ordered the county to pay the attorney fee. The county had not been involved in the case prior to the fee award. The Court of Appeals noted that while various statutes grant a court authority to require counties to pay attorney fees in various circumstances, none were applicable to the case. The Court of Appeals concluded that there was "no authority for the court to order the County to pay the fees of the court-appointed attorney in this civil guardianship case in which the County was in no way involved."[10]

In a brief filed in this appeal, Kohl calls our attention to Neb. Rev. Stat. § 43-292.01 (Reissue 2004), a provision of the Nebraska Juvenile Code, which states that a guardian ad litem appointed in a termination of parental rights case "shall be paid a reasonable fee set by the court and paid from the general fund of the county." Kohl argues that we should read this statute in pari materia with § 43-104.18 so as to include a requirement that the county pay the guardian ad litem fee in this case. We note that the adoption statutes and the Nebraska Juvenile Code are two separate legislative enactments. But of greater significance, the two statutes are distinctly different. In § 43-292.01, as in certain other civil statutes, the Legislature has specifically provided that a county can be required to pay guardian ad litem or attorney fees.[11] No such provision is included in § 43-104.18.

[7] The intent of the Legislature is expressed by omission as well as by inclusion.[12] The fact that the Legislature expressly

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[9] *In re Guardianship of Suezanne P.*, 6 Neb. App. 785, 578 N.W.2d 64 (1998).

[10] *Id.* at 789, 578 N.W.2d at 67.

[11] See, e.g., Neb. Rev. Stat. §§ 30-2620.01 and 42-364 (Cum. Supp. 2006) and 43-273 (Reissue 2004).

[12] *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 54 N.W.2d 409 (1952).

obligated counties to pay guardian ad litem fees in some statutes, but not in § 43-104.18, reflects a legislative intent that the county cannot be ordered to pay the fees of a guardian ad litem appointed for a biological father in a private adoption case. Accordingly, we conclude that the county court erred in ordering Sarpy County to pay the fee of Kohl, the guardian ad litem appointed for Richard.

[8] Although he is an appellee, David's brief includes an "Assignment of Error" in which he asserts that the county court "did not have authority under the adoption statutes to appoint a guardian ad litem for Richard and that therefore, there is no authority to assess these costs" to David.[13] We regard this as a request for affirmative relief in the event that Sarpy County prevails in this appeal. A cross-appeal must be properly designated under Neb. Ct. R. of Prac. 9D(4) (rev. 2006) if affirmative relief is to be obtained.[14] Rule 9D(4) provides

> Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

Because David failed to properly identify his brief as a cross-appeal, we decline to address his arguments. Although we conclude that Sarpy County is not obligated to pay the fee of the guardian ad litem, we express no opinion on the question of whether the fee should be taxed as costs to David. That issue was never addressed by the county court and likely will arise on remand. An appellate court will not consider an issue on appeal that was not passed upon by the trial court.[15]

CONCLUSION

We conclude that the county court erred in ordering Sarpy County to pay the fee of Kohl, the guardian ad litem appointed

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[13] Brief for appellee David E. at 2.

[14] *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

[15] *In re Estate of Eriksen*, 271 Neb. 806, 716 N.W.2d 105 (2006).

for Richard, the biological father. Accordingly, we reverse, and remand to the county court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KIMBERLEE TROSPER, APPELLANT,
V. BAG 'N SAVE, APPELLEE.
734 N.W.2d 704

Filed July 6, 2007. No. S-05-889.

1. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law which requires an appellate court to reach a conclusion independent of the trial court.
2. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
3. **Employer and Employee: Public Policy: Damages.** Under the public policy exception to the at-will employment doctrine, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy.
4. **Employer and Employee: Public Policy.** The public policy exception to the at-will employment doctrine is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards.
5. **Employer and Employee: Public Policy: Courts.** In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.
6. **Workers' Compensation: Employer and Employee: Public Policy.** The Nebraska Workers' Compensation Act presents a clear mandate of public policy warranting application of the public policy exception.
7. **Actions: Workers' Compensation: Employer and Employee.** A cause of action for retaliatory demotion exists when an employer demotes an employee for filing a workers' compensation claim.
8. **Workers' Compensation.** An employee's right to be free from retaliatory demotion for filing a workers' compensation claim is married to the right to be free from discharge.
9. **Workers' Compensation: Employer and Employee: Public Policy.** An employer's conduct in demoting an employee contravenes the public policy of the Nebraska Workers' Compensation Act, just as discharge does.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded for further proceedings.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellant.

Robert F. Rossiter, Jr., and Sherman P. Willis, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

CONNOLLY, J.

Under Nebraska law, an employer, without incurring liability, generally may terminate an at-will employee at any time. But in *Jackson v. Morris Communications Corp.*,[1] we held a public policy exception to this rule applies when an employer wrongfully discharges an employee in retaliation for filing a workers' compensation claim. Kimberlee Trosper alleges not that she was fired, but that she was demoted because she pursued workers' compensation. This case presents the question whether we should extend the public policy exception to include retaliatory demotion. Extending our ruling in *Jackson*, we now hold that demotion, like discharge, violates public policy. We reverse, and remand for further proceedings.

BACKGROUND

Trosper filed a complaint alleging the following: Bag 'N Save employed her as a "deli manager." During the course of her employment, she suffered a work-related injury which required medical treatment. When she reported her injury to her employers, the company demoted her from "deli manager" to "deli clerk," and her annual salary decreased from $30,100 to $22,500. Trosper's complaint does not allege that she filed for workers' compensation. Bag 'N Save, however, acknowledges that Trosper filed a workers' compensation claim and that she reported the injury under the Nebraska Workers' Compensation Act.[2]

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[1] *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

[2] See Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2004 & Cum. Supp. 2006).

Trosper alleged that Bag 'N Save acted in a retaliatory manner contrary to our decision in *Jackson v. Morris Communications Corp.*[3] Bag 'N Save moved to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), alleging that the complaint failed to state a claim upon which relief could be granted. The trial court sustained the motion and dismissed the complaint.

[1] Whether a petition states a cause of action is a question of law which requires this court to reach a conclusion independent of the trial court.[4]

ASSIGNMENT OF ERROR

Trosper assigns, restated, that the district court erred as a matter of law in sustaining Bag 'N Save's motion to dismiss.

ANALYSIS

Trosper urges this court to adopt a cause of action for retaliatory demotion when an employer demotes an employee for filing a workers' compensation claim. She contends that demotion, like termination, frustrates the public policy behind the Nebraska Workers' Compensation Act. Bag 'N Save argues that the public policy exception should be restricted to situations involving discharge. It argues that demotion does not implicate the same concerns as discharge and that expanding the tort could cause a flood of litigation.

Nebraska Jurisprudence on Public Policy Exception

[2-5] Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.[5] We recognize, however, a public policy exception to the at-will employment doctrine. Under the public policy exception, we will allow an employee to claim damages for wrongful discharge when the motivation for the firing contravenes public policy.[6] The public policy exception is restricted to cases when a clear

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[3] *Jackson v. Morris Communications Corp., supra* note 1.

[4] See *id.*

[5] *Id.*; *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001).

[6] *Jackson v. Morris Communications Corp., supra* note 1.

mandate of public policy has been violated, and it should be limited to manageable and clear standards.[7] In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.[8]

We have addressed whether a public policy exception to the at-will employment doctrine should apply in several cases. We have previously recognized public policy exceptions when a statute prohibits an employer from discharging an employee.[9] And we have recognized the exception when an employee reports, in good faith, his suspicions that his employer is violating a criminal law.[10] In contrast, we determined that the Nebraska Wage Payment and Collection Act did not "represent a 'very clear mandate of public policy' which would warrant recognition of an exception to the employment-at-will doctrine."[11] That act did not prohibit employers from discharging employees, and it did not provide employees with any substantive rights. Instead, it was primarily remedial, providing an enforcement mechanism for rights that already exist.[12]

Recently, in *Jackson*, we recognized a public policy exception to the at-will employment doctrine and permitted a cause of action when an employer discharges an employee for filing a claim under the Nebraska Workers' Compensation Act. In *Jackson*, we acknowledged that the Nebraska Workers' Compensation Act, like the Nebraska Wage Payment and Collection Act, does not include a statutory prohibition that prevents employers from discharging employees who assert their

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[7] *Id.*; *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987).

[8] *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988).

[9] See *Ambroz v. Cornhusker Square Ltd.*, *supra* note 7.

[10] See *Schriner v. Meginnis Ford Co.*, *supra* note 8.

[11] *Malone v. American Bus. Info.*, *supra* note 5, 262 Neb. at 739, 634 N.W.2d at 793. Accord *Ambroz v. Cornhusker Square Ltd.*, *supra* note 7.

[12] See Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2004).

rights under the act.[13] We, however, cited other states which recognized public policy exceptions absent a clear statutory ban.[14]

[6] Moreover, unlike the Nebraska Wage Payment and Collection Act, the Nebraska Workers' Compensation Act creates substantive rights to compensation arising from the statute itself. It serves the important and beneficent purpose of protecting injured workers from the adverse economic effects of work-related injuries and occupational disease and binds employers to compensate injured workers. This duty "would be seriously frustrated if employers were able to prevent employees from filing claims through the threat of discharge."[15] We further explained:

> To hold that there is not a clear public policy warranting an exception to the at-will employment doctrine would ignore the beneficent nature of the Nebraska Workers' Compensation Act. This, in effect, would allow an employer to say to the employee: "'Although you have no right to a tort action, you have a right to a workmen's compensation claim which, while it may mean less money, is a sure thing. However, if you exercise that right, we will fire you.'"[16]

Thus, we held that the Nebraska Workers' Compensation Act presented a clear mandate of public policy warranting application of the exception.

Trosper now requests that we expand our cause of action for retaliatory discharge to retaliatory demotion.

Other States' Case Law Involving Retaliatory Conduct Short of Discharge

We have not previously addressed whether our cause of action for retaliatory discharge should be expanded to include

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[13] Cf. *Malone v. American Bus. Info., supra* note 5.

[14] See, *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984); *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981).

[15] *Jackson v. Morris Communications Corp., supra* note 1, 265 Neb. at 431, 657 N.W.2d at 640.

[16] *Id.* at 432, 657 N.W.2d at 640, quoting *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 366 N.E.2d 1145, 9 Ill. Dec. 634 (1977).

any lesser retaliatory actions against employees who file workers' compensation claims. Other jurisdictions provide some guidance.

In *Zimmerman v. Buchheit of Sparta, Inc.*,[17] a plurality of the Illinois Supreme Court rejected a claim for retaliatory demotion. The court first addressed this claim as a possible extension of its retaliatory discharge tort.[18] In declining to expand the tort, the court cited several Illinois cases which had narrowly interpreted the cause of action.[19]

The *Zimmerman* court stated that the element of discharge was essential to the tort it had created. It explained,

> In our view, adoption of plaintiff's argument [a cause of action for retaliatory demotion] would replace the well-developed element of discharge with a new, ill-defined, and potentially all-encompassing concept of retaliatory conduct or discrimination. The courts then would be called upon to become increasingly involved in the resolution of workplace disputes which center on employer conduct that heretofore has not been actionable at common law or by statute.[20]

The plaintiff's recitations of the "general principles of policy" behind retaliatory discharge did not sway the court.[21] It held that

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[17] *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 645 N.E.2d 877, 206 Ill. Dec. 625 (1994).

[18] See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978) (adopting exception for retaliatory discharge for filing workers' compensation claim).

[19] See, e.g., *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 601 N.E.2d 720, 176 Ill. Dec. 22 (1992); *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526, 519 N.E.2d 909, 116 Ill. Dec. 694 (1988); *Hindo v. University of Health Sciences*, 237 Ill. App. 3d 453, 604 N.E.2d 463, 178 Ill. Dec. 207 (1992) (court of appeals rejected retaliatory demotion as cause of action); *Scheller v. Health Care Service Corp.*, 138 Ill. App. 3d 219, 485 N.E.2d 26, 92 Ill. Dec. 471 (1985) (declining to expand tort to constructive discharge).

[20] *Zimmerman v. Buchheit of Sparta, Inc., supra* note 17, 164 Ill. 2d at 39, 645 N.E.2d at 882, 206 Ill. Dec. at 630.

[21] *Id.*

the plaintiff had not established a compelling reason to expand the cause of action.

The court also rejected the plaintiff's claim under an Illinois statutory provision which made it unlawful for an employer to "discriminate" against an employee because he exercised his rights under that state's workers' compensation act. In its discussion, the court pointed out that the "plaintiff fail[ed] to explain the manner in which demotions, as distinct from terminations, relieve employers of their responsibility to compensate employees for their work-related injuries."[22]

Only two justices joined the majority decision. Two concurring justices and two dissenting justices disagreed with the plurality's decision to treat retaliatory demotion and retaliatory discharge differently. The concurring justices stated that the courts should leave recognition of both retaliatory discharge and demotion to the legislature. The concurrence pointed out, however, that refusing to recognize a tort of retaliatory demotion while maintaining the retaliatory discharge tort created a "glaring loophole" because employers could simply retaliate by demoting rather than firing employees who file workers' compensation claims.[23]

The dissent argued the cause of action should be extended to demotion because there is "no principled way to distinguish the two situations."[24] The dissent relied on an Illinois statute which made it a crime to either discharge or discriminate against workers who filed workers' compensation claims.

In response to the concurring and dissenting opinions, the plurality wrote:

> Neither the dissent nor the concurrence acknowledges that this court acts within its authority in reaffirming the well-settled and limited tort of retaliatory discharge, as an exception to the at-will employment doctrine, without being constrained to open broad new avenues of litigation

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[22] *Id.* at 44, 645 N.E.2d at 884, 206 Ill. Dec. at 632.

[23] *Id.* at 46, 645 N.E.2d at 885, 206 Ill. Dec. at 633 (Bilandic, C.J., concurring).

[24] *Id.* at 52, 645 N.E.2d at 888, 206 Ill. Dec. at 636 (Harrison, J., dissenting).

> for other, less defined types of retaliatory conduct in the workplace.[25]

Similarly, the Utah Supreme Court rejected a cause of action for retaliatory harassment or discrimination against an employee who disagreed with how an employer treated employees who filed workers' compensation claims. In *Touchard v. La-Z-Boy Inc.*,[26] the Utah court determined that the public policy exception behind retaliatory discharge did not apply "to the same extent when the employee . . . does not have the fear of losing his or her employment." The court also expressed concern that to recognize such a claim would expand the public policy exception beyond its intended narrow scope by implicating "a much broader range of behavior, including *demotions*, salary reductions, job transfers, or disciplinary actions."[27]

In contrast, the Kansas Supreme Court has recognized a cause of action for retaliatory demotion. In *Brigham v. Dillon Companies, Inc.*,[28] the Kansas court analyzed the *Zimmerman* decision, focusing on the concurring and dissenting opinions. The Kansas court pointed out that four of seven justices on the *Zimmerman* court—both the concurring and dissenting justices—believed it was inconsistent to recognize a cause of action for retaliatory discharge, but not demotion.

The Kansas court, in recognizing a cause of action for retaliatory demotion, reasoned:

> The employers' violation of public policy and the resulting coercive effect on the employee is the same in both [termination and demotion]. The loss or damage to the demoted employee differs in degree only. We do not share the employers' concern that a torrent of litigation of insubstantial employment matters would follow in the wake of our recognition of a cause of action for retaliatory demotion and, even if we did, it does not constitute a valid

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[25] *Id.* at 45-46, 645 N.E.2d at 885, 206 Ill. Dec. at 633.

[26] *Touchard v. La-Z-Boy Inc.*, 148 P.3d 945, 955 (Utah 2006).

[27] *Id.* (emphasis supplied).

[28] *Brigham v. Dillon Companies, Inc.*, 262 Kan. 12, 935 P.2d 1054 (1997).

> reason for denying recognition of an otherwise justified cause of action.
>
> We conclude that the recognition of a cause of action for retaliatory demotion is a necessary and logical extension of the cause of action for retaliatory discharge. To conclude otherwise would be to repudiate this court's recognition of a cause of action for retaliatory discharge. The obvious message would be for employers to demote rather than discharge employees in retaliation for filing a workers compensation claim or whistleblowing. Thus, employers could negate this court's decisions recognizing wrongful or retaliatory discharge by taking actions falling short of actual discharge.[29]

Bag 'N Save cites several cases refusing to expand the public policy exception to other retaliatory actions short of discharge.[30] But we do not find that authority persuasive. Here, we address only demotion. Moreover, most of the cases cited did not involve retaliatory actions for filing a workers' compensation claim and thus, did not address the same policy concerns now before us.[31] Although one of the cases cited is a workers' compensation case, it is distinguishable because it involved the unique circumstance where the plaintiffs had filed for workers' compensation under a different state's statute.[32] Finally,

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[29] *Id.* at 20, 935 P.2d at 1059-60.

[30] See, *Sanchez v. Philip Morris Inc.*, 992 F.2d 244 (10th Cir. 1993) (failure to hire); *Warnek v. ABB Combustion Eng'g*, 137 Wash. 2d 450, 972 P.2d 453 (1999) (failure to rehire); *White v. State*, 131 Wash. 2d 1, 929 P.2d 396 (1997) (wrongful transfer); *Mintz v. Bell Atlantic Systems Leasing*, 183 Ariz. 550, 905 P.2d 559 (Ariz. App. 1995) (failure to promote).

[31] See, *Sanchez v. Philip Morris Inc., supra* note 30 (involving national origin discrimination); *White v. State, supra* note 30 (retaliation in violation of First Amendment right to freedom of speech); *Mintz v. Bell Atlantic Systems Leasing, supra* note 30 (retaliation for filing sex discrimination claim). See, also, *Ludwig v. C & A Wallcoverings, Inc.*, 960 F.2d 40 (7th Cir. 1992) (refusing to recognize cause of action for retaliatory demotion when employee reported supervisor's alleged misconduct).

[32] See *Warnek v. ABB Combustion Eng'g, supra* note 30.

one other jurisdiction has taken the opposite view and allowed claims for lesser retaliatory actions.[33]

NEBRASKA RECOGNIZES A CAUSE OF ACTION FOR RETALIATORY DEMOTION FOR FILING A WORKERS' COMPENSATION CLAIM

[7] Focusing on our rationale in *Jackson*, we conclude that a cause of action for retaliatory demotion exists when an employer demotes an employee for filing a workers' compensation claim. When we recognized a retaliatory discharge claim, we reasoned that "a rule which allows fear of retaliation for the filing of a claim undermines [the important public policy of the Nebraska Workers' Compensation Act]."[34] And we stated that "'the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal.'"[35]

[8] An employee's right to be free from retaliatory demotion for filing a workers' compensation claim is married to the right to be free from discharge. Demotion, like termination, coercively affects an employee's exercise of his or her rights under the Nebraska Workers' Compensation Act. If we fail to recognize a claim for retaliatory demotion, it would create an incentive for employers to merely demote, rather than discharge, employees who exercise their rights. To promote such behavior would compromise the act and would render illusory the cause of action for retaliatory discharge. Thus, we believe that extending the tort created in *Jackson* to include retaliatory demotion is a logical step, and one which gives vitality to that decision.

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[33] See, *Lawson v. AK Steel Corp.*, 121 Ohio App. 3d 251, 699 N.E.2d 951 (1997) (recognizing wrongful demotion cause of action when employer fired employee for whistleblowing); *Powers v. Springfield City Schools*, No. 98-CA-10, 1998 Ohio App. LEXIS 2827 (Ohio App. June 26, 1998) (unpublished opinion) (recognizing wrongful denial of promotion cause of action for whistleblowing). See, also, *Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134, 162, 677 N.E.2d 308, 328 (1997) (recognizing common-law tort action for "wrongful discharge/discipline" in violation of public policy).

[34] *Jackson v. Morris Communications Corp.*, *supra* note 1, 265 Neb. at 432, 657 N.W.2d at 640-41.

[35] *Id.* at 429, 657 N.W.2d at 639, quoting *Hansen v. Harrah's*, *supra* note 14.

[9] We disagree with Bag 'N Save's contention that our case law advises against recognizing a tort for retaliatory demotion. Bag 'N Save cites our refusal in *White v. Ardan, Inc.*,[36] to adopt claims of "malicious termination" or "bad faith discharge" as indicating that we narrowly interpret the public policy exception. But in *White*, the plaintiffs' terminations did not implicate a clear public policy. The plaintiffs simply alleged that their employer fired them because an executive falsely accused them of dishonesty. In *White*, the plaintiffs failed to show that a constitutional, statutory, or regulatory provision or scheme warranted an exception to the "'terminable-at-will' rule."[37] Our refusal to recognize a cause of action in *White* is easily distinguishable from the present case because we have already determined that the Nebraska Workers' Compensation Act provides a clear public policy mandate.[38] And an employer's conduct in demoting an employee contravenes this policy, just as discharge does.

Bag 'N Save also refers us to *Collins v. Baker's Supermarkets*,[39] where we held that an employee's demotion did not violate Neb. Rev. Stat. § 81-1932 (Reissue 1999). Section 81-1932 prohibits an employer from terminating an employee based on the results of the employee's polygraph examination. Under the plain language of the statute, it only prohibited termination. Thus, the statute simply did not apply to demotion. *Collins* is not controlling.

We recognize that demotion may not be as severe as discharge in that it affects only the terms of employment, rather than the "essence" of the employment.[40] But this is not a compelling distinction. Although *Jackson* specifically addressed discharge, more broadly, the intent in *Jackson* was to protect the important public policy and beneficent purpose of the Nebraska Workers' Compensation Act. Although demotion is less harsh

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[36] See *White v. Ardan, Inc.*, 230 Neb. 11, 16-17, 430 N.W.2d 27, 31 (1988).

[37] *Id.* at 15, 430 N.W.2d at 30.

[38] See *Jackson v. Morris Communications Corp.*, *supra* note 1.

[39] *Collins v. Baker's Supermarkets*, 223 Neb. 365, 389 N.W.2d 774 (1986).

[40] See Mark A. Rothstein, *Wrongful Refusal to Hire: Attacking the Other Half of the Employment-at-Will Rule*, 24 Conn. L. Rev. 97, 143 (1991).

than dismissal, nevertheless, it would shrink an employee's right to pursue workers' compensation. Allowing employers to demote an employee for filing a workers' compensation claim would circumvent the policy in *Jackson*.

We acknowledge that allowing a cause of action for retaliatory demotion could result in claims for other retaliatory conduct. As usual in common-law adjudication, we will deal with those concerns case-by-case. Today, we address demotion, and nothing more. Further, we do not believe that the courts will be flooded with suits over insubstantial employment matters resulting in excessive judicial entanglement. But even so, an increase in litigation would "not constitute a valid reason for denying recognition of an otherwise justified cause of action."[41]

CONCLUSION

Here, Trosper's petition alleged that Bag 'N Save demoted her in retaliation for reporting a work-related injury. Because we recognize that a cause of action exists, we reverse, and remand for further proceedings. We note that to the extent Trosper's petition lacks factual allegations, she should be given leave to amend.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[41] *Brigham v. Dillon Companies, Inc.*, *supra* note 28, 262 Kan. at 20, 935 P.2d at 1059.

GERRARD, J., concurring.

I join fully in the majority opinion. I write separately to address two issues raised by the dissenting opinion. The dissent advances these primary contentions: that our holding unwisely expands our retaliatory discharge rule announced in *Jackson v. Morris Communications Corp.*[1] and that the issue of retaliatory demotion should be addressed only by the Legislature. I respectfully disagree. The Legislature certainly could, if it

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[1] *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

chose, follow the example of other states and address the issues presented in this case, but that does not preclude this court from acting upon the public policy already expressed in the Nebraska Workers' Compensation Act. And the statutes enacted in other states, relied upon by the dissent, actually demonstrate that a rule protecting employees from retaliatory demotion is practical and fair.

The dissenting opinion begins by asserting that we are expanding the "narrow exception" to the at-will employment doctrine that we adopted in *Jackson* into a new theory of liability for retaliatory demotion. I simply do not agree with the articulated basis for making a distinction in these circumstances. We explained in *Jackson* that the overriding purpose of the Nebraska Workers' Compensation Act[2] would be seriously frustrated if employers were able to prevent employees from filing claims through the threat of discharge. The same is true for retaliation short of discharge—the only difference is the nature and extent of the damage suffered by the employee.[3] The Nebraska Workers' Compensation Act is equally subverted if an employer can threaten a potential claimant with retaliation that is short of discharge but substantial enough to deter the filing of a claim.

The dissenting opinion suggests that today's holding may prove unworkable. But the dissent's argument is contrary to decades of experience with similar rules, in Nebraska and other jurisdictions. As the dissent notes, many other jurisdictions have enacted statutes that protect workers' compensation claimants from retaliation.[4] Those statutes generally bar an employer from

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[2] Neb. Rev. Stat. § 48-101 et seq. (Reissue 2004 & Cum. Supp. 2006).

[3] See, *Brigham v. Dillon Companies, Inc.*, 262 Kan. 12, 935 P.2d 1054 (1997); *White v. State*, 131 Wash. 2d 1, 929 P.2d 396 (1997) (Madsen, J., concurring); *Garcia v. Rockwell Intern. Corp.*, 187 Cal. App. 3d 1556, 232 Cal. Rptr. 490 (1986).

[4] See, e.g., Conn. Gen. Stat. Ann. § 31-290a (West 2003); Mo. Ann. Stat. § 287.780 (West 2005); N.Y. Workers' Comp. Law § 120 (McKinney 2006); N.C. Gen. Stat. § 95-241 (2005); Ohio Rev. Code Ann. § 4123.90 (LexisNexis 2001); S.C. Code Ann. § 41-1-80 (West Cum. Supp. 2006); Tex. Lab. Code Ann. § 451-001 (Vernon 2006); Vt. Stat. Ann. tit. 21, § 710 (2003); Wash. Rev. Code Ann. § 51.48.025(1) (West 2002).

"discriminating" against a claimant, but have been understood to give rise to civil remedies for retaliation short of discharge.[5] Yet those states answered the questions posed by the dissent and avoided the calamities that the dissent predicts.

They have done so because their laws, and our holding, are not, as the dissenting opinion suggests, radical departures from well-settled law. Rather, they apply a well-settled, developed, and extensive body of law regarding discrimination and retaliation. Our Legislature has enacted comparable antidiscrimination statutes in a variety of contexts.[6] And this court has already been required to address circumstances involving employer action short of discharge.[7]

We have handled those situations, as have other jurisdictions, by incorporating the *McDonnell Douglas*[8] burden-shifting analysis familiar from discrimination cases.[9] Most recently, in *Riesen v. Irwin Indus. Tool Co.*,[10] we applied that burden-shifting analysis to a case involving retaliatory discharge for filing a workers' compensation claim. We explained that "[t]o establish a prima facie case of unlawful retaliation, an employee must show that he or she participated in a protected activity, that the employer took an adverse employment action against him or her, and that a causal connection existed between the protected

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[5] See, e.g., *Mele v. City of Hartford*, 270 Conn. 751, 855 A.2d 196 (2004); *Robel v. Roundup Corp.*, 148 Wash. 2d 35, 59 P.3d 611 (2002); *Murray v. St. Michael's College*, 164 Vt. 205, 667 A.2d 294 (1995); *Garcia v. Levi Strauss & Co.*, 85 S.W.3d 362 (Tex. App. 2002); *Palermo v. Tension Envelope Corp.*, 959 S.W.2d 825 (Mo. App. 1997).

[6] See, e.g., Neb. Rev. Stat. §§ 48-1004 and 48-1114 (Reissue 2004).

[7] See, *Fraternal Order of Police v. County of Douglas*, 270 Neb. 118, 699 N.W.2d 820 (2005); *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993).

[8] See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[9] See, *Fraternal Order of Police, supra* note 7; *Humphrey, supra* note 7; *Helvering v. Union Pacific RR. Co.*, 13 Neb. App. 818, 703 N.W.2d 134 (2005).

[10] *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006).

activity and the adverse employment action."[11] If the employee succeeds in proving a prima facie case, the burden shifts to the employer to articulate some legitimate, lawful reason for the adverse employment action. If the employer articulates a nondiscriminatory reason for disparate treatment of the employee, the employee maintains the burden of proving that the stated reason was pretextual.[12]

As we noted in *Riesen*, most jurisdictions have applied this burden-shifting analysis to workers' compensation retaliatory discharge cases.[13] But as we implied in *Riesen*, this framework is also applicable to other "adverse employment action[s]."[14] And other jurisdictions have applied that burden-shifting framework to claims of retaliation short of discharge against workers' compensation claimants.[15] This has allowed those courts to take advantage of the breadth of jurisprudence in which a burden-shifting analysis has been used to resolve similar claims of adverse employment actions.[16]

The dissenting opinion poses a number of questions about various issues of fact courts may be asked to decide. But in any given case, the issue will always be whether the employer has engaged in actions that violate public policy, and courts have routinely examined similar questions in a wide variety of cases. In particular, courts have routinely addressed issues of workplace discrimination and retaliation involving employer action other than discharge.[17] I do not understand why those issues will be more difficult to address when the alleged retaliation is based on a workers' compensation claim, as opposed to any other

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[11] *Id.* at 48-49, 717 N.W.2d at 915.

[12] See *id.*

[13] *Id.* (citing cases).

[14] See *id.* at 49, 717 N.W.2d at 915.

[15] See, e.g., *Mele, supra* note 5; *Murray, supra* note 5; *Garcia, supra* note 5.

[16] See, e.g., *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636 (2d Cir. 2000); *Sanchez v. Denver Public Schools*, 164 F.3d 527 (10th Cir. 1998); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998).

[17] See *White, supra* note 3 (Madsen, J., concurring).

activity protected by public policy. While a work-related injury may bring about legitimate temporary or permanent changes in an employment relationship, I respectfully suggest that the law is well equipped to ferret out substantial claims of retaliatory demotion versus petty complaints by the employee or legitimate changes in employment by the employer.

The well-understood principles of antidiscrimination law provide more clarity than the dissent's proposed rule, which would present the difficult problem of separating "constructive discharge" from lesser forms of retaliation.[18] And if an identified public policy is important enough that a wrongful discharge claim should be allowed, then it is important enough to support a claim based on lesser acts of an employer that may just as effectively contravene a clear mandate of public policy.[19] The common-law principles of at-will employment have already adapted to functionally identical restrictions. Employers in Nebraska should already be familiar with the hazards of retaliatory "adverse employment actions" other than termination, due to similar rules against retaliation imposed by other state and federal laws.[20]

Nor do I believe the dissent's fears of undue interference with the employment relationship are justified. It is well understood that some threshold level of substantiality must be met for a plaintiff to make a prima facie case of unlawful retaliation.[21]

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[18] See, e.g., *National Sec. Ins. Co. v. Donaldson*, 664 So. 2d 871 (Ala. 1995).

[19] See *White, supra* note 3 (Madsen, J., concurring).

[20] See, e.g., *Meyers v. Starke*, 420 F.3d 738 (8th Cir. 2005); *Jacob-Mua v. Veneman*, 289 F.3d 517 (8th Cir. 2002) (retaliatory demotion); *Bradley v. Widnall*, 232 F.3d 626 (8th Cir. 2000); *Scusa v. Nestle U.S.A. Co., Inc.*, 181 F.3d 958 (8th Cir. 1999); *Williams v. KETV Television, Inc.*, 26 F.3d 1439 (8th Cir. 1994); *Carlton v. Union Pacific R.R.*, No. 8:05CV293, 2006 WL 3290323 (D. Neb. Nov. 13, 2006); *Weigand v. Spadt*, 317 F. Supp. 2d 1129 (D. Neb. 2004) (retaliatory demotion); *Letares v. Ashcroft*, 302 F. Supp. 2d 1092 (D. Neb. 2004); *Mustafa v. State of Nebraska Dept. of Correctional*, 196 F. Supp. 2d 945 (D. Neb. 2002); *Fraternal Order of Police, supra* note 7.

[21] See, e.g., *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274 (11th Cir. 1999).

A plaintiff sustains an "adverse employment action," as we used the phrase in *Riesen*,[22] if he or she suffers a materially adverse change in the terms and conditions of employment.[23] To be materially adverse, a change in working conditions must be a significant change in employment status, more disruptive than a mere inconvenience or an alteration of job responsibilities.[24] As the U.S. Supreme Court recently explained, for the challenged action to be materially adverse, it must be such that "'it well might have "dissuaded a reasonable worker"'" from engaging in the activity protected by public policy.[25] Although the significance of any given act of retaliation will often depend upon the particular circumstances, an employee's decision to engage in protected activity cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.[26] A plaintiff must suffer "*material* adversity" because "it is important to separate significant from trivial harms."[27] That separation answers the questions posed by the dissenting opinion.

The dissent concludes that any further restrictions on at-will employment should be expressly imposed by the Legislature. I do not disagree that the Legislature could address the issue or that it is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.[28] The Legislature could resolve any lingering doubts about the scope of protection afforded to workers' compensation

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[22] *Riesen, supra* note 10, 272 Neb. at 49, 717 N.W.2d at 915.

[23] *Galabya, supra* note 16.

[24] See *id.* See, generally, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

[25] *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), quoting *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006).

[26] See *id.*

[27] *Id.*, 548 U.S. at 68 (emphasis in original).

[28] See *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

claimants by enacting an antiretaliation statute similar to those of other jurisdictions.

But it was the very point of *Jackson v. Morris Communications Corp.*[29] that the Legislature *has declared* the public policy of this state, by enacting the Nebraska Workers' Compensation Act. We recognized that the Legislature enacted the Nebraska Workers' Compensation Act to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease and that important public purpose would be undermined by a rule which allowed fear of retaliation for the filing of a claim. Our holdings in this case and *Jackson* are equally based on the "clear mandate of public policy" that the Nebraska Workers' Compensation Act presents.[30] Our decision in *Jackson* met with the Legislature's acquiescence,[31] and there is no reason to believe that our application today of the same principle is any less a reflection of legislatively declared public policy.

If anything, the dissent would frustrate the Legislature's stated public policy by opening a loophole in *Jackson* that could quickly subsume its holding. The Nebraska Workers' Compensation Act would lose its meaning if the benefits it provides could be reclaimed by an employer's retaliatory action, even if that retaliation stops short of discharge. Because the majority's holding is a more workable rule, guided by ample precedent, and provides greater protection for clearly established public policy, I concur in the majority's decision.

McCormack and Miller-Lerman, JJ., join in this concurrence.

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[29] *Jackson, supra* note 1.

[30] See *id.*, 265 Neb. at 432, 657 N.W.2d at 641.

[31] See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

STEPHAN, J., dissenting.

Jackson v. Morris Communications Corp.[1] was correctly decided within the structure of our long-established common law pertaining to at-will employment. Because today's decision significantly expands that structure, I respectfully dissent.

The general principle that an employer may discharge an at-will employee at any time with or without reason, so long as the discharge is not constitutionally, statutorily, or contractually prohibited, recognizes the right of the employer to determine the makeup of its workforce without judicial oversight. Just as an at-will employee is free to leave an employment relationship without recourse by the employer, so is the employer free to terminate the relationship, so long as it does not act unlawfully or in breach of a contract. This rule applies even where the result may seem harsh to an outside observer.[2] The public policy exception to this rule holds that an at-will employee "'may claim damages for wrongful discharge when the motivation for the firing contravenes public policy.'"[3] The exception has been narrowly applied in discharge cases, based upon our recognition that

> courts must use care in creating new public policy and that "'recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch.'"[4]

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[1] *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

[2] See, *Goff-Hamel v. Obstetricians & Gyns., P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999) (Stephan, J., dissenting); *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994).

[3] *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 902, 416 N.W.2d 510, 513 (1987), quoting *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980).

[4] *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 91, 421 N.W.2d 755, 759 (1988), quoting *Adler v. American Standard Corp.*, 830 F.2d 1303 (4th Cir. 1987).

In *Malone v. American Bus. Info.*,[5] we declined to apply the public policy exception to a claim that an employee was discharged for exercising rights under the Nebraska Wage Payment and Collection Act, reasoning that the act did not declare "'an important public policy with such clarity as to provide a basis for a civil action for wrongful discharge.'" But in *Jackson*, after conducting a detailed analysis of the policy considerations underlying the Nebraska Workers' Compensation Act, we held that the public policy exception permitted "an action for retaliatory discharge when an employee has been discharged for filing a workers' compensation claim."[6]

If an employer's decision to discharge an at-will employee is exempt from judicial oversight except in the limited circumstance where the public policy exception applies, it logically follows that decisions affecting the terms and conditions of an at-will employment relationship which do not terminate the relationship should be entitled to an even greater degree of deference. Until today, we have never imposed common-law restrictions upon an employer's right to make such decisions. The majority has done so in this case by transforming a narrow exception to the rule of nonliability for discharge into a new theory of liability for retaliatory demotion. In my opinion, recognition of this new cause of action is unwise. While I would be willing to extend the holding in *Jackson* to circumstances constituting a constructive discharge, which is not alleged in this case, I would go no further.

I do not condone any form of retaliation against an employee who files a workers' compensation claim. But the reality is that a job-related injury may bring about legitimate changes in an employment relationship. A workers' compensation claimant may be temporarily or permanently prevented from performing job requirements by the physical effects of the injury. Will a transfer to a different position, perhaps at a reduced wage, in order to accommodate the worker's diminished physical

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[5] *Malone v. American Bus. Info.*, 262 Neb. 733, 740, 634 N.W.2d 788, 793 (2001), quoting *Schriner v. Meginnis Ford Co.*, *supra* note 4.

[6] *Jackson v. Morris Communications Corp.*, *supra* note 1, 265 Neb. at 432, 657 N.W.2d at 641.

abilities, now be deemed a retaliatory demotion? An employee who has filed a workers' compensation claim is subject to the employer's work rules to the same extent as other employees. Will routine disciplinary actions involving workers' compensation claimants now be the basis for a retaliation lawsuit? If there is a restructuring necessitated by changing business conditions, will the employer be required to exempt workers' compensation claimants from any changes in hours or job status in order to avoid a retaliation claim? Will an employer be prevented from taking measures to address the unsatisfactory job performance of an employee who has a pending workers' compensation claim?

The concurring opinion suggests that to resolve these concerns, we can simply apply the "*McDonnell Douglas*[7] burden-shifting analysis familiar from discrimination cases." Even if application of this analysis would be a workable solution, the fact is that the analysis was developed and is used by courts to adjudicate express *statutory* prohibitions of various forms of workplace discrimination. We simply are not presented with such a prohibition here. Instead, the majority holds for the first time in Nebraska that an implicit declaration of public policy can serve as the basis of an employment discrimination claim in a nondischarge situation. All of the cases cited in the concurring opinion as utilizing *McDonnell Douglas* "to resolve similar claims of adverse employment actions" involved express *statutory* causes of action. Federal and state employment discrimination statutes include defined terms, jurisdictional requirements, specific statements of prohibited conduct and available defenses, and enforcement mechanisms.[8] No such detailed guidance is provided with respect to the new common-law cause of action which the court recognizes today, and there is no assurance that it will be construed in the future in the manner predicted in the concurring opinion.

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[7] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[8] See, e.g., 42 U.S.C. §§ 2000e, 2000e-2, 2000e-3, and 2000e-5 (2000); Neb. Rev. Stat. §§ 48-1104, 48-1108, 48-1111, and 48-1118 (Reissue 2004).

It is true that in *Riesen v. Irwin Indus. Tool Co.*,[9] we applied the *McDonnell Douglas* burden-shifting analysis to the established common-law cause of action for wrongful discharge under the public policy exception to the doctrine of employment at will. The analysis was appropriate in part because wrongful discharge is actionable both under employment discrimination statutes and, in more limited circumstances, at common law. But until today, there has been no common-law cause of action which would impose civil liability for an employer's action which does not result in termination of the employment relationship. Unlike the circumstance of wrongful discharge, an employer will have no means of knowing in advance what specific conduct is proscribed under the new common-law cause of action which today's majority opinion creates. To say that we will use *McDonnell Douglas* to figure it all out simply ignores the fundamental difference between recognizing a wrongful discharge claim based on an implicit legislative articulation of public policy and recognizing an entirely new cause of action arising from the same source.

As the majority notes, two other courts have specifically declined to recognize a new cause of action for retaliatory demotion within an at-will employment relationship. These cases generally reason that retaliatory demotion or discrimination does not implicate a clear and substantial public policy to the same extent as a discharge and that creating a new cause of action would "encourage myriad claims against employers."[10] I agree with the reasoning of these courts, especially to the extent that they find that an implicit articulation of public policy is an insufficient basis on which to predicate the judicial recognition of a new, common-law cause of action.

Instead, if there are to be restrictions upon an employer's freedom to make decisions concerning the terms and conditions of on-going at-will employment, it is my view that they

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[9] *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006).

[10] See *Touchard v. La-Z-Boy Inc.*, 148 P.3d 945, 955 (Utah 2006). See, also, *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 645 N.E.2d 877, 206 Ill. Dec. 625 (1994).

should be expressly imposed by the Nebraska Legislature.[11] The Legislature has enacted statutes prohibiting retaliation or discrimination based upon an employee's exercise of certain statutory rights.[12] In my opinion, it should be left to the Legislature to decide whether or to what extent the public policy considerations underlying the Nebraska Workers' Compensation Act require or warrant regulation of the terms and conditions of an existing at-will employment relationship.

For these reasons, I would affirm the judgment of the district court.

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

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[11] See, e.g., Conn. Gen. Stat. Ann. § 31-290a (West 2003) (prohibiting discharge or discrimination against employee who files workers' compensation claim and prescribing nature and scope of remedy); Mo. Ann. Stat. § 287.780 (West 2005) (prohibiting discharge or discrimination against employee for exercising rights under workers' compensation law, enforceable by civil action for damages); N.C. Gen. Stat. § 95-241 (2005) (prohibiting discrimination or any retaliatory action against employee who exercises statutory rights and establishing defense to such claims where employer can show it would have taken same action in absence of protected activity of employee).

[12] See Neb. Rev. Stat. §§ 48-1004 (Reissue 2004) (prohibiting discrimination based upon assertion of rights under statute prohibiting age discrimination in employment) and 48-1114 (Reissue 2004) (prohibiting discrimination based upon exercise of rights under Fair Employment Practice Act).

DANIEL DOMJAN, M.D., APPELLANT AND CROSS-APPELLEE,
V. FAITH REGIONAL HEALTH SERVICES, APPELLEE
AND CROSS-APPELLANT.
735 N.W.2d 355

Filed July 6, 2007. No. S-05-1463.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law.
3. **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.

4. **Jury Instructions: Evidence: New Trial.** Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial.
5. **Breach of Contract.** Whether or not a breach is material and important is a question of degree which must be answered by weighing the consequences of the breach in light of the actual custom of persons in the performance of contracts similar to the one involved in the specific case.
6. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
7. **Jury Instructions: Appeal and Error.** Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.
8. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed upon only those theories of the case that are presented by the pleadings and which are supported by competent evidence.
9. **Jury Instructions: Trial.** A party's right to a fair trial may be substantially impaired by jury instructions that contain inconsistencies or confuse or mislead the jury.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Reversed and remanded for a new trial.

Gregory C. Scaglione and Heather S. Voegele, of Koley Jessen, P.C., L.L.O., for appellant.

Timothy E. Brogan, of Brogan & Gray, P.C., L.L.O., and Christopher R. Hedican, of Baird Holm, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Daniel Domjan, M.D., appellant and cross-appellee, brought this breach of contract action against Faith Regional Health Services (Faith Regional), appellee and cross-appellant. In the fall of 2001, Domjan and Faith Regional entered into three contracts, a "Recruitment Agreement" (Recruitment Agreement), an "Agreement to Provide Medical Direction and Clinical Services for the Specialty of Cardiothoracic Surgery" (Director

Agreement), and a "Cardiovascular Services Promotional Agreement" (Promotional Agreement). These three contracts formed the basis of the present lawsuit. Each agreement related to Domjan's providing cardiothoracic surgery services in the Norfolk, Nebraska, area. Faith Regional later terminated the agreements, claiming, in summary, that Domjan had failed to perform the terms of the agreements.

Domjan sued Faith Regional in the district court for Madison County, Nebraska, for breach of each of the three agreements. Faith Regional denied the alleged breaches of contract, and, as to the Recruitment Agreement, Faith Regional filed a counterclaim against Domjan, claiming that Domjan had breached the terms of the Recruitment Agreement. The matter came on for trial, and a jury found in favor of Domjan on his claim against Faith Regional for breach of the Recruitment Agreement and rejected Faith Regional's counterclaim as to the Recruitment Agreement. The jury also found in favor of Domjan on his claim that Faith Regional had breached the Director Agreement. The jury rejected Domjan's claim that Faith Regional had breached the Promotional Agreement. The district court entered judgment on the jury's verdicts.

Following the jury's verdicts, Domjan filed an application for attorney fees, and Faith Regional filed a motion for new trial. The district court overruled Domjan's application for attorney fees. In a separate order, the district court sustained in part, and in part overruled Faith Regional's motion for new trial. The district court overruled that portion of Faith Regional's motion seeking a new trial on liability issues, but sustained the motion to the extent it sought a new trial limited to the issue of Domjan's damages for Faith Regional's breach of the Recruitment Agreement.

Domjan appeals from the district court's orders denying his motion for attorney fees and sustaining Faith Regional's motion for new trial as to damages for its breach of the Recruitment Agreement. Faith Regional cross-appeals from that part of the district court's order that overruled its motion for new trial, in which it sought a new trial as to liability with respect to the Recruitment Agreement and the Director Agreement.

We take up Faith Regional's cross-appeal first because disposition of the cross-appeal determines the outcome of the appeal. We conclude that the district court committed prejudicial error in the giving of its jury instructions. We therefore reverse that portion of the district court's order denying Faith Regional's motion for new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and the Director Agreement and on Faith Regional's counterclaim that Domjan breached the Recruitment Agreement. We remand the cause for a new trial on Domjan's claim and Faith Regional's counterclaim with respect to the Recruitment Agreement and Domjan's claim that Faith Regional breached the Director Agreement. Because the jury verdict with respect to the Promotional Agreement is not challenged on appeal, the judgment entered with respect to the Promotional Agreement stands. Further, because our decision with regard to Faith Regional's cross-appeal is dispositive of the issues raised in this appeal, we do not reach the errors assigned by Domjan in his direct appeal.

STATEMENT OF FACTS

In the fall of 2001, Faith Regional successfully recruited Domjan to engage in the practice of cardiothoracic surgery in the Norfolk area. As part of the process, Domjan and Faith Regional entered into a series of separate agreements. The Recruitment Agreement was executed by the parties in September 2001 and provided, inter alia, that Domjan would relocate to Norfolk and use his "best efforts to establish a successful, stable medical practice." In return, Faith Regional agreed to pay Domjan certain amounts as a moving allowance and a signing bonus. Faith Regional also agreed to provide Domjan a "net operating income" for a certain period of time. This feature of the Recruitment Agreement was effectively an income support provision by which Faith Regional would periodically lend Domjan money if his income failed to reach a certain level. The Recruitment Agreement provided that Domjan worked as an independent contractor and further provided that Faith Regional was obligated each year to issue an Internal Revenue Service 1099 tax form for the moneys it paid Domjan under the agreement. The Recruitment Agreement provided that either Domjan or Faith Regional could terminate the agreement

"for cause," which the agreement more specifically defined as a "material breach or default" by either party.

On September 10, 2001, Domjan and Faith Regional entered into the Director Agreement under which Domjan agreed, inter alia, to manage and develop the Faith Regional "Division of Cardiothoracic Surgery," in exchange for which he would receive $125 an hour not to exceed 1,000 hours annually. The Director Agreement stated that Domjan provided services under the contract as an independent contractor and not as an employee of Faith Regional and further provided that Domjan was to pay for "his own debts, obligations, acts, and omissions, including payment of all required withholding, social security and other taxes, malpractice insurance, and benefits." Either Domjan or Faith Regional could terminate the Director Agreement "for cause," which the agreement more specifically defined as a "material breach or default" by either party.

Finally, Domjan and Faith Regional entered into the Promotional Agreement, which, inter alia, provided that Faith Regional would pay Domjan certain sums for its use of Domjan's name in promotional activities.

The record reflects that after Domjan began providing cardiothoracic services at Faith Regional, disputes arose between the parties concerning, inter alia, the nature and quality of the services provided by Domjan and Domjan's relationship with other staff members. In 2003 and early 2004, Faith Regional terminated its various agreements with Domjan. In response to Faith Regional's termination of the agreements, Domjan filed a breach of contract action against Faith Regional. In his amended complaint filed on January 5, 2004, the operative complaint for purposes of this appeal (the complaint), Domjan claimed that Faith Regional had breached its obligations to him under each of the three agreements. As relief, Domjan sought "general damages" and "lost income," as well as prejudgment and postjudgment interest, attorney fees, and costs.

On February 5, 2004, Faith Regional filed its "Answer to Amended Complaint, Affirmative Defenses, and Counterclaim." In addition to generally denying the material allegations contained in Domjan's complaint, Faith Regional asserted a counterclaim against Domjan, in which it claimed that Domjan had

breached his obligations to Faith Regional under the Recruitment Agreement. For its damages, Faith Regional sought judgment in the amount of $577,903.84.

The case came on for a jury trial in the fall of 2005. A total of 22 witnesses testified during the trial. Eighty-eight exhibits, consisting of several hundred pages, were offered into evidence. Included in the evidence were copies of Domjan's federal tax returns for the period of time during which Domjan's agreements with Faith Regional were in effect. In those returns, Domjan reported that he was self-employed.

The jury was instructed by the district court, and following deliberations, on September 30, 2005, the jury returned its verdicts. The jury found in favor of Domjan on his claim for breach of the Recruitment Agreement and rejected Faith Regional's counterclaim claiming that Domjan had breached the Recruitment Agreement. The jury awarded Domjan damages in the amount of $1,233,588,16. The jury further found in favor of Domjan on his claim for breach of the Director Agreement and awarded Domjan damages in the amount of $84,150. The jury rejected Domjan's claim that Faith Regional had breached the Promotional Agreement. On October 4, the district court entered judgment in accordance with the jury's verdicts.

The parties filed a series of posttrial motions. Prior to trial, Domjan had filed an application for attorney fees, which application he amended following trial. In his amended application filed October 11, 2005, Domjan asserted in summary that he was an employee of Faith Regional and that Faith Regional had violated the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2004), when it failed to pay him certain sums under the various agreements. Domjan also asserted that as a result of the jury verdicts in his favor, he was entitled to attorney fees, court costs, and damages to be awarded to the Nebraska School Fund.

On October 14, 2005, Faith Regional filed a motion for new trial, asserting that it was entitled to a new trial due to irregularities in the proceedings, excessive damages, errors in the assessment of damages, jury verdicts that were contrary to the evidence, and errors in the law. Faith Regional sought a new trial

on the jury's verdicts in favor of Domjan on the Recruitment Agreement, in favor of Domjan on the Director Agreement, and in favor of Domjan and against Faith Regional on its counterclaim concerning the Recruitment Agreement.

The posttrial motions came on for hearing on November 3, 2005. In an order filed November 23, the district court denied Domjan's amended application for attorney fees, concluding, in summary, that based upon the evidence adduced at trial, Domjan was an independent contractor and not an employee of Faith Regional. In a separate order also filed November 23, the district court denied Faith Regional's motion for new trial to the extent it sought a new trial as to liability on the jury's verdicts in favor of Domjan on the Recruitment Agreement and the Director Agreement and in favor of Domjan and against Faith Regional on its counterclaim on the Recruitment Agreement. With regard to the jury's verdict on Domjan's claim for breach of the Recruitment Agreement, the district court determined that there was sufficient evidence adduced at trial by which the jury could find that Faith Regional had breached its obligations under that agreement. The district court further determined, however, that the jury had failed to follow its jury instruction No. 6 with regard to the calculation of damages for Faith Regional's breach of the Recruitment Agreement. Accordingly, the district court ordered a new trial limited to the issue of Domjan's damages resulting from Faith Regional's breach of the Recruitment Agreement.

Domjan appeals from that portion of the district court's order that ordered a new trial on Domjan's damages sustained as a result of Faith Regional's purported breach of the Recruitment Agreement, as well as from the district court's order denying his amended application for attorney fees. Faith Regional cross-appeals from that portion of the district court's order that denied Faith Regional's motion seeking a new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and the Director Agreement, as well as that portion of the order that denied Faith Regional's motion for a new trial on its counterclaim claiming that Domjan breached the Recruitment Agreement.

ASSIGNMENTS OF ERROR

On appeal, Domjan assigns numerous errors that we restate. Domjan claims that the district court erred (1) in sustaining Faith Regional's motion for new trial and vacating the damages portion of the $1,233,588.16 judgment on Domjan's claim that Faith Regional breached the Recruitment Agreement and (2) in denying Domjan's application for attorney fees. Domjan also claims that if this court determines on appeal that the district court did not err in sustaining part of Faith Regional's motion for new trial, then the district court erred in ordering a new trial on damages when it should have merely reduced the amount of the judgment to $205,471.16.

For its cross-appeal, Faith Regional assigns three errors. Faith Regional claims that the district court erred (1) in denying Faith Regional's motion for new trial on the issue of Domjan's claim that Faith Regional breached the Recruitment Agreement; (2) in denying Faith Regional's motion for new trial on the issue of Domjan's claim that Faith Regional breached the Director Agreement; and (3) in denying Faith Regional's motion for new trial on its counterclaim.

STANDARDS OF REVIEW

[1] 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. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[2,3] Whether a jury instruction given by a trial court is correct is a question of law. *Worth v. Kolbeck, ante* p. 163, 728 N.W.2d 282 (2007). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

We first take up the assignments of error presented by Faith Regional's cross-appeal, because resolution of these issues is dispositive of this case. For its cross-appeal, Faith Regional asserts that the district court erred in denying its motion for new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and the Director Agreement, as well as

on Faith Regional's counterclaim against Domjan for breach of the Recruitment Agreement.

Faith Regional specifically claims that the district court erred as a matter of law in giving instruction No. 6, which read as follows:

> If you find in favor of Dr. Domjan on any of his claims for breach of contract, then you must determine the amount of Dr. Domjan's damages.
>
> Dr. Domjan is entitled to recover the amount of the salary agreed upon for the period agreed to, minus the amount of money Dr. Domjan earned or reasonably could have earn [sic] from other employment during that same time.
>
> If you find in favor of Dr. Domjan but do not find any actual damages, then you may award Dr. Domjan no more than a nominal sum.

With regard to this instruction, Faith Regional notes that it objected to the instruction during the instruction conference and that although the district court had agreed to modify instruction No. 6 by changing "salary" to "compensation," it later failed to do so. Faith Regional claims that instruction No. 6 is incorrect and prejudicial. Faith Regional argues that, to its detriment, instruction No. 6 uses employment terms to describe Domjan's working relationship with Faith Regional and Domjan was not an employee. Faith Regional states that it was prejudiced by this instruction because an employment relationship has different responsibilities from those of an independent contractor relationship.

Faith Regional further asserts that the error surrounding instruction No. 6 was compounded by the remainder of the instructions and in particular, the giving of instruction No. 11. Instruction No. 11, read, in pertinent part, as follows: "[g]ood cause for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee as distinguished from arbitrary and capricious." Faith Regional claims that this instruction was incorrect because the actual agreements at issue permitted Faith Regional to terminate the agreements "for cause," which was defined as a "material breach or default" by Domjan. Faith Regional also argues that instruction No. 11 was incorrect

because it states that Domjan worked with Faith Regional as an "employee," whereas Domjan was an independent contractor. Faith Regional claims that by giving this instruction, the district court improperly instructed the jury on the standard under which Faith Regional could terminate the Recruitment Agreement and Director Agreement and that it was prejudiced thereby.

We agree with Faith Regional that taken as a whole, the manner by which the district court instructed the jury resulted in instructions that were misleading, confused the jury, and constituted prejudicial error. As a result, the district court abused its discretion when it denied Faith Regional's motion for new trial. We therefore reverse that portion of the district court's order that denied Faith Regional's motion for new trial and remand the cause for a new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and Director Agreement, as well as on Faith Regional's counterclaim against Domjan for breach of the Recruitment Agreement.

[4] In reaching our conclusion, we note that jury instruction No. 6 utilized terms such as "other employment" and "salary" when instructing the jury. These terms indicate that Faith Regional and Domjan had an employer-employee relationship. Such a relationship, however, was not supported by the evidence. The evidence at trial included the agreements, which defined Domjan's relationship with Faith Regional as one of an independent contractor, and Domjan's tax records, in which he reported that he was self-employed. Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002). Thus, the inclusion of employment terms in instruction No. 6 to describe the parties' relationship, when the evidence adduced at trial was insufficient to establish an employment relationship, was incorrect, confused the jury as to the parties' rights and responsibilities under the agreements, and constituted prejudicial error. See *Thompson v. Florida Drum Co.*, 651 So. 2d 180, 182 (Fla. App. 1995) (stating that when evidence adduced at trial indicated certain individuals were independent contractors, "it [was] error to instruct the jury" that they were "employees").

[5] The error surrounding instruction No. 6 is compounded when we consider the jury instructions taken as a whole. Compare *Worth v. Kolbeck, ante* p. 163, 728 N.W.2d 282 (2007) (stating that jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state law, are not misleading, and adequately cover issues supported by pleadings and evidence). In this regard, as previously noted, Faith Regional directs our attention to instruction No. 11 in which the jury was instructed that a reasonable employer could terminate the services of an employee for good cause. Both the Recruitment Agreement and the Director Agreement provide that Faith Regional could terminate the agreements "for cause," which the controlling agreements defined as a "material breach or default" by Domjan. We have stated that "[w]hether or not a breach is material and important is a question of degree which must be answered by weighing the consequences of the breach in light of the actual custom of persons in the performance of contracts similar to the one involved in the specific case." *Phipps v. Skyview Farms*, 259 Neb. 492, 499, 610 N.W.2d 723, 730-31 (2000). The district court did not instruct the jury on the standard for a material breach to which the parties had agreed. Instead, the district court instructed the jury as to a "good cause" standard for dismissal from employment. We conclude that this instruction was incorrect and had the effect of confusing the jury, by instructing the jury to evaluate the breach of contract claims under a standard for termination of the agreements that was not agreed to by the parties. Furthermore, instruction No. 11 erroneously perpetuated the characterization of the relationship of the parties as an employer-employee relationship.

[6-8] Whether a jury instruction given by a trial court is correct is a question of law. *Worth v. Kolbeck, supra*. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.* Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence. *Id.* A litigant is entitled to have the jury instructed upon only those theories of the case

that are presented by the pleadings and which are supported by competent evidence. *Id.*

[9] Here, the jury was given instructions that incorrectly described the relationship between the parties as an employer-employee relationship and, additionally, delivered incorrect instructions on the standard to apply when determining whether Faith Regional properly terminated the Recruitment Agreement and Director Agreement. The instructions taken as a whole did not comport with the evidence adduced at trial. A party's right to a fair trial may be substantially impaired by jury instructions that confuse or mislead the jury. See *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003). The instructions in this case were not correct and were prejudicial. We conclude as a matter of law that instruction No. 6 was prejudicial error, and because of the potential for confusion created by instructions Nos. 6 and 11, the district court abused its discretion in denying Faith Regional's motion for new trial. We therefore reverse the district court's order overruling Faith Regional's motion for new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and the Director Agreement, and on Faith Regional's counterclaim asserting that Domjan breached the Recruitment Agreement and remand the cause for a new trial.

[10] Because we are ordering a new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and the Director Agreement, as well as a new trial on Faith Regional's counterclaim that Domjan breached the Recruitment Agreement, a discussion of Domjan's assignments of error is not necessary. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

CONCLUSION

For the reasons discussed above, we conclude that the district court abused its discretion when it denied Faith Regional's motion for new trial. We reverse that portion of the district court's order that denied Faith Regional's motion and remand the cause for a new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and Director Agreement, as well as on Faith Regional's counterclaim against Domjan for

breach of the Recruitment Agreement. The judgment entered on the jury's verdict with respect to the Promotional Agreement stands and is not affected by the disposition of this appeal.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA EX REL. HARLAND H. JOHNSON ET AL., APPELLANTS, V. HONORABLE JOHN A. GALE, SECRETARY OF STATE OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

734 N.W.2d 290

Filed July 6, 2007. No. S-06-224.

1. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
2. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
3. **Constitutional Law.** Constitutional interpretation presents a question of law.
4. **Constitutional Law: Initiative and Referendum.** The people have the power to amend the Nebraska Constitution by the initiative process pursuant to Neb. Const. art. III, § 2, which provides in part: "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature."
5. **Constitutional Law.** A constitution represents the supreme written will of the people regarding the framework for their government.
6. **Constitutional Law: Initiative and Referendum.** The people of Nebraska may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties.
7. **Initiative and Referendum: Appeal and Error.** An appellate court makes no attempt to judge the wisdom or the desirability of enacting initiative amendments.
8. **Constitutional Law: Proof.** The party challenging the constitutionality of an amendment bears the burden of establishing its unconstitutionality.
9. **Constitutional Law: Statutes: States.** The 1st Amendment's protection of speech and association for the advancement of political objectives is extended to the states through the 14th Amendment and applies to both state statutes and state constitutional provisions.
10. **Constitutional Law.** The First Amendment protects the right of citizens to band together in promoting among the electorate candidates who espouse their political views.

11. **Constitutional Law: Voting.** Although there is no fundamental right to seek elective office, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.
12. **Voting.** Election laws will invariably impose some burden upon individual voters.
13. **Constitutional Law: Voting.** The right to vote in any manner and the right to associate for political purposes are not absolute; the U.S. Supreme Court has recognized that states retain the power to regulate their own elections under the federal Constitution.
14. ____: ____. Although the rights of voters are fundamental, not all restrictions imposed by the states on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates.
15. **Constitutional Law: Courts: Statutes.** To resolve a challenge to a state's election laws, a court must weigh the character and magnitude of the asserted injury to the rights protected by the 1st and 14th Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the state as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.
16. **Constitutional Law: Statutes.** Election laws imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. When the burden is slight, the state need not establish a compelling interest to tip the constitutional scales in its direction.
17. **Constitutional Law: Presumptions.** If minimal scrutiny applies, a presumption of constitutionality can be overcome only if the party challenging an amendment's constitutionality negates every conceivable basis that might support the amendment.
18. **Equal Protection.** The Equal Protection Clause keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.
19. **Constitutional Law: Equal Protection: Appeal and Error.** When the classifications involved in a constitutional amendment do not create any suspect class or address any fundamental right, an appellate court applies only minimal scrutiny under the equal protection analysis.
20. **Constitutional Law: Appeal and Error.** Under a minimal scrutiny standard of review, an appellate court will uphold a classification created by a constitutional amendment where it is a rational means of promoting a legitimate government interest or purpose.
21. **Constitutional Law: Intent: Appeal and Error.** In ascertaining the intent of a constitutional provision from its language, an appellate court may not supply any supposed omission, or add words to or take words from the provision as framed.
22. **Constitutional Law: Intent.** Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and therefore construction is necessary.
23. ____: ____. The words in a constitutional provision must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests that they are used in a technical sense.
24. ____: ____. If the meaning of a constitutional provision is clear, the court will give to it the meaning that obviously would be accepted and understood by laypersons.

25. **Constitutional Law: Statutes.** Constitutional provisions are not subject to strict construction and receive a broader and more liberal construction than do statutes.
26. **Constitutional Law: Courts: Intent.** It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto.
27. **Constitutional Law.** The Nebraska Constitution, as amended, must be read as a whole.
28. ____. A constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument.
29. **Constitutional Law: Legislature.** Subsection (3) of Neb. Const. art. III, § 12, operates only to determine whether an expired legislative term will count as a full term toward disqualification to seek a third consecutive term.
30. **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 Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Alan E. Peterson, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellants.

Jon Bruning, Attorney General, Charles E. Lowe, and Dale A. Comer for appellees.

L. Steven Grasz, of Blackwell, Sanders, Peper & Martin, L.L.P., and Donald B. Stenberg, of Erickson & Sederstrom, P.C., for amici curiae U.S. Term Limits, Inc., and Don't Touch Term Limits-Nebraska.

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

PER CURIAM.

I. NATURE OF CASE

This is a mandamus and declaratory judgment action filed by voters wishing to reelect three state legislators whose 2005 candidate filings for placement on the ballot were rejected by the Secretary of State, John A. Gale. Gale rejected the filings because he determined the legislators were ineligible to serve a third consecutive term under Neb. Const. art. III, § 12. This term limits section was added to the state Constitution when voters approved Initiative 415 at the general election on November 7, 2000.

Appellants claim that § 12 must be read to disqualify only incumbent legislators halfway through their second term. They contend that § 12 therefore unnecessarily burdens the right of voters to choose among political candidates because challengers to second-term legislators do not face this risk. Appellants also contend that § 12 denies them equal protection under the law because first-term legislators are not disqualified halfway through their term. The State claims that § 12 does not prevent an incumbent legislator from serving a full second term.

The district court agreed with the State's interpretation of § 12 and accordingly denied appellants' requests for (1) a declaration that § 12 infringes upon their federal constitutional rights and (2) a peremptory writ of mandamus requiring Gale to revoke his decision that the legislators were disqualified from seeking another term of office. We affirm.

II. CONSTITUTIONAL PROVISION

Neb. Const. art. III, § 12, provides:

> (1) No person shall be eligible to serve as a member of the Legislature for four years next after the expiration of two consecutive terms regardless of the district represented.
>
> (2) Service prior to January 1, 2001, as a member of the Legislature shall not be counted for the purpose of calculating consecutive terms in subsection (1) of this section.
>
> (3) For the purpose of this section, service in office for more than one-half of a term shall be deemed service for a term.

III. BACKGROUND

In November 2005, Senators Dennis Byars, Marian L. Price, and Ernie Chambers submitted to Gale candidate filings for reelection. Byars and Price asked to be placed on the primary ballot in 2006; Chambers asked to be placed on the primary ballot in 2008. Byars and Price were first elected to the Legislature in 1998 and reelected in 2002. Chambers was first sworn in on January 5, 1971, and was reelected to consecutive terms thereafter, including reelections in 2000 and 2004. Also in November, Gale rejected all three filings because he determined the legislators were ineligible to serve another consecutive term.

In December 2005, appellants, who are registered voters in the districts represented by Byars, Price, and Chambers, filed this action. They asked for an alternative writ of mandamus requiring Gale to revoke his decision or to show cause for his failure to do so. In addition, they asked for (1) a peremptory writ of mandamus after the court had considered the evidence[1] and (2) a declaration that article III, § 12, violated their constitutional rights under the 1st and 14th Amendments to the U.S. Constitution. Appellants named Byars, Price, and Chambers as necessary parties, and the legislators later asked to be aligned with appellants.

1. Appellants' Allegations

Appellants alleged that Gale had exceeded his authority and violated their First Amendment rights of free speech and free association under the U.S. Constitution—to vote for the representative of their choice—by enforcing article III, § 12. They further alleged that their senators had been unconstitutionally denied their right to run for office and unconstitutionally placed at risk of being found ineligible to serve before the end of their 4-year terms.

Appellants' allegations centered on subsections (1) and (3) of § 12. They alleged that when read together, these subsections disqualify any representative after he or she has served more than half of a second 4-year term. Because Byars and Price had served more than half of their 2002 terms when the complaint was filed in December 2005, appellants alleged that these senators were presently subject to disqualification. Appellants claimed the plain language of the statute would require political appointees to complete the second term of any incumbent representative. Although Gale had accepted Byars' and Price's filings to seek 4-year terms in 2002, appellants alleged that this fact showed Gale had inconsistently and discriminatorily applied § 12.

Appellants also alleged that Gale had denied them equal protection of the law. They claimed the district court could not save

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[1] See Neb. Rev. Stat. §§ 25-2158 (Reissue 1995) and 25-2159 (Cum. Supp. 2006).

§ 12 by construing it in a "nonliteral" manner because to do so would deny Byars and Price equal protection of the law. That is, Gale had already determined that Byars and Price had served more than half of a term between January 2001 and January 2003, so applying the law any differently for other senators would present an equal protection problem. Appellants further alleged that voters in Chambers' district would be particularly injured by losing an effective representative for the only non-Caucasian majority district in the state.

2. Secretary of State's Response

The court issued an alternative writ of mandamus. In Gale's answer and response, he alleged that because article III, § 12, did not define the word "term," it must be read in conjunction with article III, § 7. Section 7 provides that "all members shall be elected for a term of four years." When so read, Gale alleged that subsection (1) of § 12 provides that no person may serve more than two consecutive *4-year* terms and that subsection (3) only clarifies whether a legislator's service at the expiration of a 4-year term counts as a "full term" in determining whether the legislator is disqualified from serving a third term.

3. Appellants' Position at Show Cause Hearing

At the show cause hearing, appellants specified they were not claiming that § 12 was racially discriminatory. They also conceded that challenges to term limits had failed in other jurisdictions. But they argued they were not claiming term limits were inherently unconstitutional—only that Nebraska's term limits were unconstitutional because of the way § 12 was drafted. Appellants agreed with the district court's statement that if it decided § 12 did not make legislators ineligible to continue after they had been in office for more than half of their second term, then their argument failed.

4. District Court's Order

In a written order, the district court concluded that § 12 could be interpreted as disqualifying a senator after 6 years only if subsection (3) altered the meaning of a "term" for purposes of term limits. The court declined to interpret subsection (3) to be inconsistent with the 4-year definition of a term provided

in article III, § 7. It reasoned that subsection (3) addressed, in part, circumstances requiring a political appointment to fill a vacancy in the Nebraska Unicameral. The court concluded that subsection (3) was intended to resolve whether "a term counts in computing consecutive terms, and not to determine how long a term lasts. . . . It is only by torturing the plain language of the amendment that it could mean anything else."

IV. ASSIGNMENTS OF ERROR

Appellants assign, restated, that the district court erred in (1) concluding that subsection (3) of article III, § 12, does not modify and qualify the meaning of "term" in subsection (1); (2) failing to find that article III, § 12, is unconstitutional on its face and as applied; (3) failing to find that Gale is construing and enforcing § 12 in a manner inconsistent with its plain language; (4) failing to reach the issue of whether voters in Chambers' district, in particular, were denied their First Amendment and equal protection rights, and to decide this issue in favor of appellants; and (5) failing to grant appellants' requested order for a peremptory writ of mandamus and declaratory judgment.

V. STANDARD OF REVIEW

[1] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.[2]

[2] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.[3]

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[2] *State ex rel. Upper Republican NRD v. District Judges, ante* p. 148, 728 N.W.2d 275 (2007).

[3] *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

[3] Here, whether the district court properly denied a peremptory writ of mandamus and declaratory relief turns upon the meaning of article III, § 12, of the Nebraska Constitution. Constitutional interpretation presents a question of law.[4]

VI. ANALYSIS

[4] The people have the power to amend the Nebraska Constitution by the initiative process pursuant to Neb. Const. art. III, § 2, which provides in part: "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature."[5]

[5-8] A constitution represents the supreme written will of the people regarding the framework for their government.[6] The people of Nebraska may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties.[7] This court makes no attempt to judge the wisdom or the desirability of enacting initiative amendments.[8] The party challenging the constitutionality of an amendment bears the burden of establishing its unconstitutionality.[9]

1. Parties' Contentions on Appeal

Appellants contend that article III, § 12, operates to keep "only certain senators" from filing for candidacy, which prohibits their supporters from voting for the candidate of their choice.[10] They argue that this result is a substantial burden on First Amendment rights that requires this court to apply strict scrutiny review. In addition, appellants argue that their votes have been diluted under the Equal Protection Clause because

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[4] See *Keef v. State*, 271 Neb. 738, 716 N.W.2d 58 (2006).

[5] See *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006).

[6] *Id.*

[7] *Hall v. Progress Pig, Inc.*, 254 Neb. 150, 575 N.W.2d 369 (1998).

[8] See *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996).

[9] See *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000).

[10] Brief for appellants at 15.

only incumbent legislators can be disqualified midway through their second term. The State contends that appellants' interpretation of § 12 is incorrect and that even if correct, § 12 is neutral and does not severely burden voting rights.

Appellants' First Amendment and equal protection claims are both based on the alleged unequal treatment that § 12 imposes on incumbent legislators. To explain why their First Amendment argument depends upon their equal protection argument, we first set out the analytical framework of a voter's First Amendment challenge to election laws.

2. Free Speech and Association

[9] The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The 1st Amendment's protection of speech and association for the advancement of political objectives is extended to the states through the 14th Amendment[11] and applies to both state statutes and state constitutional provisions.[12]

[10,11] Among other things, the First Amendment "protects the right of citizens 'to band together in promoting among the electorate candidates who espouse their political views.'"[13] Although there is no fundamental right to seek elective office,[14] "'the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.'"[15]

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[11] See, *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986).

[12] See *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999).

[13] *Clingman v. Beaver*, 544 U.S. 581, 586, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005).

[14] See *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995), citing *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972).

[15] *Anderson v. Celebrezze*, 460 U.S. 780, 786, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983).

[12-14] "Election laws will invariably impose some burden upon individual voters."[16] But the right to vote in any manner and the right to associate for political purposes are not absolute; the U.S. Supreme Court has recognized that states retain the power to regulate their own elections under the federal Constitution.[17] "Although [the] rights of voters are fundamental, not all restrictions imposed by the states on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates."[18]

Strict scrutiny of an election law is appropriate only if the burden on voters' associational rights is severe.[19] Reasonable and nondiscriminatory restrictions are usually supported by a state's important regulatory interests.[20] "[T]he mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'"[21]

[15] To resolve a challenge to a state's election laws, a court must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[22]

This scheme has become known as the *Anderson-Burdick* balancing test.[23]

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[16] *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

[17] *Id.*

[18] *Anderson v. Celebrezze, supra* note 15, 460 U.S. at 788.

[19] *Clingman v. Beaver, supra* note 13.

[20] *Id.*

[21] *Burdick v. Takushi, supra* note 16, 504 U.S. at 433.

[22] *Id.*, 504 U.S. at 434, quoting *Anderson v. Celebrezze, supra* note 15.

[23] See, e.g., *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998).

[16,17] Election laws imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest.[24] But when the burden is slight, "the State need not establish a compelling interest to tip the constitutional scales in its direction."[25] If minimal scrutiny applies, "a presumption of constitutionality can be overcome only if the party challenging [an amendment's] constitutionality negates every conceivable basis that might support the amendment."[26]

This court adopted the *Anderson-Burdick* balancing test in *Pick v. Nelson*.[27] Under this test, courts in other jurisdictions have generally held that burdens imposed by voter initiatives to establish term limits for state officers do not warrant strict scrutiny review. Courts have concluded that term limit provisions are content-neutral and do not impose an undue burden on voters when weighed against the state's interests in enforcing the term limits.[28] Courts have compared term limits to other neutral eligibility restrictions on candidacy, like age and residency requirements,[29] and have concluded that even lifetime term limit bans do not severely restrict incumbents' access to the ballot when they are not prohibited from seeking a different elected office.[30]

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[24] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997).

[25] *Burdick v. Takushi*, *supra* note 16, 504 U.S. at 439.

[26] *Hall v. Progress Pig, Inc.*, *supra* note 9, 259 Neb. at 418, 610 N.W.2d at 430.

[27] *Pick v. Nelson*, *supra* note 14.

[28] See, *Citizens for Legislative Choice v. Miller*, *supra* note 23; *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (en banc); *League of Women Voters v. Diamond*, 923 F. Supp. 266 (D. Me. 1996); *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994); *Legislature of State of Cal. v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991).

[29] See, e.g., *Citizens for Legislative Choice v. Miller*, *supra* note 23; *Bates v. Jones*, *supra* note 28.

[30] *Citizens for Legislative Choice v. Miller*, *supra* note 23; *Bates v. Jones*, *supra* note 28; *Legislature of State of Cal. v. Eu*, *supra* note 28.

Appellants' First Amendment argument focuses on the last part of the *Anderson-Burdick* test: the requirement that a court take into consideration the extent to which a state's interests make it necessary to burden a plaintiff's rights. Appellants specifically state that they are not challenging term limits in general. Their challenge is limited to their contention that § 12 imposes an unnecessary burden on voters by disqualifying only incumbent legislators midway through their second term, whereas their challengers can serve 4 years. This claim of unequal treatment between incumbents and their challengers mirrors their equal protection claim of unequal treatment between incumbents and first-term legislators. As appellants conceded to the district court, both arguments depend upon their contention that only second-term incumbents face the risk of disqualification before their 4-year term has expired. We therefore do not address the arguments separately.

3. Equal Protection Challenge

Appellants contend that § 12 violates the Equal Protection Clause by diluting the votes of persons wishing to reelect incumbent legislators because it operates to disqualify an incumbent legislator after the midway point of his or her second term, thus depriving voters of their elected representative. Appellants contend that nonincumbent legislators do not face this risk: "They [incumbent legislators] are not given an equal chance, even to serve a second term, with non-incumbent candidates."[31] Appellants also argue that Gale is "apparently applying the subsection (3) language only to the persons who were elected in 1998 and therefore served just over half their term between January 1, 2001, and early January, 2003."[32]

Appellants' second argument regarding Gale's application of the amendment only to legislators elected in 1998 is refuted by their own allegations and evidence. That is, Gale rejected Chambers' candidate filing for reelection in 2008, after Chambers was reelected in 2004. Thus, Gale did not apply the law only to legislators reelected in 1998.

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[31] Brief for appellants at 18.

[32] *Id.*

(a) Level of Scrutiny

Regarding appellants' unequal treatment claim between incumbent and first-term legislators, the State argues that appellants' interpretation of § 12 is incorrect. Alternatively, the State argues that even if appellants' interpretation were correct, strict scrutiny does not apply and that "[t]he amendment does not limit anyone's access to candidacy or the ballot based on a prohibited factor such as race, religion or gender. . . . Access will be the same as it always has been for all voters."[33] Based on this equal access argument, the State apparently assumes there is no fundamental right at stake because every voter's representative would be disqualified to serve the last 2 years of a second term, which would be only an incidental burden on voting rights.

[18-20] The Equal Protection Clause keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.[34] But when the classifications involved in a constitutional amendment do not create any suspect class or address any fundamental right, we apply only minimal scrutiny under the equal protection analysis.[35] Under this standard of review, this court will uphold a classification created by a constitutional amendment where it is a rational means of promoting a legitimate government interest or purpose.[36]

Appellants do not contend that § 12 creates a suspect classification. As noted, there is no fundamental right to seek elective office.[37] Similarly, the U.S. Supreme Court has held that voters do not have a fundamental right to vote for a particular candidate.[38] It does not follow from this, however, that voters do not have a right to be served by their chosen representative for a full term once elected. Article III, § 7, of the Nebraska

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[33] Brief for appellees at 34-35.

[34] *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006).

[35] *Hall v. Progress Pig, Inc.*, *supra* note 9.

[36] See *id.*

[37] See *Pick v. Nelson*, *supra* note 14.

[38] See, *Timmons v. Twin Cities Area New Party*, *supra* note 24; *Burdick v. Takushi*, *supra* note 16.

Constitution provides that members of the Legislature "shall be elected for a term of four years."

Further, even applying minimal scrutiny, disqualifying only second-term legislators midway through their term is not rationally related to the main purpose of term limits: to eliminate incumbent election advantage.[39] If incumbent legislators are disqualified from running again for a 4-year period following the expiration of their second term, a political appointment for the last 2 years of their second term is unnecessary to eliminate incumbent election advantage. Thus, we reject the State's argument that appellants' interpretation of § 12 would not create a constitutional infirmity. Regardless of what level of review this court applies, the resolution of appellants' First Amendment and equal protection challenges hinges on the correct interpretation of § 12.

(b) Meaning of Article III, § 12

Appellants argue that for legislators like Chambers, who were elected in 1996 and 2000, both these terms expired after the January 1, 2001, effective date in subsection (2): their first term expired on January 3, 2001, and their second term expired on January 5, 2005.[40] Appellants argue that under subsection (1), these legislators should have been disqualified from seeking reelection in 2004 because subsection (1) disqualifies legislators from a third consecutive term after the expiration of two consecutive terms. But under subsection (3), which provides that "service in office for more than one-half of a term shall be deemed service for a term," they were nonetheless allowed to run for office again because their 1996 terms did not count as service for a term after the effective date. According to appellants, this shows that the full-term calculation under subsection (3) must be incorporated into subsection (1) to determine whether a term has expired.

Appellants further argue that this incorporation is demonstrated by Gale's determination that Byars and Price had served more than half of their 1999 terms after the amendment's

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[39] See, e.g., *Bates v. Jones, supra* note 28.

[40] See Neb. Const. art. III, § 10.

effective date of January 1, 2001. They then contend that this incorporation shows the subsection (3) calculation has altered the meaning of a "term" in subsection (1) so that "service of more than one-half a term [is] the same as expiration of a term."[41] Thus, they argue § 12 disqualifies all incumbent legislators "from the moment they have passed the midpoint of their second term" and that subsection (1) must be read to incorporate the following underscored language: "No person shall be eligible to serve as a member of the Legislature for four years next after the expiration of service for more than one-half of each of two consecutive terms regardless of the district represented."[42]

[22] In ascertaining the intent of a constitutional provision from its language, however, this court may not supply any supposed omission, or add words to or take words from the provision as framed.[43] The additional language that appellants contend must be read into subsection (1) illustrates that their interpretation is not consistent with its plain language. Without this italicized language, the meaning of subsection (1) is clear and appellants' sophistic argument cannot mask the structural simplicity of § 12.

[22] Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and therefore construction is necessary.[44]

[23-26] The words in a constitutional provision must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests that they are used in a technical sense.[45] If the meaning is clear, the court will give to it the meaning that obviously would be accepted

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[41] Brief for appellants at 28.

[42] *Id.* at 27-28.

[43] *State ex rel. Lemon v. Gale, supra* note 5; *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

[44] *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[45] *Id.*

and understood by laypersons.[46] Constitutional provisions are not subject to strict construction and receive a broader and more liberal construction than do statutes.[47] It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto.[48]

A layperson would understand from the plain language of subsection (1) that a legislator is disqualified to serve for another consecutive term "*after the expiration of* two consecutive terms." (Emphasis supplied.) Under appellants' interpretation, however, a legislator is disqualified from serving a third consecutive term *before the expiration of* two consecutive terms. Thus, appellants' interpretation is contrary to the plain language and natural sense of subsection (1).

Nor is there any reason to incorporate the full-term calculation from subsection (3) into subsection (1) because all the subsections have distinct functions. Subsection (1) prohibits a third term for a 4-year period after two consecutive terms have expired. Subsection (2) specifies that term limits apply only prospectively to a legislator's time served on or after January 1, 2001. At the time the initiative was passed, however, prospective application raised the problem of how to count a legislator's current term as of the effective date. This is the problem that subsection (3) was most obviously intended to address, although the State and district courts have noted possible future applications of subsection (3). That is, subsection (3) was primarily intended to determine whether a legislator's current term on January 1, 2001, would count toward disqualifying the legislator from a third consecutive term. If more than one-half of the then-current term was served after the effective date, the term would count toward disqualification for a third term, but not otherwise.

This is exactly the manner in which Gale has applied it. Significantly, appellants did not allege that Gale determined any second-term legislator is disqualified halfway through his or her term, and we take judicial notice of Chambers' current represen-

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[46] *Hall v. Progress Pig, Inc.*, *supra* note 9.

[47] See, *id.*; *Carpenter v. State*, 179 Neb. 628, 139 N.W.2d 541 (1966).

[48] *Pony Lake Sch. Dist. v. State Committee for Reorg.*, *supra* note 43.

tation of his district despite having served more than half of his second consecutive term according to appellants' evidence.[49]

Byars and Price were elected in 1998. That term began on January 6, 1999, and expired January 8, 2003, so they served more than half of their 1998 term on or after January 1, 2001. Under subsection (3), therefore, their 1998 term counted as their first consecutive term after January 1, 2001, and their reelection in 2002 counted as their second consecutive term. Thus, Gale properly determined they were disqualified from seeking a third consecutive term in 2006. Chambers' 1996 term began on January 8, 1997, and expired January 3, 2001, so he served only 2 days of that term on or after January 1, 2001, meaning that under subsection (3), his 1996 term did not count as one of his consecutive terms. Chambers' 2000 term therefore counted as his first consecutive term, and his 2004 term counted as his second consecutive term. Applying § 12 in a straightforward manner disqualifies Chambers from seeking a third consecutive term in 2008. Subsection (3) did not, and does not, operate to disqualify any incumbent legislator at the midway point of a second term.

The district court also correctly noted that appellants' interpretation of § 12 would cause a conflict with article III, § 7, which defines a legislator's "term" as 4 years. If subsection (3) were interpreted to mean that "service in office for more than one-half a term" is the same as expiration of a term, then subsection (3) would amend article III, § 7, by implication.[50]

[27,28] The Nebraska Constitution, as amended, must be read as a whole.[51] A constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument.[52]

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[49] See *State v. Kolosseus*, 198 Neb. 404, 253 N.W.2d 157 (1977).

[50] Compare *Duggan v. Beermann, supra* note 8.

[51] *Father Flanagan's Boys Home v. Dept. of Soc. Servs.*, 255 Neb. 303, 583 N.W.2d 774 (1998).

[52] See *id.*

[29] Reading the constitution as a whole and giving § 12 the meaning that would obviously be accepted and understood by laypersons, we agree with the district court that subsection (3) of § 12 operates only to determine whether an expired legislative term will count as a full term toward disqualification to seek a third consecutive term.

4. First Amendment and Equal Protection Conclusion

As noted, the Equal Protection Clause keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.[53] But appellants have failed to show that the full-term calculation in subsection (3) requires a different application for incumbent and nonincumbent legislators. Different outcomes do not necessarily demonstrate different treatment under the law. Equally important, appellants have failed to show that § 12 disqualifies incumbent legislators after they have been in office for more than half of their second term. Thus, § 12 does not infringe upon any fundamental right. Accordingly, this court applies minimal scrutiny, and the burden is on appellants to show that the amendment is not rationally related to achieving any legitimate state purpose.[54] In other words, a presumption of constitutionality can be overcome only if the party challenging its constitutionality negates every conceivable basis that might support the amendment.[55]

Regardless of whether this court agrees with the wisdom or desirability of term limits, the State has cited rational bases for its enforcement of § 12, including restoring voter participation, competitive elections, and citizen representation by eliminating incumbent election advantages.[56] Appellants do not attempt to negate these rationales because their entire argument depends upon an interpretation of § 12 that we reject. We conclude that

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[53] *In re Interest of Phoenix L., supra* note 34.

[54] See *Hall v. Progress Pig, Inc., supra* note 9.

[55] *Id.*

[56] See, *U.S. Term Limits, Inc. v. Hill, supra* note 28; *Legislature of State of Cal. v. Eu, supra* note 28. See, also, *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).

appellants' equal protection argument must fail. Because appellants' First Amendment claim also depends solely upon their claim of unequal treatment, that claim must fail as well.

5. Minority Voters

Finally, appellants assign that the district court erred in failing to reach the issue of whether voters in Chambers' district, in particular, were denied their First Amendment and equal protection rights because they lost an effective representative for the only district in the state with a majority of voters who are of a minority race. At the show cause hearing, however, they specifically conceded this was not a racial discrimination claim. These statements effectively informed the district court that it need not address this claim on the basis of racial discrimination or suspect classifications.

[30] A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.[57] In addition, as the State has pointed out, there is no merit to this argument. Section 12 applies to a legislator from any district, and the Sixth Circuit has concluded that because term limit provisions burden all voters the same, a claim that a minority district is disproportionately affected by losing an effective legislator will not support a claim that the term limit provision imposes a severe burden on those voters' rights.[58]

VII. CONCLUSION

Appellants have failed to show that Nebraska's term limit amendment imposes a severe burden on their First Amendment rights or that it violates the Equal Protection Clause. Both claims depended upon their contention that article III, § 12, disqualifies any incumbent legislator after serving more than half of his or her second term. We conclude that appellants' interpretation of § 12 is contrary to its plain and obvious meaning. We agree with the district court's conclusion that subsection (3) determines whether an expired term counts as one of the two consecutive terms a legislator is permitted to serve before being disqualified

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[57] *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003).

[58] See *Citizens for Legislative Choice v. Miller*, *supra* note 23.

to seek a third consecutive term. We further agree that subsection (3) has no application to determining the length of term under subsection (1). We therefore affirm the district court's denial of a peremptory writ of mandamus and declaratory judgment.

AFFIRMED.

WRIGHT, J., not participating.

RHONDA GRIFFIN WASHINGTON, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT LEE GRIFFIN, APPELLANT, V. TARIE CONLEY, ALSO KNOWN AS TARIA CONLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSE L. GRIFFIN, ET AL., APPELLEES.

734 N.W.2d 306

Filed July 6, 2007. No. S-06-428.

1. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** The granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) which is limited to a facial attack on the pleadings is subject to the same de novo standard of review as a motion brought under rule 12(b)(6).
2. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
3. **Rules of the Supreme Court: Pleadings: Jurisdiction.** There are two ways a party may challenge the court's subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003). The first way is a facial attack which challenges the allegations raised in the complaint as being insufficient to establish that the court has jurisdiction over the subject matter of the case. In a facial attack, a court will look only to the complaint in order to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction. The second way is a factual challenge where the moving party alleges that there is in fact no subject matter jurisdiction, notwithstanding the allegations presented in the complaint. In a factual challenge, the court may consider and weigh evidence outside of the pleadings to answer the jurisdictional question.
4. **Motions to Dismiss: Jurisdiction: Affidavits: Proof.** A motion to dismiss becomes a factual challenge to the court's subject matter jurisdiction when the moving party supports its motion by presenting affidavits or other evidence properly brought before the court. The party opposing the motion must then offer affidavits or other relevant evidence to support its burden of establishing subject matter jurisdiction.

5. **Decedents' Estates: Courts: Jurisdiction: Equity.** County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
6. **Decedents' Estates: Actions: Equity: Courts: Jurisdiction.** In common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
7. **Actions: Trusts: Equity.** Actions to declare a resulting or constructive trust are in equity.
8. **Courts: Jurisdiction.** When the jurisdiction of the county court and district court is concurrent, the basic principles of judicial administration require that the court which first acquires jurisdiction should retain it to the exclusion of the other court.
9. **Decedents' Estates: Courts: Jurisdiction.** The county court acquires jurisdiction of all matters relating to the administration and settlement of the estate when formal or informal estate proceedings are filed or instituted in the county court.
10. **Trusts: Statutes.** Resulting and constructive trusts are not governed by the Nebraska Uniform Trust Code.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Reversed and remanded for further proceedings.

Thomas K. Harmon, of Law Offices of Thomas K. Harmon, for appellant.

Rebecca Abell Brown, of Law Office of Rebecca Abell Brown, for appellees.

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

GERRARD, J.

NATURE OF CASE

Robert Lee Griffin purchased a parcel of real estate and placed title to the property in Rose L. Griffin's name. Rose died, and shortly thereafter, Robert also died. The personal representative of Robert's estate, Rhonda Griffin Washington, brought an action in district court against the personal representative of Rose's estate and several other individuals, seeking to establish a resulting or constructive trust over the parcel of real estate at issue. The defendants filed a motion to dismiss for, among other things, lack of subject matter jurisdiction. The district court granted the defendants' motion to dismiss, determining that the county court had exclusive jurisdiction over this matter. The

question presented in this appeal is whether the district court, given the record before it, erred in concluding that it did not have subject matter jurisdiction.

STATEMENT OF FACTS

Washington's operative complaint alleges as follows: In late 2002, Robert Lee Griffin purchased a parcel of real estate located on Fort Street in Omaha, Nebraska. For Robert's "convenience," title to the property was placed in the name of Rose L. Griffin and a deed was delivered to Rose, which was then recorded in the office of the register of deeds for Douglas County. Robert occupied part of the premises with his family, improved and cared for the property, collected the rents from the property, and never recognized Rose as the owner of the property.

Rose died, and Tarie Conley was appointed as the personal representative of her estate. Washington alleges that after Rose's death, Robert requested that the defendants execute and deliver to him a deed for the property at issue in this case, but the defendants refused to do so. On March 4, 2005, Robert died, and Washington was subsequently appointed as the personal representative of his estate.

On December 30, 2005, Washington filed the operative complaint in district court against Melanie Conley, Christopher Conley, Morgan Conley, and Tarie Conley, as an individual and in her capacity as the personal representative of Rose's estate. Washington's complaint alleged that because Robert purchased the real property, Robert's estate has equitable title to the property, and that the defendants are obligated, in equity, to hold title to the property for his benefit. In essence, Washington requested that the district court impose a constructive or resulting trust on the real estate to which Rose held the record title. The defendants filed a motion to dismiss, claiming that Washington's complaint failed to state a claim upon which relief could be granted and for lack of jurisdiction.

At the hearing on the defendants' motion to dismiss, the following colloquy occurred:

> THE COURT: Okay. And we're here on the Motion to Dismiss filed on behalf of the Defendants. And the Court's first question in that regard, having reviewed the Complaint, the Motion to Dismiss, the Objection, and the

> Brief in Opposition of the Motion for Dismissal, what is going on in the county court?
>
> [Counsel for the defendants]: There has been a probate filed for the estate of Rose L. Griffin. It's just in the beginning stages. [Tarie] Conley has been appointed personal representative. It is an informal proceeding at this point in time and was just appointed not that long ago. I think November would be —
>
> [Counsel for Washington]: Judge, my understanding it was like November 10th or November 17th of 2005, if I may interject. Thank you. Excuse me.
>
> THE COURT: Okay. In fact, I see those letters of appointment that were attached to the Complaint. Is the property [on] Fort Street that is at issue in the Rose L. Griffin estate matter?
>
> [Counsel for the defendants]: That is basically along with the vehicle is the only property in the estate that needs to be probated.

However, no evidence was adduced at the hearing, and no pleadings have been filed other than the complaint. None of the parties requested that the district court take judicial notice of any probate proceedings. Apparently relying on the statements of counsel that the real estate was subject to a probate proceeding in county court, the district court granted the defendants' motion to dismiss for lack of jurisdiction. In support of this conclusion, the court cited *Ptak v. Swanson*[1] for the proposition that when a personal representative's recovery of estate assets is inextricably tied to the probate of the estate, the right of recovery arises within the exclusive original jurisdiction over probate matters in the county court. The court noted that in the present case, Washington is seeking to recover title to real property that the court believed was involved in an ongoing probate proceeding. Accordingly, the court concluded that Washington's recovery in this case is inextricably tied to the probate of Rose's estate and that Washington's right of recovery arises within the exclusive original jurisdiction of the county court. The court dismissed the complaint, and Washington appealed.

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[1] *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006).

ASSIGNMENT OF ERROR

Washington assigns, summarized, restated, and renumbered, that the district court erred in concluding that it was without jurisdiction to hear her complaint.

STANDARD OF REVIEW

[1,2] The granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) which is limited to a facial attack on the pleadings is subject to the same de novo standard of review as a motion brought under rule 12(b)(6).[2] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[3]

ANALYSIS

The sole question presented to this court on appeal is whether the district court erred in granting the defendants' motion to dismiss for lack of subject matter jurisdiction. Washington's action was filed on December 30, 2005, and thus, we apply the new rules for notice pleading.[4] Because Nebraska's notice pleading rules are modeled after the Federal Rules of Civil Procedure, we look to the federal decisions for guidance.[5]

[3] It is well established in federal courts that there are two ways a party may challenge the court's subject matter jurisdiction under rule 12(b)(1). The first way is a facial attack which challenges the allegations raised in the complaint as being insufficient to establish that the court has jurisdiction over the subject matter of the case.[6] In a facial attack, a court will look only to the complaint in order to determine whether the plaintiff

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[2] *VanHorn v. Nebraska State Racing Comm.*, *ante* p. 737, 732 N.W.2d 651 (2007).

[3] See *id.*

[4] See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004).

[5] See *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006).

[6] See, *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000); *Courtney v. Choplin*, 195 F. Supp. 2d 649 (D.N.J. 2002); *Zelaya v. J.M. Macias, Inc.*, 999 F. Supp. 778 (E.D.N.C. 1998).

has sufficiently alleged a basis of subject matter jurisdiction.[7] The second type of challenge is a factual challenge where the moving party alleges that there is in fact no subject matter jurisdiction, notwithstanding the allegations presented in the complaint.[8] In a factual challenge, the court may consider and weigh evidence outside of the pleadings to answer the jurisdictional question.[9]

[4] A motion to dismiss becomes a factual challenge to the court's subject matter jurisdiction when the moving party supports its motion by presenting affidavits or other evidence properly brought before the court.[10] The party opposing the motion must then offer affidavits or other relevant evidence to support its burden of establishing subject matter jurisdiction.[11]

In this case, the defendants filed a motion to dismiss but did not offer any evidence in support of their motion. Accordingly, we consider the defendants' motion to be a facial challenge to the district court's jurisdiction, as opposed to a factual one.[12] Because it is a facial challenge, we must accept all of the allegations made in Washington's complaint as true and draw all reasonable inferences in favor of Washington.[13]

Given this standard of review, we conclude that the district court erred in finding that it did not have subject matter jurisdiction over this claim. We begin by reviewing the general principles relating to the respective jurisdiction of the district and county courts.

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[7] See *VanHorn v. Nebraska State Racing Comm., supra* note 2. See, also, *Beatty v. U.S. Food and Drug Admin.*, 12 F. Supp. 2d 1339 (S.D. Ga. 1997); *Cohen v. Temple Physicians, Inc.*, 11 F. Supp. 2d 733 (E.D. Pa. 1998).

[8] See, *St. Clair v. City of Chico*, 880 F.2d 199 (9th Cir. 1989); *Beatty v. U.S. Food and Drug Admin., supra* note 7.

[9] See, *Krohn v. Forsting*, 11 F. Supp. 2d 1082 (E.D. Mo. 1998); *Rodriguez v. Texas Com'n on Arts*, 992 F. Supp. 876 (N.D. Tex. 1998), *affirmed* 199 F.3d 279 (5th Cir. 2000).

[10] See *Savage v. Glendale Union High School*, 343 F.3d 1036 (9th Cir. 2003).

[11] See, *id*; *Paterson v. Weinberger*, 644 F.2d 521 (5th Cir. 1981).

[12] See, *Paterson v. Weinberger, supra* note 11; *Yuksel v. Northern American Power Technology*, 805 F. Supp. 310 (E.D. Pa. 1992).

[13] See *VanHorn v. Nebraska State Racing Comm., supra* note 2.

Neb. Const. art. V, § 9, states: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide . . . ." Because a district court's general jurisdiction emanates from the Nebraska Constitution, it cannot be legislatively limited or controlled.[14]

Exclusive original jurisdiction over probate matters has been given to the county court by the Nebraska Legislature. Neb. Rev. Stat. § 24-517 (Cum. Supp. 2006) provides in relevant part that "[e]ach county court shall have the following jurisdiction: (1) Exclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof . . . ." Neb. Rev. Stat. § 30-2211(a) (Cum. Supp. 2006) provides in part: "To the full extent permitted by the Constitution of Nebraska, the [county] court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons . . . ."

[5,6] County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.[15] We have noted, however, that the Legislature's grant of exclusive jurisdiction to the county court in matters relating to decedents' estates "'is of suspect constitutionality insofar as it relates to matters that would involve either the chancery or common-law jurisdiction of the district courts.'"[16] In reconciling this apparent tension, we have concluded that in common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.[17] We have further explained:

> The grant of jurisdiction to the district court, however, while original, is not exclusive. That each of two courts

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[14] *Ptak v. Swanson*, *supra* note 1; *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999).

[15] *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985); *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981).

[16] *Ptak v. Swanson*, *supra* note 1, 271 Neb. at 63, 709 N.W.2d at 341.

[17] *Ptak v. Swanson*, *supra* note 1; *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999); *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991).

> may possess the same original jurisdiction is clear, but that two separate courts may not exercise exclusive jurisdiction is also clear. Our previous opinions have not always addressed this point. In considering the difference between exclusive and original, the apparent conflict between the jurisdiction of the county court and the district court vanishes.[18]

[7] In this case, Washington is seeking to impose a constructive or resulting trust on a parcel of real estate. Actions to declare a resulting or constructive trust are in equity.[19] In the absence of a probate issue the district court would have original jurisdiction over such an action. However, in an equitable action relating to a decedent's estate, the county court may under some circumstances have concurrent original jurisdiction with the district court.

[8,9] When the jurisdiction of the county court and district court is concurrent, the basic principles of judicial administration require that the court which first acquires jurisdiction should retain it to the exclusion of the other court.[20] We have explained that the "county court acquires jurisdiction of all matters relating to the administration and settlement of the estate when formal or informal estate proceedings are filed or instituted in the county court."[21]

The resolution of the present case depends on the answers to the following questions: First, whether there is a pending probate proceeding in county court involving the real property at issue in this case; and second, if there is an ongoing probate proceeding, whether the county court first acquired jurisdiction. Based solely on the allegations presented in Washington's complaint, which answer neither of these questions, we conclude

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[18] *In re Estate of Steppuhn, supra* note 15, 221 Neb. at 332, 377 N.W.2d at 85.

[19] *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994); *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978).

[20] See *In re Estate of Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980).

[21] *Id.* at 785, 295 N.W.2d at 280.

that the district court erred in finding that it did not have jurisdiction over this matter.

We note that under Nebraska law, title to real property passes immediately upon death to devisees or heirs, subject to administration.[22] Of course, pursuant to Neb. Rev. Stat. § 30-2470 (Reissue 1995), a personal representative may request possession of the property for purposes of estate administration, and may also maintain an action to determine title to the property.[23] However, in the present case, there is no allegation in the complaint that the real property is necessary for purposes of estate administration or for a determination of title in the probate court. Thus, on the face of the complaint, there is no impediment to the district court's properly exercising jurisdiction over this action.

Moreover, in finding that it lacked jurisdiction, the district court erroneously relied upon information not found in Washington's complaint, specifically, the assertions of counsel that the property at issue in this case is subject to a separate and contemporaneous probate proceeding in county court. In relying solely on the allegations made by Washington in her complaint, as we must, and without an allegation in the complaint that the property at issue is somehow necessary for purposes of estate administration in a pending probate proceeding, we cannot say that the county court has acquired jurisdiction over this matter to the exclusion of the district court. The district court erred in granting the motion to dismiss based on the record before it.

As an alternative basis for dismissing the complaint, the defendants argue that the county court has jurisdiction over this case pursuant to Neb. Rev. Stat. §§ 30-3814(a) and (f) (Cum. Supp. 2006) of the Nebraska Uniform Trust Code. Section 30-3814(a) provides that "[t]o the full extent permitted by the Constitution of Nebraska, the county court has jurisdiction over all subject matter relating to trusts." Section 30-3814(f) states

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[22] Neb. Rev. Stat. § 30-2401 (Reissue 1995). See, also, *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001); *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997).

[23] See *Ruzicka v. Ruzicka, supra* note 22.

that "[f]or purposes of this section, 'proceeding' includes action at law and suit in equity." The defendants claim that given these provisions, the county court has jurisdiction because a resulting or constructive trust, although an action in equity, is a "matter relating to trusts."

The defendants' reliance on § 30-3814(a) and (f) is misplaced. Neb. Rev. Stat. § 30-3802 (Cum. Supp 2006) provides that "[t]he Nebraska Uniform Trust Code applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust." The official comment to § 102 of the Uniform Trust Code, which is identical to § 30-3802, states that the code, "while comprehensive, applies only to express trusts."[24] Excluded from the code's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law.[25]

[10] It is clear from the plain language of § 30-3802 that resulting and constructive trusts are not governed by the Nebraska Uniform Trust Code. The defendants' argument that the county court had jurisdiction under the code is without merit.

CONCLUSION

We conclude that the district court erred in considering evidence outside of Washington's complaint and finding that it did not have subject matter jurisdiction over Washington's claim. Absent other evidence, the allegations presented in Washington's complaint are sufficient to vest jurisdiction in the district court. We reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[24] Unif. Trust Code § 102, 7C U.L.A. 411 (2006).

[25] *Id.*

IN RE ESTATE OF EDWARD F. NEMETZ, JR., DECEASED. JILL A. NEMETZ AND CHRISTOPHER NEMETZ, APPELLANTS, V. KATHLEEN A. NEMETZ, APPELLEE.

735 N.W.2d 363

Filed July 6, 2007. No. S-06-487.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates.** A proceeding under Neb. Rev. Stat. § 30-2454 (Reissue 1995) to remove a personal representative for cause is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
4. **Statutes.** The meaning of a statute is a question of law.
5. **Statutes: Appeal and Error.** 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.
6. **Courts: Jurisdiction: Decedents' Estates.** A county court has exclusive jurisdiction over all proceedings regarding a decedent's estate.
7. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the County Court for Douglas County: THOMAS G. MCQUADE, Judge. Affirmed.

Bradley E. Barrows, of Hoppe & Harner, L.L.P., for appellants.

Sally J. Hytrek for appellee.

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

WRIGHT, J.

NATURE OF CASE

Eighteen years after Edward F. Nemetz, Jr., died, his surviving spouse, Kathleen A. Nemetz, filed an application for informal appointment of personal representative in intestacy, and she was appointed. Edward's children from a previous marriage filed a petition to remove Kathleen as personal representative. Following an evidentiary hearing, the county court denied the petition, and the children appeal.

SCOPE OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

FACTS

Edward died August 9, 1987. He was survived by his spouse, Kathleen, and two children from a previous marriage: Jill A. Nemetz, born August 22, 1972, and Christopher Nemetz, born November 20, 1975. At the time of his death, Edward owned residential property in Omaha, Nebraska. From the time of Edward's death through the time of the proceedings below, Kathleen continued to live in the house, paid the mortgage and taxes, and made necessary repairs to the premises.

No probate proceeding was commenced until September 14, 2005, at which time, Kathleen filed in the county court an application for informal appointment of personal representative in intestacy. She was appointed as personal representative of Edward's estate in an unsupervised administration, and a letter of personal representative was issued to her. On October 4, Kathleen, as personal representative, signed a deed of distribution transferring the residential property to herself.

On January 27, 2006, Jill and Christopher petitioned the court for formal adjudication of intestacy, removal of the personal representative, appointment of a successor personal representative, determination of heirs, and surcharge of the former personal representative. The court separated the issues raised in the children's petition and held an evidentiary hearing on their request to remove Kathleen as personal representative. At the end of the hearing, the court found no reason to remove Kathleen and entered an order denying the children's request. From that order, the children appeal.

ASSIGNMENTS OF ERROR

The children assert, restated, that the county court erred (1) in finding that its jurisdiction was not limited by Neb. Rev. Stat.

§ 30-2408 (Reissue 1995) to determining only how Edward's property devolved at his death and (2) in denying their request to remove Kathleen as the personal representative for the estate.

ANALYSIS

In their brief on appeal, the children make a number of arguments about issues that have not yet been adjudicated in the county court. The only ruling from which the children have appealed is the order denying their request to remove Kathleen as personal representative. Just two issues are presented in this appeal: Did the county court have jurisdiction to appoint Kathleen as personal representative? Did the county court err in denying the children's request to remove Kathleen as personal representative?

[3] We note that a proceeding under Neb. Rev. Stat. § 30-2454 (Reissue 1995) to remove a personal representative for cause is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995). *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992). Therefore, the county court's order denying the children's request to remove Kathleen is a final order and is appealable, even though it neither terminated the action nor constituted a final disposition of the case. See *id.*

Jurisdiction of County Court

The children argue that if probate proceedings are commenced more than 3 years after the decedent's death, § 30-2408 limits the court's jurisdiction to determining how the property of an intestate decedent devolved at the time of the decedent's death and determining claims for administration expenses. The record shows that the county court appointed Kathleen as personal representative and denied the children's request to remove her. No determination has yet been made by the county court as to how Edward's estate passed (or should pass) to his heirs. Thus, we address the children's jurisdiction argument only as it pertains to the appointment of Kathleen.

We first consider the children's argument that the county court did not have jurisdiction to appoint Kathleen as personal representative more than 3 years after Edward's death. The proceedings were initiated when Kathleen filed an application for

informal appointment of personal representative in intestacy. Section 30-2408 provides, in relevant part, as follows:

> No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, *except . . . (4) an informal probate or appointment or a formal testacy or appointment proceeding may be commenced thereafter if no formal or informal proceeding for probate or proceeding concerning the succession or administration has occurred within the three-year period*, but claims other than expenses of administration may not be presented against the estate.

(Emphasis supplied.)

[4,5] The meaning of a statute is a question of law. *State ex rel. Columbus Metal v. Aaron Ferer & Sons*, 272 Neb. 758, 725 N.W.2d 158 (2006). 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. *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

[6] A county court has exclusive jurisdiction over all proceedings regarding a decedent's estate. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997). See, also, Neb. Rev. Stat. § 30-2211 (Cum. Supp. 2006). Section 30-2408 clearly permits an informal appointment proceeding to be commenced more than 3 years after the decedent's death "if no formal or informal proceeding for probate or proceeding concerning the succession or administration has occurred within the three-year period."

The record shows that Edward died intestate on August 9, 1987. No formal or informal proceeding for probate or proceeding concerning the succession or administration of Edward's estate occurred within 3 years after his death. Kathleen filed her application for informal appointment of personal representative on September 14, 2005. Although this filing was made more than 3 years after Edward's death, we conclude that under

the plain language of § 30-2408, the county court had jurisdiction to appoint Kathleen as personal representative of Edward's estate.

DENIAL OF REQUEST TO REMOVE PERSONAL REPRESENTATIVE

The children also claim that the county court erred in refusing to remove Kathleen as personal representative. A personal representative of an estate may be removed by a court upon the petition of an interested person in the estate if

> removal would be in the best interests of the estate, or if it is shown that a personal representative . . . intentionally misrepresented material facts in the proceedings leading to his [or her] appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his [or her] office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

See § 30-2454(b).

[7] The children first assert an argument similar to their jurisdictional claim. They argue that Kathleen should have been removed because she made claims for homestead allowance, family allowance, and exempt property more than 3 years after Edward's death. Whether improper claims were made against the estate has not been adjudicated by the county court. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *In re Estate of Eriksen*, 271 Neb. 806, 716 N.W.2d 105 (2006). Thus, we do not address the children's argument concerning alleged claims made against the estate by Kathleen.

Second, the children argue that Kathleen has a conflict of interest that precludes her from acting as personal representative of Edward's estate. In October 2005, after Kathleen was appointed personal representative to administer the estate without supervision, she signed a deed of distribution transferring the residential property to herself. The children claim that in so doing, Kathleen failed to act impartially and did not consider the children's inheritance rights. The children assert that once they petitioned for Kathleen's removal in January 2006, she should have returned the property to the estate. Because she did

not do so, the children claim Kathleen has a conflict of interest and should be removed from serving as personal representative.

The record does not show that Kathleen has intentionally misrepresented any facts, disregarded any court orders, become incapable of discharging the duties of her office, or mismanaged the estate. Nor does the record show that Kathleen has exhibited bad faith in performing her duties as personal representative, as the children have alleged. The children's petition for formal adjudication of the intestate estate has not yet been heard by the county court; in other words, proper distribution of the estate has not been determined. During the hearing on the children's removal request, Kathleen stated that if the court were to determine that the residence should have been distributed differently, she would distribute it in accordance with the court's ruling.

To the extent that the children's argument stands for the notion that Kathleen cannot serve as personal representative because of her interest in the estate, this court has previously rejected such notion. Those who are directly interested in estates are regularly selected and appointed as personal representatives. See *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005). "That the named personal representative is interested in the estate and that his or her interest may become hostile to those of the other interested beneficiaries does not necessarily render the personal representative legally incompetent." *Id.* at 332, 701 N.W.2d at 363-64.

The county court applied the language of § 30-2454(b) and found that no cause existed to remove Kathleen as personal representative. Based on an examination for error appearing on the record, we conclude that the county court's ruling conformed to the law, was supported by competent evidence, and was neither arbitrary, capricious, nor unreasonable.

CONCLUSION

The children's assignments of error are without merit. The county court had jurisdiction to appoint Kathleen as personal representative and did not err in denying the children's request to remove her. The county court's order is affirmed.

AFFIRMED.

HAUPTMAN, O'BRIEN, WOLF & LATHROP, P.C., APPELLEE, V. LOUIS J. TURCO, JR., AND LUCIA TURCO, APPELLANTS.

735 N.W.2d 368

Filed July 13, 2007. No. S-05-928.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.
4. **Attorney Fees.** An attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility and are inconsistent with the character of the profession.
5. ____. An attorney fee computed pursuant to a contingent fee agreement is subject to the same standard of reasonableness as any other attorney fee.
6. **Attorney Fees: Contracts: Proof.** In a suit to recover an unpaid fee, the lawyer has the burden of persuading the trier of fact, when relevant, of the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of the lawyer's services.
7. **Attorney and Client.** The value of an attorney's services is ordinarily a question of fact.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded for further proceedings.

Jeff T. Courtney for appellants.

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

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

STEPHAN, J.

Louis J. Turco, Jr., engaged the law firm of Hauptman, O'Brien, Wolf & Lathrop, P.C., to represent his minor daughter, Lucia Turco, with respect to her personal injuries and the death of her unborn child resulting from a motor vehicle accident. Louis executed a contingent fee agreement with the firm.

After receiving a settlement offer, but before accepting it, Louis advised the firm that he was terminating its services. The firm then brought this action to enforce an attorney lien against Louis and Lucia (collectively the Turcos) in an amount computed in accordance with the contingent fee agreement. The Turcos asserted various defenses, including a claim that the amount of the fee was unreasonable. The district court for Douglas County granted the firm's motion for summary judgment, and the Turcos appealed. Because the record does not afford a sufficient basis for determining the reasonableness of the claimed fee, we conclude that there are genuine issues of material fact which preclude summary judgment and therefore reverse, and remand for further proceedings.

BACKGROUND

On June 20, 2004, Lucia was a passenger in an automobile involved in an accident with another vehicle. Lucia was a minor at the time of the accident and was 31 weeks pregnant. She suffered a broken femur and the loss of her unborn child. She was hospitalized for 6 days.

Several days after the accident, Louis contacted the law firm on Lucia's behalf and met with an attorney from the firm. During the meeting, he explained that Lucia had been a passenger in an automobile which was struck by a drunk driver and that her unborn child had died as a result. Louis did not employ the law firm at this initial meeting, but he did leave the office with a brochure and a copy of the firm's contingent fee agreement.

On July 8, 2004, Louis, his wife, and Lucia again met with attorneys from the law firm. During this meeting, the parties discussed Lucia's injuries, responsibility for medical bills, issues relating to the possible wrongful death claim, and the length of time it would take to resolve the matters. The details and particulars of the accident and Lucia's injuries were related to the law firm. From the attorneys' comments, Louis understood that "it would be a lot of work to get the insurance companies to pay the claim" and that the firm would not consider settling for 6 to 8 months because of uncertainty as to the extent of Lucia's injuries and the resulting medical bills. The contingent

fee agreement was explained during this meeting, and Louis signed it.

The agreement provided that the firm's fee would be "thirty-three and one-third percent (33 1/3%) of the gross amount recovered either by judgment or by settlement . . . calculated independently of any costs or bills owed by client." It included an acknowledgment that the fee was "dependent upon the outcome of client's claim" and that the firm had explained that the case "could be handled at an attorney's regular hourly rate, plus expenses, payable monthly as billed, but client prefers that this matter be handled on a contingent fee basis." The agreement also included the following provision:

> In the event of termination of attorney's representation, attorney shall have a lien for fees and expenses, which lien will be imposed upon any sums recovered by, for, or on behalf of client. For purposes of computing the contingency fee to which attorney is entitled, the 33 1/3 percentage shall be computed based upon the last settlement offer received by attorney from defendant's representatives. If no such settlement offer has been tendered, attorney shall be allowed fees in an amount equal to his/her standard hourly rate for the hours expended, as well as the hourly rate of paralegal and other support staff utilized on client's behalf.

Members of the firm explained to the Turcos that this provision was necessary to protect it from clients who would terminate its services in order to avoid payment of a fee.

On August 9, 2004, an attorney from the firm telephoned Louis' wife and informed her that the liability insurance carrier for the driver of the other vehicle involved in the accident had offered to settle for its policy limits. The attorney told her that the next step would be to pursue underinsured coverage. Neither Louis nor his wife told the attorney that they would accept the settlement offer, which was in the amount of $194,000.

Following a court hearing in September 2004, Louis became dissatisfied with the firm. On September 14, he delivered a letter to the law firm terminating its services. Although he was aware of the provision of the contingent fee agreement specifying the fee payable upon termination, he felt that the law firm

had expended little time and effort and that the fee of 33⅓ percent of the settlement offer was excessive for the amount of work done.

After the firm tried unsuccessfully to resolve the dispute regarding the fee, it served notice of an attorney lien on the attorney representing the party which had made the settlement offer. The notice stated that the lien was in the amount of $64,600 and represented fees owed pursuant to the contingent fee agreement signed by Louis. New counsel retained by Louis subsequently advised the firm that while Louis agreed that it was entitled to be compensated for the "reasonable value of services provided up to the time of [the firm's] termination" and reimbursed for expenses incurred, the amount of the claimed lien was excessive.

The law firm subsequently brought this action against the Turcos, generally alleging breach of contract. In their answer, the Turcos alleged that terms of the contingent fee agreement were unconscionable, that the execution of the agreement was fraudulently induced, and that the amount of the fee claimed by the firm was "unreasonable and excessive." The firm filed a motion for summary judgment, as did the Turcos. The district court granted the law firm's motion and denied that filed by the Turcos. The Turcos perfected this appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

The Turcos assign, restated, that the district court erred in granting the law firm's motion for summary judgment because (1) there are genuine issues of material fact as to whether the fee is excessive for the amount of work actually performed, (2) the law firm failed to present evidence that the terms of the fee agreement were reasonable, and (3) there are genuine issues of material fact as to whether the law firm made fraudulent representations that the Turcos relied upon to their detriment.

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

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

ANALYSIS

[3] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.[4] The evidence offered by the law firm in support of its motion for summary judgment included the contingent fee agreement and notice of attorney lien, the deposition of Louis, and the termination letter Louis delivered to the firm. These latter documents reflect Louis' dissatisfaction with the firm's services and his reasons for claiming that the amount of the fee was unreasonable. The law firm also offered the affidavit of an attorney who opined that the contingent fee agreement utilized in this case "is a reasonable fee agreement and is not excessive" and that the firm was experienced and enjoyed an "outstanding reputation" in the legal, insurance, and medical communities. However, this affidavit does not address the reasonableness of the fee itself.

The firm contends that the reasonableness of its claimed fee is not at issue. In its brief, the firm argues that it has not

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[2] *Ferer v. Aaron Ferer & Sons*, 272 Neb. 770, 725 N.W.2d 168 (2006); *Brodine v. Blue Cross Blue Shield*, 272 Neb. 713, 724 N.W.2d 321 (2006).

[3] *In re Adoption of Jaden M.*, 272 Neb. 789, 725 N.W.2d 410 (2006); *Ferer v. Aaron Ferer & Sons, supra* note 2.

[4] *Crouse v. Pioneer Irr. Dist.*, 272 Neb. 276, 719 N.W.2d 722 (2006); *Lovette v. Stonebridge Life Ins. Co.*, 272 Neb. 1, 716 N.W.2d 743 (2006).

claimed that the fee is owed "only because [it] is reasonable."[5] Instead, it argues that the fee computed in accordance with the contingent fee agreement "is owed because [the Turcos] agreed to pay that specific amount."[6] It further argues that whether that amount "has been shown to be 'reasonable' is not relevant" to its claim for breach of contract.[7] In support of this argument, the firm relies in part upon *Mecham v. Colby*,[8] which it cites for the proposition that written, unambiguous fee agreements between attorney and client are enforceable where the agreement contains a set or identifiable amount of the fee owed to the attorney.

In *Mecham*, we affirmed a summary judgment in favor of an attorney who had negotiated a settlement on behalf of a client involved in a complex dispute relating to an estate's inherited shares of corporate stock. After the settlement was consummated, the attorney billed the client in the amount of $2,000 and the client approved the statement in writing. The client later refused to pay the fee. We held that the client's written approval of the billing statement constituted a contract enforceable by the attorney, notwithstanding the client's subsequent claim that the settlement was not in her best interests. The record in *Mecham* included affidavits establishing that the attorney had achieved "the best possible settlement that was obtainable" for the client and that the "reasonable value" of his services was "between $7,500 and $10,000," far in excess of the $2,000 fee established in the contract.[9] The opinion does not recite any evidence placing the value of the attorney's services at less than the amount claimed. Thus, *Mecham* does not support an argument that an attorney fee contract is enforceable in the absence of some showing that the amount of the claimed fee is reasonable.

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[5] Brief for appellee at 9.

[6] *Id.* at 9-10.

[7] *Id.* at 10.

[8] *Mecham v. Colby*, 156 Neb. 386, 56 N.W.2d 299 (1953).

[9] *Id.* at 393, 56 N.W.2d at 302-03.

[4] Our jurisprudence recognizes that an attorney fee agreement is different from conventional commercial contracts.[10] The difference arises from the fact that an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility and are inconsistent with the character of the profession.[11]

The Code of Professional Responsibility, which was in effect when the legal services at issue in this case were performed, provided: "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."[12] Under the code, a fee was deemed "clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."[13] The code enumerated eight factors to be considered as guides in determining the reasonableness of the fee, one of which was "[w]hether the fee is fixed or contingent."[14] The Nebraska Rules of Professional Conduct, which are currently in effect, similarly provide that a lawyer "shall not make an agreement for, charge, or collect an unreasonable fee," and list the same eight factors to be considered in determining the reasonableness of a fee.[15] The official comment 3 to rule 1.5 specifically states: "Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule."

Citing authority from other jurisdictions, we have held that "[a] contingent fee which is not fair and reasonable can not be recovered in an action for attorney fees."[16] In *Kirby*, we held

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[10] See, *Baker v. Zikas*, 176 Neb. 290, 125 N.W.2d 715 (1964); *Byrne v. Hauptman, O'Brien*, 9 Neb. App. 77, 608 N.W.2d 208 (2000).

[11] *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000); *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998); *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995).

[12] Code of Professional Responsibility, Canon 2, DR 2-106(A).

[13] *Id.*, DR 2-106(B).

[14] *Id.*, DR 2-106 (B)(8).

[15] Neb. Ct. R. of Prof. Cond. 1.5(a) (rev. 2005).

[16] *Kirby v. Liska*, 214 Neb. 356, 362, 334 N.W.2d 179, 183 (1983).

that the evidence was insufficient to establish an oral contingent fee agreement. Noting that the record showed that the attorney "examined the record, filed some pleadings, wrote some correspondence, conferred with his client, obtained continuances, drafted a settlement offer, and was present when the settlement agreement was signed," we concluded that it did "not sustain an allowance of $65,340 for attorney fees upon the basis of an express agreement or upon a quantum meruit basis. Such an amount is excessive."[17]

[5] We conclude that an attorney fee computed pursuant to a contingent fee agreement is subject to the same standard of reasonableness as any other attorney fee. To hold otherwise would require us to ignore the ethical principle which prohibits a lawyer from making an agreement for, charging, or collecting an unreasonable fee. We agree with the observation of the Court of Special Appeals of Maryland that "'[e]ither a fixed or contingent fee, proper when contracted for, may later turn out to be excessive.'"[18] Under the Code of Professional Responsibility applicable to this case and the Nebraska Rules of Professional Conduct currently in effect, whether a fee is fixed or contingent is only one factor to be considered in determining whether the fee is reasonable.

[6,7] In a suit to recover an unpaid fee, "the lawyer has the burden of persuading the trier of fact, when relevant, of the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of the lawyer's services."[19] The value of an attorney's services is ordinarily a question of fact.[20] Here, the evidence offered by the law firm in support of its motion for summary judgment established that Louis signed a contingent fee agreement which was reasonable on its face and

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[17] *Id.* at 363, 334 N.W.2d at 183.

[18] *Brown & Sturm v. Frederick Rd.*, 137 Md. App. 150, 181, 768 A.2d 62, 79 (2001).

[19] Restatement (Third) of the Law Governing Lawyers § 42(2) at 301 (2000).

[20] *Sherrets, Smith v. MJ Optical, Inc.*, *supra* note 11; *Grimminger v. Cummings*, 176 Neb. 142, 125 N.W.2d 613 (1963).

included an acknowledgment that the law firm had offered Louis the alternative of an hourly fee billed monthly, which he declined. There is also evidence that the law firm is experienced and respected in handling personal injury suits. However, the law firm presented no evidence of the extent and value of the professional services which it performed during the period from July 8, 2004, when the contingent fee agreement was executed until September 14, 2004, when Louis terminated the representation. Without such evidence, there is no factual basis upon which to determine whether or not the claimed fee computed pursuant to the contingent fee agreement is reasonable. The district court erred in sustaining the law firm's motion for summary judgment because the firm did not meet its initial burden, as the moving party, of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Because this conclusion requires reversal, we do not reach the Turcos' other assignments of error.

CONCLUSION

For the reasons discussed, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GERRARD, J., concurring.

I agree with the majority opinion, which clearly explains the basic principles involved in this kind of fee dispute. It is well established that a contingent fee which is not fair and reasonable cannot be recovered in an action for attorney fees.[1] I write separately, in light of further proceedings in this case, because the parties have a fundamental disagreement on the evidence necessary for a lawyer to establish a prima facie case that the fees sought are reasonable. Further, the parties disagree on the evidence the client would then need to produce in order to show the existence of a material issue of fact precluding judgment as a matter of law on the issue of reasonableness in a contingency fee case.

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[1] See, *Kirby v. Liska*, 214 Neb. 356, 334 N.W.2d 179 (1983); *Byrne v. Hauptman, O'Brien*, 9 Neb. App. 77, 608 N.W.2d 208 (2000).

As our opinion explains, in a suit to recover an unpaid fee, the lawyer has the burden of proving the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of the lawyer's services.[2] A lawyer can establish the extent and value of his or her services in a contingency fee case by producing evidence showing, for example, the results obtained, the quality of the work, and whether the lawyer's efforts substantially contributed to the result.[3] We have also identified other factors relevant to the reasonableness of a contingency fee, such as the time and labor required, the novelty and difficulty of the legal issues involved, the skill required to do the work properly, and the experience, reputation, and ability of the lawyer performing the services.[4] While the pertinent factors will differ from case to case, generally, the inquiry should focus on the circumstances of the agreement and the work performed.[5]

At that point, the burden of going forward with evidence shifts to the client, and the client must object with specificity to demonstrate why the documented fees are not reasonable.[6] The client must, for instance, produce competent evidence disputing specific facts respecting the reasonableness of the fees or set forth the basis for a qualified opinion that the fees are unreasonable.[7] In particular, it will generally be insufficient to simply conclude that the size of a contingent fee, compared to the length of the litigation, makes the fee unreasonable. There

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[2] See Restatement (Third) of the Law Governing Lawyers § 42(2) (2000). See, also, *Byrne v. Hauptman, O'Brien, supra* note 1.

[3] See *McKenzie Const., Inc. v. Maynard*, 758 F.2d 97 (3d Cir. 1985). See, also, *King v. Fox*, 418 F.3d 121 (2d Cir. 2005).

[4] See *Kirby v. Liska, supra* note 1.

[5] See *King v. Fox, supra* note 3.

[6] *In re Ralph Lauren Womenswear, Inc.*, 204 B.R. 363 (S.D.N.Y. 1997). See, also, e.g., *Cloutier, Barrett, et al. v. Wax*, 604 A.2d 42 (Me. 1992); *Basin Credit Consultants, Inc. v. Obregon*, 2 S.W.3d 372 (Tex. App. 1999).

[7] See *id.* Compare, e.g., *Hinkle, Cox, et al. v. Cadle Co.*, 115 N.M. 152, 848 P.2d 1079 (1993).

are a number of reasons why, in any particular case, a contingency fee agreement may be more advantageous to a client than an hourly fee paid on a monthly basis. A contingency fee will generally be reasonable if the lawyer offered the client a free and informed choice between an hourly fee and a contingency fee, the contract provides for a fee within the range commonly charged by other lawyers in similar representations, and there was no subsequent change in circumstances that made the fee contract unreasonable.[8]

And while events may occur after a fee agreement was made so that a contingent fee arrangement that was fair in the first instance becomes unfair in its enforcement, courts should be reluctant to disturb contingent fee arrangements freely entered into by knowledgeable and competent parties.[9] A prompt and efficient attorney who achieves a fair settlement without litigation serves both the client and the interests of justice.[10] It should therefore be the unusual circumstance that a court refuses to enforce a fully informed contingent fee arrangement because of events arising after the contract's negotiation.[11]

> A contingent-fee contract . . . allocates to the lawyer the risk that the case will require much time and produce no recovery and to the client the risk that the case will require little time and produce a substantial fee. Events within that range of risks, such as a high recovery, do not make unreasonable a contract that was reasonable when made.[12]

In short, once a lawyer has established a prima facie case that a demanded fee is reasonable, judgment as a matter of law is precluded only if the client produces specific evidence on factors relevant to the reasonableness of the fee. Only at that point does the client show a genuine issue of material fact, so as to place the burden on the lawyer to persuade the trier of fact

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[8] See Restatement, *supra* note 2, § 34, comment *c*.

[9] *McKenzie Const., Inc. v. Maynard*, *supra* note 3.

[10] See *id.*

[11] See *id.*

[12] Restatement, *supra* note 2, § 34, comment *c*. at 250.

that the fee demanded is reasonable under the circumstances.[13] But because, as the majority opinion explains, the law firm in this case did not meet its initial burden, I agree that the summary judgment in this case should be reversed. I concur in the judgment.

CONNOLLY and MCCORMACK, JJ., join in this concurrence.

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[13] See Restatement, *supra* note 2, §§ 34 and 42.

GEORGETTE TADROS, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
735 N.W.2d 377

Filed July 13, 2007. No. S-05-1538.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, and when reviewing a question of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
2. **Actions: Parties.** Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) is limited to actions involving more than one defendant.
3. **Statutes: Intent.** Statutes which effect a change in common law or take away a common-law right should be strictly construed.
4. **Actions: Tort-feasors: Liability.** Under Neb. Rev. Stat. § 25-21,185.11(1) (Reissue 1995), when the claimant settles with a joint tort-feasor and that tort-feasor is no longer a defendant in the action, the proportionate share of the settling tort-feasor's liability, as determined by the trier of fact, is deducted from the claimant's claim against any nonsettling party joint tort-feasor.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded with directions.

Robert J. Hamer, Deputy Omaha City Attorney, for appellant.

Matthew G. Miller for appellee.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for amicus curiae Nebraska Association of Trial Attorneys.

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

McCORMACK, J.

NATURE OF CASE

We are asked to determine whether, under our contributory negligence statutes,[1] a joint tort-feasor defendant's liability for economic damages is reduced by the amount of a nonparty joint tort-feasor's settlement with the plaintiff or, instead, by the nonparty's proportionate share of liability regardless of the settlement amount. Section 25-21,185.11(1) states that in the event of settlement by the claimant with one joint tort-feasor, "[t]he claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact." The defendant in this case relies on § 25-21,185.11 to argue that its liability should be reduced by the nonparty tort-feasor's proportionate share of negligence, even though the plaintiff/claimant received less than that proportionate share in her settlement. The plaintiff argues that § 25-21,185.11 does not clearly abrogate the common-law rule that joint tort-feasors were jointly and severally liable and that any settlement with one reduces the liability of remaining tort-feasors only by the amount of the settlement.

BACKGROUND

The City of Omaha (City) appeals from a determination upon remand of apportionment of liability.[2] The underlying facts of the case are not in dispute. To summarize, Georgette Tadros was crossing West Center Road in Omaha, Nebraska, when she was seriously injured after being struck by a vehicle driven by James Bowley, Jr. Tadros had begun to cross West Center Road when the "walk" light on the crosswalk signal was illuminated, but the signal changed to red as she stepped from a median in the middle of the street. In setting the pedestrian clearance interval for the signal, the City had failed to provide sufficient time for pedestrians traveling at a normal speed to cross the intersection.

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[1] See Neb. Rev. Stat. §§ 25-21,185.07 to 25-21,185.12 (Reissue 1995).

[2] See *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005).

Tadros originally brought suit against both the City and Bowley, but later settled with Bowley for the amount of $35,000. In accordance with a joint stipulation of Tadros and Bowley, the court dismissed Bowley as a defendant in the case. The propriety of the court's dismissal of Bowley as a party defendant is not contested, and only Tadros and the City were parties to the proceedings upon remand. There is no suggestion that the City and Bowley acted in concert as part of a common enterprise or plan.

The trial court found that Tadros was 20-percent negligent in stepping off the median and into traffic, that Bowley was 30-percent negligent in failing to keep a proper lookout and exercise due care to avoid colliding with Tadros, and that the City was 50-percent negligent in its timing of the "walk" signal. The court found that Tadros suffered total economic damages in the amount of $1,258,999.81 and total noneconomic damages in the amount of $300,000.

Relying on § 25-21,185.10, the court concluded that the City and Bowley were jointly and severally liable to Tadros for the amount of economic damages not attributable to her contributory negligence, a total amount of $1,007,199.81. It determined that the City's liability for noneconomic damages was several only, and not joint. The court calculated that the City was responsible for 50 percent of Tadros' noneconomic damages, which would be $150,000. The court then added the $1,007,199.81 and $150,000 amounts and deducted the $35,000 settlement amount which Bowley paid to Tadros, for a total judgment against the City in the amount of $1,122,199.81. Pursuant to the limitations on recovery under Neb. Rev. Stat. § 13-926(1) (Reissue 1997), the judgment against the City was reduced to $1 million. The City appeals the district court's order.

ASSIGNMENT OF ERROR

The City asserts that in considering the effect of the pretrial settlement and release of Bowley, the trial court erred in reducing its liability for economic damages by the amount of the settlement and release, $35,000, rather than by $377,699.94, the amount representing Bowley's 30-percent proportionate share of responsibility for Tadros' injuries.

STANDARD OF REVIEW

[1] The meaning of a statute is a question of law, and when reviewing a question of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.[3]

ANALYSIS

Under Nebraska common law, an act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable for all damages, both economic and noneconomic, jointly and severally.[4] Under such joint and several liability, either tort-feasor may be held liable for the entire damage, and a plaintiff need not join all tort-feasors as defendants in an action for damages.[5] Also, in accordance with the underpinnings of joint and several liability, our common law follows the traditional rule[6] that if the plaintiff settles with one of the jointly and severally liable tort-feasors, then the plaintiff's recovery against the remaining tort-feasors is reduced by the actual settlement amount. This is often referred to as pro tanto reduction.[7]

However, for cases involving multiple defendants where contributory negligence is a defense, the Legislature has altered the common law.[8] We have explained that in cases falling under § 25-21,185.10, the Legislature has abrogated common law regarding noneconomic damages against joint tort-feasors not acting in concert by limiting a plaintiff's recovery of noneconomic damages from any one tort-feasor to that tort-feasor's

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[3] See *Zach v. Nebraska State Patrol, ante* p. 1, 727 N.W.2d 206 (2007).

[4] *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999).

[5] *Id.*

[6] See 22 Am. Jur. 2d *Damages* § 390 (2003).

[7] See, *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000). See, also, *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998); *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 131 N.W. 612 (1911).

[8] See §§ 25-21,185.07 to 25-21,185.12.

proportionate liability.[9] This proportionate share is often referred to as the pro rata share. Section 25-21,185.10 retains common law joint and several liability for economic damages. Thus, Tadros relies on § 25-21,185.10 in arguing that the trial court's decision to reduce the City's liability for economic damages by the pro tanto amount of her settlement with Bowley was correct.

[2] Because Bowley was no longer a defendant in Tadros' action, we conclude that § 25-21,185.10 is inapplicable to the question of apportionment of liability as between Bowley and the City. Section 25-21,185.10, by its terms, is limited to "action[s] involving more than one defendant." In addition, the joint and several liability for economic damages described in § 25-21,185.10 is "of each defendant." In *Maxwell v. Montey*,[10] we explained that if the action does not involve multiple party defendants, then § 25-21,185.10 is simply not applicable. The proper timeframe to consider whether there are multiple defendants is when the case is submitted to the finder of fact.

The joint tort-feasor in *Maxwell* was not dismissed pursuant to a settlement with the plaintiff, and we have never had occasion to consider the provisions of § 25-21,185.11 which specifically address the rights of the parties when a settlement is entered into between the claimant and a person liable to the claimant. The City argues that § 25-21,185.11 abrogates the common-law pro tanto reduction rule in favor of a pro rata reduction. Tadros, in contrast, argues that whether or not § 25-21,185.10 governs this case, § 25-21,185.11 does not abrogate the common-law pro tanto rule.

[3] It is true that statutes which effect a change in common law or take away a common-law right should be strictly construed.[11] Also, a construction which restricts or removes a common-law right should not be adopted unless the plain

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[9] See *Lackman v. Rousselle, supra* note 4.

[10] *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001).

[11] *Lackman v. Rousselle, supra* note 4.

words of the statute compel it.[12] But we agree with the City that § 25-21,185.11 has clearly abrogated common law with regard to the apportionment of liability between a party defendant joint tort-feasor and a nonparty settling tort-feasor.

Section 25-21,185.11 states in full:

> (1) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides. *The claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact.*
>
> (2) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall preclude that person from being made a party or, if an action is pending, shall be a basis for that person's dismissal, but the person's negligence, if any, shall be considered in accordance with section 25-21,185.09.

(Emphasis supplied.)

Section 25-21,185.09 states:

> Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. The jury shall be instructed on the effects of the allocation of negligence.

[4] As reflected above, § 25-21,185.11(1) plainly states that after the claimant settles with a joint tort-feasor, the claimant's claim against other persons "shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact." That the obligation is to be a "share" "determined by the trier of fact" precludes the idea that the "obligation" referred to in § 25-21,185.11(1) is the pro tanto amount

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[12] *Id.*

of the settlement with the injured party. Had the Legislature wished for a nonsettling party's share to be reduced simply by the settlement amount, an obligation which would neither represent a "share" nor necessitate a "determin[ation]" by the trier of fact, it could have easily done so. Instead, the language of § 25-21,185.11(1) is similar to the language of § 25-21,185.10, relating to the allocation of noneconomic damages amongst multiple defendants, "in direct proportion to that defendant's percentage of negligence."

Tadros argues that our decisions in *Jameson v. Liquid Controls Corp.*[13] and *Vowers & Sons, Inc. v. Strasheim*[14] hold otherwise. *Jameson* involved the settlement of a products liability claim, while *Vowers & Sons, Inc.* was a breach of contract action. Neither of those cases fell under the contributory negligence statutes or addressed § 25-21,185.11, and those cases are simply inapposite to this case.

Under the contributory negligence statutory scheme in Nebraska, joint tort-feasors who are "defendants" in an action "involving more than one defendant" share joint and several liability to the claimant for economic damages.[15] They are liable for the entire amount of the claimant's economic damages which are not chargeable to the claimant, so long as the claimant's contributory negligence is not equal to or greater than the total negligence of all persons against whom recovery is sought.[16] But, when the claimant settles with a joint tort-feasor, the claimant forfeits that joint and several liability. The claimant cannot recover from the nonsettling joint tort-feasor more than that tort-feasor's proportionate share in order to compensate for the fact that the claimant made settlement with another that may prove to be inadequate.

By deducting the pro rata settlement amount from the claimant's claim against any nonsettling party joint tort-feasor, finality of liability for the settling tort-feasor is accomplished as to

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[13] *Jameson v. Liquid Controls Corp., supra* note 7.

[14] *Vowers & Sons, Inc. v. Strasheim, supra* note 7.

[15] § 25-21,185.10.

[16] See § 25-21,185.09.

both the claimant and party defendant joint tort-feasors. This encourages settlement, and it is the policy of the law to encourage rather than discourage the settlement of controversies by the parties out of court.[17] This is the case because while a joint tort-feasor has a right to contribution against other joint tort-feasors when he or she discharges more than his or her proportionate share of the judgment,[18] the joint tort-feasor will not discharge more than his or her proportionate share as to the settling tort-feasor. In addition, fairness is achieved to the extent that the nonsettling tort-feasor will not be prejudiced by a settlement amount over which he or she had no control.

This scheme is in accordance with the Uniform Comparative Fault Act and the Restatement (Third) of Torts.[19] While it is true that the injured party, by choosing to settle with one or more of several joint tort-feasors, takes the risk of settling for too small an amount,[20] the claimant could also benefit in the event the settlement exceeds the settling tort-feasor's proportionate liability.[21] Reducing the claimant's claim against nonsettling joint tort-feasors by the pro rata, rather than the pro tanto, share of the settling tort-feasor's obligation, strikes a balance in the interests of encouraging settlement and fairness to all affected parties.

Because § 25-21,185.11 mandates reduction by the settling tort-feasor's proportionate share of liability as determined by the trier of fact, the trial court erred in failing to deduct that share of responsibility attributable to Bowley from Tadros' judgment for economic damages against the City. The trial court already determined the relative share of negligence for Tadros, the City, and Bowley, and there is no dispute before us as to

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[17] See *Snoke v. Beach*, 105 Neb. 127, 179 N.W. 389 (1920).

[18] *Royal Ind. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975).

[19] See, Unif. Comparative Fault Act § 6, 12 U.L.A. 147 (1996); Restatement (Third) of Torts: Apportionment of Liability § 16 (2000).

[20] See 3 Jacob A. Stein, Stein on Personal Injury Damages § 14:33 (Gerald W. Boston ed., 3d ed. 1997).

[21] See *id.*

that determination or as to the determination of total economic damages. Accordingly, we reverse the judgment and remand the cause with directions to enter a judgment against the City for $629,499.91 in economic damages, for a total award of economic and noneconomic damages of $779,499.91, as follows:

ECONOMIC:	$1,258,999.81	
	- 251,799.96	(Tadros' 20 percent)
	$1,007,199.85	
	- 377,699.94	(Bowley's 30 percent)
	$ 629,499.91	
NONECONOMIC:	$ 300,000.00	
	- 60,000.00	(Tadros' 20 percent)
	$ 240,000.00	
	- 90,000.00	(Bowley's 30 percent)
	$ 150,000.00	
TOTAL:	$ 629,499.91	
	+ 150,000.00	
	$ 779,499.91	

REVERSED AND REMANDED WITH DIRECTIONS.
STEPHAN, J., not participating.

THE TRAVELERS INDEMNITY COMPANY, APPELLEE, V.
INTERNATIONAL NUTRITION, INC., APPELLANT.
734 N.W.2d 719

Filed July 13, 2007. No. S-06-063.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts: Intent: Appeal and Error.** An insurance policy is a contract. In an appellate review of an insurance policy, the court construes the policy

as any other contract to give effect to the parties' intentions at the time the writing was made.

4. **Insurance: Contracts.** In construing an insurance contract, a court must give effect to the instrument as a whole and, if possible, to every part thereof.
5. ____: ____. While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
6. **Contracts: Statutes.** Statutes in existence at the time of the execution of a contract become part of the contract as if set forth therein.
7. **Prejudgment Interest.** Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004).
8. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
9. **Prejudgment Interest: Claims.** Prejudgment interest under Neb. Rev. Stat. § 45-103.02 (Reissue 2004) is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either the plaintiff's right to recover or the amount of such recovery.

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

James L. Quinlan, David J. Stubstad, and Russell A. Westerhold, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

CeCelia Ibson Wagner, of Smith, Schneider, Stiles & Serangeli, P.C., for appellee.

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

GERRARD, J.

International Nutrition, Inc., acquired workers' compensation insurance from The Travelers Indemnity Company (Travelers) through the State of Nebraska's assigned risk program. Soon after the policy term began, Travelers changed International Nutrition's classification code and retroactively applied the change, which resulted in an increase in International Nutrition's premium payments. Travelers sued International Nutrition for failure to pay the premiums. The primary issue presented in this appeal is whether Travelers had the authority to change International Nutrition's classification code and retroactively apply the change.

BACKGROUND

Assigned Risk Program

The Nebraska Workers' Compensation Act[1] requires, with few exceptions, that every employer carry workers' compensation insurance.[2] For employers who cannot acquire such insurance on the open market, the State of Nebraska has established a workers' compensation insurance program that allows employers to obtain insurance coverage under the state's assigned risk program.[3] At all times relevant to this case, Travelers was under contract with the state to serve as the sole provider of workers' compensation coverage to employers required to use the assigned risk program.

Under the assigned risk program, an employer's premium payment is determined by, among other things, the employer's annual payroll and classification code. Classification codes are assigned based on the general nature of the employer's business. Different types of businesses involve different levels of risk, and as a result, different levels of premiums apply. The classification codes are promulgated by the National Council on Compensation Insurance, Inc. (NCCI), a rating organization licensed in Nebraska to make and file rules, rating values, classifications, and rating plans for workers' compensation insurance. Pursuant to Travelers' contract with the State of Nebraska, Travelers is required to use the classification codes, rates, filing data, and forms filed by the NCCI and approved by the Nebraska Department of Insurance.

Two manuals published by the NCCI are relevant to this case, the "Basic Manual," which, among other things, promulgates rules for insurers, and the "Scopes of Basic Manual Classifications" or "Scopes Manual," which lists and describes the classification codes. The NCCI Basic Manual provides that when a correction in a classification results in an increased premium, the correction is retroactively applied to the start of

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[1] Neb. Rev. Stat. § 48-101 et seq. (Reissue 2004 & Cum. Supp. 2006).

[2] § 48-106.

[3] § 48-146.01.

the policy if the correction is made during the first 120 days of the policy.

INTERNATIONAL NUTRITION

International Nutrition is a company involved in the production and sale of nutritional and medicated supplements to the livestock and poultry industries. International Nutrition receives bulk raw materials, such as rice hulls and limestone, which are stored in large holding storage areas. Supplemental products such as medications and vitamins are then mixed into the bulk raw material. After the mixing is complete, the finished product is packaged into both 25- and 50-pound bags. International Nutrition describes its manufacturing operation as "primarily one of mixing and packaging." The finished product is then sold to International Nutrition's customers, including feed manufacturers, animal food manufacturers, feedlots, egg operations, and poultry farms. International Nutrition's administrative procedures and manufacturing practices are regulated by the U.S. Food and Drug Administration.

International Nutrition was unable to obtain workers' compensation insurance on the open market and, as a result, submitted an application for coverage under the assigned risk program. In its application, International Nutrition provided its estimated annual payroll and indicated that the work performed by a portion of its employees fell under the NCCI's job classification code 4611. Classification code 4611 applies to employers "engaged in the compounding, blending or packing of drugs, medicines or pharmaceutical preparations."

Given this information, Travelers extended coverage to International Nutrition on March 16, 2001, by issuing a binder letter and manual. The binder letter explained that it was only a temporary insurance contract and that International Nutrition would be receiving its new policy in approximately 20 days, at which point the binder letter would be canceled.

Included with the binder letter was a 6-page manual prepared by Travelers. Section V of this manual, entitled "Premium Audits," stated:

> In accordance with policy provisions, and so that you pay only what you owe, audits are required for all workers' compensation policies to determine accurate premiums.

> To confirm that your policy is priced accurately from the start, we may need to conduct a preliminary audit that involves a review of recent payroll and other business records within the first 90 days of coverage on new policies. If this is needed, an auditor will contact you to schedule a convenient time.

On March 22, 2001, Travelers sent a letter to International Nutrition's insurance agent, requesting a detailed description of International Nutrition's business. Travelers requested this information in order to verify that the classification codes listed on International Nutrition's application were correct. International Nutrition provided Travelers with a description of its business on April 4.

Travelers had issued the actual insurance policy to International Nutrition on March 30, 2001. Based on the information provided in International Nutrition's application, the policy included an estimated annual premium of $27,806 and classified a portion of International Nutrition's employees under classification code 4611.

The precise language of the policy will be set forth in greater detail below. Summarized, the policy provided that its terms could not be changed or waived except by endorsement. The policy further provided that the premiums would be determined by the relevant manuals. The policy explained that the work classifications in the policy were an estimate and that if they were inaccurate, then proper classifications would be assigned. The premium shown on the policy was also an estimate, and the final premium was to be determined later using the actual premium basis and proper classifications. The policy required International Nutrition to permit Travelers to audit its records and inspect its workplaces.

Classification Code Change

On May 22, 2001, a loss control consultant from Travelers performed a "Loss Prevention and Engineering Survey" on International Nutrition. The purposes of this survey were "to gain a better understanding of [International Nutrition's] operations and to discuss [International Nutrition's] loss prevention activities." Following the survey, the loss control consultant prepared a written survey report which provided, among other

things, a description of International Nutrition's operations. Although similar to the description provided by International Nutrition on April 4, this description contained additional details relating to International Nutrition's operations. The description in the survey report did not contain any information contradicting the information provided by International Nutrition in its April 4 business description.

In light of International Nutrition's description of its business operations and the results of the loss prevention and engineering survey, Travelers decided to change International Nutrition's classification code from 4611 to 2014. Classification code 2014 applies to "insureds engaged in the operation of grist mills where grains such as wheat, oats, barley, rye, rice and corn are milled." Code 2014 also applies to "[t]he manufacture of feed or feed additives for livestock and poultry . . . ."

On June 18, 2001, Travelers informed International Nutrition's insurance agent that it was changing International Nutrition's classification code. Travelers explained that a preliminary audit would be ordered to verify that the classification code change was correct and that it would suspend billing for the endorsement until the audit was complete. Also on June 18, Travelers issued an endorsement to the policy that added classification code 2014 and resulted in an additional estimated premium of $65,285.

Travelers conducted the preliminary audit and on August 17, 2001, informed International Nutrition's insurance agent that the change from classification code 4611 to 2014 was correct. The preliminary audit also revealed that International Nutrition had significantly underestimated the payroll for employees initially classified under code 4611 in its original application. International Nutrition had estimated in its application that the annual payroll for employees classified under code 4611 was $549,000. However, the preliminary audit revealed that for these same employees now classified under code 2014, the payroll was actually $807,797. Travelers issued an endorsement reflecting these changes on August 17, the result of which was an additional estimated premium of $49,847.

International Nutrition disagreed with the change in classification code and on October 9, 2001, informed Travelers

that it had requested an NCCI inspection to verify the validity of the classification code change. Travelers agreed to suspend billing for the endorsement pending the outcome of the NCCI inspection. NCCI performed an onsite survey on October 31 and issued an "Inspection & Classification Report." The inspection report confirmed that classification code 2014 was the appropriate classification.

International Nutrition continued to dispute the change in classification code by sending various letters of protest to NCCI and Travelers. In spite of International Nutrition's letters, both NCCI and Travelers maintained that the change in classification code was correct. On March 9, 2002, Travelers canceled the policy for nonpayment of premiums. Travelers conducted a final audit and sent International Nutrition a demand for payment of a final premium of $113,571. International Nutrition paid Travelers $33,367 and also tendered a final premium payment of $26,110.38 that Travelers refused.

District Court's Decision

Travelers sued International Nutrition for breach of contract and sought payment of $83,472, representing the unpaid premium balance. International Nutrition filed a counterclaim, seeking a declaratory judgment that it had no legal or equitable obligation to pay any additional amounts to Travelers, that Travelers breached the policy by retroactively changing the classification codes and increasing the premiums, and that Travelers engaged in unfair and deceptive acts in violation of the Consumer Protection Act.[4] The parties filed cross-motions for summary judgment.

The district court granted Travelers' motion for summary judgment and denied International Nutrition's motion. The court awarded Travelers $83,472, along with prejudgment interest. In granting Travelers' motion, the court concluded that Travelers' conduct did not constitute a breach of the policy because the plain and unambiguous policy language allowed Travelers to audit International Nutrition, change the classification code, and retroactively charge a higher premium. The

[4] Neb. Rev. Stat. § 59-1601 et seq. (Reissue 2004).

court further determined that the change in classification code was correct. In rejecting International Nutrition's counterclaim under the Consumer Protection Act, the court explained that there was no evidence showing that Travelers had engaged in unfair or deceptive acts or conduct. International Nutrition appealed.

ASSIGNMENTS OF ERROR

International Nutrition assigns, consolidated, restated, and renumbered, that the district court erred in (1) overruling its motion for summary judgment and granting Travelers' motion for summary judgment; (2) determining that it breached the policy of insurance between it and Travelers; (3) determining that Travelers did not breach the insurance policy by retroactively applying the change in classification code and failing to conduct a preliminary audit, as set forth in the terms of the policy; (4) concluding that the clear and unambiguous language of the insurance policy allowed Travelers to rely on the NCCI Basic Manual; (5) finding that classification code 2014 is the correct classification code; (6) awarding Travelers a premium calculated pursuant to the assigned risk rate, as opposed to the open market rate, after changing the classification code; (7) finding that Travelers' conduct did not constitute a breach of its duty of good faith and fair dealing; (8) concluding that the Consumer Protection Act did not apply; and (9) awarding Travelers prejudgment interest.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[5] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[6]

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[5] *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007).

[6] *Id.*

ANALYSIS

TRAVELERS' AUTHORITY TO RETROACTIVELY APPLY CLASSIFICATION CODE CHANGE

We begin with International Nutrition's argument that the district court erred in determining that the insurance policy granted Travelers the authority to retroactively apply the change in classification code and increase the premiums. International Nutrition argues that there are no provisions in the policy that expressly grant Travelers this authority and that the language in the policy on which the district court relied to support its conclusion is ambiguous and should have been construed against Travelers.

[3-5] An insurance policy is a contract. In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made.[7] In construing an insurance contract, a court must give effect to the instrument as a whole and, if possible, to every part thereof.[8] While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.[9] Guided by these principles, we agree with the district court and conclude that the provisions of the insurance policy issued to International Nutrition, when considered together, gave Travelers the authority to retroactively change International Nutrition's classification code and charge the resulting increased premium when the initial premium was based on an incorrect classification code.

The insurance policy expressly states that the initial premium is only an estimated premium. The policy, in part five, paragraph B, under the title "Classifications," provides that the rate and premium basis stated on the information page of

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[7] *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005).

[8] *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000).

[9] *Boutilier v. Lincoln Benefit Life Ins. Co.*, 268 Neb. 233, 681 N.W.2d 746 (2004).

the policy is "assigned based on an estimate of the exposures [International Nutrition] would have during the policy period." That same paragraph further states that "[i]f your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy." Part five, paragraph E, under the title "Final Premium," provides that "[t]he premium shown on the Information Page, schedules, and endorsements is an estimate." This provision further explains that "[t]he final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy."

Furthermore, the policy contains provisions under which Travelers is given the authority to perform inspections and audits to determine the correct premium to be charged. Part five, paragraph G, under the title "Audit," states that "[y]ou [International Nutrition] will let us examine and audit all your records that relate to this policy" and "[w]e [Travelers] may conduct the audits during regular business hours during the policy period and within three years after the policy period ends." This paragraph further explains that the "[i]nformation developed by audit will be used to determine final premium." Part six, paragraph A, entitled "Inspection," states that Travelers has "the right, but [is] not obliged to inspect [International Nutrition's] workplaces at any time." The paragraph further notes that these inspections are not safety inspections, but "relate only to the insurability of the workplaces and the premiums to be charged."

Travelers' insurance policy plainly stated that International Nutrition's initial premium was only an estimate and subject to change as a result of an audit or inspection performed by Travelers. The policy further stated that if International Nutrition's initial classifications were incorrect, Travelers would assign the proper classifications, rates, and premium basis through an endorsement to the policy. These provisions clearly and unambiguously gave Travelers the authority to retroactively change International Nutrition's classification codes and increase the premium payments when the initial premium

was based on what was later determined to be an incorrect classification code.[10]

[6] We further conclude that the "Our Manuals" provision in Travelers' policy incorporated the NCCI Basic Manual into the policy. The law generally is that statutes in existence at the time of the execution of a contract become part of the contract as if set forth therein.[11] Accordingly, the policy at issue in this case must be read in light of § 48-146.01, pursuant to which Travelers entered into a binding agreement with the state to become the state's assigned risk insurer. Under this agreement, Travelers is obligated to use the classification codes, rates, filing data, and forms filed by the NCCI and approved by the Nebraska Department of Insurance. One of the documents, created by the NCCI and relevant to Travelers' insurance policy, is the NCCI Basic Manual. The NCCI Basic Manual clearly states that if a correction in a classification is effective "[d]uring the first 120 days of the policy term," then the correction is applied "[r]etroactively to the inception of the policy."

The insurance policy issued by Travelers provided that all premiums for the policy will be determined by "our manuals of rules, rates, rating plans and classifications." International Nutrition argues that this phrase is ambiguous and cannot be read to include the NCCI Basic Manual. International Nutrition contends that because the NCCI Basic Manual was not actually produced by Travelers, it cannot be considered one of "our manuals" under the plain language of the policy. We disagree.

International Nutrition's argument ignores the context in which the term is used in the policy and the legal framework in which the assigned risk program operates. Travelers does not have the authority to create and apply its own classification codes, rates, filing date, or forms. Rather, Travelers is obligated to use those filed by the NCCI and approved by the state. Because of this requirement, the "our manuals" provision in

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[10] Compare, e.g., *Savant Ins. Ser. v. Central Oil and Supply*, 821 So. 2d 623 (La. App. 2002); *Great American Ins. Co. v. Nova-Frost, Inc.*, 362 N.W.2d 358 (Minn. App. 1985). See, also, *Nationwide Mut. Ins. v. Ed Soules Const. Co.*, 397 So. 2d 775 (Fla. App. 1981).

[11] *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986).

the policy cannot be understood without reference to the NCCI publications. And in any event, the 120-day provision from the NCCI Basic Manual simply supplements the clear language of the policy with respect to estimated and final premiums.

In sum, the insurance policy states that the initial premium was only an estimate and that a final, actual premium would be determined by an audit. The policy explained that the actual premium would be based on the proper classification codes and rates that lawfully apply. The policy explained that if the final premium was lower than the estimated premium, Travelers would refund the difference, but if the final premium was higher, International Nutrition would be billed for the difference. And finally, the policy incorporated the NCCI Basic Manual that explicitly provides Travelers the authority to correct classification codes and, if the correction is made within the first 120 days of the policy term, apply the correction retroactively. We conclude that the provisions of the insurance policy, when considered together, clearly and unambiguously grant Travelers the authority to make classification code corrections and retroactively apply the increased premiums.

The undisputed evidence in the record shows that Travelers notified International Nutrition of the change in classification code on June 18, 2001, which is 95 days after the policy took effect on March 15, 2001. Because Travelers made the classification code change within the first 120 days of the policy term, Travelers was entitled to apply the classification code change retroactively.

Travelers' Failure to Perform Preliminary Audit Within 90 Days of Coverage

International Nutrition contends that Travelers' failure to conduct a preliminary audit within the timeframe set forth in the binder manual resulted in a waiver of Travelers' right to change the classification code and retroactively increase the premiums. The binder manual, issued by Travelers on March 16, 2001, served as a temporary insurance contract until the actual policy was delivered. The binder manual provided, as previously stated, that to confirm that the policy was priced accurately, Travelers "may need to conduct a preliminary audit

that involves a review of recent payroll and other business records within the first 90 days of coverage on new policies." The binder manual further explained that "[i]f this is needed, an auditor will contact you to schedule a convenient time."

It is undisputed that Travelers did not conduct a preliminary audit within the first 90 days of coverage. However, contrary to International Nutrition's argument, Travelers' decision to not perform a preliminary audit did not result in a waiver of Travelers' right to conduct a later audit and change the classification code. The plain language of the binder manual clearly provides that the preliminary audit was discretionary.

Both the audit and the inspection clauses in the insurance policy grant Travelers the right to perform audits and inspections throughout the policy period. The audit clause states that International Nutrition "will let [Travelers] examine and audit all [its] records that relate to this policy" and that Travelers "may conduct the audits . . . during the policy period and within three years after the policy period ends." The inspection clause in the policy states that Travelers has "the right . . . to inspect [International Nutrition's] workplaces at any time" and that these inspections relate to "the insurability of the workplaces and the premiums to be charged."

We conclude that Travelers was not obligated to conduct a preliminary audit, and its decision not to do so did not waive Travelers' right under the policy to correct International Nutrition's classification code and retroactively apply the premium increase.

NCCI Classification Code 4611 Versus Code 2014

We next address International Nutrition's contention that the district court erred in determining that code 2014, as opposed to code 4611, was the correct classification code. The relevant facts regarding International Nutrition's business description, as summarized above, are not in dispute.

The description for classification code 2014, as set forth in the NCCI Scopes Manual, provides in relevant part:

> Code 2014 is applied to insureds engaged in the operation of grist mills where grains such as wheat, oats, barley, rye, rice and corn are milled.

> The classification contemplates the receiving and storage of the grain in grain elevators, storage bins and hoppers or warehouses. The processing operations involve the use of mechanical equipment to clean, mill, mix and package the finished grain. Equipment such as screens, separators, scrubbers and brushes, mechanical grinders or rolling mills, mixing hoppers and mechanical bagging or packaging machines are utilized.
>
> The manufacture of feed or feed additives for livestock and poultry is also covered under Code 2014. While the process generally involves grinding operations, there can be extensive mixing, blending and packaging operations.

Classification code 4611 provides in relevant part:

> Code 4611 is applied to insureds engaged in the compounding, blending or packing of drugs, medicines or pharmaceutical preparations. The Code 4611 risk does not manufacture any of the ingredients that comprise the foregoing but receives the ingredients from others along with other miscellaneous ingredients such as sugars, starches, oils, extracts, flavorings and colorings.
>
> . . . .
>
> Code 4611 operations may involve simple hand or machine mixing or blending where no chemical reaction processes are involved.

Although Travelers' auditor, in the final audit report, noted that International Nutrition's operations had characteristics of both classification codes, the auditor ultimately applied classification code 2014 to International Nutrition's payroll. International Nutrition contends that given its business operations and the foregoing classification code descriptions, the application of code 2014 was incorrect. International Nutrition argues that code 2014 is intended to apply to businesses "'engaged in the operation of grist mills'" and to businesses involved in "'the receiving and storage of the grain in grain elevators, storage bins and hoppers or warehouses.'"[12] International Nutrition emphasizes that it does not operate a grist mill, nor

[12] Brief for appellant at 33.

does it receive and store grain in elevators, bins, or warehouses. International Nutrition argues that code 4611 is the correct classification.

While International Nutrition's business operations do not fit perfectly into either classification code, we agree with Travelers, the NCCI, and the district court that the most accurate classification code for International Nutrition's business is code 2014. International Nutrition's argument for why code 2014 is not correct is primarily based on the fact that International Nutrition does not operate a grist mill or engage in the milling or grinding of grain.

However, as correctly noted by Travelers and the NCCI, code 2014 expressly applies to the "manufacture of feed or feed additives for livestock and poultry," which is an accurate description of International Nutrition's business. The undisputed evidence establishes that International Nutrition is involved in the production and sale of supplements to the livestock and poultry industries. Moreover, code 2014 states that "[w]hile the process generally involves grinding operations, there can be extensive mixing, blending and packaging operations." Although International Nutrition's process does not involve grinding, its manufacturing operation is "primarily one of mixing and packaging" which, as noted above, fits within the description of code 2014.

A classification analyst with the NCCI, in a letter to International Nutrition, gave an accurate explanation of why code 2014 is the correct classification. In his letter, he stated:

> Please note that while not every classification will fit every insured perfectly, classification seeks to find the one classification that best describes the business. We understand that your business does not engage in the grinding typically found in insureds assigned to Code 2014. However, your business does engage in extensive mixing and packaging that is typically found in insureds assigned to Code 2014. While both Codes 2014 and 4611 contemplate packaging, the packaging typically found in risks classified to 4611 is in small pharmaceutical quantities (like a bottle of pills) not in the bulk bags contemplated by Code 2014. We also understand that [your]

business manufactures feed additives and medicated feed for livestock.

Classification codes are intended to provide insurers with a categorical way of assessing the risks associated with providing workers' compensation coverage to employers. In this case, code 2014 is a more accurate description of International Nutrition's business as it relates to the duties and hazards faced by its employees. We conclude that the district court, as a matter of law, correctly determined that classification code 2014 is the proper classification code to be applied to International Nutrition.

Open Market Rate Versus Assigned Risk Rate

International Nutrition argues that in retroactively applying the increased premium, Travelers incorrectly applied the assigned risk rate instead of the lower open-market-based rate when calculating the premium payment. International Nutrition reasons that had Travelers originally assigned classification code 2014, International Nutrition could have obtained workers' compensation insurance on the open market and, as a result, paid a lower premium. Accordingly, International Nutrition claims that the lower, open-market-based rate should have been the rate used by Travelers. International Nutrition cites no authority for this contention, and we are not persuaded by its argument.

To suggest that Travelers should have applied the open-market-based rate as opposed to the assigned risk rate, as urged by International Nutrition, ignores the fact that once an insured has applied for coverage through the assigned risk program, the insurance provider is required to apply the assigned risk rates. As previously noted, pursuant to Travelers' contract with the state, Travelers was required to use the classification codes, rates, filing data, and forms filed by the NCCI and approved by the Nebraska Department of Insurance. Travelers did not have the option of applying any rate other than the assigned risk rates. International Nutrition applied for coverage through the assigned risk program, and that is what it received. International Nutrition's argument is without merit.

PREJUDGMENT INTEREST

[7-9] International Nutrition argues that the district court erred in awarding prejudgment interest. Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004),[13] and whether prejudgment interest should be awarded is reviewed de novo on appeal.[14] Prejudgment interest under § 45-103.02 is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either the plaintiff's right to recover or the amount of such recovery.[15] A two-pronged inquiry is required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both.[16]

International Nutrition argues that there was a reasonable controversy regarding Travelers' right to recover the retroactively assessed premiums. We disagree. Based on our analysis above, we conclude that Travelers' right to recover its unpaid premiums was established beyond reasonable controversy. The district court did not err in concluding that prejudgment interest should be awarded.

Our conclusion that Travelers had the authority, under the terms of the insurance policy, to retroactively apply the change in classification code is otherwise dispositive of this appeal. Therefore, we do not address International Nutrition's remaining assignments of error.

CONCLUSION

We conclude that given the plain and unambiguous language of the insurance policy and the application of the NCCI Basic Manual, Travelers had the authority to correct International Nutrition's classification code and retroactively apply the corresponding change in premium. Travelers did not breach the insurance contract, nor did it waive its right to change the classification code as a result of its decision not to

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[13] *IBP, inc. v. Sands*, 252 Neb. 573, 563 N.W.2d 353 (1997).

[14] *Ferer v. Aaron Ferer & Sons*, 272 Neb. 770, 725 N.W.2d 168 (2006).

[15] *Id.*

[16] *Id.*

perform a preliminary audit within the first 90 days of coverage. Travelers did not use an incorrect premium rate when it applied the assigned risk rate to calculate International Nutrition's premium. And the district court did not err in awarding Travelers prejudgment interest. We, therefore, affirm the judgment of the district court.

AFFIRMED.

GLAD TIDINGS ASSEMBLY OF GOD, A NEBRASKA NOT-FOR-PROFIT CORPORATION, APPELLANT AND CROSS-APPELLEE, V. NEBRASKA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD, INC., A NEBRASKA NOT-FOR-PROFIT CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

734 N.W.2d 731

Filed July 13, 2007. No. S-06-145.

1. **Declaratory Judgments: Appeal and Error.** In a declaratory judgment action treated as an action at law, an appellate court does not disturb factual determinations unless they are clearly wrong.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Trial: Witnesses: Appeal and Error.** In a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of the witnesses, and we do not reweigh the evidence on appeal.
5. **Corporations: Contracts.** To constitute a director's conflicting interest transaction, there must first be a transaction by the corporation, its subsidiary, or controlled entity.
6. **Corporations: Contracts: Words and Phrases.** The term "transaction" under Neb. Rev. Stat. § 21-1987 (Reissue 1997) generally connotes negotiations or a consensual bilateral arrangement between the corporation and another party or parties that concern their respective and differing economic rights or interests—not simply a unilateral action by the corporation, but, rather, a "deal."
7. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate it is entitled to judgment as a matter of law.

8. ____: ____. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. Then, the burden of producing evidence shifts to the party opposing the motion.

Appeal from the District Court for Buffalo County, PAUL W. KORSLUND, Judge, on appeal thereto from the County Court for Buffalo County, GRATEN D. BEAVERS, Judge. Judgment of District Court affirmed.

Jack W. Besse, of Knapp, Fangmeyer, Ashwege, Besse & Marsh, P.C., for appellant.

Jerald L. Rauterkus and Jason R. Yungtum, of Erickson, Sederstrom, P.C., for appellees.

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

CONNOLLY, J.

Glad Tidings Assembly of God (Glad Tidings) brought this action against the Nebraska District Council of the Assemblies of God, Inc. (District Council), and members of Glad Tidings' board of directors (Board). Glad Tidings alleged that the Board acted outside its authority when it closed Glad Tidings and transferred its property to the District Council.

This appeal presents two issues: (1) whether church members voted to close the church and (2) whether a conflict of interest existed involving directors who were also District Council officials. The county court found that by standing in unison, the church members voted to close the church, and that the directors did not have a conflict of interest. The district court affirmed.

We conclude that (1) when the church members stood in unison, they voted to close the church, and the church property reverted to the District Council under Glad Tidings' bylaws, and (2) no transaction occurred which would subject the directors to liability. We affirm.

BACKGROUND

CHURCH ORGANIZATION

Glad Tidings is a church in Gibbon, Buffalo County, Nebraska. It is a district-affiliated church of the District Council, meaning

it has fewer than 20 members. Glad Tidings, a Nebraska nonprofit corporation, owns property in its name, including real estate. Under Glad Tidings' constitution and bylaws, however, all of its property reverts to the District Council if it ceases to function as a church.

In Nebraska, the District Council is the governing body for all Assemblies of God churches. It consists of 10 presbyters, nominated from 10 geographic sections throughout the state, and 3 elected officers: a superintendent, assistant superintendent, and a secretary-treasurer. The next level of governance for a district-affiliated church is the church's board of directors. Glad Tidings' Board consisted of the District Council superintendent, the geographic presbyter from Glad Tidings' section, and Glad Tidings' pastor. At all relevant times, Robert Nazarenus, the superintendent; Robert Wine, the presbyter; and Alex Brodine, the local pastor, made up Glad Tidings' Board. Wine also served as the pastor of New Life Assembly in Kearney, Nebraska (New Life), and Brodine served in a mentorship position at New Life.

District-affiliated churches may also have an advisory board, which serves under the District Council and the church's board of directors. Glad Tidings previously had an advisory board consisting of three church members; however, two of the advisory board members resigned in July 2003. The church did not appoint anyone to replace them, and the board has since ceased to function.

Glad Tidings' Operational Difficulties

For several years, Glad Tidings had operational problems. Dorothy Miller, a member of Glad Tidings for about 10 years, began serving on the advisory board in January 2003. She testified that the congregation had problems with a new pastor who came to Glad Tidings in June 2001. Miller stated the pastor's spending concerned the church members. She also stated tensions arose between the church and the District Council because the District Council failed to give sufficient help. The record reflects that for several years, Glad Tidings lacked leadership and direction. The District Council believed that the church had failed in evangelization, discipleship, and growth.

In August or September 2003, the District Council appointed Brodine as an interim pastor. The District Council and the Board decided that Glad Tidings was dysfunctional and needed significant change. The Board presented three options to the congregation: (1) appoint a new pastor and continue the status quo, (2) close the church and "replant" it (i.e., reopen it with a fresh start), or (3) affiliate with New Life in Kearney. The Board members, however, expressed that continuing the status quo was not a good option, and they would not appoint a new pastor.

GLAD TIDINGS CLOSES

On January 18, 2004, Wine and Brodine held a meeting with the Glad Tidings congregation to decide the church's future. They discussed whether to join with New Life. During the meeting, the record shows the members clearly did not want to join with New Life; Miller stood up and stated that she did not want to become a part of New Life and that if Glad Tidings were going to close, she wanted it to do so immediately. Then, the other church members stood as well. Wine testified that he asked if by standing, the members were showing that they wanted to close the church and have the property revert to the District Council. Wine and Brodine testified that the members confirmed that was their intent. But Glad Tidings contends the members were only standing to show that they would not join New Life—not that they wanted to close the church.

After the January 18, 2004, meeting, the District Council required that Glad Tidings members turn over all church property to it. The property included a safe-deposit box containing church documents and a certificate of deposit worth about $2,500. Brodine closed Glad Tidings' checking and savings accounts containing about $1,400. Wine testified that the District Council combined Glad Tidings' funds with New Life's general fund and used it to pay Glad Tidings' utilities and maintenance expenses.

Glad Tidings has not held church services since January 18, 2004, and church members have not had access to the building because the District Council changed the locks on January 21. New Life has used the church building for ministry activities in the Gibbon community. Glad Tidings still exists as a nonprofit corporation.

GLAD TIDINGS' LAWSUIT

Glad Tidings brought this action against the District Council and the Board members. It sought a declaration that the Board exceeded its authority by transferring the church assets to the District Council. Glad Tidings alleged that the members did not vote to close the church or dispose of the property. The county court, however, determined that the members signified their vote to close the church by standing with Miller at the January 18, 2004, meeting. Further, the court found they were aware that by voting to close the church, they were also voting to dispose of the property because the property would revert to the District Council.

Glad Tidings had also argued that board members Wine and Nazarenus had conflicts of interest because they held positions on the District Council and benefited from receiving Glad Tidings' property. Nevertheless, the county court found no genuine issue of material fact regarding a conflict of interest and entered summary judgment for the District Council.

Glad Tidings appealed to the district court. The district court affirmed the county court's decision.

ASSIGNMENTS OF ERROR

Glad Tidings assigns, renumbered and restated, that the trial court erred in (1) finding that church members voted to close the church and dispose of its assets and (2) granting summary judgment to the District Council and the Board regarding whether the Board had conflicts of interest.

On cross-appeal, the District Council and the Board assign, restated, that the trial court erred in failing to grant it summary judgment because the First Amendment precluded the adjudication of the case.

STANDARD OF REVIEW

[1] In a declaratory judgment action treated as an action at law, we do not disturb factual determinations unless they are clearly wrong.[1]

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue

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[1] See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[3]

ANALYSIS

The Church Members Voted to Close the Church

Glad Tidings contends that its members did not authorize the Board to close the church and dispose of its property. Glad Tidings relies on Neb. Rev. Stat. § 21-19,126 (Reissue 1997). This statute permits a nonprofit corporation to "dispose of all or substantially all of its property" when the transaction is approved "[b]y the members by two-thirds of the votes cast or a majority of the voting power," unless the corporation's bylaws require a greater vote. Glad Tidings' bylaws require a two-thirds vote by the membership present at a regular or special meeting for any assembly property to be "sold, leased, mortgaged, or otherwise alienated." The bylaws also provide that if the assembly "ceases to function as a church body," its property shall revert to the District Council.

Glad Tidings argues that the action the members took at the January 18, 2004, meeting was not a vote either to close the church or to dispose of its property. Church members testified that they did not vote to close the church by standing in unison. Instead, they were only opposed to joining New Life. Yet according to Wine and Brodine, Wine asked the members whether by standing, they were voting to close the church and transfer the church property to the District Council. Wine and Brodine further testified that the members confirmed this was their intent, verbally and nonverbally, and that no one objected.

[4] The record shows conflicting evidence before the county court. In a bench trial, the judge sitting as the trier of fact is

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[2] *Willet v. County of Lancaster*, 271 Neb. 570, 713 N.W.2d 483 (2006).

[3] *Brodine v. Blue Cross Blue Shield*, 272 Neb. 713, 724 N.W.2d 321 (2006).

the sole judge of the credibility of the witnesses, and we do not reweigh the evidence on appeal.[4] Here, the county court determined that—by standing in unison—the members voted to close the church. It also found the members knew such a vote would cause the church property to revert to the District Council.

Glad Tidings argues, however, that no vote occurred because the church did not follow the proper procedure to take a vote, i.e., by using motions and seconds. Neither Glad Tidings' bylaws nor Nebraska statutes require a particular procedure.[5] A "vote" can be expressed "by ballot, show of hands, or other type of communication."[6] For example, a "standing vote" occurs when each voter "stand[s] up when his or her side of the question is counted," and a "voice vote" can occur when "the voters collectively [answer] aloud."[7] Wine testified he did not use formal parliamentary procedure so the meeting would not feel "harsh or cold" and to avoid intimidating the small group. Despite the lack of formality, the congregation expressed its decision regarding the church's future through standing, nodding, and verbally responding when Wine questioned the members about their intent.

We conclude that the congregation voted to close the church. The church members were aware that by closing the church, the church property would revert to the District Council by operation of the bylaws. The district court did not clearly err in determining that the members voted to close the church and dispose of the property.

No Conflict of Interest Transaction Occurred Under § 21-1987

Glad Tidings contends that Wine and Nazarenus had conflicts of interest because they were on Glad Tidings' Board and held positions with the District Council, which received Glad Tidings' property when it closed. Neb. Rev. Stat. § 21-1987

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[4] *Waite v. A.S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991).

[5] See Neb. Rev. Stat. § 21-1914(32) (Reissue 1997).

[6] Black's Law Dictionary 1606 (8th ed. 2004).

[7] *Id.* at 1607.

(Reissue 1997) defines a conflict of interest transaction as "a transaction with the corporation in which a director of the corporation has a direct or indirect interest." Glad Tidings alleges that the transfer of property to the District Council was a transaction under this section. The District Council counters that § 21-1987 does not apply because no transaction occurred.

The Nebraska Nonprofit Corporation Act does not define the term "transaction." The Model Nonprofit Corporation Act, upon which Nebraska's act is based, is also silent on what comprises a transaction. However, the Model Business Corporation Act (MBCA) contains a similar provision in § 8.60. And the comments provide guidance regarding what is a transaction.

[5,6] The official comment to § 8.60 states that "[t]o constitute a director's conflicting interest transaction, there must first be a transaction by the corporation, its subsidiary, or controlled entity . . . ."[8] The introductory comment to subchapter F, in which § 8.60 is contained, elaborates further:

> [T]he subchapter is applicable only when there is a "transaction" by or with the corporation. For purposes of subchapter F, "transaction" generally connotes negotiations or a consensual bilateral arrangement between the corporation and another party or parties that concern their respective and differing economic rights or interests—not simply a unilateral action by the corporation but rather a "deal."

In *Mueller v. Zimmer*,[9] the Wyoming Supreme Court consulted the MBCA's comments in addressing a conflict of interest argument under a statute identical to § 21-1987. The corporation managed a recreational residential subdivision, and it had a policy of reimbursing directors for expenses incurred while performing their duties. One director was also a partner in a law firm, and he used his law firm's resources in performing his duties as a director. He then sought reimbursement for the expenses incurred by the law firm. The corporation's members alleged that the reimbursement was a conflict-of-interest transaction, which required specific board approval. The Wyoming

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[8] 2 Model Business Corporation Act Ann. § 8.60, official comment at 8-382 to 8-383 (3d ed. 2002).

[9] *Mueller v. Zimmer*, 124 P.3d 340 (Wyo. 2005).

court, however, determined that under the MBCA's definition, a transaction had not occurred. The court observed that the MBCA's definition is also consistent with the plain meaning of the word:

> 1. The act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract. 2. Something performed or carried out; a business agreement or exchange. 3. Any activity involving two or more persons. 4. *Civil law.* An agreement that is intended by the parties to prevent or end a dispute and in which they make reciprocal concessions.[10]

The court in *Mueller* held that the reimbursement of a director's expenses was not the type of corporate action the Legislature designed the statute to cover. No negotiations, no bilateral arrangement, and no "'deal'" occurred between the corporation and another party.[11] Instead, the reimbursement was a policy choice.

We conclude that the MBCA's description of the term "transaction" is the appropriate definition of that term under § 21-1987. As in *Mueller*, no negotiations or mutual agreement occurred between the parties that would constitute a transaction as that term is used in the Nebraska Nonprofit Corporation Act. Instead, the church members voted to close the church. As stated in Glad Tidings' bylaws, church policy mandated that the assets reverted to the District Council when the church ceased to function. Summing up, the record does not show a "deal" between Glad Tidings and the District Council.

[7,8] In reviewing the county court's granting summary judgment, we look to these familiar principles: Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[12] The party moving for summary judgment has the burden

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[10] Black's Law Dictionary, *supra* note 6 at 1535. See, also, *Mueller v. Zimmer, supra* note 9.

[11] *Mueller v. Zimmer, supra* note 9, 124 P.3d at 358.

[12] *Willet v. County of Lancaster, supra* note 2.

to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate it is entitled to judgment as a matter of law.[13] A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. Then, the burden of producing evidence shifts to the party opposing the motion.[14] The undisputed facts show that no transaction occurred because no agreement or negotiations took place between the District Council and Glad Tidings for the transfer of the property. Instead, the property reverted to the District Council by operation of Glad Tidings' bylaws.

CONCLUSION

The Board did not violate § 21-19,126 by transferring Glad Tidings' property. The church members voted to close the church, and as a result, the property reverted to the District Council through the bylaws. Also, the transfer of property was not a transaction under § 21-1987 because it was the result of an internal decision by the corporation, instead of a bilateral arrangement with another party. Thus, the conflict-of-interest provision does not apply. Having determined that the Board legally transferred Glad Tidings' property to the District Council, we need not address the District Council's cross-appeal. We affirm.

AFFIRMED.

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[13] *Id.*

[14] *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

IN RE ESTATE OF ALAN BAER, DECEASED. THEODORE G. BAER, PERSONAL REPRESENTATIVE OF THE ESTATE OF ALAN BAER, DECEASED, APPELLEE, V. DOUGLAS COUNTY, NEBRASKA, APPELLANT.

735 N.W.2d 394

Filed July 13, 2007. No. S-06-372.

1. **Decedents' Estates: Taxation: Appeal and Error.** The scope of review in an appeal of an inheritance tax determination is review for error appearing on the record.

2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Pleadings: Records: Evidence: Proof: Presumptions: Appeal and Error.** It is the appellant's burden to present a record to support the errors assigned, and in the absence of a complete bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence and that it was correctly determined.
4. **Records: Appeal and Error.** A party's brief may not expand the evidentiary record.
5. **Records: Evidence: Proof: Presumptions: Appeal and Error.** When it is clear that the appellant presented a full record of the evidence before the lower court and the inadequacy of the record on appeal is due to the failure of the party with the burden of proof below to present evidence, there is no presumption that the order of the trial court was supported by the evidence.
6. **Evidence: Records: Appeal and Error.** Evidence not made part of the record cannot be given a favorable reading, nor can any beneficial inferences be deduced therefrom.

Appeal from the County Court for Douglas County: LAWRENCE BARRETT, Judge. Reversed.

Stuart J. Dornan, Douglas County Attorney, and Bernard J. Monbouquette for appellant.

Robert J. Murray, Angela M. Pelan, and Kyle Wallor, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Under Nebraska law, inheritance taxes are imposed upon contingent bequests at the highest rate which would be possible on the happening of any of the contingencies.[1] In this case, inheritance taxes were assessed and paid on various contingent bequests in the distribution of the estate of Alan Baer (the Estate). Slightly less than 2 years after the original tax determination and payment, the personal representative of the Estate filed a "Protective Claim for Refund of Inheritance Tax," asserting that the contingencies of the bequests were unlikely to occur and that the taxes paid should be refunded to the

[1] Neb. Rev. Stat. § 77-2008.01 (Reissue 2003).

Estate. Douglas County objected. After an informal hearing in which no exhibits were offered into evidence or formal testimony adduced, the court granted the refund. Douglas County appeals.

BACKGROUND

The record of the proceedings below consists of the Estate's motion for a refund with two attached tax worksheets, the court's order granting the refund, and 12 pages transcribing the discussion of the parties with the county judge concerning the refund request. The parties agree that no evidentiary hearing was held on the matter and that no evidence was formally adduced to support the Estate's motion.

In their appellate briefs, the parties explain that on or about November 5, 2003, $99,165 was paid in inheritance taxes on bequests contingent upon Comoretel, a company being sold at a profit before the death of Baer's surviving spouse. The personal representative's "Protective Claim for Refund of Inheritance Tax" was filed with the county court on August 4, 2005. In support of the claim for a refund, the personal representative asserted that although Baer's spouse was still alive, it was a "virtual certainty" that Comoretel would never be sold at a profit.

The bequests themselves are not in the record, but according to the parties' briefs, they are found in "Article VI, Item Two, Paragraph (I) of the Alan Baer Revocable Trust of February 9, 1996."[2] According to the briefs, the trust states in relevant part:

> (I) In the event that Settlor's interest in Comoretel (a private equity interest) is sold and a profit realized, as determined in the sole and absolute discretion of Trustee, Trustee shall distribute outright in amounts and to those individuals set out below in the order set forth herein and with each specific bequest having to be fully funded before the next listed bequest is funded. In the event any of these bequests are not funded prior to the death of [Baer's spouse], they shall automatically lapse.[3]

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[2] Brief for appellee at 6. Accord brief for appellant at 4.

[3] *Id.*

The trust names the various contingent beneficiaries and the specific amount to be paid to each of those beneficiaries if the contingency occurs. The inheritance worksheets, prepared and signed by the personal representative, reflect the contingent beneficiaries and calculated inheritance tax as if the contingency had occurred and the specified amounts had been paid out.

At the hearing on the Estate's motion, the personal representative explained that the reason the contingency would likely never occur is because from the time of its inception, Comoretel had never operated at a profit. The personal representative admitted, however, that there was a remote possibility that the company's profitability could change. Because of this remote possibility, the personal representative suggested that the Estate would be willing to file an annual report with the county attorney's office to keep it informed as to whether the contingency had occurred. The personal representative expressed concern that if the refund were not granted at that time, pursuant to his pending motion, then the refund would later be barred by the statute of limitations for refunds of "erroneous payment[s]" found in Neb. Rev. Stat. § 77-2018 (Reissue 2003).

The county attorney argued at the hearing that anything was possible and that the value of the company could go up. The county attorney offered to put the taxes paid on the contingent bequests into an interest-bearing investment for the benefit of the beneficiaries, as allowed by § 77-2008.01. The county attorney did not believe that the statute of limitations found in § 77-2018 was of any concern because the payment of taxes on the contingent bequests was not "erroneous."

The county court granted the personal representative's motion and ordered a refund of the taxes paid on the contingent bequests. The court further ordered that until the contingency became "impracticable or impossible," the trustees of Baer's revocable trust must make annual reports to the county attorney's office to inform that office whether the contingency of the trust had occurred. In the event that the contingency occurred, the court ordered that the trustees would repay the refunded tax amount with interest pursuant to Neb. Rev. Stat. §§ 77-2010 (Reissue 2003) and 45-104.01 (Reissue 2004).

ASSIGNMENTS OF ERROR

Douglas County assigns that the county court erred in (1) ordering a redetermination of inheritance tax, and the resulting refund of $99,165 to the heirs of Baer's estate, based on the court's finding that the contingent bequests of article VI, item two, paragraph (I), of Baer's trust would never be funded; (2) finding that the statute of limitations of § 77-2018 applies to inheritance taxes paid on contingent bequests of article VI, item two, paragraph (I), of Baer's trust; and (3) finding that the contingent bequests of Baer's trust will not be fulfilled.

STANDARD OF REVIEW

[1,2] The scope of review in an appeal of an inheritance tax determination is review for error appearing on the record.[4] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[5]

ANALYSIS

The taxes in issue were calculated pursuant to § 77-2008.01, which states that when property is bequeathed in a manner subject to inheritance taxes, but the bequest is contingent, the tax "shall be imposed upon [the contingent bequest] at the highest rate which, on the happening of any of the contingencies or conditions, would be possible under the provisions of Chapter 77, article 20." Section 77-2008.01 further provides that on the happening of a contingency by which the property is transferred to a party for whom the tax rate is less, the party "shall be entitled to a redetermination of the tax and to a return by the county treasurer . . . of so much of the tax imposed and paid as equals the difference between the amount imposed and paid and the amount which such person, corporation, or institution should pay." When payment of a tax on a contingent request is made pursuant to § 77-2008.01, the county court is authorized to direct the county treasurer to invest the tax proceeds in U.S.

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[4] *In re Estate of Reed*, 271 Neb. 653, 715 N.W.2d 496 (2006).

[5] *Id.*

Treasury bonds and similar investments, and if the tax is redetermined, the refund includes the interest on the sum refunded, while the balance goes to the general inheritance tax fund.[6]

Notwithstanding all of those provisions, the court also has the authority, on written application of one of the inheritance taxpayers, "to determine a final inheritance tax on any property devised, bequeathed, or otherwise transferred, based upon the probabilities at the time of the decedent's death rather than taxing the property at the rates specified in such sections."[7] Alternatively, a contingent beneficiary may elect not to pay the tax resulting from the contingent interest until the contingency has occurred, but the beneficiary must then post a bond with the county court for an amount not to exceed two times the amount of the estimated tax.[8]

We note, in passing, that in this case, the personal representative of the Estate filed the motion for a refund in the belief that if it was not made within 2 years, the Estate would be barred from obtaining a refund by the 2-year statute of limitations found in § 77-2018, regardless of whether the contingency would ever occur. The parties, on appeal, disagree about the applicability of § 77-2018. However, § 77-2018 is applicable only to inheritance tax "paid erroneously," and a tax paid at the correct rate, pursuant to statute, is not paid erroneously. The parties do not argue, in this case, that the inheritance tax initially paid was incorrectly determined, based on § 77-2008.01. This is not a case of erroneous payment. Rather, any refund available to the Estate in this case is necessarily based on the redetermination provision of § 77-2018.05.

The court apparently relied on § 77-2018.05 for its authority to issue its order of redetermination and refund in accordance with the probabilities, rather than the possibilities, of the contingencies. Section 77-2018.05 states in full:

> Notwithstanding sections 77-2001 to 77-2039, the court shall have the authority, upon the written application of

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[6] § 77-2008.01

[7] Neb. Rev. Stat. § 77-2018.05 (Reissue 2003).

[8] Neb. Rev. Stat. § 77-2009 (Reissue 2003).

> any of the parties subject to the tax imposed under such sections, to determine a final inheritance tax on any property devised, bequeathed, or otherwise transferred, based upon the probabilities at the time of the decedent's death rather than taxing the property at the rates specified in such sections.

We note that § 77-2018.05 does not expressly authorize the county court to redetermine and order refund of a tax already assessed and paid, as opposed to making a determination based upon probabilities in the first instance. Furthermore, there is some question whether the personal representative's proposal to keep the county informed of the status of the contingency, and the court's decision to refund the tax subject to repayment, is consistent with the directive in § 77-2018.05 to determine a "final" inheritance tax based upon the probabilities at the time of the decedent's death. But we do not reach these issues in this proceeding because of a more fundamental problem with the county court's order.

Assuming, without deciding, that the county court had the statutory authority to issue an order redetermining and refunding taxes already assessed, subject to repayment, we find that the county court's order in this case was unsupported by competent evidence. As already mentioned, the record does not contain the bequests in issue or any evidence as to the probability that the contingency of the bequests will occur. All that is reflected by the record is the informal discussion of the attorneys with the county court. The parties agree that the record is a full reflection of what occurred below. The personal representative admits that the Estate did not present formal evidence or testimony to the county court to support its motion.

[3] Generally, it is the appellant's burden to present a record to support the errors assigned, and in the absence of a complete bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence and that it was correctly determined.[9] Stated another way, "[i]n the absence of a record of the evidence considered by the court, it is presumed

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[9] *Blanco v. General Motors Acceptance Corp.*, 180 Neb. 365, 143 N.W.2d 257 (1966).

that the order of the trial court was supported by the evidence and was correct."[10]

[4,5] But the reason for this rule is to ensure that this court reviews the case upon the evidence actually received and considered in the trial court.[11] A party's brief may not expand the evidentiary record.[12] In this case, it is clear that the inadequacy of the record is due to the failure of the party with the burden of proof below to present evidence. The appellant met *its* burden to present this court with a complete bill of exceptions containing the evidence relied upon by the trial court. The aforementioned presumption, that the order of the trial court was supported by the evidence, does not apply to this case.

[6] It is clear from the record and admissions of the parties that the county court's determination was made without the benefit of evidence supporting the allegations of the Estate. As we have stated before, we will reverse a judgment which depends on a finding of fact that was manifestly unsupported by the evidence.[13] While under our clearly erroneous standard of review, we consider the evidence in the light most favorable to the successful party, evidence not made part of the record cannot be given a favorable reading, nor can any beneficial inferences be deduced therefrom.[14] There was no competent evidence to support the county court's judgment in this case. Accordingly, we reverse the judgment of the county court.

REVERSED.

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[10] *Keystone Ranch Co. v. Central Neb. Pub. Power & Irr. Dist.*, 237 Neb. 188, 192, 465 N.W.2d 472, 476 (1991).

[11] *State v. Jacobsen*, 194 Neb. 105, 230 N.W.2d 219 (1975).

[12] *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993).

[13] *American Fire Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 52 Neb. 676, 72 N.W. 1047 (1897). See, also, *Board of Regents v. Thompson*, 6 Neb. App. 734, 577 N.W.2d 749 (1998).

[14] *Home Fed. Sav. & Loan v. McDermott & Miller, supra* note 12.

CLYDE A. WILLIAMS, APPELLEE, V. SHEILA BAIRD, APPELLANT.

735 N.W.2d 383

Filed July 13, 2007. No. S-06-889.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
5. **Actions: Statutes.** A special proceeding includes every special statutory remedy which is not in itself an action.
6. **Actions: Final Orders.** A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding.
7. **Actions: Statutes.** A special proceeding entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
8. **Jurisdiction: Final Orders: Appeal and Error.** Generally, in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.
9. **Final Orders: Appeal and Error.** To fall within the collateral order doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.
10. **Claims: Immunity: Final Orders.** The denial of a claim of qualified immunity, where the issues presented are purely questions of law, is immediately reviewable under the collateral order doctrine.
11. **Civil Rights: Public Officers and Employees: Immunity.** Qualified immunity provides a shield from liability for public officials sued under 42 U.S.C. § 1983 (2000) in their individual capacity, so long as an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
12. **Public Officers and Employees: Immunity.** Whether an official may prevail in his or her qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law.
13. **Civil Rights: Public Officers and Employees: Proof.** An official sued under 42 U.S.C. § 1983 (2000) bears the burden of demonstrating that in performing the acts complained of, he or she was acting in a discretionary authority. Once this burden is met, the plaintiff bears the burden of proof as to whether the right allegedly violated was clearly established.

14. **Trial: Immunity.** Where appropriate, the issues relating to qualified immunity may be determined via a separate trial or evidentiary hearing.
15. **Final Orders: Appeal and Error.** In order to determine whether a case presents an order reviewable under the collateral order doctrine, an appellate court engages in a three-part inquiry: (1) whether the plaintiff has alleged the violation of a constitutional right, (2) whether that right was clearly established at the time of the alleged violation, and (3) whether the evidence shows that the particular conduct alleged was a violation of the right at stake.

Petition for further review from the Nebraska Court of Appeals, IRWIN, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Hall County, TERESA K. LUTHER, Judge. Judgment of Court of Appeals reversed in part, and in part dismissed.

Jon Bruning, Attorney General, and Vicki L. Adams for appellant.

No appearance for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

Clyde A. Williams brought a civil rights action under 42 U.S.C. § 1983 (2000) against the Nebraska Department of Health and Human Services (DHHS) and Sheila Baird, a DHHS employee. Baird motioned for summary judgment, arguing that she was entitled to qualified immunity from suit, but the district court denied Baird's motion. She appealed. The Court of Appeals summarily dismissed her appeal for lack of a final, appealable order.[1] We granted Baird's petition for further review to address whether the denial of a claim of qualified immunity is final for the purpose of immediate appellate review.

II. FACTUAL BACKGROUND

Baird has been employed as a caseworker for DHHS since 1991. In February 2004, Baird was assigned to investigate

[1] *Williams v. Baird*, 15 Neb. App. ___ (No. A-06-889, Sept. 11, 2006).

claims of physical neglect of Williams' three stepdaughters, ages 11, 8, and 6, by their natural mother, Janette Williams, and also physical abuse of those children by their stepfather, Williams. The allegations arose from reports from a teacher at the children's school. On March 2, Baird first interviewed the children, then met with Janette. A deputy with the Howard County sheriff's office was present during these interviews. After interviewing Janette, Baird and the deputy interviewed Williams. During that interview, Williams was defensive and asked whether he needed an attorney.

Based upon statements made by Janette and the children, as well as Williams' defensive attitude during his interview, Baird removed the children from the home shared by Janette and Williams. At that time, Williams was also placed under arrest. The reasons for Williams' arrest are not entirely clear from the record; however, during his deposition, Williams testified that he thought he was arrested for viewing pornography on the Internet and for showing the children pornography on the Internet. Williams was released the following day, and no charges were filed against him in connection with the allegations of abuse. However, the safety plan entered into by Janette and Baird required that in order for the children to be returned to Janette, Williams had to move out of the family home. In accordance with this plan, Janette obtained a protection order against Williams.

Though Janette later retracted her statements, in the affidavit to obtain the protection order, she stated that she did not want Williams to have contact with the children due to several recent "red flags," including allegations that Williams had yelled at the children and spanked the children. Janette also noted that the children had admitted to DHHS they were afraid of Williams and that there was evidence that Williams had been viewing pornography on the family computer. Finally, Janette indicated in the affidavit that she suspected sexual abuse of both the 11-year-old and 6-year-old, though she does not explicitly accuse Williams of that abuse. Approximately 2 months after the issuance of the protection order, Janette had the order withdrawn. Williams returned to the home in late April 2004.

Williams then brought this action against DHHS and Baird under 42 U.S.C. § 1983. Williams generally alleged violations of his rights under the 4th and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 5, of the Nebraska Constitution. Williams also alleged he was denied the quiet use and enjoyment of his home, property, and effects without due process of law under both the U.S. and the Nebraska Constitutions. In their answers, DHHS and Baird asserted several affirmative defenses, including a claim that Baird was entitled to qualified immunity.

Eventually, Williams voluntarily dismissed his action against DHHS, leaving the action pending against Baird. Baird filed a motion for summary judgment, arguing that she was entitled to qualified immunity. The district court denied Baird's claim of qualified immunity, noting that there were genuine issues of material facts, "including whether any reasonable person could believe in good faith that there was probable cause to arrest [Williams] or on an objective basis, whether officers of reasonable competence could disagree whether or not probable cause existed to arrest [Williams]." Baird appealed. The Nebraska Court of Appeals dismissed her appeal on its own motion, concluding that the denial of a motion for summary judgment was not a final order.[2] We granted Baird's petition for further review.

III. ASSIGNMENTS OF ERROR

Baird assigns that the district court erred in (1) implicitly finding that Williams had a clearly established right to be free from illegal seizures within the context of this case, (2) finding there was a genuine issue of material fact regarding whether there was probable cause to arrest Williams, and (3) failing to find that Williams failed to establish a violation of the right to familial integrity.

As an initial matter, this court is presented with the question of whether this case presents a final, appealable order under our final order jurisprudence or, alternatively, is reviewable under our collateral order doctrine.

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[2] *Williams v. Baird, supra* note 1.

IV. STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[3]

V. ANALYSIS

1. Final Order Under Neb. Rev. Stat. § 25-1902

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.[5]

[4] An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[6] We note that the order denying Baird's motion for summary judgment did not determine the action or prevent a judgment, as the denial allowed Williams' action against Baird to proceed. In addition, the order was not made on summary application in an action after judgment was rendered. The initial question presented in this case is whether the district court's order was made during a special proceeding.

[5-7] A special proceeding includes every special statutory remedy which is not in itself an action.[7] A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding.[8] Generally, a "special proceeding" entails civil statutory remedies not

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[3] *Pfeil v. State*, *ante* p. 12, 727 N.W.2d 214 (2007).

[4] *Id.*

[5] *Id.*

[6] *Id.* See, also, Neb. Rev. Stat. § 25-1902 (Reissue 1995).

[7] *Pfeil v. State*, *supra* note 3.

[8] *Id.*

encompassed in chapter 25 of the Nebraska Revised Statutes.[9] Examples of special proceedings include juvenile court proceedings,[10] probate actions,[11] and workers' compensation cases.[12]

In Baird's petition for further review, she contends first that the nature of her qualified immunity means that "the use of the motion for summary judgment for asserting qualified immunity essentially initiates a 'special proceeding' in the federal courts."[13] Baird also contends this court has previously held in *Currie v. Chief School Bus Serv.*[14] that the summary judgment process can be a special proceeding.

In *Currie*, this court noted that "the fact that the summary judgment process is encompassed in chapter 25 . . . does not preclude this court from finding the summary judgment process to be a special proceeding."[15] However, we later distinguished *Currie* and concluded that situations involving partial motions for summary judgment were not special proceedings.[16]

It has been the repeated conclusion of this court that the denial of a motion for summary judgment is not a final order for purposes of § 25-1902.[17] Moreover, in considering the summary judgment process in light of the definition of a special proceeding, it becomes obvious that a summary judgment proceeding is not itself an action, but, rather, is merely a step in the

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[9] *Id.*

[10] *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000).

[11] *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000).

[12] *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999).

[13] Brief for appellant in support of petition for further review at 7.

[14] *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996).

[15] *Id.* at 880, 553 N.W.2d at 475.

[16] *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). See, also, *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

[17] See, *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004); *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988); *Rehn v. Bingaman*, 157 Neb. 467, 59 N.W.2d 614 (1953).

overall action. As such, a summary judgment proceeding is not a special proceeding.

As the district court's order was not made in a special proceeding, we are not presented with a final order under § 25-1902.

2. Collateral Order Doctrine

[8] Generally, in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.[18] However, we must determine whether the collateral order doctrine might operate to vest this court with the jurisdiction to decide this appeal.

[9] This court most recently explained the collateral order doctrine in *Hallie Mgmt. Co. v. Perry*.[19] In that case, we noted that this court had previously adopted the collateral order doctrine,[20] an exception to the final order rule which was announced by the U.S. Supreme Court in *Cohen v. Beneficial Loan Corp.*[21] We noted with approval the U.S. Supreme Court's pronouncement of the doctrine and held that for an order to fall within the doctrine, it must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.[22]

We noted also in *Hallie Mgmt. Co.* that the U.S. Supreme Court had emphasized the modest scope of the collateral order doctrine, explaining that

> "the 'narrow' exception should stay that way and never be allowed to swallow the general rule . . . that a party is entitled to a single appeal, to be deferred until final

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[18] See, *Pfeil v. State*, *supra* note 3; *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006); *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997).

[19] *Hallie Mgmt. Co. v. Perry*, *supra* note 18.

[20] See *Richardson v. Griffiths*, *supra* note 18.

[21] *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

[22] *Hallie Mgmt. Co. v. Perry*, *supra* note 18.

> judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated."[23]

The U.S. Supreme Court has specifically concluded that under the doctrine, the denial of a claim of qualified immunity is appealable, notwithstanding the absence of a final judgment,[24] *if* the denial of immunity turns on a question of law.[25] Various states have similarly concluded that the denial of qualified immunity can be immediately reviewable.[26] The U.S. Supreme Court noted:

> The upshot is that . . . considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals of "qualified immunity" matters to cases presenting more abstract issues of law. Considering these "competing considerations," we are persuaded that "[i]mmunity appeals . . . interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law."[27]

In *Stella v. Kelley*,[28] the First Circuit Court explained the distinction:

> [O]n the one hand, a district court's pretrial rejection of a proffered qualified immunity defense remains immediately appealable as a collateral order to the extent that it

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[23] *Id.* at 86, 718 N.W.2d at 535 (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994)).

[24] *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

[25] *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995); *Mitchell v. Forsyth, supra* note 24.

[26] See, *Webb v. Haas*, 728 A.2d 1261 (Me. 1999); *Park County v. Cooney*, 845 P.2d 346 (Wyo. 1992); *Carillo v. Rostro*, 114 N.M. 607, 845 P.2d 130 (1992); *Henke v. Superior Court*, 161 Ariz. 96, 775 P.2d 1160 (Ariz. App. 1989). See, also, *Farrell v. Translyvania County Bd. of Educ.*, 175 N.C. App. 689, 625 S.E.2d 128 (2006) (denial of qualified immunity substantial right and reviewable).

[27] *Johnson v. Jones, supra* note 25, 515 U.S. at 317.

[28] *Stella v. Kelley*, 63 F.3d 71, 74 (1st Cir. 1995).

> turns on a pure issue of law, notwithstanding the absence of a final judgment. [Citations omitted.] On the other hand, a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact.

[10] We find this reasoning persuasive and agree with the U.S. Supreme Court that the denial of a claim of qualified immunity, where the issues presented are purely questions of law, should be immediately reviewable under the collateral order doctrine. Thus, as a threshold issue for appellate jurisdiction, we must consider whether the qualified immunity issue in this case presents disputed questions of fact.

[11] Qualified immunity provides a shield from liability for public officials sued under 42 U.S.C. § 1983 in their individual capacity, so long as an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[29] Though potentially available to all public officials, qualified immunity is often invoked by law enforcement[30] and prison officials,[31] as well as social service workers.[32]

[12,13] Whether an official may prevail in his or her qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law.[33] An official sued under 42 U.S.C. § 1983 bears the burden of demonstrating that in performing the acts complained of, he or she was acting in a discretionary

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[29] *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), *disapproved on other grounds, Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004).

[30] *Diaz v. Martinez*, 112 F.3d 1 (1st Cir. 1997); *Newton v. Huffman*, 10 Neb. App. 390, 632 N.W.2d 344 (2001).

[31] *Crow v. Montgomery*, 403 F.3d 598 (8th Cir. 2005); *Martin v. Curry*, 13 Neb. App. 171, 690 N.W.2d 186 (2004).

[32] *Gottlieb v. County of Orange*, 84 F.3d 511 (2d Cir. 1996); *Manzano v. South Dakota Dept. of Social Services*, 60 F.3d 505 (8th Cir. 1995); *Shearer v. Leuenberger, supra* note 29.

[33] *Shearer v. Leuenberger, supra* note 29.

authority.[34] Once this burden is met, the plaintiff bears the burden of proof as to whether the right allegedly violated was "clearly established."[35]

[14] Where appropriate, the issues relating to qualified immunity may be determined via a separate trial or evidentiary hearing.[36] In some instances, it might be unclear, based upon the record before a court, whether a defendant is entitled to qualified immunity. In those instances, "[a] hearing would likely clarify the matter. It may be that resolution of the qualified immunity defense . . . depends upon the resolution of disputed fact issues or on a credibility determination. On the other hand, a more developed record might render such a determination unnecessary."[37]

(a) Appellate Court Conducts Three-Part Inquiry Into Whether Collateral Order Doctrine Applies

[15] Thus, in order to determine whether a case presents an order reviewable under the collateral order doctrine, an appellate court engages in a three-part inquiry. First, we determine whether the plaintiff has alleged the violation of a constitutional right.[38] Second, we determine whether that right was clearly established at the time of the alleged violation.[39] Finally, we determine whether the evidence shows that the particular conduct alleged was a violation of the right at stake.[40] The first two inquiries are questions of law; the last could require factual determinations to the extent that evidence is in conflict.[41]

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[34] *Harbert Intern., Inc. v. James*, 157 F.3d 1271 (11th Cir. 1998).

[35] See, *Sparr v. Ward*, 306 F.3d 589 (8th Cir. 2002); *Conrod v. Davis*, 120 F.3d 92 (8th Cir. 1997).

[36] See, e.g., *Thompson v. Mahre*, 110 F.3d 716 (9th Cir. 1997); *Johnson v. Garraghty*, 57 F. Supp. 2d 321 (E.D. Va. 1999).

[37] *Johnson v. Garraghty, supra* note 36, 57 F. Supp. 2d at 329.

[38] *Shearer v. Leuenberger, supra* note 29.

[39] *Id.*

[40] See, *Stella v. Kelley, supra* note 28; *Shearer v. Leuenberger, supra* note 29.

[41] See *Stella v. Kelley, supra* note 28.

(b) Williams' Allegations

In Williams' complaint, he generally alleged violations of his rights under the 4th and 14th Amendments to the U.S. Constitution and article 1, §§ 3 and 5, of the Nebraska Constitution. Williams also alleged that he was denied the "quiet use and enjoyment of his property, home, and effects without due process of law" under both the U.S. and the Nebraska Constitutions.

We note that no one appears to contest the fact that Baird was acting in a discretionary function as an employee of DHHS, and in any case, we conclude that Baird was doing so. For the purposes of a qualified immunity analysis, a defendant is acting within his or her discretionary authority when his or her actions were undertaken pursuant to the performance of his or her duties and within the scope of his or her authority.[42] Baird averred in two separate affidavits that she was acting in her capacity as a DHHS caseworker when investigating claims of abuse made against Williams.

(i) Unreasonable Seizure Under Fourth Amendment

We first address Williams' contention that he was unreasonably seized in violation of his Fourth Amendment rights. In his complaint, Williams alleges facts, and introduces evidence in support of these allegations, suggesting that he was arrested without probable cause due to false and misleading representations made by Baird. We conclude that with respect to this allegation, Williams, while having alleged the violation of a constitutional right, has failed to allege *a legally cognizable claim* for the violation of such a right.[43]

That one cannot be arrested in the absence of probable cause is clearly established.[44] Williams in fact alleges he was arrested without probable cause. However, Williams also alleges he was arrested by law enforcement at Baird's direction. Williams does not contend that Baird arrested him; indeed, she would appear

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[42] See *Rich v. Dollar*, 841 F.2d 1558 (11th Cir. 1988).

[43] See *Shearer v. Leuenberger, supra* note 29 (Connolly, J., concurring).

[44] See, *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *Donovan v. Thames*, 105 F.3d 291 (6th Cir. 1997).

to have no authority to do so,[45] as generally only peace officers have the authority to effect an arrest.[46]

Further, this court has noted on more than one occasion that "probable cause . . . requires that the facts available *to the officer* would cause a reasonably cautious person to believe that the suspect has committed an offense."[47] Therefore, it is inconsequential whether Baird might have directed law enforcement to arrest Williams, as law enforcement would have been required to makes its own assessment of probable cause. There is no indication either from the record or state law that Baird was a member of law enforcement. Given this, we conclude as a matter of law that Williams has failed to state a legally cognizable claim for the violation of a constitutional right. As such, we conclude as to this contention that Baird is entitled to qualified immunity.

(ii) Familial Integrity

In his second contention, Williams argues that his rights under the U.S. and Nebraska Constitutions to quiet use and enjoyment of his property were violated without due process of law. Williams alleges in his complaint that Baird informed Janette that unless Williams ceased to reside in the family home, Baird would not allow Williams' stepchildren to return to the family home. Relying on these statements, Williams alleges that Janette obtained a protection order against him and that he was barred from his home for approximately 2 months.

Based upon the record presented to us, a fair characterization of the right at issue would be the right to familial integrity, wherein parents and children have a constitutionally protected liberty interest in the care and companionship of one another.[48] This right is clearly established.[49] However, there is a high

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[45] See Neb. Rev. Stat. §§ 29-404.02 (Reissue 1995) and 49-801(15) (Reissue 2004).

[46] § 29-404.02.

[47] *State v. Eberly*, 271 Neb. 893, 902, 716 N.W.2d 671, 679 (2006) (emphasis supplied, citing *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006)).

[48] *Manzano v. South Dakota Dept. of Social Services, supra* note 32.

[49] *Id.*

burden upon plaintiffs attempting to establish a violation of the right to familial integrity.[50] The Eight Circuit has repeatedly noted that "when a state official pursuing a child abuse investigation takes an action which would otherwise unconstitutionally disrupt familial integrity, he or she is entitled to qualified immunity, if such action [was] properly founded upon a reasonable suspicion of child abuse."[51]

Based upon the record presented to us, we conclude that certain factual determinations remain unresolved. In particular, we note that factual determinations are necessary in order to decide whether Baird had a reasonable suspicion that Williams was abusing the children. Complicating this matter further is the fact that the district court failed to address in any manner Williams' claim of familial integrity. These unresolved factual determinations prevent us from utilizing the collateral order doctrine to decide whether Baird, in fact, violated the clearly established right alleged by Williams. We note that a hearing on these factual determinations might assist the district court in clarifying Baird's entitlement to qualified immunity on this second claim.

VI. CONCLUSION

The order of the district court denying Baird's claims of qualified immunity is not a final order under § 25-1902. However, under the collateral order doctrine, we are permitted to review Baird's qualified immunity claim with respect to Williams' first claim. As such, we conclude that Baird is entitled to qualified immunity on that claim, as Williams failed to allege a legally cognizable constitutional claim. We accordingly reverse the district court's denial of Baird's claim of qualified immunity.

Baird's appeal with regard to the second claim is not reviewable under the collateral order doctrine at this time. Baird's appeal on this claim is dismissed.

REVERSED IN PART, AND IN PART DISMISSED.

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[50] *Thomason v. SCAN Volunteer Services, Inc.*, 85 F.3d 1365 (8th Cir. 1996).

[51] *Manzano v. South Dakota Dept. of Social Services, supra* note 32, 60 F.3d at 511. See, also, *Thomason v. SCAN Volunteer Services, Inc., supra* note 50.

GAIL FICKLE, BOTH INDIVIDUALLY AND AS PARENT AND GUARDIAN OF JACOB WAGNER, APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

735 N.W.2d 754

Filed July 20, 2007. No. S-04-1250.

1. **Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996), will not be set aside unless such findings are clearly erroneous.
2. ____: ____. Whether the allegations made by a plaintiff constitute a claim under the State Tort Claims Act or whether the allegations set forth a claim that is precluded by the exemptions set forth in the act are questions of law. An appellate court has an obligation to reach its conclusions on these questions independent from the conclusions reached by the trial court.
3. **Tort Claims Act: Damages: Appeal and Error.** The amount of damages awarded in a case under the State Tort Claims Act is a matter solely for the finder of fact, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial.
4. **Tort Claims Act: Proof.** In order to recover in a negligence action brought under 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.
5. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.
6. ____. The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
7. **Governmental Subdivisions: Highways.** The State has a duty to use reasonable and ordinary care in the construction, maintenance, and repair of its highways so that they will be reasonably safe for the traveler using them while exercising reasonable and ordinary care and prudence.
8. **Tort Claims Act: Highways: Negligence: Notice.** Under the plain language of Neb. Rev. Stat. § 81-8,219(9) (Reissue 1996), the State has a duty to correct a malfunctioning traffic signal within a reasonable time after receiving notice of the defect.
9. **Negligence: Proof.** Foreseeability is a factor in establishing a defendant's duty.
10. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred.
11. **Trial: Negligence: Proximate Cause.** Determination of causation is ordinarily a matter for the trier of fact.
12. **Judgments: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain a judgment, appellate courts are mindful that every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
13. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

14. **Negligence: Proximate Cause.** Plaintiffs are contributorily negligent if (1) they fail to protect themselves from injury, (2) their conduct concurs and cooperates with the defendant's actionable negligence, and (3) their conduct contributes to their injuries as a proximate cause.
15. **Negligence: Proof.** To entitle a defendant to judgment under the comparative negligence statutory scheme, the defendant must prove that any contributory negligence chargeable to the plaintiff is equal to or greater than the total negligence of all persons against whom recovery is sought.
16. **Trial: Negligence: Damages: Appeal and Error.** Because the purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.
17. **Negligence: Motor Vehicles: Proximate Cause: Liability: Evidence: Damages.** Under Neb. Rev. Stat. § 60-6,273 (Reissue 2004), evidence that a person was not wearing a seatbelt is admissible only as evidence concerning the mitigation of damages and cannot be used with respect to the issue of liability or proximate cause.
18. **Negligence: Motor Vehicles: Damages.** The failure to use a seatbelt cannot be used to allocate the percentage of negligence to a party.
19. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
20. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function.
21. **Rules of Evidence: Expert Witnesses.** When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, in accordance with Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.
22. **Trial: Expert Witnesses.** A trial court adequately demonstrates that it has performed its gatekeeping duty in determining the reliability of expert testimony when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination.
23. **Trial: Evidence.** A trial court may not abdicate its gatekeeping duty under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), in a bench trial, but the court is afforded more flexibility in performing this function.
24. **Trial: Evidence: Damages.** Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages.
25. **Damages: Medical Assistance.** Social legislation benefits, including payments by Medicare and Medicaid, are excluded by the collateral source rule.
26. **Damages.** The general rule in Nebraska is that an award for future damages must be reduced to its present value.

27. **Words and Phrases.** Present value is the current worth of a certain sum of money due on a specified future date after taking interest into consideration.
28. **Damages: Appeal and Error.** An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
29. **Damages.** If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.
30. ____. There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Jon Bruning, Attorney General, Michele M. Lewon, and Matthew F. Gaffey for appellant.

Douglas J. Peterson and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

Jacob Wagner was seriously injured when the car he was driving collided with a semitrailer truck at an intersection controlled by a traffic signal. His mother, Gail Fickle, sued the State of Nebraska under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996). She alleged that the accident was caused by a malfunction of the traffic signal, which displayed green lights in conflicting directions. Following a bench trial, a judgment was entered against the State. The issues in this appeal are whether the State had notice of the alleged malfunction and, if so, whether the State corrected the malfunction within a reasonable time. On cross-appeal, Fickle challenges the amount of the awards for economic and noneconomic damages.

II. SCOPE OF REVIEW

[1] A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings

are clearly erroneous. *Hradecky v. State*, 264 Neb. 771, 652 N.W.2d 277 (2002).

[2] Whether the allegations made by a plaintiff constitute a claim under the State Tort Claims Act or whether the allegations set forth a claim that is precluded by the exemptions set forth in the act are questions of law. See, *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42 (1992); *Hammond v. Nemaha Cty.*, 7 Neb. App. 124, 581 N.W.2d 82 (1998). An appellate court has an obligation to reach its conclusions on these questions independent from the conclusions reached by the trial court. *Blitzkie v. State, supra.*

[3] The amount of damages awarded in a case under the State Tort Claims Act is a matter solely for the finder of fact, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999).

III. FACTS

Shortly after 10 p.m. on February 14, 1999, Wagner was driving a car southbound on Nebraska Highway 15 in Colfax County. At approximately the same time, a semitrailer truck owned by Metz Baking Company (Metz) was westbound on U.S. Highway 30. The two vehicles collided at the intersection of Highways 15 and 30 in Schuyler, Nebraska, which was controlled by a traffic signal. The semitrailer truck struck the driver's side of Wagner's car, and Wagner was seriously injured.

In her individual capacity and as Wagner's parent and guardian, Fickle sued the city of Schuyler, the county of Colfax, Metz, and the State. The city, the county, and Metz were dismissed from the action before trial. The record reflects that Fickle entered into settlement agreements with the city and Metz. There is no indication whether a settlement agreement or other release was reached with the county, and no such information was presented to the district court.

Fickle presented evidence that at the time of the accident, the traffic signal was displaying green lights for both southbound and westbound traffic. Evidence showed that in the 6 months preceding the accident, the city of Schuyler, the county

of Colfax, and the State had received complaints from citizens regarding conflicting green lights at the same intersection.

As a result of the accident, Wagner was in a coma for 19 days. He was subsequently transferred to a rehabilitation hospital that specialized in treating traumatic brain injuries. Wagner experienced problems with vision, respiration, blood pressure, and the ability to communicate. After 8 months of physical therapy, Wagner could communicate by blinking his eyes and vocalizing a few words.

Wagner continues to have cognitive and visual impairment and requires a wheelchair. He has significant spasticity in his arms and legs. It is unlikely that his condition will improve. Because Wagner's family found it difficult to meet his needs at home, he resides in Village Northwest Unlimited, an intermediate care facility in Sheldon, Iowa. The facility treats persons with severe brain injuries. This type of facility provides Wagner with the best chance to maintain the functioning level he achieved at the rehabilitation hospital. He will probably need to live at this or a similar facility for the remainder of his life. His life expectancy from the time of trial was approximately 40 years.

The district court concluded that the State was negligent in the operation, maintenance, inspection, and repair of the traffic signal and that this negligence proximately caused the collision in which Wagner was injured. The court found that the negligence of Wagner, the city of Schuyler, and Metz also contributed to the accident. The court assigned 10 percent of the negligence to Wagner, 10 percent to Metz, 15 percent to the city, and 65 percent to the State.

The district court found that Fickle, in her individual capacity, had incurred economic damages of $1,013,417.01. In her representative capacity for Wagner, Fickle's economic damages were $3.5 million, and her noneconomic damages were $500,000. The court then took into account the percentages of negligence assigned to Wagner and the other actors and considered Fickle's settlements with Metz and the city of Schuyler. Judgment was entered against the State for economic damages in the amount of $3,928,575.31 and noneconomic damages in the amount of $325,000.

The State appealed, and Fickle has cross-appealed. Additional facts will be set forth below as they are relevant for analyzing the issues presented.

IV. ASSIGNMENTS OF ERROR

The State claims, rephrased, that the district court erred (1) in denying the State immunity from liability under § 81-8,219, (2) in finding that the State was liable for Wagner's injuries, and (3) in permitting Fickle's expert to testify at trial.

On cross-appeal, Fickle claims that the district court's awards for economic and noneconomic damages were inadequate.

V. ANALYSIS

1. State's Appeal

(a) Question of Sovereign Immunity

The first question is whether this action against the State was precluded by exemptions set forth in the State Tort Claims Act. At all times relevant to this case, the applicable statute provided:

> The State Tort Claims Act shall not apply to:
>
> . . . .
>
> (9) Any claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal.

§ 81-8,219.

Under this provision, the State is immune from liability against allegations of a malfunctioning traffic signal unless the malfunction was not corrected by the State within a reasonable time after it received actual or constructive notice of the problem. Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the State Tort Claims Act is a question of law. See, *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42 (1992); *Hammond v. Nemaha Cty.*, 7 Neb. App. 124, 581 N.W.2d 82 (1998). An appellate court has an obligation to reach its conclusion on this question independent from the conclusion reached by the trial court. *Blitzkie v. State,*

supra. To determine whether Fickle's action was precluded by the traffic-signal exemption in the State Tort Claims Act, the district court had to determine that the State had notice of a malfunction in the traffic signal but did not correct the malfunction within a reasonable time. On appeal under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. *Blitzkie v. State, supra*.

(i) Notice of Signal Malfunction

We first consider whether the State had actual or constructive notice that the traffic signal had malfunctioned. The State argues it had no notice of a malfunction on February 14, 1999, the date of the accident. The State claims it was contacted only twice about conflicting green lights at the intersection in the months preceding the accident. Fickle asserts that the State received several complaints concerning the malfunction of the traffic signal before and immediately after the accident.

Evidence presented at trial showed that the State was notified of conflicting green lights at the intersection of Highways 15 and 30. Joseph Sobota reported conflicting green lights from the traffic signal on September 22, 1998. Sobota's call was confirmed by Robert Simard, a traffic signal engineer for the State. The telephone log of the Colfax County Sheriff's Department recorded that on October 16, a person named "Chrissy" reported that the traffic signal was displaying red lights for westbound and southbound traffic and green lights for eastbound and northbound traffic. The log reflects that the sheriff's department notified the State about the signal problem. This call was also confirmed by Simard at trial.

Brenda Rist, a dispatcher for the sheriff's department and a manager for the Gas 'N Shop located on the corner of Highways 15 and 30, testified that on various occasions in 1998 and 1999, she had observed that the lights on the traffic signal in question were all red or all green. She observed conflicting green lights numerous times before the accident occurred. She contacted the State once or twice before the accident.

Eugene Sindelar traveled through the intersection on a daily basis. Before the accident, he observed many times that the lights on the traffic signal were green in conflicting directions.

On September 5, 1998, he was traveling westbound on Highway 30 and as he approached the intersection, he noticed a semi-trailer truck coming from the south on Highway 15 that was not going to stop. Sindelar applied the brakes of his vehicle in order to miss the truck, and after he stopped, he noticed that the traffic signal was green for both directions. Sindelar testified that he contacted the city several times and the State once about the recurring problem. He was told by the State that it was aware of the situation and that it would be taken care of.

Thomas McCoy, a district maintenance superintendent for Nebraska's Department of Roads, testified he remembered having a telephone conversation before February 14, 1999, in which he was told about conflicting green signals at the intersection. He had no record of whether anyone from the State responded to that complaint, and he admitted that the State had received other calls from people complaining about conflicting green lights displayed at the intersection. A coordinated investigation to repair the signal was not initiated because the lights appeared to work properly each time an employee of the State observed the traffic signal.

Warren Racely, a highway maintenance superintendent with the State, testified that he remembered seeing a notice about conflicting green lights at the intersection in the latter part of 1998 or early 1999. Keith Rabe, an electronics technician for the State, was responsible for complaint calls and troubleshooting for malfunctioning traffic signals. He testified to having a discussion with someone before February 14, 1999, regarding conflicting green lights at the intersection in question.

The State asserts there was no evidence that it had either actual or constructive notice of a conflicting green signal at the Schuyler intersection on February 14, 1999. The State claims that no defect to the signal was apparent on February 14 and that no person or agency informed the Department of Roads that conflicting green signals were being displayed on that date. The State contends it had no actual notice of the malfunction on that date and therefore had no opportunity to respond to or correct the malfunction.

The State contends it was contacted only twice regarding conflicting lights at the intersection and that those calls were

made 4 to 5 months before the accident. The State claims that each time a report of conflicting green lights was received, no defect was found in the signal or any of its components. Maintenance on the signal was last performed before the accident on January 12, 1999, and the signal was working properly. The State emphasizes that no malfunctions were reported between January 12 and the date of the accident and argues that the complaints 4 to 5 months before the accident were too remote in time to support an allegation of conflicting green lights on February 14. Therefore, the State argues that it did not have notice of any malfunction of the signal and that the district court should have found the State immune from liability under § 81-8,219(9).

Whether the State had notice of the malfunction of the traffic signal on February 14, 1999, does not exempt the State from liability. It is clear the State had notice on numerous occasions prior to that date that the traffic signal in question was malfunctioning.

(ii) Correction of Signal Malfunction

Once it is found that the State had notice of the malfunction, the question becomes whether the malfunction was corrected within a reasonable time. The State maintains it made reasonable efforts to ascertain whether the traffic signal was malfunctioning but that the signal did not display conflicting green lights whenever State employees checked on the problem. The State had corrected other problems with the traffic signal during the 6 months preceding the accident. For example, the conflict monitor was replaced in August 1998 due to a DC-voltage failure. A conflict monitor is a component in a traffic-signal cabinet that detects improper electrical current sent between the other components. The traffic-signal cabinet at the intersection was designed so that if conflicting current was detected by the conflict monitor, the traffic signal was put into "flash" mode. The State also corrected a problem with a defective loop detector that caused the red lights to stay on too long.

McCoy, a district maintenance superintendent for the Department of Roads, testified that someone from the State checked the signal in response to all complaints. He did not

believe that the lights could have been green and conflicting at the time of the accident because each time the State responded to a complaint, "everything was functioning normally." Racely, a highway maintenance superintendent, testified that the State had checked the traffic signal after receiving complaints. He did not have a key to access the traffic-signal cabinet, but he visually inspected the signal after complaints and found it to be working properly. This evidence establishes that the State attempted to fix the malfunctioning traffic signal.

Fickle presented numerous eyewitness reports of conflicting green lights before, during, and after the accident. Several of such instances have been detailed previously.

Two eyewitnesses testified that the traffic signal was displaying conflicting green lights the evening of February 14, 1999, before the accident. John Gardner, Jr., who lived in Schuyler, stated that he traveled through the intersection between 5 and 6 p.m. As he approached and entered the intersection from the west, his light was green. After entering the intersection, he nearly collided with another car coming from the south. After Gardner stopped, he could see that both lights were green.

Rist had driven to her job at the Gas 'N Shop that evening between 9:30 and 9:45 p.m. When she arrived at the store, she observed that the traffic signal was displaying green in all directions. She reported the situation to police officers who were in the store around 10 p.m. About the same time, Gardner was seated at a table in the Gas 'N Shop and was looking out the window. He could see both the westbound light for Highway 30 and the southbound light for Highway 15. He saw the collision and noticed that both lights were green at the time.

Michelle Egr testified that between 6 and 6:30 a.m. the day after the accident, she approached the intersection from the south and could see that the light was green, but she also saw eastbound and westbound vehicles on Highway 30 traveling through the intersection. She slowed down because she "obviously knew that there was something not right." By the time Egr arrived at the intersection, her light had changed to red, and she stopped. When her northbound light again turned green, Egr was "shocked" to find that an eastbound semitrailer truck passed through the intersection. She looked at the traffic signal

and discovered that both the northbound and eastbound lights were green.

The State was not immune from liability under § 81-8,219(9) if it did not correct the malfunction of the traffic signal within a reasonable time after having actual or constructive notice of such malfunction. An attempt to correct the malfunction does not exempt the State from liability. The evidence and the reasonable inferences therefrom establish that the State failed to repair the defective traffic signal.

The district court was not clearly wrong in its implicit finding that the State had notice of the malfunctioning traffic signal but did not correct the malfunction within a reasonable time.

(b) Liability of State

[4] The State next claims the district court erred in holding the State liable for the injuries sustained by Wagner on February 14, 1999. In order to recover in a negligence action brought under the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Bartunek v. State*, 266 Neb. 454, 666 N.W.2d 435 (2003).

(i) Duty

[5,6] The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. *Spear T Ranch v. Nebraska Dept. of Nat. Resources*, 270 Neb. 130, 699 N.W.2d 379 (2005). The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.* The State does not assert that it owed no duty to Wagner with regard to the traffic signal; rather, the State contends it did not breach any duty owed.

[7-9] Concerning highways in general, the State has a duty to use reasonable and ordinary care in the construction, maintenance, and repair of its highways so that they will be reasonably safe for the traveler using them while exercising reasonable and ordinary care and prudence. See *Malolepszy v. State, ante* p. 313, 729 N.W.2d 669 (2007). Under the plain language of § 81-8,219(9), the State had a duty to correct the malfunctioning traffic signal within a reasonable time after receiving

notice of the defect. Foreseeability is a factor in establishing a defendant's duty. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). It was clearly foreseeable that an automobile accident would occur at an intersection where the traffic signal was showing green lights in conflicting directions.

(ii) Breach

Although in its order the district court did not expressly discuss duty and breach, the court found that Fickle had met the burden of proof on her negligence claim. Therefore, the court implicitly found that the State breached its duty to correct the malfunctioning traffic signal within a reasonable time after notice of such malfunction.

The State's argument that it did not breach such duty because the components of the traffic signal were regularly maintained is without merit. Although the signal's specifications may have complied with the standards in the traffic-engineering industry, sufficient evidence demonstrated that the signal malfunctioned, resulting in the accident. The State's duty was to correct the malfunctioning traffic signal within a reasonable time after receiving notice of the problem. The State failed to do so and thus breached its duty.

(iii) Causation

[10-12] Fickle met the burden of proof to show that the malfunctioning traffic signal was the proximate cause of the traffic accident. A proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). Determination of causation is ordinarily a matter for the trier of fact. *Id.* When reviewing the sufficiency of the evidence to sustain a judgment, we are mindful that every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably be deduced from the evidence. See *id.*

[13] The State relies on certain testimony which it claims established that the traffic signal did not malfunction at the time of the accident. Accordingly, the State argues that the traffic signal could not have proximately caused the accident. The

district court heard the witnesses, considered the evidence, and found against the State on this issue. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997).

Giving Fickle, as the successful party, the benefit of every inference that can reasonably be deduced from the evidence, the evidence is sufficient to support the district court's finding that the negligence of the State was the proximate cause of the accident and Wagner's resulting injuries. The court was not clearly wrong in so finding.

(iv) Comparative Negligence

The State argues that its negligence did not proximately cause Wagner's injuries because the negligence of Wagner and the dismissed parties combined to proximately cause the accident. Thus, the State contends the district court erred in allocating only 10 percent of the negligence to Wagner, 10 percent to Metz, and 15 percent to the city of Schuyler.

The State argues that credible evidence was presented to support an apportionment of more than 10 percent of the negligence to Wagner. The State relies on cases in which this court has declared that drivers must "maintain a proper lookout and have the duty to see what is in plain sight." See, e.g., *Kimberling v. Omaha Public Power Dist.*, 225 Neb. 744, 746, 408 N.W.2d 269, 271 (1987). According to the State, Wagner's negligence was at least 50 percent because he failed to keep a proper lookout at the intersection and entered the intersection when it was clearly unsafe to enter—i.e., when the semitrailer truck was crossing the intersection.

The State also argues that parties dismissed from the action were negligent and that their negligent acts, in addition to Wagner's, represented the total proximate cause of the accident. Evidence showed that the Colfax County Sheriff's Department and the Schuyler Police Department had received complaints about the traffic signal's displaying conflicting green lights, but they failed to report all the complaints to the State. The court found that the negligence of Metz and the city

(both dismissed from the action based on settlements) contributed to the accident.

Evidence was presented by Fickle indicating that the conflicting green lights, attributed to the State's negligence, played a greater role in the accident than did other negligent acts. Conflicting green lights at an intersection create a much more dangerous condition than if the signal displays all red lights. Ronald Hensen, a civil engineer who specialized in traffic engineering, testified that a situation in which green lights are displayed in conflicting directions is "clearly the most egregious possibility . . . for a failure of intersection traffic control." He explained that when an intersection is controlled by a traffic signal, the responsibility for "who yields to who[m]" is taken away from the drivers and it is assigned to the equipment. One driver assumes that if he or she has a green light, the other does not. When two lights display green in conflicting directions, it "sets up a situation where both drivers believe they are assigned the right of way."

[14,15] The district court concluded that Wagner was negligent and that in relation to the negligence of the other actors, his negligence was 10 percent responsible for the accident. The judgment against the State for damages was reduced accordingly. It is well settled that plaintiffs are contributorily negligent if (1) they fail to protect themselves from injury, (2) their conduct concurs and cooperates with the defendant's actionable negligence, and (3) their conduct contributes to their injuries as a proximate cause. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). To entitle a defendant to judgment under the comparative negligence statutory scheme, the defendant must prove that any contributory negligence chargeable to the plaintiff is equal to or greater than the total negligence of all persons against whom recovery is sought. *Id.* See Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995).

[16] Because the purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to

the respective elements of negligence proved at trial. *Baldwin v. City of Omaha, supra.* We conclude that the district court's apportionment of damages was supported by credible evidence and bore a reasonable relationship to the negligence proved at trial.

(v) Failure to Use Seatbelt

[17-19] As part of its argument that the district court improperly allocated negligence in determining causation, the State asserts that the damages should have been reduced by 5 percent because Wagner allegedly was not wearing a seatbelt at the time of the accident. Under Neb. Rev. Stat. § 60-6,273 (Reissue 2004), evidence that a person was not wearing a seatbelt is admissible only as evidence concerning the mitigation of damages and cannot be used with respect to the issue of liability or proximate cause. The failure to use a seatbelt cannot be used to allocate the percentage of negligence to a party. And the State did not assign as error the district court's award of damages. Errors argued but not assigned will not be considered on appeal. *County of Sarpy v. City of Gretna, ante* p. 92, 727 N.W.2d 690 (2007).

(vi) Damages

No real dispute exists as to whether Fickle sufficiently proved damages. In her cross-appeal, Fickle challenges the *amount* of damages awarded, but that issue will be addressed later in this opinion.

(c) Admission of Expert Testimony

[20] The State next asserts that the district court abused its discretion in permitting Fickle's expert, Hensen, to testify. An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function. *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004).

(i) Procedural Background Involving Fickle's Expert

Hensen, a civil engineer specializing in traffic engineering, testified as an expert for Fickle. During the discovery phase of this litigation, Hensen opined that the conflicting green lights could have been caused by a low-voltage situation. At trial, the State filed a motion to prevent Hensen from testifying about

certain subjects, and a separate hearing was held. The State asked the district court to preclude Hensen from testifying that (1) a voltage failure occurred, (2) low voltage caused the traffic signal to display conflicting green lights, (3) the signal cabinet should have been replaced, (4) the State and the city of Schuyler lacked a coordinated policy to address problems with the traffic signal, and (5) the State had a duty to correct the problem of conflicting green lights. The court concluded that Fickle could adduce testimony from Hensen but noted that its ruling did not preclude the State from objecting to Hensen's testimony as deemed necessary.

(ii) Relevant Law Governing Expert Testimony

[21] When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, in accordance with Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). This entails a preliminary assessment to determine whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Id.*

[22] A trial court adequately demonstrates that it has performed its gatekeeping duty in determining the reliability of expert testimony when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination. *Zimmerman v. Powell, supra.*

(iii) Trial Testimony by Fickle's Expert

We note that Hensen did not testify at trial with regard to some of the subjects that constitute the basis for the State's assigned error. The State argues that Hensen should have been precluded at trial from testifying about the cause of the alleged conflicting green lights and about insufficient coordination between the City of Schuyler and the State. But no such testimony was elicited from Hensen at trial.

Hensen testified about the adequacy of the State's response to the complaints it received with regard to the traffic signal. He also testified concerning whether the State should have replaced the signal cabinet. Hensen's testimony was based on his knowledge and experience in traffic engineering. He opined that the State's response to the complaints was inadequate. Regarding the keeping of records pertaining to such complaints, Hensen also relied on a publication by the Institute of Transportation Engineers. The State has not taken issue with the publication. Hensen testified as to his extensive knowledge and experience in traffic engineering. Since 1979, Hensen had worked full time as a consultant to various public agencies, including state road departments and municipalities.

(iv) District Court's Gatekeeping Duty

The State argues that the district court did not make adequate findings on the record with regard to the admissibility of Hensen's testimony. At a hearing concerning Hensen's proposed testimony, the court did not specifically and expressly make findings. However, the record shows the court concluded that Hensen's testimony was admissible, see *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004), and the court left open the opportunity for the State to object at trial. During trial, the court permitted Hensen to testify that the signal cabinet should have been replaced. The record indicates, in accordance with *Zimmerman v. Powell*, that the court expressed its reason for allowing Hensen to testify and the factor considered by the court bearing on the reliability of his testimony: Hensen's testimony was based on his expertise, and he was "entitled to rely on his experience in the field to make the recommendation that the cabinet be pulled."

[23] A trial court may not abdicate its gatekeeping duty under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), in a bench trial, but the court is afforded more flexibility in performing this function. See, generally, *Seaboard Lumber Co. v. U.S.*, 308 F.3d 1283 (Fed. Cir. 2002) (holding that while concerns underlying *Daubert* requirements are of lesser import in bench

trials, *Daubert* standards must nevertheless be met); *City of Owensboro v. Adams*, 136 S.W.3d 446 (Ky. 2004) (noting that *Daubert* is applied in procedurally different manner in bench trial in that trial court often admits evidence first and then disregards it upon deciding it is unreliable); *USGen New England v. Town of Rockingham*, 177 Vt. 193, 862 A.2d 269 (2004) (holding that admissibility standards of *Daubert* are required in bench trial but in more relaxed manner). In determining whether an expert's testimony is reliable, a trial court necessarily must first hear the testimony. And we presume that a trial court considers only competent and relevant evidence in rendering its decision. See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

Based on a de novo review of the record, we conclude that the district court did not err in admitting Hensen's testimony. When the trial court has not abdicated its gatekeeping function, an appellate court reviews the trial court's decision to admit or exclude the evidence for an abuse of discretion. *Zimmerman v. Powell, supra.* The district court did not abuse its discretion in permitting Fickle's expert to testify.

For the reasons stated above, we conclude that the State's appeal is without merit and affirm the district court's judgment holding the State liable in this matter under the State Tort Claims Act. We now turn to the cross-appeal.

2. Fickle's Cross-Appeal

The district court found that Fickle, in her individual capacity, had incurred economic damages of $1,013,417.01. The court found that in her representative capacity for Wagner, Fickle had sustained economic damages of $3.5 million and noneconomic damages for pain and suffering in the amount of $500,000. The issue is whether these sums were adequate.

The amount of damages awarded in a case under the State Tort Claims Act is a matter solely for the finder of fact, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). We must determine whether the award bears a reasonable relationship to the damages proved at trial.

(a) Future Economic Damages

Fickle asserts that the amount of future economic damages awarded was inadequate. At the time of trial, Wagner was 20 years old. George Wolcott, a neurologist, testified that Wagner could expect to live "into his 60's." The evidence established that Wagner's life expectancy from the time of trial was approximately 40 years. Fickle claims that Wagner's future medical care and loss of wages require a much greater award than was given by the district court.

(i) Future Medical Care

The evidence established that Wagner's future medical expenses (including the cost of residential care at Village Northwest Unlimited) would be between $193,610 and $198,355 per year. This range did not reflect inflation or future increases in cost. These amounts were shown in a "Life Care Plan" compiled by Robin Welch-Shaver. Welch-Shaver has a bachelor of science degree in nursing and is a certified life care planner. The plan was formulated using information from Fickle, Wagner, the providers at Village Northwest Unlimited, and Drs. Wolcott, Lester Sach, Sarah Zoelle, and Lyal Leibrock.

The life care plan considered that Wagner would remain a resident of Village Northwest Unlimited, which provided appropriate treatment, including 24-hour nursing care, physical and occupational therapy, cognitive-skills training, and other services. The plan also was based upon the fact that Wagner would always need a residential setting in which he would receive services similar to those he was receiving from Village Northwest Unlimited. The cost associated with Wagner's need for this residential setting was $462 per day, which equated to an annual cost of $168,630.

Evidence at trial suggested that Wagner had been receiving Medicaid payments and that Village Northwest Unlimited was charging him at the Medicaid rate, which was lower than the rate paid by private parties. The State argues that the lower Medicaid rate should have been considered in calculating damages instead of the private-party rate. This argument has no merit.

[24,25] The private-party rate, not the Medicaid rate, is the proper rate to use in calculating Wagner's future medical expenses. Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages. *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997). Social legislation benefits, including payments by Medicare and Medicaid, are excluded by the collateral source rule. See, *Bynum v. Magno*, 106 Haw. 81, 101 P.3d 1149 (2004) (holding that collateral source rule prohibited reducing patient's damages award to reflect discounted Medicare and Medicaid payments); Restatement (Second) of Torts § 920A, comment *c.* (1979). Moreover, once Fickle receives the judgment awarded in this case, Wagner may no longer be eligible for Medicaid (or Village Northwest Unlimited's Medicaid rate), because eligibility standards take into account the resources available to a Medicaid applicant or recipient. See *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006).

The State also claims that certain medical expenses should not be included because they were controverted at trial. For instance, the State points out that Wagner was not required to take the following medications and supplements as a result of the accident: "Aterol," multivitamins, and calcium supplements. The State also asserts that the cost of a motorized wheelchair should not be included as a future medical expense. The State further claims that the standard cost of a minivan should be deducted from the value of a minivan with customization; however, Welch-Shaver testified that it is not a common practice to deduct the base cost of a minivan without modification. Disregarding any adjusted figures for the modified van, we summarize that the State disputes various future medical expenses in the amount of $203,480 and argues that this amount should not be considered in the damages award.

When reviewing the sufficiency of the evidence to sustain a judgment, we are mindful that every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably

be deduced from the evidence. See *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). Giving Fickle the benefit of every inference that can reasonably be deduced from the evidence, Wagner's future medical expenses without inflation are between $7,744,400 and $7,934,200.

(ii) Future Lost Wages

Evidence showed that Wagner was unable to earn a living in the labor market due to his injuries. At trial, the State contested whether Wagner would have been a skilled laborer. At the time of the accident, Wagner was a high school student who had difficulties in school and whose academic performance was not stellar. He planned to obtain a diploma through GED and pursue training through Job Corps to acquire a skill. Fickle argues that the evidence presented indicated that even if Wagner did not complete vocational training or obtain a diploma through GED, he could have expected to make at least $8 per hour as an unskilled laborer. A laborer working at this rate would earn a minimum of $16,000 per year. Over a period of 40 years, Wagner's earnings would amount to at least $640,000.

The State argues that Wagner's potential earnings should have been based upon the minimum wage. But the State fails to direct us to evidence in the record indicating that minimum wage was all that Wagner could have expected to earn. Therefore, the record supports the fact that Wagner could have expected to earn at least $640,000.

(iii) Total Future Economic Damages

Giving Fickle the benefit of every inference that can reasonably be deduced from the evidence, the evidence indicated that future medical expenses for Wagner would be between $7,744,400 and $7,934,200 and that future lost wages would be a minimum of $640,000. Thus, without consideration for inflation, the evidence presented at trial established Wagner's future economic damages would be between $8,384,400 and $8,574,200.

(iv) Reduction to Present Value

[26,27] The general rule in Nebraska is that an award for future damages must be reduced to its present value. *Cassio v.*

Creighton University, 233 Neb. 160, 446 N.W.2d 704 (1989). Present value is the current worth of a certain sum of money due on a specified future date after taking interest into consideration. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995).

Present value must be determined because the money awarded can be invested and earn interest. A present award should also consider the fact that inflation will increase the expenses incurred by the plaintiff. Although the plaintiff can earn interest, the value of the dollar will decline because of inflation. See, generally, G. Michael Fenner, *About Present Cash Value*, 18 Creighton L. Rev. 305 (1985) (discussing various approaches for determining present value). These factors are left to the judgment of the trial court but should, nevertheless, be considered in the amount of the award.

(v) Conclusion Regarding Future Economic Damages

We conclude that the evidence supports a finding that Wagner will suffer a much greater amount of future economic damages than was awarded by the district court. Therefore, the award for economic damages did not bear a reasonable relationship to the damages proved at trial.

(b) Noneconomic Damages

[28] The district court found noneconomic damages in the amount of $500,000. On appeal, the fact finder's determination of damages is given great deference. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002).

Wagner sustained a traumatic brain injury. He was comatose for 19 days. He subsequently was transferred to a hospital that specialized in treating such injuries. He was fed by a tube and had difficulty with his vision, respiration, and blood pressure. He received 8 months of physical therapy to reduce the spasticity in his arms and legs and had a "Baclofen pump" surgically implanted in his stomach to deliver medication to relieve

the spasticity. He has ongoing problems with spasticity in his arms and legs.

Wagner has received speech and psychological therapy. Initially, he was able to communicate only by blinking. At the time of trial, he could vocalize a few words. He continues to have cognitive and visual impairment, and his medical progress has reached a plateau. He requires a wheelchair and can speak and communicate only at a modest level. These impairments are likely permanent. Evidence showed that it will be necessary for Wagner to remain in an intermediate-care facility for the remainder of his life, and he will be limited in his abilities to complete simple tasks.

[29] Wagner's injuries were catastrophic and permanent, and the award of $500,000 for noneconomic damages does not fairly and reasonably compensate him for his pain and suffering. If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record. *Id.*

[30] There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents. *Schaefer v. McCreary*, 216 Neb. 739, 345 N.W.2d 821 (1984). It is a matter left largely to the discretion of the fact finder, which saw the witnesses and heard the evidence. See *id.* Here, the award of noneconomic damages did not bear a reasonable relationship to the injuries Wagner sustained and was the result of a mistake or an error by the court.

VI. CONCLUSION

The State's appeal is without merit. As to the cross-appeal, the amount of the award for economic damages was significantly lower than the amount shown by the evidence. The awards for economic and noneconomic damages did not bear a reasonable relationship to the elements of the damages proved.

We therefore affirm the judgment of liability against the State, but we reverse the judgment as to damages. The cause is remanded with directions that the district court award economic and noneconomic damages consistent with this opinion.

We direct the court to our interpretation of Neb. Rev. Stat. § 25-21,185.11 (Reissue 1995) in *Tadros v. City of Omaha, ante* p. 935, 735 N.W.2d 377 (2007).

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

GERALD JACKSON, APPELLEE, V. BROTHERHOOD'S RELIEF AND COMPENSATION FUND, APPELLANT.

734 N.W.2d 739

Filed July 20, 2007. No. S-06-177.

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. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
4. **Rules of Evidence: Expert Witnesses.** Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert.
5. **Evidence.** Opinion evidence which is unsupported by appropriate foundation is not admissible.
6. **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.
7. **Testimony: Evidence: Appeal and Error.** Testimony objected to which is substantially similar to evidence admitted without objection results in no prejudicial error.
8. **Trial: Evidence: Presumptions: Appeal and Error.** Error in the admission of evidence is presumed to be prejudicial when the evidence admitted may have influenced the verdict or affected unfavorably the party against whom it was admitted.
9. **Trial: Evidence: Appeal and Error.** Where it cannot be gleaned from the record that evidence wrongfully admitted did not affect the result of the trial unfavorably to the party against whom such evidence was admitted, reception of that evidence must be considered prejudicial error.
10. **Directed Verdict: Evidence.** The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If

there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.

11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Reversed and vacated, and cause remanded for a new trial.

Renee Eveland, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Andrew W. Snyder, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

Gerald Jackson sued Brotherhood's Relief and Compensation Fund (the Fund), alleging that the Fund breached its agreement to pay him "'Held Out of Service'" benefits in the event he was suspended by his employer. Following a trial, a jury found in favor of Jackson. The district court awarded attorney fees and costs to Jackson in addition to the damages found by the jury. The Fund appealed.

II. SCOPE 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. *In re Trust of Rosenberg, ante* p. 59, 727 N.W.2d 430 (2007).

[2] 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. *Worth v. Kolbeck, ante* p. 163, 728 N.W.2d 282 (2007).

[3] 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. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

III. FACTS

1. Jackson Does Not Provide Urine Sample for Random Drug Test

Jackson was employed as an engineer for Burlington Northern Santa Fe Railway (BNSF). When he reported to work on January 2, 2003, he was asked to provide a urine sample for a random drug test. Jackson had successfully performed similar tests in the past, but on this day, he stated that he could not urinate. Over a 3-hour period, Jackson neither provided nor attempted to provide a urine sample. He said he had urinated at home before leaving for work and that he lacked "the urge to go." He also said he had eaten a large meal just before work, and he refused to drink any liquid because he claimed he would suffer from indigestion and heartburn if he drank anything.

Because Jackson did not provide a urine sample, he was "pulled out of service" by BNSF. A formal investigation was initiated by the railway. BNSF advised Jackson that he would be "withheld from service pending results of this investigation."

During a BNSF investigative hearing held March 19, 2003, Jackson asserted several reasons why he did not furnish the required urine sample. He said he had urinated 15 minutes before leaving for work. He said he was taking a prescription drug called Effexor, and he claimed that a side effect of the drug was difficulty in urinating. Jackson also claimed he had been diagnosed with prostatitis, which he said could cause a person to have trouble urinating. He claimed he had been afflicted with diarrhea for several days before the drug test and that this illness could have caused dehydration. Jackson further claimed he had eaten a large meal at home before work and thus felt too full to drink liquids to help him urinate. He stated that drinking liquids after such a large meal would have given him indigestion.

Following the BNSF investigation, Jackson was suspended for 9 months for failing to provide a urine sample without a valid medical reason, in violation of the BNSF alcohol and drug policy.

2. Jackson Gets No Relief From Fund

In consideration for the payment of dues, the Fund provides benefits to railroad workers who are employed in hazardous

occupations. A member is compensated when he or she has been held out of service for disciplinary reasons if the suspension was not the result of an intentional rule violation. A member of the Fund must be a member of the local railroad union. The Fund bases its determination of benefits eligibility upon the results of the grievance process provided under the member's collective bargaining agreement. The terms of the agreement between the Fund and a member are contained in the Fund's "constitution," which governs the claims process.

Jackson was a member of the Fund on January 2, 2003. In accordance with the agreement, Jackson underwent a formal investigation by his employer, BNSF, and was represented at the BNSF hearing by the union. He timely submitted a claim to the Fund for benefits, along with copies of the transcript and exhibits from the BNSF investigative hearing.

The Fund denied Jackson's claim because his suspension was based upon the "refusal to perform any duty or service for the employer" or the "failure to take . . . or pass any examination or test required by the employer." The Fund also based its denial of benefits to Jackson on the definition of the term "'Held Out of Service'" as set forth in the Fund's constitution. A member could claim benefits if he had been permanently or temporarily

> relieved by his employer from the performance of his said usual duties after formal investigation, at which said employee was properly represented by a representative of the local grievance committee or other employee, as discipline for an offense or offenses, *not, however, because of any willful or intentional violation or infraction of any order . . . rule . . . or regulation . . . of his employer . . . .*

(Emphasis supplied.)

3. Jackson Sues Fund and Prevails at Trial

Jackson filed a complaint against the Fund in the district court for Box Butte County. He alleged that the Fund had breached its contract with him by failing to compensate him while he was suspended. Jackson sought damages and attorney fees and costs.

A jury trial was held in July 2005. Evidence was adduced concerning Jackson's failure to provide a urine sample for the

BNSF drug test and the Fund's denial of benefits for Jackson's suspension from work. Over the Fund's objection on grounds of hearsay, insufficient foundation, and relevance, exhibits 17 and 18 were received into evidence with no limiting instruction. Exhibit 17 contained the exhibits from the BNSF investigative hearing. Exhibit 18 was a complete transcript of the testimony from that hearing.

The jury found in Jackson's favor and awarded him $53,010, the amount of damages to which the parties had stipulated. The district court sustained Jackson's motion for attorney fees and costs.

The Fund's motion for new trial was overruled, and the Fund appealed. We transferred the appeal to our docket in accordance with our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

IV. ASSIGNMENTS OF ERROR

The Fund claims, restated, reordered, and summarized, that the district court erred (1) in admitting into evidence exhibits 17 and 18, (2) in overruling the Fund's motion for a new trial, (3) in overruling the Fund's motion for a directed verdict, and (4) in awarding attorney fees and costs to Jackson.

V. ANALYSIS

1. Admission of Exhibits 17 and 18

In proceedings in which 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. *In re Trust of Rosenberg, ante* p. 59, 727 N.W.2d 430 (2007). Preliminary questions concerning the admissibility of evidence are determined by the trial judge. See Neb. Evid. R. 104, Neb. Rev. Stat. § 27-104 (Reissue 1995). When 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. *Worth v. Kolbeck, ante* p. 163, 728 N.W.2d 282 (2007).

Over the Fund's objections, exhibits 17 and 18 were received into evidence. Exhibit 17 contained the exhibits submitted at

the BNSF investigative hearing. Exhibit 18 was a transcript of that hearing. The Fund objected to the admission of these exhibits on the grounds of hearsay, insufficient foundation, and relevance.

(a) Alleged Medical Reasons for Not Providing Urine Sample

During the BNSF investigative hearing, Jackson claimed he was unable to urinate for the random drug test due to medical reasons. He testified that he had been diagnosed with prostatitis, which he said can cause a person to experience difficulty in urinating. He based this claim on information gathered from two sources—a book entitled "Prescription for Nutritional Healing," by Phyllis A. Balch and James F. Balch, and a medical encyclopedia. Jackson read aloud from sections in these sources addressing prostatitis.

Jackson further described difficulty in urinating as a side effect of a prescription medication called Effexor, which he was taking at the time of the BNSF drug test. Jackson stated that Effexor "probably had the biggest part of my not being able to urinate." Jackson relied upon and read aloud from the prescribing information for Effexor published by the drug's manufacturer, which listed dehydration and impairment of urination as side effects of the drug. Jackson maintained that a correlation existed between the use of Effexor and his inability to provide a urine sample "because of all the [drug's] side effects." When Jackson attempted to testify about these side effects at trial, however, the district court sustained the Fund's objection on foundation.

Jackson also claimed in the BNSF hearing that he did not drink liquids to help him urinate during the BNSF drug test because drinking liquids would have given him indigestion. He said he had eaten a large meal before work and opined that "'[d]rinking liquids with meals contributes to indigestion because it dilutes the enzymes needed'" for digestion. This claim was based on the nutrition book described above, and Jackson read aloud from a section about indigestion.

The information Jackson submitted at the BNSF hearing, including the prescribing information for Effexor and the excerpts from the nutrition book and medical encyclopedia, were

all part of exhibit 17, which was admitted at trial. Jackson's entire testimony from the hearing, during which he testified about and read from those materials, was received into evidence at trial as exhibit 18, the transcript from the hearing.

[4,5] Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). Opinion evidence which is unsupported by appropriate foundation is not admissible. *Stukenholtz v. Brown*, 267 Neb. 986, 679 N.W.2d 222 (2004).

The record provides no indication that Jackson was qualified to testify as an expert about the symptoms of prostatitis, the causes of indigestion, or the side effects of the drug Effexor. However, his opinion that each of these items contributed to his alleged inability to provide a urine sample was presented to the jury at trial in the form of exhibit 18, the hearing transcript. Furthermore, no foundation was laid at trial for the prescribing information and medical texts from which Jackson read aloud and on which he based his testimony at the BNSF hearing. This information was placed before the jury through exhibit 17.

In *Stang-Starr v. Byington*, 248 Neb. 103, 532 N.W.2d 26 (1995), we stated that standard medical texts and other authorities may be used for the purpose of impeaching, contradicting, or discrediting a witness through cross-examination and during rebuttal testimony; however, such authorities may not be used as independent evidence of the opinions and theories advanced by the parties. Since *Stang-Starr*, Nebraska has adopted the learned-treatise hearsay exception. See 1999 Neb. Laws, L.B. 64, § 1. With such adoption, statements from certain published treatises, periodicals, or pamphlets may be admissible. See Neb. Evid. R. 803(17), Neb. Rev. Stat. § 27-803(17) (Cum. Supp. 2006). However, the foundational requirements for their admission must still be met. For example, the writing must be established as a reliable authority. See *id.* Moreover, learned treatises that have been established as reliable authority are admissible into evidence only to the extent called to the attention of an expert witness upon cross-examination or relied upon by the

expert witness in direct examination. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003). Even then, statements from such writings may be read into evidence but may not be received as exhibits. See § 27-803(17).

In this case, there was no foundation laid at trial for the documents Jackson read from and submitted at the BNSF hearing. The jury should not have been permitted to consider this evidence at trial.

(b) Results of March 2003 Drug Tests

During the BNSF investigative hearing, Jackson said that drug tests conducted at his own expense "prove[d] that there were no illegal drugs in [his] system before the day in question, during, or after." He submitted documents purporting to show that in March 2003, samples of Jackson's hair were tested by two laboratories for the presence of certain drugs within a 90-day time period. Negative results were shown. At trial, these documents were included in exhibit 17, and Jackson's testimony about the drug tests was contained in exhibit 18.

It goes without saying that to be admissible, testimony and exhibits concerning the results of drug tests must have sufficient foundation. In *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985), we found that insufficient foundation had been laid for testimony regarding the testing of the decedent's blood and urine for alcohol when there was no evidence as to the origin of the urine sample and, at best, the chain of custody concerning the blood sample was equivocal. In *Raskey v. Hulewicz*, 185 Neb. 608, 177 N.W.2d 744 (1970), the trial court refused to admit evidence as to the result of a urine test due to lack of foundation. Affirming this ruling, this court held that the authenticity of the urine sample must be unequivocally established before its admission into evidence. In *Houghton v. Houghton*, 179 Neb. 275, 137 N.W.2d 861 (1965), the results of blood tests conducted to establish paternity were admitted because they were supported by testimony of the doctor who supervised the tests.

In the present case, the purported results of the March 2003 forensic hair analyses and Jackson's testimony concerning them were incorporated in exhibits 17 and 18, which were admitted into evidence. However, no competent evidence was

presented of the origin of the samples and when they were obtained. Admission on such insufficient foundation would be the equivalent of allowing the defendant in a paternity case to offer a sample of blood as his own without establishing its origin by independent evidence. Neither was any evidence presented about the testing itself. We need not delve into what type or how much foundation was required for the admissibility of the results of Jackson's forensic hair analyses. Suffice it to say that in this case, there was no foundation laid at trial, and therefore, the results of the March 2003 drug tests and Jackson's testimony about them at the BNSF hearing should not have been admitted.

(c) Inadmissibility of Exhibits 17 and 18

The Fund objected to the admission of exhibits 17 and 18 on the basis of insufficient foundation. If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003). In this case, the first criterion is met.

When exhibits 17 and 18 were introduced at trial, Jackson testified that exhibit 17 contained "all the exhibits that were in the [BNSF] formal investigation." He further stated that exhibit 18 was "the complete transcript of the investigation." The foundation laid for these exhibits consisted of Jackson's testimony that he was required by the Fund's constitution to send these items to the Fund along with his claim for benefits. However, at trial, it was never disputed that Jackson had properly submitted his claim for benefits. In the Fund's admissions, already in evidence, it acknowledged that Jackson had "provided transcript, letter of discipline and information for submission of claim benefits." The parties stipulated during trial that Jackson had properly submitted his claim for benefits in accordance with the Fund's constitution. Thus, while Jackson unnecessarily testified why he had submitted exhibits 17 and 18 to the Fund, the testimony failed to establish the admissibility of the 39 separate documents contained in exhibit 17 or the

122 single-spaced pages of hearing testimony encompassed in exhibit 18.

Insufficient foundation was laid for Jackson's opinions regarding medical causation, the excerpts from the medical and nutrition books, the prescribing information for Effexor, and the results of the forensic hair analyses. Evidence that would not have made it through the front door of admissibility nevertheless made its way to the jury through the back door, cloaked as exhibits 17 and 18. We conclude that the district court abused its discretion in admitting exhibits 17 and 18 into evidence.

(d) Reversible-Error Analysis

[6,7] 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. *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997). Testimony objected to which is substantially similar to evidence admitted without objection results in no prejudicial error. *Id.* In the present case, exhibits 17 and 18 were the only evidence that established a correlation between Jackson's failure to provide a urine sample and the condition of prostatitis, the side effects of Effexor, and indigestion.

Although other evidence at trial indicated that Jackson had been diagnosed with prostatitis, no other evidence established a causal connection between the failure to provide a urine sample for the BNSF drug test and this condition. The office notes of Dr. Robert Graves, a urologist, were in evidence. He examined Jackson and diagnosed him with prostatitis a week after the BNSF drug test, but the notes do not state that prostatitis caused (or could have caused) Jackson to be incapable of providing a urine sample. In fact, in a letter to Jackson dated January 23, 2003, Graves was unable to "give a medical explanation for [Jackson's] inability to give a urine specimen during the three-hour period" on January 2. Graves wrote that "the inability to give the urine specimen would be more related to dehydration rather than from the prostatitis itself," and he encouraged Jackson to "drink several glasses of water" the next time he was required to provide his employer a urine sample.

Evidence regarding the side effects of Effexor was presented to the jury only through exhibits 17 and 18. When Jackson attempted to testify at trial about the drug's side effects, the district court sustained the objection as to lack of foundation. As to indigestion, Jackson was permitted to testify that he sometimes got indigestion if he drank liquids after eating a large meal; however, a scientific explanation for indigestion (the "'dilut[ion]'" of "'enzymes'") came in only through exhibits 17 and 18. Finally, the jury was presented with the results of the March 2003 drug tests only in exhibits 17 and 18. Accordingly, the evidence contained in exhibits 17 and 18 was not merely cumulative.

[8,9] The Fund argues that the admission of exhibits 17 and 18 was presumptively prejudicial because the Fund was unable to cross-examine or rebut Jackson's unqualified opinions and documents contained therein and because the record does not disclose whether the evidence influenced the jury verdict. Error in the admission of evidence is presumed to be prejudicial when the evidence admitted may have influenced the verdict or affected unfavorably the party against whom it was admitted. *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004). Where it cannot be gleaned from the record that evidence wrongfully admitted did not affect the result of the trial unfavorably to the party against whom such evidence was admitted, reception of that evidence must be considered prejudicial error. *Id.*

In considering what effect the admission of exhibits 17 and 18 may have had on the jury, we note that the jury's attention was directed to the BNSF investigative hearing and the information submitted therein. References to the hearing were made throughout trial. Jackson testified that exhibit 17 contained all the documents submitted at the hearing and that exhibit 18 was the complete transcript of the hearing. Moreover, although Jackson was not permitted to testify about the side effects of Effexor, the jury was essentially told that it could find information about these side effects in exhibit 17. The following colloquy transpired during the redirect examination of Jackson:

> Q[:] Were you aware that [E]ffexor has side effects which would affect urination?

[Counsel for the Fund]: I'll object to the form, object on hearsay, and foundation and form of the question.

THE COURT: The objection is sustained.

Q[:] . . . Jackson, you provided the [Fund] and [its] attorney the book of exhibits, correct?

A[:] Yes, I did.

Q[:] It's been received by the Court. Didn't you provide them the side effects of urination for [E]ffexor?

A[:] Yes.

Q[:] How did you get that?

A[:] I wrote the manufacture[r] of the drug . . . I was taking.

Q[:] Did they respond to you and send you back something that listed the side effects?

A[:] Yes.

Q[:] Did it indicate it can affect urination?

[Counsel for the Fund]: I'll object on foundation.

At this point, the parties approached the bench and an off-the-record discussion was had between the parties and the court.

The overall issue at trial was whether Jackson was entitled to benefits pursuant to the Fund's constitution. In order to make such a finding, the jury had to determine that Jackson did not "willful[ly] or intentional[ly]" violate any order, rule, or regulation of his employer, BNSF. The BNSF alcohol and drug policy authorized a 9-month suspension for an employee who failed to provide a urine sample for a drug test "without a valid medical reason." Thus, the key question for the jury was whether Jackson simply *refused* to provide a urine sample for the drug test or whether he was *physically incapable* of urinating at that time.

The admission of exhibits 17 and 18 into evidence could have unfairly prejudiced the Fund in a number of ways. The jury could have accepted as fact Jackson's unqualified opinions relating to possible medical reasons for his alleged inability to urinate on January 2, 2003. The jury could have read the material submitted at the BNSF hearing and concluded that prostatitis and the taking of Effexor contributed to Jackson's failure to provide a urine sample. The results of the March 2003 drug tests were susceptible to being used by the jury as proof that

Jackson had nothing to hide in the BNSF drug test and therefore that he must have been physically incapable of providing a urine sample. Because we are unable to determine that exhibits 17 and 18 did not affect the result of the trial unfavorably to the Fund, we conclude that reception of that evidence was prejudicial and reversible error.

2. Motion for New Trial

The Fund's argument concerning the denial of its motion for new trial is tied to its argument regarding the admission of exhibits 17 and 18. The Fund argues that its motion for new trial should have been sustained because the admission of exhibits 17 and 18 was presumptively prejudicial. 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. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006). Having determined that the admission of exhibits 17 and 18 was prejudicial error, we further conclude that the district court abused its discretion in overruling the Fund's motion for new trial.

3. Motion for Directed Verdict

[10] The Fund's assignment of error concerning the overruling of its motion for directed verdict is without merit. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002). If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Id.*

4. Award of Attorney Fees and Costs

[11] The award of attorney fees and costs to Jackson was based upon his obtaining a judgment against the Fund. Because we have concluded that the district court committed reversible error in admitting exhibits 17 and 18 into evidence, the jury verdict and subsequent award of attorney fees and costs are vacated. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Ferer v. Erickson, Sederstrom*, 272 Neb. 113,

718 N.W.2d 501 (2006). Thus, we need not address the Fund's arguments concerning attorney fees and costs.

VI. CONCLUSION

The district court erred in admitting exhibits 17 and 18 into evidence. Accordingly, we vacate the jury's verdict and the judgment entered against the Fund. We reverse the order overruling the Fund's motion for new trial and remand the cause to the district court for a new trial.

REVERSED AND VACATED, AND CAUSE REMANDED FOR A NEW TRIAL.

POLK COUNTY RECREATIONAL ASSOCIATION, DOING BUSINESS AS RYAN HILL COUNTRY CLUB, ET AL., APPELLANTS, V. SUSQUEHANNA PATRIOT COMMERCIAL LEASING COMPANY, INC., AND ROYAL LINKS USA, INC., APPELLEES.

734 N.W.2d 750

Filed July 20, 2007. No. S-06-442.

1. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
2. **Motions to Dismiss: Courts: Jurisdiction.** The proper procedure in Nebraska courts for a party to enforce a forum selection clause naming another state as a forum is to file a motion to dismiss pursuant to Neb. Rev. Stat. § 25-415 (Reissue 1995).
3. **Motions to Dismiss: Pleadings: Appeal and Error.** Aside from factual findings, a ruling on a motion to dismiss pursuant to Neb. Rev. Stat. § 25-415 (Reissue 1995) is subject to de novo review. Where the trial court's decision is based upon the complaint and its own determination of disputed factual issues, an appellate court reviews the factual findings under the "clearly erroneous" standard.
4. **Dismissal and Nonsuit: Jurisdiction.** In the absence of one of the five listed exceptions, Neb. Rev. Stat. § 25-415 (Reissue 1995) requires dismissal of an action only when the forum selection clause is mandatory. If the forum selection clause is permissive rather than mandatory, § 25-415 does not require dismissal of the Nebraska action.
5. **Contracts: Jurisdiction: States: Proof.** A party seeking to avoid a contractual forum selection clause bears a heavy burden of showing that the clause should not be enforced, and, accordingly, the party seeking to avoid the forum selection clause bears the burden of proving that one of the statutory exceptions applies.

6. **Jurisdiction.** A forum is seriously inconvenient only if one party would be effectively deprived of a meaningful day in court.
7. **Jurisdiction: Fraud.** A forum selection clause can be avoided for fraud only when the fraud relates to procurement of the forum selection clause itself, standing independently from the remainder of the agreement.
8. **Declaratory Judgments.** Whether to entertain an action for declaratory judgment is within the discretion of the trial court.
9. ____. In connection with actions for declaratory judgment, relief will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action.

Appeal from the District Court for Polk County: MICHAEL OWENS, Judge. Affirmed.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellants.

Douglas J. Peterson and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Various Nebraska golf courses that leased equipment from Susquehanna Patriot Commercial Leasing Company, Inc. (Patriot), filed this declaratory judgment action in the district court for Polk County against Patriot and Royal Links USA, Inc. (Royal Links), seeking a declaration that their leases were void. Because it filed for bankruptcy, the action was stayed as to Royal Links. The court concluded that the action should be dismissed as to Patriot because the leases at issue contained forum selection clauses and because Patriot had already filed actions on the leases in Pennsylvania. The golf courses appeal the dismissal of the action as to Patriot. We affirm the dismissal.

II. STATEMENT OF FACTS

Royal Links manufactured the "Beverage Caddy Express" (the Caddy), a cart from which beverages and snacks may be

sold. Royal Links marketed the Caddy to golf courses to be used as a stationary unit or as a movable unit towed by another cart. Royal Links' marketing strategy was to offer golf courses a two-part arrangement. First, a golf course would acquire the Caddy and finance the purchase by entering into a leasing arrangement with a financing company. The typical lease was for a term of 60 months with monthly payments of approximately $300 and an option to purchase at the end of the term. Patriot was one of the financing companies Royal Links used for the leasing portion of the marketing arrangement. Under the second part of Royal Links' marketing arrangement, the golf course would enter into a separate "Program Agreement" with Royal Links under which Royal Links agreed to secure advertising from large national companies and the golf course agreed to display advertising on the Caddy. Under the program agreement, Royal Links would share the advertising revenue with the golf course in an amount equal to the golf courses' payments under the lease. Based on this arrangement, Royal Links' sales people marketed the Caddy as being essentially free to the golf courses because their payments under the lease would be offset by revenue from Royal Links under the program agreement.

In 2003 and 2004, the Royal Links' regional sales representative in Nebraska sold the Caddy under the marketing arrangement described above to various golf courses, including the eight plaintiffs-appellants in this case, Polk County Recreational Association, doing business as Ryan Hill Country Club; Calamus Area Golf & Recreation Club, Inc.; Crofton Lakeview Golf Association, Inc.; Henderson Golf Association, Inc.; O'Neill Country Club; Summerland Golf Club, Inc.; Thornridge Golf Course; and Atkinson-Stuart Country Club (collectively referred to as "the golf courses" herein). When each of the golf courses agreed to participate in the marketing arrangement, it entered into a program agreement with Royal Links and completed an application for financing. Royal Links forwarded the application to Patriot, and upon approval, the golf course executed a lease agreement with Patriot.

The lease agreements named Patriot as the lessor and did not contain any provision making monthly payments contingent on the golf courses' receipt of advertising revenue from Royal

Links. The lease agreements contained forum selection and choice-of-law clauses. The lease agreements executed by seven of the eight golf courses provided as follows:

> JURISDICTION AND VENUE. This Lease shall be binding and effective when accepted by an officer of Lessor at its home office in Pennsylvania, shall be deemed to have been made in Pennsylvania and, accept [sic] for local filing requirements, shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania. Lessee knowingly and voluntarily consents and submits to the jurisdiction of the Federal and State courts of Pennsylvania for purposes of adjudicating the rights and liabilities of the parties pursuant to the Lease. Lessee also knowingly and voluntarily waives the right to trial by jury in any matter or proceeding brought under this Lease.

The lease agreement executed by the eighth golf course, Thornridge Golf Course (hereinafter Thornridge), provided as follows:

> Both parties agree to waive all rights to a jury trial. This Lease shall be governed by the laws of Pennsylvania. Any legal action concerning this Lease shall be brought in federal or state court located within or for Montgomery County, Pennsylvania. You consent to the jurisdiction and venue of federal and state courts in Pennsylvania.

The program agreements that the golf courses executed with Royal Links contained forum selection and choice-of-law clauses providing that the agreements were to be governed by Ohio law and that the actions related to the program agreements were to be brought only in the courts of Lucas County, Ohio.

Royal Links eventually failed to secure advertising and experienced financial difficulty. In October 2004, Royal Links sent letters to the golf courses informing them that it would "no longer fund the monthly payments" under the program agreements. Royal Links gave the golf courses the option of continuing in the advertising program under new agreements or terminating the agreements. After receiving the letters from Royal Links, each of the golf courses stopped making payments to Patriot under the leasing agreements.

In late 2004 and early 2005, Patriot filed separate actions against each of the golf courses to enforce Patriot's rights under the leases. Patriot filed the actions in Montgomery County, Pennsylvania. Patriot had confessions of judgment entered against five of the golf courses. Patriot filed complaints against the three remaining golf courses but did not have confessions of judgment entered. Each of the golf courses made appearances in the respective Pennsylvania cases. On April 25, 2005, the Pennsylvania court granted the golf courses' uncontested motions to consolidate the Pennsylvania cases.

On May 4, 2005, the golf courses filed the present action for declaratory relief in the district court for Polk County, Nebraska. The golf courses named both Patriot and Royal Links as defendants. The golf courses asserted, inter alia, that the forum selection clauses in the agreements were void and should not be enforced. They further asserted that they were fraudulently induced to enter into the program agreements and the lease agreements as a "package deal." The golf courses sought a declaration of their rights pertaining to the agreements. They specifically sought as relief declarations that the agreements were void, declarations that the forum selection clauses of the agreements did not apply, injunctions preventing Patriot from enforcing the lease agreements, and a judgment for any amounts recovered by Patriot in the Pennsylvania proceedings plus other damages. As the basis for a declaration that the agreements were void, the golf courses asserted that the agreements violated various provisions of Nebraska law, including the Seller-Assisted Marketing Plan Act, Neb. Rev. Stat. §§ 59-1701 to 59-1762 (Reissue 2004). On August 25, Royal Links filed a notice in the Nebraska case stating that Royal Links had filed a petition for bankruptcy and that therefore, the proceedings in the Nebraska case were stayed as to Royal Links.

On May 31, 2005, the golf courses moved the Pennsylvania court to stay the consolidated Pennsylvania case. On December 14, the Pennsylvania court entered an order granting the motion and ordering the Pennsylvania case stayed until the proceedings in the Nebraska case were concluded or until further order of the Pennsylvania court.

On June 1, 2005, Patriot had filed a motion for summary judgment in the Nebraska case, and on July 25, the golf courses had filed a motion for partial summary judgment. On April 14, 2006, the court entered an order ruling on Patriot's motion for summary judgment and the golf courses' motion for partial summary judgment. The court noted the forum selection clauses in the leases and stated that "it can hardly be said that the [golf courses] could not reasonably anticipate being haled into court in another state with respect to disputes over the lease." The court concluded that even if the forum selection clauses were unenforceable, the present Nebraska action should be dismissed because "the Pennsylvania action was obviously pending at the time of commencement of this declaratory judgment action." The court therefore overruled the golf courses' motion for partial summary judgment and granted Patriot's motion for summary judgment. The court stated that because the action was stayed as to Royal Links, the order was a final judgment as to the claims between the golf courses and Patriot. The court dismissed the complaint as to Patriot.

The golf courses appeal the April 14, 2006, order of the district court for Polk County.

III. ASSIGNMENTS OF ERROR

The golf courses assert that the district court erred in granting summary judgment in favor of Patriot and dismissing the action as to Patriot. They specifically assert that the court erred in concluding (1) that the forum selection clauses in the leases were enforceable under applicable common-law principles and under Nebraska's Model Uniform Choice of Forum Act (the Act), Neb. Rev. Stat. §§ 25-413 to 25-417 (Reissue 1995), and (2) that a Nebraska court was precluded from entertaining this declaratory judgment action because of the prior pending action in Pennsylvania.

IV. STANDARDS OF REVIEW

[1] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question. *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

Other applicable standards of review are discussed in the analysis portion of this opinion.

V. ANALYSIS

The golf courses claim that the district court erred in granting Patriot's motion and dismissing their complaint as to Patriot. They assert that the court erred in concluding that the forum selection clauses in the leases were enforceable and in concluding that this declaratory judgment action should be dismissed because of the prior pending Pennsylvania action. We conclude that the forum selection clause in the Thornridge lease was a mandatory forum selection clause that was enforceable pursuant to § 25-415 and that the court therefore did not err in dismissing the complaint as to Patriot with regard to that lease. We further conclude that although the forum selection clauses in the remaining seven leases were permissive rather than mandatory, the court did not err in dismissing the complaint as to Patriot with regard to these leases because the Pennsylvania action was pending at the time the golf courses filed this action for declaratory judgment in Nebraska.

1. Forum Selection Clauses

(a) Law Related to Forum Selection Clauses

(i) Nature of Motion and Order and Standard of Review

As a preliminary matter, we find it necessary to determine the nature of the motion and order under review as they relate to the enforcement of the forum selection clauses. Although Patriot fashioned its motion raising the forum selection issue as a motion for summary judgment, we determine that the appropriate procedure in Nebraska for raising an issue seeking to enforce a forum selection clause which provides that an action be brought in another state is a motion to dismiss pursuant to § 25-415. We treat the proceedings below accordingly.

In *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005), we stated that under the facts present therein, the defendant properly raised a challenge to forum selection clauses as a motion to dismiss for lack of jurisdiction

over the person pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2003). The forum selection clauses in the relevant contracts in *Ameritas Invest. Corp.* named Nebraska, and in particular Lancaster County, as the forum for suits under the contracts. We noted that § 25-414 of the Act applies where the Nebraska court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice-of-forum agreement. We determined that a challenge which claims that a forum selection clause naming Nebraska as the forum does not meet the requirements of the Act is properly viewed as a challenge to the personal jurisdiction over the defendant by the Nebraska court and that therefore, the challenge was properly raised in a rule 12(b)(2) motion to dismiss.

[2] In contrast to *Ameritas Invest. Corp.*, wherein the defendant resisted a forum selection clause which named Nebraska as the forum, in the present action, Patriot, in the Nebraska case, seeks to enforce a forum selection clause which names another jurisdiction, Pennsylvania, as the forum. The issue raised by Patriot in the present case therefore is not an issue challenging personal jurisdiction, and a rule 12(b)(2) motion to dismiss would not be the proper procedure to raise the forum selection issue. While, as noted in *Ameritas Invest. Corp.*, forum selection clauses naming Nebraska as the forum are governed by § 25-414 of the Act, forum selection clauses naming a jurisdiction other than Nebraska are governed by § 25-415. Section 25-415 is titled "Choice of forum in another state; action pending in this state; procedure" and provides:

> If the parties have agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless (1) the court is required by statute to entertain the action; (2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action; (3) the other state would be a substantially less convenient place for the trial of the action than this state; (4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or (5) it would for some

> other reason be unfair or unreasonable to enforce the agreement.

We read § 25-415 to provide the procedure in Nebraska whereby a party may enforce a forum selection clause naming another state as the forum. Section 25-415 provides that "the court will dismiss or stay the action, as appropriate, unless" one of the exceptions is present. Giving meaning to the word "dismiss" in § 25-415, we determine that the proper procedure in Nebraska courts for a party to enforce a forum selection clause naming another state as a forum is to file a motion to dismiss pursuant to § 25-415. See *Haakinson & Beaty Co. v. Inland Ins. Co.*, 216 Neb. 426, 344 N.W.2d 454 (1984). We determine that the motion for summary judgment filed by Patriot in this case can be treated as a motion to dismiss pursuant to § 25-415 and that the court's April 14, 2006, order can be treated as an order granting such motion to dismiss.

[3] With regard to the standard of review, we determine that in ruling on a motion to dismiss pursuant to § 25-415, a trial court engages in a procedure similar to ruling on a motion to dismiss for lack of subject matter jurisdiction under rule 12(b)(1), in that the court may base its decision solely on the complaint or may need to make findings of fact. See, generally, *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006) (regarding standard of review for ruling on rule 12(b)(1) motion to dismiss). Thus, when deciding a motion to dismiss pursuant to § 25-415, the existence and enforceability of a forum selection clause may be determined by a review of the complaint if the contract containing such clause is attached to the complaint, but the court might need to consider additional evidence in order to determine whether any of the exceptions to enforcement of a forum selection clause under § 25-415 is present. We determine that the standard of review for a ruling on a motion to dismiss pursuant to § 25-415 should be similar to that for a ruling on a rule 12(b)(1) motion and therefore is as follows: Aside from factual findings, a ruling on a motion to dismiss pursuant to § 25-415 is subject to de novo review. Where the trial court's decision is based upon the complaint and its own determination of disputed factual issues, we review the factual findings under the "clearly erroneous" standard.

(ii) Mandatory Versus Permissive Forum Selection Clause

As noted above, § 25-415 provides that unless one of the exceptions applies, a court in Nebraska will dismiss an action "[i]f the parties have agreed in writing that an action on a controversy shall be brought *only* in another state . . . ." (Emphasis supplied.) We note that while the forum selection clause in the lease executed by Thornridge provides that "[a]ny legal action concerning this Lease *shall be brought* in federal or state courts located within or for Montgomery County, Pennsylvania" (emphasis supplied), the forum selection clauses in the leases executed by the remaining golf courses provide that "[l]essee knowingly and voluntarily consents and submits to the jurisdiction of the Federal and State courts of Pennsylvania for purposes of adjudicating the rights and liabilities of the parties pursuant to the Lease." We determine that while the forum selection clause in the Thornridge lease is a mandatory forum selection clause requiring actions to be brought only in Pennsylvania, the forum selection clauses in the remaining leases are merely permissive forum selection clauses providing that actions may be brought in Pennsylvania, but not requiring that actions be brought only in Pennsylvania or prohibiting actions from being brought in an another appropriate forum.

We note that other jurisdictions have distinguished between forum selection clauses that are mandatory in nature and those that are permissive in nature. In *Converting/Biophile v. Ludlow Composites*, 296 Wis. 2d 273, 287-88, 722 N.W.2d 633, 640-41 (Wis. App. 2006), the Wisconsin Court of Appeals stated:

> "Clauses in which a party agrees to 'submit' to jurisdiction are not necessarily mandatory." [Citation omitted.] "Such language means that the party agrees to be subject to that forum's jurisdiction *if sued there*. It does not prevent the party from bringing suit in another forum." [Citation omitted.] The language of a mandatory clause shows more than that jurisdiction is *appropriate* in a designated forum; it unequivocally mandates *exclusive* jurisdiction. [Citation omitted.] Absent specific language of exclusion, an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere.

(Emphasis in original.)

[4] Under a plain reading, we determine that § 25-415 necessarily makes a similar distinction between mandatory and permissive forum selection clauses when it refers to agreements providing "that an action on a controversy shall be brought *only* in another state." (Emphasis supplied.) In the absence of one of the five listed exceptions, § 25-415 requires dismissal of an action only when the forum selection clause is mandatory. If the forum selection clause is permissive rather than mandatory, § 25-415 does not require dismissal of the Nebraska action.

The forum selection clause in the Thornridge lease provides that any action concerning the lease "shall be" brought in Pennsylvania. We read this forum selection clause to be a mandatory clause requiring that an action with respect to the lease shall be brought only in Pennsylvania. The forum selection clauses in the other seven leases provide only that the parties consent and submit to the jurisdiction of Pennsylvania courts. We read these forum selection clauses to be permissive clauses providing that an action may be brought in Pennsylvania, but not requiring that an action be brought only in Pennsylvania and not prohibiting an action from being brought in another state.

Because the forum selection clause in the Thornridge lease is mandatory, we will consider the enforceability of such clause pursuant to § 25-415 in this section of the opinion. Because the forum selection clauses in the remaining leases are permissive, such clauses are not a barrier to an action in Nebraska and we will consider in the following section of this opinion whether dismissal of the action regarding the remaining leases was appropriate on another basis.

(iii) Choice of Law

We note that our analysis of the enforceability of the Thornridge forum selection clause is somewhat complicated by the fact that in addition to the forum selection clause, the Thornridge lease, like the remaining leases, contains a choice-of-law clause providing that the lease is to be governed by the law of Pennsylvania. When a party to such an agreement files suit in a state that is not designated by either the forum selection clause or the choice-of-law clause, it is necessary to determine which state's law will govern the enforceability of the forum selection clause itself. However, because in the

present case we determine that the forum selection clause in the Thornridge lease is enforceable under either Nebraska law or Pennsylvania law, we need not decide which jurisdiction's law governs the question of enforceability of the forum selection clause. See *Turcheck v. Amerifund Financial, Inc.*, 272 Mich. App. 341, 725 N.W.2d 684 (2006).

(b) Application of Law to Forum Selection Clause in Thornridge Lease

[5] Under the Act, Nebraska courts are generally directed to enforce forum selection clauses unless certain statutory exceptions apply. A party seeking to avoid a contractual forum selection clause bears a heavy burden of showing that the clause should not be enforced, and, accordingly, the party seeking to avoid the forum selection clause bears the burden of proving that one of the statutory exceptions applies. See, *Turcheck v. Amerifund Financial, Inc., supra* (applying Michigan law similar to the Act in Nebraska).

As noted above, § 25-415 provides that a forum selection clause naming another state is to be enforced and the action dismissed unless one of the listed exceptions is present. Although Pennsylvania has not enacted the Model Uniform Choice of Forum Act, Pennsylvania's analysis regarding the enforceability of forum selection clauses is similar to the analysis that would be undertaken pursuant to Nebraska law. Recently, in *Patriot Leasing Co. v. Kremer Restaurant*, 915 A.2d 647 (Pa. Super. 2006), the Superior Court of Pennsylvania found that a forum selection clause identical to the clause in the Thornridge lease was enforceable. The Pennsylvania court stated that under Pennsylvania law,

> a forum selection clause in a commercial contract between business entities is presumptively valid and will be deemed unenforceable only when: 1) the clause itself was induced by fraud or overreaching; 2) the forum selected in the clause is so unfair or inconvenient that a party, for all practical purposes, will be deprived of an opportunity to be heard; or 3) the clause is found to violate public policy.

Id. at 651. In sum, under both Nebraska and Pennsylvania law, forum selection clauses are to be enforced unless a specified exception is present.

The golf courses argue that under Nebraska law, three exceptions listed in § 25-415 exist in the present case: (1) that the golf courses cannot secure effective relief in Pennsylvania; (2) that Pennsylvania would be a less convenient place for trial; and (3) that agreement as to the forum selection clause was induced by fraudulent misrepresentations by Royal Links as an agent of Patriot. In addition, the golf courses argue that as a matter of common law, the entire agreement, including the forum selection clause, is void and unenforceable because it was predicated on fraudulent misrepresentations.

With regard to the first argument, the golf courses assert that they cannot secure effective relief in Pennsylvania "due to the complex and novel nature of their claims." Brief for appellants at 36. They specifically assert that their action for declaratory judgment involves novel interpretations of Nebraska law, including the Seller-Assisted Marketing Plan Act, §§ 59-1701 to 59-1762. The golf courses argue that because such law is unique to Nebraska and has not been extensively interpreted by the courts of this state, Pennsylvania courts "would have an extremely difficult time applying this law." The golf courses cite *R. C. A. v. Rotman*, 411 Pa. 630, 192 A.2d 655 (1963), for the proposition that Pennsylvania courts are prohibited from making "'conclusive interpretations'" of another state's law in the absence of clear guidance from case law from that other state. Brief for appellants at 36.

We reject the argument that the golf courses could not secure effective relief in Pennsylvania courts. We note again that the leases include choice-of-law provisions stating that the leases are to be governed by Pennsylvania law. Therefore, a question remains as to whether and to what extent the Nebraska laws cited by the golf courses are applicable to the leases. To the extent Nebraska law is applicable, we do not think that Pennsylvania courts are incapable of interpreting such law, nor do we read *Rotman* to prohibit Pennsylvania courts from so doing. The Pennsylvania Supreme Court stated in *Rotman* that "[a]lthough we have the power, and are often required, to give *our* interpretation of the statute of another state, the *conclusive* interpretation of that statute—the one which these parties desire—must emanate from the courts

of that state." 411 Pa. at 632, 192 A.2d at 657 (emphasis in original). The Pennsylvania Supreme Court therefore acknowledged that Pennsylvania courts can and do interpret the statutes of other states; however, in *Rotman*, the court determined that because of the specific circumstances of that case and the necessity of a conclusive interpretation of another state's law, it was wise judicial procedure to stay the proceedings in Pennsylvania until it was determined whether a conclusive interpretation could be obtained in the other state. The golf courses have not shown that the same considerations exist in the present case, and we therefore do not think that the Pennsylvania courts would be unable to interpret Nebraska law to the extent necessary in the present dispute.

The golf courses next argue that Pennsylvania is a substantially less convenient place for trial. Their main argument in this regard is that "the overwhelming majority of witnesses that will be called at trial are all from Nebraska." Brief for appellants at 40. The golf courses also assert various factors of public interest that argue against trial in Pennsylvania.

[6] In this regard, we note that in *Patriot Leasing Co. v. Kremer Restaurant*, 915 A.2d 647 (Pa. Super. 2006), the Pennsylvania Superior Court rejected similar arguments that Pennsylvania was a substantially less convenient place for trial than the defendants' home states of Missouri and Alabama. The court stated that "mere inconvenience or additional expense will not permit a forum selection clause to be avoided" and that "if the forum is available and can do substantial justice to the action, there is no serious impairment of a party's ability to litigate." *Id.* at 652. With regard to the golf courses' argument that most of the witnesses are from Nebraska, we note that it has been stated that a forum is seriously inconvenient only if one party would be "'effectively deprived of a meaningful day in court.'" See *Interfund Corp. v. O'Byrne*, 462 N.W.2d 86, 88 (Minn. App. 1990) (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)). The court in *Interfund Corp.* further stated that "location and convenience of witnesses [do] not necessarily make a forum seriously inconvenient because deposition testimony can be taken and used without disadvantage at trial." *Id.* We note further that

the convenience of witnesses is a matter that should be within the contemplation of the parties when they agree to a forum selection clause and therefore generally should not be a basis for avoiding enforcement of the clause. We determine that the golf courses have not demonstrated that Pennsylvania is a substantially less convenient forum either under Pennsylvania law or under the Act.

Finally, the golf courses argue that the forum selection clause should not be enforced because the agreements were induced by fraudulent misrepresentations by Royal Links as an agent of Patriot. The golf courses argue that such alleged fraud is a barrier to enforcement of the agreements and of the forum selection clauses under both common law and the Act. Because the Act governs enforceability of forum selection clauses, we analyze this argument under the Act rather than under common-law principles.

[7] We note that the Pennsylvania court rejected similar arguments in *Patriot Leasing Co. v. Kremer Restaurant, supra.* The court in *Patriot Leasing Co.* stated that a "forum selection clause can be avoided for fraud only when the fraud relates to procurement of the forum selection clause itself, standing independently from the remainder of the agreement." *Id.* at 653. The court concluded that "the fraud allegations relate to procurement of the equipment lease as a whole rather than the forum selection clause itself; therefore, the allegations will not invalidate the clause." *Id.* The golf courses' allegations of fraud in the present case similarly relate to the procurement of the lease as a whole rather than to the forum selection clause in particular. We therefore conclude that under both Nebraska and Pennsylvania law, such alleged fraud would not invalidate the forum selection clause.

Because none of the exceptions under § 25-415 and none of the exceptions under Pennsylvania law are present, we conclude that the mandatory forum selection clause in the Thornridge lease is enforceable under either Nebraska or Pennsylvania law. Because the forum selection clause required actions concerning the Thornridge lease to be brought in Pennsylvania, the district court properly dismissed the action as to Patriot with regard to the Thornridge lease.

2. Dismissal of Declaratory Judgment Action Due to Pending Action in Pennsylvania

Because the remaining seven leases contained permissive forum selection clauses, the court was not required under § 25-415 to dismiss the action as to Patriot with respect to those leases, and we therefore consider whether the court erred in dismissing the action with respect to those leases for the reason that the action was pending in Pennsylvania. The golf courses assert that the district court erred when it concluded that this declaratory judgment action brought in Nebraska against Patriot should be dismissed because the action in Pennsylvania was pending at the time the golf courses filed this action. We conclude that dismissal of the action against Patriot with regard to the seven remaining leases was appropriate on this basis.

[8,9] We have noted that Neb. Rev. Stat. § 25-21,154 (Reissue 1995) provides that a court "'may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding,'" and we have stated that the decision "whether to entertain an action for declaratory judgment is within the discretion of the trial court." *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 449, 684 N.W.2d 14, 23 (2004). In this context, we have stated that in connection with actions for declaratory judgment, "'relief will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action.'" *Id.* (quoting *Sim v. Comiskey*, 216 Neb. 83, 341 N.W.2d 611 (1983)).

This rule has been extended to situations in which an action is pending in another forum. In *Woodmen of the World Life Ins. Soc. v. Yelich*, 250 Neb. 345, 549 N.W.2d 172 (1996), we concluded that the trial court abused its discretion by entertaining a declaratory judgment action when an action involving the same parties and the same issues was pending in another state. We stated that where an action or proceeding is

already pending in another forum involving the same issues, it is "'"manifestly unwise and unnecessary"'" to permit a new petition for declaratory relief to be initiated by the defendant or plaintiff in that action. *Id.* at 350-51, 549 N.W.2d at 175 (quoting *Strawn v. County of Sarpy*, 146 Neb. 783, 21 N.W.2d 597 (1946)).

The golf courses acknowledge the district court's reliance on *Yelich* in dismissing this action, but they argue that dismissal was not appropriate in this case because (1) the Pennsylvania action was stayed for the purpose of allowing litigation to proceed in Nebraska and (2) the action cannot be adequately determined in Pennsylvania. With regard to the first argument, the golf courses assert that the concerns which led to the ruling in *Yelich*, specifically the threat of conflicting judgments in different jurisdictions, are not present here because the Pennsylvania court stayed the action to allow litigation to proceed in Nebraska. We note that the Pennsylvania court, in its order staying the action, did not fully explain the reason for its decision, and contrary to the golf courses' argument, we do not interpret the stay as a determination on the part of the Pennsylvania court that Nebraska was the more appropriate forum for this dispute. With regard to the second argument, the golf courses assert that all the issues in this dispute cannot be determined in the Pennsylvania action because the Pennsylvania courts cannot apply and interpret Nebraska law. This second argument is similar to the golf courses' argument considered above in connection with enforceability of the forum selection clauses that they could not secure effective relief in the Pennsylvania courts. We similarly reject the golf courses' argument in this context because we do not find that the Pennsylvania courts would be incapable of or prohibited from interpreting any portions of Nebraska law that might be applicable to the dispute between the golf courses and Patriot.

Because an action for declaratory relief should not be entertained when another action involving the same parties and the same issues is pending, we conclude that the district court did not abuse its discretion when it applied this rationale and dismissed this action as to Patriot with regard to the seven leases other than the Thornridge lease.

VI. CONCLUSION

We conclude that the forum selection clause in the Thornridge lease was mandatory and enforceable under § 25-415 and that therefore, the district court did not err in dismissing the action as to Patriot with regard to Thornridge. We further conclude that the district court did not err in dismissing the action as to Patriot with regard to the remaining leases because the Pennsylvania action was pending at the time this declaratory judgment action was filed. We therefore affirm the order dismissing the complaint as to Patriot.

AFFIRMED.

HEAVICAN, C.J., not participating.

JUSTIN B. ZAHL, APPELLANT, V.
TRISHA A. ZAHL, APPELLEE.
736 N.W.2d 365

Filed July 20, 2007. No. S-06-1123.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Child Custody.** A child custody determination that does not comport with statutory requisites is an abuse of discretion.
4. **Judgments.** Whether a decision conforms to the law is by definition a question of law.
5. **Judgments: Statutes: Appeal and Error.** Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.
6. **Trial: Appeal and Error.** The rule that a party who does not object to an error during trial fails to preserve that issue for appellate review has no application to a court's order following trial.
7. **Divorce: Child Custody.** When the parties in a marital dissolution action do not agree to joint custody, the last sentence of Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2006) governs the issue.

8. **Parental Rights: Due Process.** A trial court's authority under Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2006) to order joint physical custody when the parties have not requested it must be exercised in a manner consistent with due process requirements.
9. **Constitutional Law: Parental Rights: Due Process.** The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection.
10. **Due Process: Words and Phrases.** While the concept of due process defies precise definition, it embodies and requires fundamental fairness.
11. **Constitutional Law: Due Process.** Generally, procedural due process requires parties whose rights are to be affected by a proceeding to be given timely notice, which is reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a 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 constitution or statute; and a hearing before an impartial decisionmaker.
12. **Child Custody.** Joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.
13. ____. The factual inquiry necessary to impose joint physical custody is substantially different from that required for making a sole custody determination.
14. **Pleadings: Due Process.** A court's determination of questions raised by the facts, but not presented in the pleadings, should not come at the expense of due process.
15. **Child Custody: Visitation: Courts.** A trial court has an independent responsibility to determine questions of custody and visitation of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties.
16. **Child Custody.** When a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party has requested this custody arrangement, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.
17. ____. A district court abuses its discretion to order joint custody when it fails to specifically find that joint physical custody is in the child's best interests as required in the last sentence of Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2006).
18. **Judgments.** Implicit findings cannot satisfy procedural rules requiring explicit findings.

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

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

R. Bradley Dawson for appellee.

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

HEAVICAN, C.J.

NATURE OF CASE

This marital dissolution action presents issues related to an order of joint physical custody for the parties' minor child. When ordering joint custody under Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2006), a district court must specifically find that joint custody is in a child's best interests. The district court failed to make that finding in the dissolution decree. Further, because neither party had requested joint physical custody, the evidence presented at trial was limited to which parent should have sole custody. We conclude that under this circumstance, the court must conduct a separate hearing on joint physical custody before ordering such, and that its order must specifically find that joint physical custody is in the child's best interests.

BACKGROUND

Justin B. Zahl and Trisha A. Zahl were married in July 2004. At the time of their marriage, Trisha was in a custody dispute concerning her older son from a previous marriage.

Justin and Trisha's son, Jace Zahl, was born 3 months premature in June 2004 and suffered from respiratory problems. Trisha was unemployed at the time of Jace's birth and did not begin working again until Jace was 8 months old. Trisha testified that she was Jace's primary caregiver during this time. Justin's job as a locomotive engineer on runs from North Platte, Nebraska, to Marysville, Kansas, required him to be absent approximately six times each month for approximately 36 hours per trip.

The parties separated in March 2005, shortly after Trisha returned to work. By that time, Trisha had obtained sole custody of her older son, who was 3 years older than Jace. For a while, Justin and Trisha informally agreed to share custody of Jace and, according to Trisha's testimony and the guardian ad litem's report, had approximately equal custody time. When

Justin was gone for his job, Trisha had custody and took Jace to daycare while she was working. Justin had custody when he was at home.

In May 2005, Justin filed a complaint for dissolution, seeking permanent custody and control of Jace. Trisha filed an answer and a counterclaim for dissolution, also seeking sole custody. Neither party requested joint custody. In June, the court granted Trisha's ex parte request for temporary custody. Trisha continued to allow Justin to have custody while she was at work when he was in town.

After a hearing in October 2005, however, the court awarded temporary custody to Justin. The court did not give specific reasons in its order for the change. Trisha was granted visitation on Tuesday nights and every other weekend. After Justin was awarded temporary custody, one or both of Justin's parents, who lived 12 to 15 miles away, would come to stay with Jace when Justin was called in to work so that Jace's schedule would not be disrupted and Jace would not have to be moved. Justin normally had 1½ hours' notice in which to report to work.

The guardian ad litem filed a report in December 2005 and later filed a supplemental report on July 14, 2006, approximately 1 week before trial. The guardian ad litem was originally concerned about Justin's having so many of his relatives care for Jace while he was absent for work, rather than allowing Jace to spend more time with Trisha. But in the supplemental report, the guardian ad litem concluded that with the assistance of his family, Justin had been able to provide stability and a close family setting in his own residence. Also, in the first report, the guardian ad litem suggested that joint custody might be a way for both parents to maintain an equal and substantive role in caring for Jace. However, in the second report, the guardian ad litem concluded that although joint custody would be the most beneficial to Jace if his parents cooperated better, they did not get along well enough to carry out such a plan. The guardian ad litem ultimately recommended that the court maintain custody with Justin.

By the time of trial in July 2006, Justin had been Jace's primary custodian for close to 10 months, and Jace was 25 months

old. Justin testified that he and Trisha did not get along or communicate well, and he admitted that he did not advise Trisha of Jace's medical appointments. But he maintained that he had cooperated with Trisha on visitation and had informed her of Jace's medical needs for visitation purposes.

Justin testified that he had worked about six trips per month to Kansas during the past 8 months. He also testified that he was usually able to make some of his trips coincide with Trisha's weekend visitation and overnight visitation during the week so that he had 4 to 6 days at a time to be at home with Jace. Justin also stated that if his parents should become unavailable, he would find another job within the railroad. He admitted that he thought it was more appropriate for his parents to be raising Jace than for Trisha to do so. Both of Justin's parents testified that Justin was a good father.

Trisha testified that she had just started a new job as a clerk for the sheriff's office, working 9 a.m. to 5 p.m., Monday through Friday. Dr. Lisa Jones, a psychologist hired by Trisha to evaluate Trisha's relationship with her children, as well as her parenting skills, testified at trial. Jones stated that she had observed Trisha with her sons for approximately 1½ hours in her office and during a sporting event when Trisha did not know she was being observed.

Jones had also reviewed or conducted additional testing. Jones opined that Trisha was a high-functioning parent who interacted affectionately and positively with her children and set appropriate limits. Jones also concluded that Jace was bonded to his older half brother. Trisha's friend, brother, and mother also testified that Trisha was close to her sons and parented appropriately and that her sons were bonded.

Trisha also testified that Justin had not been actively involved in Jace's care during the first 8 months of Jace's life. Trisha testified that after they separated, she and Justin had equal custody time until Justin began "laying off" of work and keeping Jace for several days at a time, prompting Trisha to seek a custody order. Trisha testified that when she had temporary custody, she continued to allow Justin to have about the same custody arrangement, but that after Justin obtained

temporary custody, he did not reciprocate and refused to talk to her about additional visitation time.

Trisha also stated that Justin did not keep her informed of Jace's medical appointments or details of his upbringing, including daycare arrangements. Trisha did not believe Justin would work to maintain her relationship with Jace if he were granted sole custody. Trisha stated that if she were granted custody, she would continue to give Justin custody while she was working if he were in town and also that she would cooperate on a joint custody schedule if definite custody times were outlined.

After trial, the court ordered the parties to submit proposals for joint custody arrangements and delayed determining custody until it could review the feasibility of the proposals. In this order, the court stated that a child's best interests were normally served by having one parent make decisions and having one place the child calls home, but that a child's confusion caused by multiple children from multiple marriages should be minimized. The court found that both parties were manipulative and did not get along except that they recognized the other as a fit parent and sought the best interests of Jace. "[A]lthough hesitant," the court stated that it would "overcome its reluctance to determine that joint custody is the proper remedy and allow the parties to submit a proposal in regard to a joint custody arrangement."

Justin's proposal offered to expand Trisha's every-other-weekend visitation to Monday morning and to give Trisha an opportunity to pick up Jace when Justin was called in to work. Trisha proposed that the parties each have custody for 2 weekdays and alternate Wednesdays and weekends on a weekly basis.

After reviewing proposals from the parties and the guardian ad litem's reports, the court ordered joint custody in the dissolution decree but did not adopt either party's proposal. Instead, it decreed that the parties would have alternate weeks of custody, from Friday to Friday. The dissolution decree was focused on specific custody arrangements, and the court did not discuss Jace's best interests. Justin timely appeals.

ASSIGNMENTS OF ERROR

Justin assigns that the district court erred in ordering joint custody of Jace and failing to award Justin sole custody.

STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.[1]

[2,3] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[2] A child custody determination that does not comport with statutory requisites is an abuse of discretion.[3]

[4,5] Whether a decision conforms to the law is by definition a question of law.[4] Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.[5]

ANALYSIS

Justin contends that the court erred in ordering joint physical custody without first allowing the parties to present evidence on that issue. He argues that § 42-364(5) requires a custody hearing on the specific issue of joint custody and a

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[1] See, *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006); *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

[2] *Coral Prod. Corp. v. Central Resources, ante* p. 379, 730 N.W.2d 357 (2007).

[3] See, *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Peterson v. Peterson*, 196 Neb. 328, 243 N.W.2d 51 (1976).

[4] See, *Robbins v. Neth, ante* p. 115, 728 N.W.2d 109 (2007); *Hauser v. Nebraska Police Stds. Adv. Council*, 269 Neb. 541, 694 N.W.2d 171 (2005).

[5] *In re Interest of Antonio S. & Priscilla S.*, 270 Neb. 792, 708 N.W.2d 614 (2005).

specific finding that joint custody is in a child's best interests. Alternatively, Justin contends that the court abused its discretion in ordering joint physical custody because the parties do not cooperate well enough to effectively parent Jace under this custody arrangement.

Trisha argues that § 42-364(5) only requires a hearing on custody, which occurred; that both parties had an opportunity to present evidence on custody; and that the district court implicitly concluded joint custody was in Jace's best interests. She contends that Justin has failed to preserve this issue for appeal because he submitted a joint custody proposal instead of refusing to comply and exercising his right to appeal. Trisha also contends the court did not err in concluding that joint custody was in Jace's best interests because (1) Justin's work schedule leaves him unavailable for emergencies, (2) Jace's relationship with his sibling should be fostered, and (3) Justin will not foster Jace's relationship with Trisha if he has sole custody.

Waiver of Error

[6] Justin has not failed to preserve this issue for appeal. The court's first order stated: "[T]he Court finds that the parties jointly, or separately, *shall submit* a proposal in regard to a joint custody arrangement within 15 days of today's date." We conclude that this statement constituted an order, not a "finding" as Trisha contends. It is true that a party who does not object to an error during trial fails to preserve that issue for appellate review.[6] But this rule has no application to a court's order following trial.

Justin could not have appealed from the court's first order because the court did not determine custody until it issued its second order.[7] Trisha cites no authority for her argument that Justin should have refused to comply with the court's order, and this court has never held that a party must risk a contempt

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[6] See, e.g., *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

[7] See, e.g., *Pfeil v. State, ante* p. 12, 727 N.W.2d 214 (2007) (explaining final orders).

order or antagonize a trial judge in order to preserve an issue for appeal. Further, Justin's joint custody proposal did not offer joint physical custody.[8] Instead of proposing custody on a rotating basis, Justin proposed to expand Trisha's every-other-weekend visitation to Monday morning and to give Trisha an opportunity to pick up Jace when Justin was called in to work. Even if Justin's compliance with the court's order could constitute a waiver of his opposition to joint custody, Trisha's argument would still fail.

Type of Hearing Required Under § 42-364(5)

Section 42-364(5) provides:

> After a hearing in open court, the court may place the custody of a minor child with both parents on a shared or joint custody basis when both parents agree to such an arrangement. In that event, each parent shall have equal rights to make decisions in the best interests of the minor child in his or her custody. The court may place a minor child in joint custody after conducting a hearing in open court and specifically finding that joint custody is in the best interests of the minor child regardless of any parental agreement or consent.

[7] In *Robb v. Robb*,[9] this court stated that when the parties do not agree to joint custody, the last sentence of § 42-364(5) governs the issue. That sentence does not specify whether the court must hear evidence on the specific issue of joint custody before it may order such.

[8] The Court of Appeals has held that § 42-364(5) "gives the trial court the authority to order joint custody even where *one of the parents* refuses to consent, if the court holds a hearing and specifically finds that joint custody is in the child's best interests."[10] But the issue in *Kay* was limited to joint legal

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[8] See *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001).

[9] *Robb v. Robb, supra* note 1.

[10] *Kay v. Ludwig*, 12 Neb. App. 868, 881, 686 N.W.2d 619, 629 (2004) (emphasis supplied).

custody,[11] and the court's holding indicates it was not dealing with a case in which neither party had requested joint custody. This court has also not decided a case in which the district court determined joint physical custody was in a child's best interests, despite no request from either parent for this custody arrangement.[12] We conclude that a trial court's authority under § 42-364(5) to order joint physical custody when the parties have not requested it must be exercised in a manner consistent with due process requirements.

[9-11] The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection.[13] While the concept of due process defies precise definition, it embodies and requires fundamental fairness.[14] Generally, procedural due process requires parties whose rights are to be affected by a proceeding to be given timely notice, which is reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a 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 constitution or statute; and a hearing before an impartial decisionmaker.[15]

When one of the parties in a marital dissolution action has requested joint physical custody of the parties' minor child, the other party has clear notice that this custody arrangement will be an issue at trial. But here, both parties sought sole custody in their pleadings, and except for Trisha's testimony at the end of the hearing that she would be willing

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[11] See *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999).

[12] Compare, *Robb v. Robb, supra* note 1; *Spence v. Bush*, 13 Neb. App. 890, 703 N.W.2d 606 (2005).

[13] *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

[14] *Id.*

[15] See, *id.*; *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992), citing *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

to cooperate if the court imposed joint custody, each party presented evidence to show that he or she would be the best sole custodian of Jace.

[12,13] This court has held that joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction,[16] and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.[17] Thus, the factual inquiry necessary to impose joint physical custody is substantially different from that required for making a sole custody determination. Under these facts, we cannot say that Justin received adequate notice that the court might order joint custody or an adequate opportunity to present evidence on this vital issue.

[14,15] A court's determination of questions raised by the facts, but not presented in the pleadings, should not come at the expense of due process.[18] We have recognized that a trial court has an independent responsibility to determine questions of custody and visitation of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties.[19] In *Lautenschlager v. Lautenschlager*,[20] we held that the trial court was free to make an independent determination even when it was inconsistent with the parties' stipulations and the parties did not contest sole custody with the mother in their pleadings. But we also held in *Lautenschlager* that if the court disapproves of a custody stipulation, it must give the parties an opportunity to present

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[16] *Trimble v. Trimble*, 218 Neb. 118, 352 N.W.2d 599 (1984).

[17] *Moninger v. Moninger*, 202 Neb. 494, 276 N.W.2d 100 (1979).

[18] See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[19] See, § 42-364(1); *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002); *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978).

[20] *Lautenschlager v. Lautenschlager, supra* note 19.

evidence relevant to a complete reexamination of the question of custody.[21]

[16] We conclude that fundamental fairness requires that we apply the rule from *Lautenschlager* to this circumstance. Therefore, we hold that when a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party has requested this custody arrangement, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.

[17,18] In addition, the district court abused its discretion to order joint custody by failing to specifically find that joint physical custody was in Jace's best interests as required in the last sentence of § 42-364(5). Although Trisha contends that the court implicitly made this finding, implicit findings cannot satisfy procedural rules requiring explicit findings.[22] In *Torres v. Aulick Leasing*,[23] we reversed a judgment of the Workers' Compensation Court for failing to make explicit findings as required by Workers' Comp. Ct. R. of Proc. 11 (1998), despite the review panel's conclusion that the factual findings were implicit in the order. We explained that "[w]ithout such findings, there can be no meaningful appellate review."[24] The same reasoning applies here.

CONCLUSION

We conclude that the district court erred in ordering joint physical custody when both parties sought sole custody and did not agree to joint custody. Fundamental fairness requires that the parties be given notice that a court is considering

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[21] *Id.* See, also, *Strohmeyer v. Strohmeyer*, 183 Conn. 353, 439 A.2d 367 (1981); *In re Marriage of Rubey v. Vannett*, No. A05-310, 2007 WL 1412749 (Minn. App. May 15, 2007) (unpublished opinion). Compare, *In re Custody of Ayala*, 344 Ill. App. 3d 574, 800 N.E.2d 524, 279 Ill. Dec. 456 (2003); *Van Schaik v. Van Schaik*, 90 Md. App. 725, 603 A.2d 908 (1992); *Mabus v. Mabus*, 890 So. 2d 806 (Miss. 2003).

[22] See *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000).

[23] *Id.*

[24] *Id.* at 863-64, 606 N.W.2d at 102.

joint physical custody and an opportunity to litigate the issues specific to that custody arrangement before it is imposed upon them. We further conclude that the court abused its discretion by failing to specifically find that joint physical custody was in the child's best interests as required by § 42-364(5). Accordingly, we reverse the district court's judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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