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WHIPPS LAND & CATTLE COMPANY, INC., A NEBRASKA CORPORATION, AND LYNDELL W. WHIPPS AND DORIS WHIPPS, HUSBAND AND WIFE, APPELLANTS, V. LEVEL 3 COMMUNICATIONS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, APPELLEE.

658 N.W.2d 258

Filed March 14, 2003. No. S-01-1206.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Actions: States: Civil Rights: Appeal and Error.** In a federal civil rights action, whether the plaintiff has shown state action is a mixed question of law and fact that is reviewed de novo by an appellate court.
4. **Appeal and Error.** In a de novo review, an appellate court reaches a conclusion independent of the trial court.
5. **Injunction: Equity.** An action for injunction sounds in equity.
6. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
7. **Statutes.** A court may, in order to ascertain the proper meaning of a statute, refer to later as well as earlier legislation upon the same subject.
8. ____. In interpreting statutes, all existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.
9. **Federal Acts: Railroads: Right-of-Way.** The federal statute, 43 U.S.C. § 912 (2000), applies to rights-of-way created pursuant to the General Railroad Right of Way Act of 1875, 43 U.S.C. § 934 et seq. (2000), and the United States retains all reversionary interests in such rights-of-way until the United States disposes of those interests as provided by law.
10. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
11. **Constitutional Law: Property: Appeal and Error.** An appellate court analyzes the state constitutional issue whether there has been an unconstitutional taking by treating federal constitutional case law and Nebraska state constitutional case law as coterminous.
12. **Constitutional Law: States.** When the claim of a constitutional deprivation is directed against a private party, a two-part inquiry is required. The first question is whether the claimed deprivation has resulted from the exercise of a right of privilege

having its source in state authority. The second question is whether, under the facts of the case, a defendant who is a private party may be appropriately characterized as a "state actor."

13. ____: ____. The inquiry when the claim of a constitutional deprivation is directed against a private party must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself. The required nexus may be present if the private entity has exercised powers that are traditionally the exclusive prerogative of the state.
14. **Invasion of Privacy: Words and Phrases.** An invasion of privacy pursuant to Neb. Rev. Stat. § 20-203 (Reissue 1997) is one consisting solely of an intentional interference with the plaintiff's interest in solitude or seclusion, either as to his or her person or private affairs or concerns, of a kind that would be highly offensive to a reasonable person.
15. **Trespass: Invasion of Privacy.** Trespassing onto real property, without more, is not the form or magnitude of interference into a person's solitude or seclusion that would rise to the level of being highly offensive to a reasonable person, such as might be actionable under Neb. Rev. Stat. § 20-203 (Reissue 1997).
16. **Injunction: Property: Trespass.** Where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted.
17. ____: ____: ____. Concerning simple acts of trespass, equity has, in most cases, no jurisdiction, but if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted.

Appeal from the District Court for Dundy County: JOHN J. BATTERSHELL, Judge. Affirmed.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

Danene J. Tushar and Daniel J. Guinan, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HENDRY, C.J., WRIGHT, GERRARD, and MILLER-LERMAN, JJ., and IRWIN, Chief Judge.

GERRARD, J.

NATURE OF CASE

Whipps Land & Cattle Company, Inc., and Lyndell W. Whipps and Doris Whipps (collectively Whipps) sued Level 3 Communications, LLC (Level 3), after Level 3 installed underground fiber-optic cable in railroad rights-of-way that abut

Whipps' properties in Hitchcock and Dundy Counties. The primary issue presented in this appeal is whether the district court correctly concluded that Whipps had no interest in the Hitchcock County right-of-way.

FACTUAL BACKGROUND

Although all of the issues presented in this case stem from Level 3's installation of underground fiber-optic cable, the issues differ significantly with respect to the Hitchcock County and Dundy County properties, because of the chain of title of the properties and the railroad rights-of-way.

In 1882, the federal government, pursuant to the General Railroad Right of Way Act of 1875, granted the Republican Valley Railroad Company a right-of-way over the Hitchcock County property, which then still belonged to the federal government. The Hitchcock County property was subsequently granted by patent deed to Alpheus Talkington. The property was eventually conveyed to Frank and Vera Whipps, who in turn conveyed the property by warranty deed to the Whipps Land & Cattle Company, Inc., in 1975. The right-of-way is now held by the Republican Valley Railroad Company's successor, the Burlington Northern and Santa Fe Railway Company (BNSF). The Hitchcock County right-of-way is 200 feet wide.

The Dundy County right-of-way was granted by deed to the Republican Valley Railroad Company in 1881 by Charles Hickman, Whipps' predecessor in title to the Dundy County property. This right-of-way is also now held by BNSF. The right-of-way deed created a right-of-way that is 100 feet wide.

Level 3 entered into an agreement with BNSF granting Level 3 right-of-way access to construct a fiber-optic network along BNSF's rights-of-way. Level 3 installed underground fiber-optic cable within the Hitchcock County right-of-way in 1999. The cable installation occurred on the northern side of the right-of-way, about 90 feet from the railroad tracks, which generally follow the centerline.

Due to an error in Level 3's construction plans, the installation of the cable continued to be 90 feet from the centerline in Dundy County—placing the cable approximately 40 feet outside the right-of-way and on Whipps' Dundy County property. When the

discrepancy was discovered, construction was halted and the 2,000 feet of installed cable on the Dundy County property was abandoned. Level 3 completed its construction by rerouting cable installation inside the right-of-way.

Whipps sued for trespass, intentional invasion of privacy, and unconstitutional taking. Whipps sought damages, injunctive relief, and attorney fees pursuant to 42 U.S.C. §§ 1983 (2000) and 1988 (Supp. IV 1998). The district court granted partial summary judgment against Whipps with respect to activities inside the railroad rights-of-way in both Hitchcock and Dundy Counties, concluding that BNSF's rights-of-way were sufficient for BNSF to permit Level 3's cable installation. The district court concluded that BNSF held all title to the Dundy County right-of-way and that Whipps had no interest in the property subject to the Hitchcock County right-of-way.

The matter proceeded to trial regarding Level 3's admitted incursion 40 feet outside the Dundy County right-of-way. The district court rejected Whipps' constitutional claim, finding that Level 3's actions were not a taking, did not involve state action, and were unintentional. The district court found that Level 3's actions were not an intentional invasion of privacy, but simply a trespass. The district court awarded damages for trespass on the Dundy County property in the amount of $3,500. No injunctive relief was granted.

ASSIGNMENTS OF ERROR

Whipps assigns, restated and consolidated, that the district court erred in (1) granting partial summary judgment with respect to Whipps' claims regarding Level 3's installation of cable inside the Hitchcock County right-of-way, (2) refusing to award damages for the unconstitutional taking of the Dundy County property, (3) failing to award attorney fees under §§ 1983 and 1988, (4) failing to find and award damages for an intentional invasion of privacy, and (5) refusing to grant injunctive relief to prevent future trespasses by Level 3.

It should be noted that Whipps does not make any appellate argument with respect to Level 3's installation of cable inside the Dundy County right-of-way. Thus, the issues are generally confined to (1) Whipps' interest, if any, to property *inside* the

Hitchcock County right-of-way and (2) Whipps' claims and damages resulting from Level 3's incursion *outside* the Dundy County right-of-way.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Egan v. Stoler, ante* p. 1, 653 N.W.2d 855 (2002).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

[3,4] In a federal civil rights action, whether the plaintiff has shown state action is a mixed question of law and fact that is reviewed de novo by an appellate court. See, *Puerto Rico Tele. v. Telecommunications Reg. Bd.*, 189 F.3d 1 (1st Cir. 1999); *Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994); *Merritt v. Mackey*, 932 F.2d 1317 (9th Cir. 1991). In a de novo review, an appellate court reaches a conclusion independent of the trial court. *Tipp-It, Inc. v. Conboy*, 257 Neb. 219, 596 N.W.2d 304 (1999).

[5,6] An action for injunction sounds in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. See *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

ANALYSIS

Hitchcock County Right-of-Way

We first address Whipps' claims regarding the property inside the Hitchcock County right-of-way. We begin this analysis on the most fundamental level: What, if any, interest does Whipps have in the property inside the right-of-way? Answering this question requires two separate determinations. We must first determine the scope of the railroad right-of-way—what it included and what interest remained in the grantor, the United States. Second, we must determine whether any interest that remained in the United States still remains with the United States or if that interest was

subsequently transferred by the United States to Whipps' predecessor in title.

The scope of BNSF's right-of-way is a matter of federal law. It is important to understand, at the outset, that while the vocabulary of the common law of real property is often imported into the discussion of railroad rights-of-way, where those rights-of-way have been created by federal law, they are entirely creatures of federal statute, and their scope and duration are determined, not by common-law principles, but by the relevant statutory provisions. See, *Brown v. State*, 130 Wash. 2d 430, 924 P.2d 908 (1996); *Puett v. Western Pacific Railroad*, 104 Nev. 17, 752 P.2d 213 (1988).

The Hitchcock County right-of-way was created by virtue of the General Railroad Right of Way Act of 1875 (hereinafter 1875 Act), 43 U.S.C. § 934 et seq. (2000). In *State of Idaho v. Oregon Short Line R. Co.*, 617 F. Supp. 207 (D. Idaho 1985), the court discussed the history of the 1875 Act.

> From 1850 to 1871, Congress subsidized railroad construction through large grants of public lands. *Great Northern Railroad Co. v. United States*, 315 U.S. 262, 263, 62 S.Ct. 529, 533, 86 L.Ed. 836 (1942). In 1871, Congress, with a finger to the prevailing winds of public opinion, changed this policy and discontinued outright grants of land to railroads. *Id.* Congress, however, still intended railroads to have exclusive use and possession of railroad rights-of-way. This may be inferred from the continued use of the term "right-of-way" in the 1875 Act and from the fact that railroads must have exclusive use of their rights-of-way in order to function. The term "right-of-way," in the context of railroad property interests, is a term of art signifying an interest in land which entitles the railroad to the exclusive use and occupancy in such land. . . . Because exclusive use and occupancy are not rights comprised within the traditional definition of an easement, definitional problems later arose in describing the nature of the railroad's interest in its right-of-way.

Oregon Short Line R. Co., 617 F. Supp. at 210.

From 1871 to 1875, Congress dealt with railroad rights-of-way on an individualized basis. *Id.* Congress then passed the 1875 Act, which provided, in relevant part, that "[t]he right of way through

the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory . . . to the extent of one hundred feet on each side of the central line of said road." See § 934. The operative language of the 1875 Act was virtually identical to that of most or all of the pre-1871 acts. *Oregon Short Line R. Co., supra.*

It is clear that the 1875 Act was not intended to grant a fee interest to railroads. *Oregon Short Line R. Co., supra.* The nature of the interest conveyed, however, was subject to some confusion. The result of early U.S. Supreme Court decisions was a concept of " 'limited fee with an implied condition of reverter.' " *Oregon Short Line R. Co.*, 617 F. Supp. at 210, citing *Northern Pacific Ry. v. Townsend*, 190 U.S. 267, 23 S. Ct. 671, 47 L. Ed. 1044 (1903). The concept of a "limited fee" was probably applied because under the common law of real property, an easement was an incorporeal hereditament which did not give an exclusive right of possession. See *State of Wyoming v. Udall*, 379 F.2d 635 (10th Cir. 1967). As the meaning of the term "easement" expanded, in the context of railroads, to include the right in perpetuity to exclusive use and possession of the land, the "limited fee" concept disappeared. See *id.* By 1942, the U.S. Supreme Court modified its understanding of rights-of-way under the 1875 Act and held that the rights-of-way were only easements and not fee interests. See *Great Northern Ry. Co. v. U. S.*, 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836 (1942).

Given the foregoing, the *Oregon Short Line R. Co.* court reached the following conclusions:

> Congress, in granting the 1875 Act rights-of-way, did not intend to convey to the railroads a fee interest in the underlying lands. Congress did, however, intend to give the railroads an interest suitable for railroad purposes—a right-of-way, which, by definition, carried with it the right to exclusive use and occupancy of the land.

617 F. Supp. at 212. See, also, *Simacek v. York County Rural P.P. Dist.*, 220 Neb. 484, 370 N.W.2d 709 (1985). Applied to the instant case, we similarly conclude that BNSF's right-of-way, when created, was an easement as explained above, with a reversionary interest in the United States should the right-of-way cease to be used for railroad purposes.

Having concluded that the United States retained an interest in the property subject to the right-of-way, we must now determine what happened to that interest when the United States conveyed the Hitchcock County property to Whipps' predecessors in title. Courts are divided on that question. However, the prevailing view is that the underlying interest in active rights-of-way is held by the United States, and not by the adjacent landowner.

Pertinent to this determination is the specific provision made by the U.S. Congress for abandoned railroad rights-of-way. In 1922, Congress enacted 43 U.S.C. § 912 (2000), which provides in relevant part that when a railroad right-of-way is abandoned, "all right, title, interest, and estate of the United States in said lands shall . . . be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted."

Excepted, however, are any lands on which a public highway is established within 1 year of the abandonment of the right-of-way and the mineral rights in the land, which are reserved in the United States. See *id.* Furthermore, if the right-of-way runs through a municipality, the municipality acquires the federal interest, regardless of whether it has title to the adjacent fee. See, *id.*; *Buckley v. Burlington Northern*, 106 Wash. 2d 581, 723 P.2d 434 (1986).

Of the few courts to have directly considered disposition of reversionary interests created under the 1875 Act, most have determined that § 912 applies to rights-of-way created pursuant to the 1875 Act. See, *Marshall v. Chicago and Northwestern Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994); *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330 (9th Cir. 1990); *State of Idaho v. Oregon Short Line R. Co.*, 617 F. Supp. 207 (D. Idaho 1985); *Barney v. Burlington Northern R. Co.*, 490 N.W.2d 726 (S.D. 1992). But see *City of Aberdeen v. Chicago & North Transp.*, 602 F. Supp. 589 (D.S.D. 1984).

> "This Court has the obligation to interpret § 912 . . . in such a way to fully effectuate congressional intent: These statutes would be rendered null if this Court were to find them inapplicable to 1875 Act rights-of-way, for they were specifically enacted to dispose of the United States' retained

> interest in 1875 Act rights-of-way. *See* [H.R. Rep. No. 217, 67th Cong., 1st Sess. 1 (1921); H.R. Rep. No. 843, 66th Cong., 2d Sess. 2 (1920)]. In enacting these statutes, Congress clearly felt that it had some retained interest in railroad rights-of-way. The precise nature of that retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law. . . . [C]ongressional committeemen in the early 1920's spoke of this retained interest in terms of an 'implied condition of reverter.' Regardless of the precise nature of this interest, Congress clearly believed that it had authority over 1875 Act railroad rights-of-way. [Section 912] evince[s] an intent to ensure that railroad rights-of-way would continue to be used for public transportation purposes, primarily for highway transportation. . . .
>
> In conclusion, the Court finds that [§ 912] appl[ies] to 1875 Act rights-of-way."

Marshall, 31 F.3d at 1032, quoting *Oregon Short Line R. Co., supra*. Accord *Barney, supra*.

> Even if the 1875 Act granted only an easement, as opposed to a higher right-of-way interest, Congress had authority, by virtue of its broad power over interstate commerce, to grant such easements subject to its own terms and conditions—which were to preserve a corridor of public transportation, particularly the railroad transportation, in order to facilitate the development of the "Western vastness." Congress could pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests. In other words, even if the 1875 Act granted only an easement, it does not necessarily follow that Congress would or did not intend to retain an interest in that easement. This is consistent with another well-settled rule of statutory construction which provides that conveyances by the Government will be strictly interpreted against the grantee and in favor of the grantor.

Oregon Short Line R. Co., 617 F. Supp. at 212.

Simply put, the above-cited courts have concluded that if the United States' retained interest in a railroad right-of-way was

conveyed to the United States' successor in title along with the adjacent fee, then Congress would not have needed to enact § 912 to transfer that interest upon abandonment of the right-of-way. Furthermore, § 912 could not, as it purports, transfer that interest to anyone other than the adjacent feeholder, such as states or municipalities, nor could the United States reserve the mineral estate to itself.

[7,8] A court may, in order to ascertain the proper meaning of a statute, refer to later as well as earlier legislation upon the same subject. See *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995). All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one. *Id.* Based upon that principle of statutory construction, courts have relied upon § 912 to support the conclusion that pursuant to federal statute, rights-of-way created pursuant to the 1875 Act reserved reversionary interests in the United States that have not been subsequently conveyed as part of the adjacent fee. See, *Marshall v. Chicago and Northwestern Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994); *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330 (9th Cir. 1990); *State of Idaho v. Oregon Short Line R. Co.*, 617 F. Supp. 207 (D. Idaho 1985); *Barney v. Burlington Northern R. Co.*, 490 N.W.2d 726 (S.D. 1992).

[9] On matters of federal law, the decisions of federal courts are highly persuasive, particularly where federal legislative history and the interpretation of federal statutes are at issue. We are persuaded by the reasoning of the 9th and 10th Circuits, set forth above, and likewise conclude that § 912 applies to rights-of-way created pursuant to the 1875 Act and that the import of § 912 is that the United States retains all reversionary interests in such rights-of-way until the United States disposes of those interests as provided by law.

Returning to the circumstances of the instant case, we note that there is no suggestion, or support in the record, for a finding that the Hitchcock County right-of-way has been abandoned within the meaning of § 912. In fact, the record indicates that the railroad is still operating in the right-of-way. Therefore, we conclude that any reversionary interest in the Hitchcock County right-of-way is still possessed by the United States. Obviously,

if Whipps has no interest in the land inside the right-of-way, then Whipps has no claim for relief with respect to any incursion onto that land.

[10] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002). In this case, there was no genuine issue of material fact, and Level 3 was entitled to judgment as a matter of law regarding the Hitchcock County right-of-way because Whipps had no rights in that property. On that basis, we reject Whipps' first assignment of error and affirm the district court's entry of summary judgment against Whipps with respect to property inside the Hitchcock County right-of-way.

Unconstitutional Taking

[11] Whipps' second and third assignments of error relate to its claim that it is entitled to damages and attorney fees under §§ 1983 and 1988 for the unconstitutional taking, without compensation, of its property outside the Dundy County right-of-way. Although Whipps argues that its property was taken in violation of both the U.S. and Nebraska Constitutions, this court has analyzed the state constitutional issue whether there has been an unconstitutional taking by treating federal constitutional case law and our state constitutional case law as coterminous. See *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998). Section 1983 provides, as relevant:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Section 1988 provides, as relevant, that prevailing parties in § 1983 actions may be entitled to attorney fees. The threshold

issue, however, is whether Level 3 engaged in "state action," i.e., acted under color of state law, when it trespassed onto Whipps' Dundy County property.

Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies, or officials responsibility for conduct for which they cannot fairly be blamed. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Lugar, 457 U.S. at 937.

[12] In a case such as this, when the claim of a constitutional deprivation is directed against a private party, a two-part inquiry is required. The first question is whether the claimed deprivation has resulted from the exercise of a right of privilege having its source in state authority. The second question is whether, under the facts of the case, a defendant who is a private party may be appropriately characterized as a "state actor." See *id.* Whipps' argument fails on the first point.

The sole basis identified by Whipps for attribution of Level 3's actions to the state is that Level 3, as a telecommunications company, is authorized by statute to enter upon private lands for surveying, with the power of eminent domain. See Neb. Rev. Stat. § 86-701 et seq. (Cum. Supp. 2002). The failure in Whipps'

argument is that even if Level 3 has been imbued with such power by the state, that power was not exercised in this instance, and none of the damages claimed by Whipps were incurred as a result of any power given by the state to Level 3. Whipps' argument " 'overlooks the essential point—that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.' " See *Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638, 657 n.47 (7th Cir. 1972) (en banc), quoting *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968).

In *Lucas*, the plaintiff brought a class action, in part, against an electric power company, challenging an administrative policy which permitted discontinuation of service for nonpayment of charges. The plaintiff argued, inter alia, that the actions of the utility were a "state action" because the state authorized the utility to enter private property under certain circumstances. 466 F.2d at 645. The Seventh Circuit rejected the plaintiff's argument, noting that "[i]f that authority were invoked by the defendants in this case, an entirely different issue would be presented. On the record before us, however, it appears that the termination of plaintiff's service can be completed simply by throwing the proper switch or disconnecting the proper wires." *Id.* at 656. The court concluded that the utility's private actions were, therefore, not under color of state law within the meaning of § 1983. *Lucas, supra.* See, also, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974).

Whipps relies on *Ballard Fish & Oyster Co. v. Glaser Construction Co.*, 424 F.2d 473 (4th Cir. 1970), in which the Fourth Circuit found that a natural gas company had acted under color of state law in the construction of a gas pipeline across the plaintiff's oyster beds, even though the gas company had failed to obtain an easement as provided by law. *Ballard Fish & Oyster Co.*, however, is inapposite to the case at bar. The determinative factor in that case was the court's finding that the gas company intentionally took the plaintiff's property "through misuse of the power the state granted it to acquire easements." *Id.* at 474-75. No such intentional misuse of state power is present in the instant case—Level 3 obtained permission from BNSF to use its

rights-of-way in a private transaction and only mistakenly entered onto Whipps' property. In any event, the reasoning of *Ballard Fish & Oyster Co., supra*, appears strained in light of subsequent U.S. Supreme Court decisions. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982); *Jackson v. Metropolitan Edison Co., supra* (fact that business is subject to state regulation does not convert action into that of state).

[13] The inquiry in such cases must be whether " 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.' " *Blum*, 457 U.S. at 1004, quoting *Jackson, supra*. The required nexus may be present if the private entity has exercised powers that are traditionally the exclusive prerogative of the state. *Id.* But in this case, Whipps concedes that Level 3 did not exercise, or seek to exercise, any power granted to it by state law to enter private property or exercise eminent domain. The inadvertent entry onto the Dundy County property cannot be ascribed to any governmental decision, and Whipps' claimed deprivation has not resulted from the exercise of a right or privilege having its source in state authority. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). The district court correctly concluded that Whipps did not satisfy the "state action" requirement of § 1983 and that Whipps was not entitled to relief under § 1983 or § 1988. Whipps' second and third assignments of error are without merit.

Invasion of Privacy

[14] Whipps claims that the district court should have awarded damages for an intentional invasion of privacy pursuant to Neb. Rev. Stat. § 20-203 (Reissue 1997). We recently discussed the scope of § 20-203 in *Polinski v. Sky Harbor Air Serv.*, 263 Neb. 406, 412, 640 N.W.2d 391, 396 (2002):

> Section 20-203 provides as follows: "Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy." In *Kaiser v. Western*

> *R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991), we considered the nature of an intrusion under § 20-203. In *Kaiser*, we described the invasion of privacy as one " 'consist[ing] solely of an intentional interference with [the plaintiff's] interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.' " 239 Neb. at 631, 477 N.W.2d at 562 (quoting Restatement (Second) of Torts § 652 B, comment *a.* (1977)). We listed the following examples from the Restatement as illustrations of the types of intrusions for consideration as an invasion of privacy under § 20-203: "a reporter's entering a hospital room and taking the photograph of a person suffering from a rare disease; 'window peeking' or wiretapping by a private detective; obtaining access to a person's bank records pursuant to a forged court order; or the continuance of frequent telephone solicitations." *Kaiser*, 239 Neb. at 631, 477 N.W.2d at 562.

Accord *Wilkinson v. Methodist, Richard Young Hosp.*, 259 Neb. 745, 612 N.W.2d 213 (2000). Compare *Sabrina W. v. Willman*, 4 Neb. App. 149, 540 N.W.2d 364 (1995) (photographing woman in tanning booth without her consent fell within scope of statute).

In *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991), the defendants operated a model airplane field. The plaintiffs, who owned land adjacent to the field, complained that the model airplanes were noisy and continually trespassed over the plaintiffs' land. This court rejected the plaintiffs' claims under § 20-203, concluding that § 20-203 was not "designed to protect persons from the type of alleged intrusion involved in this case." *Kaiser*, 239 Neb. at 631, 477 N.W.2d at 562.

[15] Although the intrusions in the instant case are more substantial than those alleged in *Kaiser, supra*, the same distinction is present between a mere trespass and the intrusion into " '"private affairs or concerns," ' " *id.* at 631, 477 N.W.2d at 562, at which § 20-203 is directed. While Level 3's entrance onto Whipps' property was intrusive and the Whipps had every right to be upset about the resulting disturbance, the circumstances of Level 3's incursion presented a classic case of common-law trespass, for which damages were awarded. Trespassing onto real property,

without more, is simply not the form or magnitude of interference into a person's solitude or seclusion that would rise to the level of being highly offensive to a reasonable person, such as might be actionable under § 20-203. See, *Polinski, supra*; *Wilkinson, supra*; *Kaiser, supra.* The district court correctly rejected Whipps' theory of recovery based on § 20-203. Whipps' assignment of error to the contrary is without merit.

Injunctive Relief

[16,17] Whipps' final argument is that the district court should have entered injunctive relief against further trespassing by Level 3.

> This court stated in *Sillasen v. Winterer*, 76 Neb. 52, 54, 107 N.W. 124, 125 (1906), that "the rule is firmly established in this state and elsewhere that, where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted." We also stated in *Thomas v. Weller*, 204 Neb. 298, 304, 281 N.W.2d 790, 793 (1979), that "[c]oncerning simple acts of trespass, equity has, in most cases, no jurisdiction, but if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted."

Harders v. Odvody, 261 Neb. 887, 896, 626 N.W.2d 568, 575 (2001). The record in this case indicates that Level 3's trespasses onto the Dundy County property were inadvertent and ceased as soon as Level 3 became aware of its mistake. The record provides no basis for concluding that Level 3 will engage in any future trespassing, much less trespassing of such a "nature and frequency . . . such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land." See *id.* Whipps simply argues that "there is no reason to believe that Level 3 will not engage in similar behavior in the future." Brief for appellants at 35. This assertion is insufficient to warrant the "extraordinary remedy" of injunctive relief. See *Harders*, 261 Neb. at 895, 626 N.W.2d at 575. The district court did not err in failing to enter an injunction, and Whipps' final assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the district court's judgment in the sum of $3,500 for trespass on the Dundy County property is affirmed.

AFFIRMED.

CONNOLLY, STEPHAN, and MCCORMACK, JJ., not participating.

GERARD T. FORGÉT III, APPELLANT, V. STATE OF NEBRASKA EX REL. STATE BOARD OF PUBLIC ACCOUNTANCY OF THE STATE OF NEBRASKA, APPELLEE.

658 N.W.2d 271

Filed March 14, 2003. No. S-01-1397.

1. **Appeal and Error.** In order 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.
2. ____. Errors argued but not assigned will not be considered on appeal.
3. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
7. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
8. **Statutes: Appeal and Error.** Appellate courts must, as far as practicable, give effect to the language of a statute and reconcile the different provisions of it so they are consistent, harmonious, and sensible.
9. **Accountants: Licenses and Permits: Words and Phrases.** A public accountancy "certificate holder or registrant who has not lost his or her right to issuance or renewal of a permit," who may be classified as inactive pursuant to Neb. Rev. Stat.

§ 1-136(4) (Reissue 1997), is a person who is otherwise entitled to issuance of a permit under the requirements set forth in the Public Accountancy Act.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Gerard T. Forgét III, pro se.

Robert T. Grimit, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

GERRARD, J.

NATURE OF CASE

Gerard T. Forgét III was sanctioned by the Nebraska Board of Public Accountancy (the Board) for holding himself out as a certified public accountant (CPA) without holding an active CPA permit, in violation of the Public Accountancy Act, Neb. Rev. Stat. § 1-105 et seq. (Reissue 1997 & Cum. Supp. 2002). The primary question presented in this appeal is whether an individual who has successfully taken the CPA examination, but has not completed the experience requirement necessary to obtain a CPA permit, may be considered an "inactive" CPA and use the designation "CPA."

BACKGROUND

Forgét is an Omaha attorney specializing in tax law. Forgét took and passed the Nebraska CPA examination in 1996 and was issued a certificate on December 1, 1997, indicating that he had passed the examination. See § 1-114. Forgét did not, however, submit to the Board any professional experience in order to obtain an active CPA permit. See § 1-136.02.

Forgét was listed in the Board's records, beginning in January 1998, as an inactive CPA. Forgét renewed his inactive registration on March 5 by submitting an application to the Board. One question on the application asked, "Do you hold yourself out as a CPA in the state of Nebraska?" and reminded the applicant that "[y]ou must have an active permit to do so." Forgét indicated that he did not hold himself out as a CPA.

However, on August 27, 1998, the Board issued a cease and desist notice to Forgét, in connection with Forgét's placement of a telephone directory listing for Forgét's business, the "Forgét Firm," under the yellow pages category, "Accountants—Certified Public." On August 28, Forgét replied to the cease and desist notice, apologized to the Board for the "misunderstanding," and indicated his intent not to list the advertisement in future telephone directories. On September 24, Forgét was directed to provide the Board with a copy of a certified letter to be sent to the telephone directory publisher to cancel the listing. On November 23, the Board, not having received such verification, scheduled a "Show Cause hearing." Forgét was notified at the hearing that the Board regarded his conduct as contrary to Nebraska law.

On November 3, 1999, the Board filed a formal complaint against Forgét. The complaint alleged that Forgét had maintained a telephone directory listing under the category "Accountants—Certified Public." The complaint also alleged that Forgét maintained an Internet Web page on which Forgét used the designation "CPA." The complaint charged Forgét with violation of the Public Accountancy Act and several Board regulations.

A formal hearing was held before the Board on December 1, 1999. Forgét testified at the hearing that he practiced tax law as an attorney and represented taxpayers in front of and against the Internal Revenue Service in contested cases, but did not create financial statements, render opinions on financial statements, or otherwise have an accounting practice. Although Forgét had prepared income tax returns for businesses and individuals, Forgét had not conducted compilations, reviews, or audits, and did not intend to do so.

Forgét's business card, entered into evidence at the formal hearing, identified him as "Gerard 'Rod' T. Forgét III, J.D., MBA, LLM, CPA" and "Attorney at Law." The letters "CPA" were marked with an asterisk, and at the bottom of the business card, in smaller type, it was indicated that Forgét was an "inactive member, Nebraska Society of Certified Public Accountants."

The record also contains telephone directory listings for the Forgét Firm, from two different Omaha telephone directories for 1999-2000. One listing was placed in the US West directory,

under the category "Accountants—Certified Public," and indicates a "CPA Certificate NE Board of Accountancy." The letters "CPA" are larger and in bolder typeface than the rest of the words on that line. The second listing, placed in the McLeod USA directory under the category "Accountants," indicates a "CPA Certificate-Nebraska Board Public Accountancy." The letters "CPA" are in bolder typeface than those on the rest of that line. The Forgét Firm was not listed under the category "Accountants—Certified Public" in the McLeod USA directory, although that category was available. Forgét also had listings in both directories under the category for tax attorneys; neither listing contained a reference to a CPA designation of any kind.

Printouts from Forgét's Web page indicate that the Web page in question was a business homepage for the Forgét Firm, and Forgét was identified as an "Attorney at Law and CPA." Forgét testified that once the contents of the Web page were called to his attention by the Board's formal complaint, he directed the individual who designed Forgét's Web page to modify the content to identify Forgét as a "CPA Registrant," and that the change was made on the date Forgét received the formal complaint. Printouts from the Web page, present in the record, reflect this change, and Forgét testified that those printouts reflected the content of his Web page at the time of the formal hearing.

On January 19, 2001, the Board entered a decision and order finding that Forgét had violated the Public Accountancy Act and the Board's rules and regulations. The Board revoked Forgét's CPA certificate, but suspended the judgment of revocation pursuant to the conditions that (1) Forgét not associate his name or that of his firm with the terms " 'certified public accountant' " or " 'CPA' " in any manner or form and (2) Forgét would be permitted to refer to his completion of the CPA examination and/or his membership in professional accountant associations only if that reference contained the following statement: " 'I passed the Uniform Certified Public Accountants examination on May 8, 1996 but I have not met all the requirements for a permit to practice public accountancy and therefore I am not a CPA.' "

Forgét appealed to the district court pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999). See § 1-149 (decisions of Board may be appealed

in accordance with Administrative Procedure Act). The court affirmed the decision of the Board. Forgét appeals.

ASSIGNMENTS OF ERROR

Forgét assigns that the court erred in (1) finding that Forgét was not an inactive CPA, (2) finding that Forgét held himself out to the public as a CPA permit holder, (3) finding that Forgét misled and deceived the public by his representations in his advertising, and (4) applying § 1-117 over § 1-122 by giving priority of a general statutory provision over a special provision when the two conflicted.

[1,2] Forgét also argues, in his brief, that the Board's order is arbitrary, capricious, and unreasonable and that the Board has violated Forgét's rights under the First Amendment to the U.S. Constitution. However, these are not assigned as error. In order 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. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Errors argued but not assigned will not be considered on appeal. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001).

STANDARD OF REVIEW

[3,4] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *American Legion v. Nebraska Liquor Control Comm.*, *ante* p. 112, 655 N.W.2d 38 (2003). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[5,6] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.* In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court

where competent evidence supports the district court's findings. *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002).

ANALYSIS

Forgét's first assignment of error is that the court erred in finding that Forgét was not an inactive CPA. We begin our analysis of this assignment of error with a general examination of the process of CPA licensing set forth by the Public Accountancy Act. Prior to January 1, 1998, the Board could issue

> a certificate of certified public accountant to any person (a) who is a resident of this state or has a place of business therein or, as an employee, is regularly employed therein, (b) who has graduated from a college or university of recognized standing, and (c) who has passed a written examination in accounting, auditing, and such other related subjects as the board determines to be appropriate.

§ 1-114(1). It is not disputed that Forgét met the above qualifications. However, issuance of a certificate is not the same as issuance of a permit to engage in the practice of public accountancy. The Board issues a permit to engage in the practice of public accountancy to a certificate holder only when the certificate holder meets certain experience requirements. See § 1-136(1). Acceptable experience includes, for instance, 2 years of employment by anyone engaging in the practice of public accountancy or experience gained through employment by government agencies. See § 1-136.02. The methods of meeting the statutory experience requirement need not be examined in detail, as it is undisputed that Forgét has not met the experience requirement.

The Public Accountancy Act explicitly provides that "[a]ny person who has successfully completed the examination described in section 1-114 shall have no status as a certified public accountant *unless and until he or she has the requisite experience* and also has been issued a certificate as a certified public accountant." (Emphasis supplied.) § 1-117. However, § 1-136(4) also provides:

> Any certificate holder or registrant who has not lost his or her right to issuance or renewal of a permit and who is not actively engaged in the practice of public accountancy in this state may file a written application with the board to be

> classified as inactive. A person so classified shall not be issued a permit or be deemed the holder of a permit but shall be carried upon an inactive roll to be maintained by the board upon the payment of an inactive fee . . . . A person so classified shall not be deprived of the right to the issuance or renewal of a permit and may, upon application to the board and upon payment of the current permit fee, be issued a current permit.

Any person who is classified as inactive under § 1-136 "shall be styled and known as a certified public accountant and may also use the abbreviation C.P.A." § 1-122. See, also, § 1-151(1). Forgét argues that he was an inactive CPA pursuant to § 1-136(4) and, thus, entitled to use the abbreviation "C.P.A." by § 1-122.

[7] However, Forgét's argument is inconsistent with the language and intent of the Public Accountancy Act. When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). The intent of the Legislature, expressed throughout the Public Accountancy Act, is that a person must have satisfactory experience in order to practice public accountancy in Nebraska. It is similarly evident that the Legislature intended to limit the use of the terms "certified public accountant" and "C.P.A." to persons who have met all the requirements imposed by the Public Accountancy Act, including the experience requirement. See §§ 1-151 and 1-166 (unauthorized use of terms is Class II misdemeanor).

Considered in pari materia, it is apparent that a certificate holder "who has not lost his or her right to issuance . . . of a permit," within the meaning of § 1-136(4), is a person who has the present right to issuance of a permit, if a permit is requested. This is evidenced by the fact that § 1-136(4) permits an inactive CPA to be issued a current permit upon application to the Board and payment of the current permit fee. This is only sensible if the inactive classification is limited to those who have met the requirements of the Public Accountancy Act for the issuance of an active permit, including the required experience.

Furthermore, § 1-136(3) provides that if a certificate holder fails to apply for a permit within 3 years of the expiration of his or her last permit, or 3 years from the date the certificate was issued, the certificate holder may be deprived of the right to issuance or renewal of a permit. The evident purpose of § 1-136(4) is to permit certificate holders to maintain their right to issuance of a permit by applying for inactive classification and paying reduced fees. Thus, the language of § 1-136(4) is best read as a reference to the provisions of § 1-136(3)—one who "has not lost his or her right to issuance or renewal of a permit" within the meaning of § 1-136(4) is one who has the right to issuance or renewal of a permit, i.e., has met the requirements for issuance of a permit, and has not been deprived of that right by operation of § 1-136(3). Forgét is not such a person; having never satisfied the experience requirement of § 1-136.02, Forgét has never had the right to issuance of a permit in the first place.

[8] This reading of the Public Accountancy Act is also compelled by §§ 1-117 and 1-122, which would otherwise be in conflict. Appellate courts must, as far as practicable, give effect to the language of a statute and reconcile the different provisions of it so they are consistent, harmonious, and sensible. *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999). Pursuant to § 1-117, a person who has completed the CPA examination nonetheless shall "have no status" as a CPA unless he or she has *both* (1) been issued a certificate and (2) has the requisite experience. Yet, Forgét's reading of the statutes would permit such a person, with "no status as a certified public accountant," to be an inactive CPA and, pursuant to § 1-122(1), be "known as a certified public accountant and . . . use the abbreviation C.P.A." This conflict is resolved, however, if the inactive classification created under § 1-136(4) is limited to those who have met all the requirements for issuance of an active permit, because such persons have successfully completed the CPA examination, been issued a CPA certificate, and have the requisite experience and, thus, may both have the "status" of certified public accountants pursuant to § 1-117 and "be known as" certified public accountants pursuant to § 1-122(2).

[9] For the foregoing reasons, we hold that a "certificate holder or registrant who has not lost his or her right to issuance or

renewal of a permit," who may be classified as inactive pursuant to § 1-136(4), is a person who is otherwise entitled to issuance of a permit under the requirements set forth in § 1-136(1) and the remainder of the Public Accountancy Act. In this case, it is not disputed that Forgét has not met those requirements. Therefore, the court did not err in determining that Forgét was not an "inactive" CPA within the meaning of § 1-136(4). The foregoing analysis is dispositive of Forgét's first and fourth assignments of error.

Forgét's remaining assignments of error are directed generally at the court's factual determination that Forgét violated the requirements of the Public Accountancy Act and Board regulations by holding himself out to be a CPA. Section § 1-151(1) provides, in relevant part:

> No person shall assume or use the title or designation certified public accountant or the abbreviation C.P.A. or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such person is a certified public accountant unless such person (a) is classified as inactive under section 1-136 or (b) has been issued a certificate as a certified public accountant under sections 1-114 to 1-124 and holds a permit issued under subsection (1)(a) of section 1-136 which is not revoked or suspended . . . .

The Board regulations provide in part:

> "Holding out to the public as a permit holder" As that term is used in these rules and in the definition of the practice of public accountancy, it means any representation that a person holds a permit to practice in connection with an offer to perform or the performance of services to the public. Any such representation is presumed to invite the public to rely upon the professional skills implied by the permit in connection with services offered to be performed. For purposes of this definition and these rules, a representation shall be deemed to include any oral or written communication conveying that a licensee holds a permit, including the use of titles or legends displayed in letterheads, business cards, office doors, advertisements, and listings.

288 Neb. Admin. Code, ch. 3, § 001.09 (1999).

> "Practice of public accountancy" shall mean the performance or offering to perform by a person holding himself out

> to the public as a permit holder, for a client or potential client, of one or more kinds of services involving:
>
> . . . .
>
> 001.17B one or more kinds of management advisory or consulting services, or the preparation of tax returns or the furnishing of advice on tax matters.

288 Neb. Admin. Code, ch. 3, § 001.17 (1999).

The record in this case, summarized above, clearly demonstrates the existence of competent evidence to support the court's findings. On two separate occasions—one occurring after the issuance of a cease and desist notice—Forgét listed the Forgét Firm in the telephone directory under the category "Accountants—Certified Public." A reasonable member of the public would be likely to conclude that a person listed under that category would, in fact, be a CPA, which Forgét was not. Furthermore, Forgét's Web page, prior to the filing of a complaint against him by the Board, identified him as a CPA, without conditions. Other representations made by Forgét included various qualifications such as "certificate" and "Registrant," neither of which was likely to convey to the public that Forgét was, in actuality, not permitted to practice public accountancy.

Nor does Forgét's purported "inactive" classification preclude a finding that Forgét violated the relevant statutes and regulations. "Whenever using 'Certified Public Accountant' or 'CPA' with his or her name, an inactive registrant shall use the disclaimer 'Inactive Registrant' in parentheses immediately after the title or abbreviation." 288 Neb. Admin. Code, ch. 7, § 003.01 (1999). Even assuming that Forgét acted in reliance on the Board's registration of his "inactive" status and that the Board was somehow estopped from denying such status—an argument that Forgét does not raise—Forgét still failed, on *any* of the instances reflected in the record, to comply with the plain and unambiguous requirement of chapter 7, § 003.01, of the Board's regulations. Even if Forgét had actually been an inactive CPA within the meaning of § 1-136(4)—an argument we reject above—he would still not have been in compliance with § 003.01.

The obvious and reasonable purpose expressed in the Public Accountancy Act, and the Board's associated regulations, is to protect the public by ensuring that the public is able to distinguish

among those who are permitted to practice public accountancy and those who are not. Forgét's actions, reflected in the record, contravened this purpose. The district court did not err in its factual findings regarding Forgét's violation of the relevant statutes and regulations. Forgét's assignments of error to the contrary are without merit.

CONCLUSION

Forgét was not an "inactive" CPA within the meaning of § 1-136, and his conduct violated the Public Accountancy Act and the regulations of the Board concerning the unlawful use of the designation "CPA." The district court's order affirming the decision of the Board is affirmed.

AFFIRMED.

IN RE ESTATE OF GEORGE R. PFEIFFER, DECEASED. HENRIETTA PFEIFFER, APPELLEE, V. CONNIE L. FRATES AND CHIRLE R. TJADEN, COPERSONAL REPRESENTATIVES, APPELLANTS.

658 N.W.2d 14

Filed March 14, 2003. No. S-01-1401.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Jurisdiction: Appeal and Error.** Generally, the denial of a motion for summary judgment is not a final, appealable order. However, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
4. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
5. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to

interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

6. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there.

Appeal from the County Court for Lincoln County: KENT E. FLOROM, Judge. Affirmed.

Edward D. Steenburg, of McQuillan, Steenburg & McQuillan, P.C., for appellants.

Allen L. Fugate for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This is an appeal from a probate proceeding in which the county court granted partial summary judgment in favor of appellee, Henrietta Pfeiffer. The county court determined that Henrietta was a surviving spouse for purposes of elective share, homestead allowance, exempt property, and family allowance. Appellants, Connie L. Frates and Chirle R. Tjaden, copersonal representatives of the estate of George R. Pfeiffer, appealed. We granted appellants' petition to bypass, and we affirm.

BACKGROUND

George married Henrietta on December 17, 1973. In November 1999, George executed a will purporting to disinherit his wife. In February 2000, George petitioned for legal separation from Henrietta, which Henrietta contested. There was a trial, and a decree of separation was entered on June 26, 2000. The court divided the property of the parties since the parties were not able to agree on the division of property themselves. The decree offset to George the sum of $426,942, representing his equity in land, equipment, and cattle he brought into the marriage. Included in the decree was a list of assets that each party was to receive. The decree also ordered George to pay Henrietta $63,668.12 "to equalize the division of property." George paid the monetary judgment, and Henrietta filed a satisfaction of judgment in August 2000.

George died on March 18, 2001. Probate was filed, and appellants, George's daughters from a previous marriage, were appointed as copersonal representatives of his estate. Henrietta filed a petition for elective share and a petition for homestead allowance, exempt property, and family allowance. Appellants filed a motion for summary judgment requesting the court to dismiss Henrietta's petitions. In October, Henrietta filed a motion for partial summary judgment on the issue as to whether she was a surviving spouse for purposes of an elective share, homestead allowance, exempt property, and family allowance. In her affidavit in support of summary judgment, Henrietta alleged that the decree did not divide $426,942 of the property. In their answer, appellants alleged that the $426,942 referenced by Henrietta was distributed by the court in the decree by setoff to George as property he brought into the marriage.

The county court, in its order dated November 28, 2001, found that Henrietta was a " 'surviving spouse' " for purposes of elective share, homestead allowance, exempt property, and family allowance. The court found Neb. Rev. Stat. §§ 30-2316(d) and 30-2353(b)(3) (Reissue 1995) to be inapplicable to this case.

ASSIGNMENTS OF ERROR

Appellants assign, rephrased, that the county court erred (1) in finding that the decree of separation entered by the district court did not constitute a waiver of the rights to elective share, homestead allowance, exempt property, and family allowance; (2) in finding that Henrietta was a surviving spouse for purposes of elective share, homestead allowance, exempt property, and family allowance as defined in chapter 30, article 23, of the Nebraska Probate Code; (3) by ordering that appellants were not entitled to summary judgment in connection with the petition filed by Henrietta for elective share, homestead allowance, exempt property, and family allowance; and (4) by ordering that Henrietta was entitled to partial summary judgment in connection with her petitions for elective share, homestead allowance, exempt property, and family allowance.

STANDARD OF REVIEW

[1-3] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no

genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Day v. Heller*, 264 Neb. 934, 653 N.W.2d 475 (2002). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999). Generally, the denial of a motion for summary judgment is not a final, appealable order. However, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002); *Knudsen v. Mutual of Omaha Ins. Co.*, 257 Neb. 912, 601 N.W.2d 725 (1999).

[4] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002); *Shirley v. Neth*, 264 Neb. 138, 646 N.W.2d 587 (2002); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

ANALYSIS

There are two issues presented on appeal: first, whether Henrietta is *not* a surviving spouse as defined by § 30-2353(b)(3), and second, whether Henrietta waived her statutory rights as defined by § 30-2316(d).

SURVIVING SPOUSE

Nebraska has adopted a portion of the Uniform Probate Code. Section 30-2353 of the Nebraska Probate Code, which is substantially the same as Unif. Probate Code § 2-802, 8 U.L.A. 210 (1998), specifically sets forth who is *not* a surviving spouse as follows:

> (a) An individual who is divorced from the decedent or whose marriage to the decedent has been dissolved or annulled by a decree that has become final is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death. *A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.*
>
> (b) For purposes of parts 1, 2, 3, and 4 of this article and of section 30-2412, a surviving spouse does not include:
>
> . . . .
>
> (3) *an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights against the decedent.*

(Emphasis supplied.)

Section 30-2353(a) clearly states that a decree of separation is not a divorce. Appellants do not allege that George and Henrietta were divorced, and they admit that Henrietta was married to George at the time of his death. However, appellants allege that Henrietta is not a surviving spouse as defined by § 30-2353(b)(3). Appellants contend that Henrietta was a party to a valid proceeding which terminated all marital property rights against the decedent. Therefore, appellants assert that Henrietta is not a surviving spouse.

The county court found § 30-2353(b)(3) inapplicable to this case. The county court held that the decree of separation at issue in this case did not contain language "purporting to 'terminate all marital property rights' " as expressly required by this section. We agree.

The decree of separation ordered George and Henrietta to live separately and apart. The county court found the decree to offset to George some property brought into the marriage in the total sum of $426,942. The decree also awarded several property items to George and Henrietta respectively. Finally, the court ordered that George shall pay to Henrietta the sum of $63,668.12 "in order to equalize the division of property." We find no language in the decree that definitively states that the property awards are not subject to any claim by the other party or that makes mention of the marital interest of either party in the property that was divided. We decline to read any such language into the court's decree.

Since we find no language in the order purporting to terminate all marital property as required by § 30-2353(b)(3), we determine that this section is inapplicable to this case. As such, Henrietta is a surviving spouse for purposes of elective share, homestead allowance, exempt property, and family allowance.

WAIVER

Section 30-2316 of the Nebraska Probate Code, which is substantially the same as Unif. Probate Code § 2-213, 8 U.L.A. 129 (1998), specifically sets forth the statutory provisions pertaining to waiver of the rights to elective share, homestead allowance, exempt property, and family allowance and provides in relevant part:

> (a) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.
>
> . . . .
>
> (d) Unless it provides to the contrary, a waiver of "all rights", or equivalent language, in the property or estate of a present or prospective spouse or *a complete property settlement entered into after or in anticipation of separation, divorce, or annulment is a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him or her from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.*

(Emphasis supplied.) We also note Unif. Probate Code § 2-802, comment, 8 U.L.A. 211 (1998), (the model for Nebraska Probate Code § 30-2353, which we discussed previously) specifically states, "Where there is only a legal separation, rather than a divorce, succession patterns are not affected; but if the separation is accompanied by a complete property settlement, this may operate under Section [30-2316] as a waiver or renunciation of benefits under a prior will and by intestate succession." We must

now determine whether a legal separation accompanied by a court-ordered division of property constitutes a waiver as promulgated by § 30-2316(d).

The county court found § 30-2316(d) inapplicable to this case. The court read § 30-2316(d) to require the parties to agree to the property settlement and to include a waiver by the spouse as to his or her rights to elective share. The court found no evidence in the record to support the argument that the parties entered into an agreed property settlement or that Henrietta had waived her rights to elective share. The property division was not by settlement between the parties, but was the decision of the trial court in a contested matter. Therefore, the county court found § 30-2316(d) clearly not applicable to the decree of separation.

On appeal, appellants maintain that the decree of separation fits within the definition of § 30-2316(d) as a complete property settlement entered into after or in anticipation of separation, divorce, or annulment and as such constitutes a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance. Appellants argue subsection (d) does not contain language requiring an "agreement" of the parties. They argue this language is found only in subsection (a), which they do not rely on. Appellants assert that a contested separation which forces the court to divide the marital property should not change the decree's effect on waiver of such rights. In essence, appellants urge this court to interpret subsection (d) as an implied waiver absent an agreement by the parties. We decline to do so.

[5,6] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Interest of J.K., ante* p. 253, 656 N.W.2d 253 (2003); *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002). It is not within the province of the courts to read a meaning into a statute that is not there. *Shaul v. Lang*, 263 Neb. 499, 640 N.W.2d 668 (2002); *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000). Section 30-2316(d) states that "a complete property *settlement* entered into after or in anticipation of separation . . . is a waiver of all rights." (Emphasis supplied.)

Henrietta contested the legal separation. Subsequently, the court ordered a disposition of property in the decree of separation. These two facts show conclusively that the parties could not agree on a property settlement. Since we find no settlement entered into as prescribed by the plain meaning of the words, we agree with the county court's findings that § 30-2316(d) is inapplicable to this case. The term "settlement" implies a meeting of the minds of the parties to a transaction or controversy; an adjustment of differences or accounts, or a coming to an agreement. *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (1995). The decree of separation does not constitute a waiver as promulgated by the statute.

CONCLUSION

We conclude that the county court did not err in granting partial summary judgment to Henrietta. We conclude that Henrietta is a surviving spouse for purposes of elective share, homestead allowance, exempt property, and family allowance. We therefore affirm the decision of the county court.

AFFIRMED.

KUGLER COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. GROWTH PRODUCTS LTD., INC., A NEW YORK CORPORATION, APPELLEE.

658 N.W.2d 40

Filed March 14, 2003. No. S-02-099.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Due Process: Jurisdiction: Proof.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.

3. **Constitutional Law: Jurisdiction.** Neb. Rev. Stat. § 25-536(2) (Reissue 1995) expressly extends Nebraska's jurisdiction over nonresidents to the extent the U.S. Constitution permits.
4. **Constitutional Law: Due Process.** The Due Process Clause of the U.S. Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.
5. **Due Process: Jurisdiction: States.** To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
6. ____: ____: ____. The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
7. **Due Process: Jurisdiction.** A personal jurisdiction analysis requires a court to consider the quality and nature of the defendant's activities to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process.
8. **Jurisdiction: States.** The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.
9. ____: ____. When considering the issue of personal jurisdiction, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.
10. **Due Process: Jurisdiction.** Due process does not require a defendant's physical presence in the forum before personal jurisdiction is exercised.
11. **Jurisdiction: Contracts: States.** The existence of a contract with a party in a forum state or the mere use of interstate facilities, such as telephones and mail, does not, in and of itself, provide the necessary contacts for personal jurisdiction.
12. ____: ____: ____. The existence of a contract and the use of interstate communications may be considered in an overall personal jurisdiction analysis.
13. **Jurisdiction: Parties.** When considering the issue of personal jurisdiction, a court will consider the prior negotiations between the parties and contemplated consequences, and if a substantial connection is created, even a single contact can support jurisdiction.
14. **States: Parties: Statutes.** Parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state for the consequences of their activities.
15. **Jurisdiction: States.** When weighing the facts to determine whether the exercise of personal jurisdiction would comport with fair play and substantial justice, a court may consider (1) the burden on the defendant, (2) the interest of the forum state, (3) the plaintiff's interest in obtaining relief, (4) the judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies.
16. **Jurisdiction.** Where a defendant who purposefully has directed his or her activities at forum residents seeks to defeat jurisdiction, the defendant must present a

compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Appeal from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. Reversed and remanded for further proceedings.

R. Kevin O'Donnell and Charles J. Stolz, of McGinley, O'Donnell, Reynolds & Edwards, P.C., for appellant.

Edward F. Noethe, of McGinn, McGinn, Jennings & Springer, for appellee.

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

CONNOLLY, J.

The appellant, Kugler Company, filed a petition against the appellee, Growth Products Ltd., Inc., alleging breach of contract and breach of express and implied warranties. The district court determined that it lacked personal jurisdiction over Growth Products, sustained its special appearance, and dismissed the petition. Kugler appeals. Because Growth Products had an ongoing relationship with Kugler and encouraged Kugler to distribute its products in Nebraska, we reverse, and remand for further proceedings.

BACKGROUND

Kugler is a company located in McCook, Nebraska. Growth Products is a New York corporation with its principal place of business in New York. Growth Products does not own property in Nebraska and does not maintain a Nebraska office.

In 1992, an employee of Kugler became aware of Growth Products from an advertisement in a trade journal that Kugler subscribed to. According to Kugler, the employee contacted Growth Products by telephone and then began to receive regular telephone contact from Growth Products. Between 1992 and 1999, Kugler purchased about 399 tons of nitrogen products from Growth Products at an approximate cost of $179,472. The product at issue was manufactured for Growth Products by a company in Wisconsin; Kugler went to Wisconsin to pick up the product.

In 1995, Clare H. Reinbergen, the president of Growth Products, wrote a letter expressing a desire to arrange a visit with the president of Kugler. In August 1996, Reinbergen wrote a letter to Kugler about meeting to discuss opportunities involving the distribution of products supplied by Growth Products. The letter described Growth Products' intention to enter the "ag market and begin advertising in trade magazines such as 'Ag Retailer' and 'Farm Chemicals.' " Growth Products stated that it would also be represented at trade shows.

In March 1997, Reinbergen sent a letter to Kugler congratulating it on becoming an assigned distributor. The letter stated that representatives of Growth Products would visit Kugler's location. It described ways the representatives would assist Kugler in distributing its products. Another 1997 letter from Growth Products stated, "It is our goal to continue to grow this relationship and business together, expanding and reaching new levels of profitability." The letter enclosed a distributor handbook entitled "Partners in Success," which Growth Products described as a "full support program." The handbook described Growth Products' expectations of its distributors, which included (1) the maintenance of an adequate inventory investment in its products, (2) a minimum sales requirement, and (3) an expectation that the distributor would participate in joint marketing efforts and invite Growth Products' participation in sales and promotional opportunities.

Growth Products described in its handbook how it would support the distributor, including (1) the assignment of a technical sales representative to the distributor, (2) the expectation of a yearly management meeting to plan goals and tactics, (3) the sponsorship of training seminars, and (4) the provision of a cooperative advertising allowance and promotional materials. Growth Products stated that it would pay for the distributor's first advertisement and could provide predesigned advertisements. It also provided incentives for the distributor to advertise by giving monetary credits for using a Growth Products' registered trademark or clip art in local advertising materials or catalogs. Growth Products offered to help pay for the printing of newsletters that featured its products and stated that it would help write the copy. The handbook included an order form to order more handbooks for sales

representatives. The handbook also contained a 1997 advertising schedule showing that between January and September, advertisements would be placed in "Golf Course Management Magazine," "Turf Magazine," and "Arbor Age."

According to Kugler's marketing manager, Ron Soden, Reinbergen held a sales meeting at the Kugler headquarters in 1996. After the meeting, either Reinbergen or her assistant began to contact Soden by telephone a couple of times a month to solicit sales for their products. Growth Products also sent Soden a comprehensive sales handbook which included the "Partners in Success" materials, product information, and promotional materials.

In 1998, the Van Diest Company of McCook began having problems with a Growth Products nitrogen product that it had purchased from Kugler. Growth Products visited the Van Diest office and later began soliciting the company directly by telephone for sales of their products. Reinbergen then sent a letter to Van Diest inviting it to participate in Growth Products' 1999 incentive program and explaining that participation would allow Van Diest to begin to work its way up to distributor status.

The record contains an affidavit from Reinbergen stating that Growth Products has never solicited or conducted business in Nebraska or advertised for business in Nebraska. According to Reinbergen, Growth Products has never derived substantial revenue from goods used in Nebraska.

Kugler filed a petition alleging that in 1999, it purchased two shipments of "Nitro-30" from Growth Products for $25,809.03. Kugler alleged that the Nitro-30 was defective and that Growth Products refused to issue a refund. According to Kugler, it incurred additional damages of about $16,868 because it had to clean tanks and dispose of the product. In her affidavit, Reinbergen states that a Kugler employee called Growth Products to place the orders for the Nitro-30.

Growth Products filed a special appearance, objecting to personal jurisdiction. Relying primarily on *Dunham v. Hunt Midwest Entertainment*, 2 Neb. App. 969, 520 N.W.2d 216 (1994), the court found that Growth Products did not purposely direct activities at the state and that the claim did not arise out of any forum-related activities. Thus, the court determined that Growth

Products lacked sufficient minimum contacts with Nebraska to establish personal jurisdiction and that exercising jurisdiction over Growth Products would not comport with fair play and substantial justice. The court sustained the special appearance and dismissed the petition. Kugler appeals.

ASSIGNMENT OF ERROR

Kugler assigns, rephrased, that the district court erred by sustaining the special appearance.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

ANALYSIS

Kugler contends that Growth Products had sufficient contacts with Nebraska for the court to assert personal jurisdiction over it. Kugler argues that Growth Products' communications with Kugler to solicit sales and visits by representatives of Growth Products should be considered in determining whether Kugler had sufficient minimum contacts with Nebraska. Kugler also notes that Growth Products advertised in several magazines with national circulation. Growth Products argues, however, that it has no physical presence in Nebraska and that the sales in Nebraska were initiated by Kugler. Growth Products further contends that there are insufficient minimum contacts because the product at issue was manufactured in Wisconsin and because Kugler went there to pick it up.

[2] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Holste v. Burlington*

Northern RR. Co., supra; *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998).

Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), provides:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
>
> (a) Transacting any business in this state;
>
> (b) Contracting to supply services or things in this state;
>
> . . . .
>
> (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

[3] Under § 25-536(1)(a) and (b), Growth Products is subject to the terms of the long-arm statute. Further, § 25-536(2) expressly extends Nebraska's jurisdiction over nonresidents to the extent the U.S. Constitution permits. *Crete Carrier Corp. v. Red Food Stores, supra*. Thus, we next address whether Growth Products had such contacts with Nebraska that the exercise of personal jurisdiction would not offend federal constitutional principles of due process.

[4,5] The Due Process Clause of the U.S. Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations. *Crete Carrier Corp. v. Red Food Stores, supra*, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend " 'traditional notions of fair play and substantial justice.' " *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed 95 (1945); *Crete Carrier Corp. v. Red Food Stores, supra*. Thus, the determination whether the court has jurisdiction is a two-step process. First, we determine whether Growth Products had the necessary minimum contacts with Nebraska; second, if such minimum contacts have been established, the contacts may be considered in light of other factors to determine whether the

assertion of personal jurisdiction would comport with fair play and substantial justice. See *Crete Carrier Corp. v. Red Food Stores, supra.*

MINIMUM CONTACTS

[6,7] The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Id.* This analysis requires that we consider the quality and nature of the defendant's activities to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process. *Internat. Shoe Co. v. Washington, supra*; *Crete Carrier Corp. v. Red Food Stores, supra*; *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

[8,9] The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998). Rather, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* This requirement ensures that a defendant will not be subject to litigation in a jurisdiction solely due to random, fortuitous, or attenuated contacts. *Id.*

[10-13] Due process, however, does not require a defendant's physical presence in the forum before personal jurisdiction is exercised. *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992); *Crete Carrier Corp. v. Red Food Stores, supra.* Also, the existence of a contract with a party in a forum state or the mere use of interstate facilities, such as telephones and mail, does not, in and of itself, provide the necessary contacts for personal jurisdiction. *Crete Carrier Corp. v. Red Food Stores, supra.* But this does not mean that the existence of a contract and the use of interstate communications may not be considered in the overall analysis. *Id.* We will also consider the prior negotiations between the parties and contemplated consequences. See, *id.*; *Williams v. Gould Inc., supra.* Further, if a substantial connection is created, even a single

contact can support jurisdiction. See *Crete Carrier Corp. v. Red Food Stores, supra.*

[14] Parties who "'"reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities.'" *McGowan Grain v. Sanburg*, 225 Neb. 129, 138, 403 N.W.2d 340, 347 (1987), quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Here, it is clear that there was an ongoing relationship between Kugler and Growth Products that was intended to market products sold under the Growth Products label in Nebraska. The record contains the statements of Kugler employees that Growth Products called them to solicit sales. This assertion is corroborated by written communications from Reinbergen seeking to set up a meeting and stating a goal to continue to grow the relationship between the companies and reach new levels of profitability. Reinbergen also visited Nebraska to hold a sales meeting. Kugler became an assigned distributor for Growth Products and was offered assistance from Growth Products for the marketing of its products. Over a period of years, Kugler purchased 399 tons of products from Growth Products. Growth Products then later solicited another Nebraska company to distribute its products. Here, we are not dealing with an isolated sale to a Nebraska citizen. Instead, the record shows numerous transactions with the intent to distribute and sell the products to Nebraska citizens.

Growth Products argues that because the product was manufactured for Growth Products by a Wisconsin company and that Kugler picked up the product in Wisconsin, it lacked direct contact with Nebraska. Here, taking delivery in Wisconsin is not significant. The product was sold to Kugler by Growth Products, and Kugler was Growth Products' assigned distributor of the products in Nebraska. The record shows that Growth Products encouraged Kugler's efforts to distribute its products in Nebraska and gave assistance that would help serve its market in Nebraska.

Growth Products also argues that *Dunham v. Hunt Midwest Entertainment*, 2 Neb. App. 969, 520 N.W.2d 216 (1994), dictates a different result. We disagree. In *Dunham*, the Nebraska Court of Appeals determined that there were insufficient minimum

contacts to establish personal jurisdiction when a Missouri amusement park placed numerous advertisements in Nebraska and sold tickets in Nebraska. But unlike *Dunham*, where the contacts were aimed at enticing people to leave Nebraska to visit a location in Missouri, Growth Products advertised products that would be purchased for use or resale in Nebraska. Further, by making Kugler an assigned distributor, Growth Products actively encouraged the sales of products in Nebraska. Thus, *Dunham* is inapplicable to this case. We conclude that the court was incorrect as a matter of law when it determined that the claim did not arise out of any forum-related activities and that Growth Products had insufficient minimum contacts with Nebraska to satisfy due process. To the extent the court made a finding of fact that Growth Products never purposely directed activities at Nebraska, we conclude that the district court was clearly wrong.

Fair Play and Substantial Justice

[15,16] We next weigh the facts to determine whether the exercise of personal jurisdiction would comport with " 'fair play and substantial justice.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998). In doing so, we may consider (1) the burden on the defendant, (2) the interest of the forum state, (3) the plaintiff's interest in obtaining relief, (4) the judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Id.* These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Burger King Corp. v. Rudzewicz, supra*; *Crete Carrier Corp. v. Red Food Stores, supra*. In addition, when, as here, a defendant who purposefully has directed his or her activities at forum residents seeks to defeat jurisdiction, the defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. *Id.*

With the increasing nationalization of commerce and the ease of modern communication, defense of an action is less burdensome in a state where he or she engages in economic activity. We

recognized as early as 1987 a discernible trend toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. *McGowan Grain, Inc. v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987).

Here, the court did not find that it would be burdensome on Growth Products to litigate the action in Nebraska. In addition, Growth Products has not presented evidence of any "other considerations" affecting fair play and substantial justice that would weigh against an exercise of personal jurisdiction over it. Growth Products has failed to show that an exercise of jurisdiction over it would offend notions of fair play and substantial justice.

CONCLUSION

We conclude that by soliciting sales from Kugler, holding a sales meeting in Nebraska, creating a distributorship relationship with Kugler, and encouraging the sale of its products in Nebraska, Growth Products had sufficient minimum contacts to establish personal jurisdiction. Growth Products has not shown that any other considerations apply that would weigh against an exercise of jurisdiction. Accordingly, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

PETER JEFFREY HARTMAN, APPELLEE, V.
DENISE KELLY HARTMAN, APPELLANT.
657 N.W.2d 646

Filed March 14, 2003. No. S-02-119.

1. **Motions to Vacate: Time: Appeal and Error.** The decision to vacate an order anytime during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.
2. **Courts: Motions to Vacate.** A district court has the inherent authority to vacate or modify a decision within the same term that the decision is rendered.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when the 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.

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

Robin L. Binning, of Binning & Plambeck, for appellant.

Amy Sherman Geren, of Geren Law Office, for appellee.

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

STEPHAN, J.

Denise Kelly Hartman moved to vacate a decree dissolving her marriage to Peter Jeffrey Hartman, claiming that due to her mental illness, the trial court was required to appoint a guardian ad litem for her pursuant to Neb. Rev. Stat. § 42-362 (Cum. Supp. 2002). Denise appeals from a denial of that motion.

FACTS

The parties were married on June 1, 1996, in Douglas County, Nebraska, and separated in October 1999. Two children were born of the marriage, the first on June 17, 1998, and the second on September 16, 1999. Peter filed a petition for dissolution in the district court for Douglas County on March 9, 2000. Prior to trial, Peter sought an order requiring Richard Young Mental Health Center to release records pertaining to treatment received by Denise at that facility subsequent to the parties' separation. Denise agreed, and the order was entered upon the stipulation of the parties. Subsequently, Peter filed a motion seeking release of all mental health records pertaining to the care and treatment received by Denise. The court entered an order requiring such release. Two days before the scheduled trial in December 2000, Denise sought a continuance to allow time for her to undergo a complete psychological evaluation. The requested continuance was apparently granted, and trial commenced on April 6, 2001.

Both parties were represented by counsel at trial. Glenda Cottam, a clinical psychologist qualified as an expert in psychology, testified on behalf of Denise. Cottam testified that Denise exhibited a bipolar disorder, with depression as the predominant feature at the time of trial. Cottam testified that Denise had been taking psychotropic medications, which she discontinued without the permission of her treating physician. However, Cottam

expressed her opinion that with regular counseling and appropriate medical care, Denise was able to act as a fit parent. The court also received documentary evidence reflecting that Denise had been diagnosed and treated for a bipolar disorder. There was no evidence that this condition rendered her incompetent.

During the trial, the parties reached agreement and stipulated through their respective counsel that legal and physical custody of the minor children be awarded to Peter, with Denise having visitation every other weekend and every Thursday evening, as well as on specified holidays. The court indicated that it would accept the stipulation, subject to a requirement that Denise receive psychiatric treatment. There was no request for or discussion of appointment of a guardian ad litem for Denise at any time during the trial or pretrial proceedings.

On June 25, 2001, the court entered a decree dissolving the marriage, dividing marital property and debts, and awarding custody and visitation rights as agreed by the parties. The decree included a requirement that Denise pay child support of $150 per month for two children. The court noted in its decree:

> This child support obligation represents a deviation from the calculation offered by the Respondent at the time of trial and attached hereto. Said deviation is based upon the Court's specific factual finding that the Respondent suffers from significant mental health conditions which will require the incurring of medical expenses and medication expenses by the Respondent. Said care is needed by Respondent to continue being an effective care-giver for her children during periods of visitation.

The decree also required Peter to pay Denise alimony of $450 per month for 20 months. Neither party appealed from the decree.

On August 23, 2001, Denise, now represented by different counsel, filed an application to vacate the decree of dissolution pursuant to "Neb. Rev. Stat. §25-2001 (3)&(7), or pursuant to the independent equity powers of this Court." Denise alleged that although the pleadings and evidence showed that she was mentally ill, the court did not appoint her a guardian ad litem as required by § 42-362.

On August 23, 2001, at the hearing on the application to vacate, Denise testified and offered the record from the dissolution

proceedings in support of her motion. The court denied the motion to vacate on grounds that Denise was represented by counsel throughout the dissolution proceedings and that she did not file a motion for new trial or appeal from the decree.

On September 20, 2001, Denise appealed the district court's dismissal of her motion to vacate. Denise's appeal was dismissed pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2000) because the district court's order denying the application to vacate the decree was not properly date stamped. See *Hartman v. Hartman*, 10 Neb. App. liv (No. A-01-1051, Dec. 4, 2001). Denise subsequently filed a motion for final order of the court, and on December 31, 2001, a final order was properly filed. Denise then perfected this timely appeal.

ASSIGNMENT OF ERROR

Denise assigns that the district court erred as a matter of law when it denied her application to vacate the decree of dissolution pursuant to the court's equity powers and/or Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2002), based on the fact that she was not appointed a guardian ad litem pursuant to § 42-362.

STANDARD OF REVIEW

[1] The decision to vacate an order anytime during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion. See, *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999); *First Fed. Sav. & Loan Assn. v. Wyant*, 238 Neb. 741, 472 N.W.2d 386 (1991).

ANALYSIS

Denise sought to have the decree of dissolution vacated "pursuant to Neb. Rev. Stat. §25-2001 (3)&(7), or pursuant to the independent equity powers of this Court." On appeal, Denise assigns that the district court erred in failing to vacate the decree "pursuant to the court's equity powers, and/or §25-2001." Brief for appellant at 4. We note that the statutory provisions which Denise relies upon and which were formerly codified at Neb. Rev. Stat. § 25-2001(3) and (7) (Cum. Supp. 1998), were recodified in 2000 as § 25-2001(4)(a) and (f) (Cum. Supp. 2002). These provisions provide in pertinent part:

> A district court may vacate or modify its own judgments or orders after the term at which such judgments or orders were made (a) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order . . . (f) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending . . . .

§ 25-2001(4). These statutory grounds plainly apply to modification or vacation of a judgment *after* the term of court at which it was entered. In this case, the application to vacate was made during the same term that the decree was entered. The term of the district court for Douglas County is coextensive with the calendar year. See Rules of Dist. Ct. of Fourth Jud. Dist. 4-1C (rev. 1995). The decree in this case was signed by the district judge on June 22, 2001, and file stamped June 25. As the application to vacate was filed on August 23, Denise clearly sought to have the judgment set aside in the same term in which it was entered.

[2] Although the statutory provisions under § 25-2001(4) are not applicable, § 25-2001(2) expressly provides that "[t]he power of a district court under its equity jurisdiction to set aside a judgment or an order as an equitable remedy is not limited by this section." It is well settled that a district court has the inherent authority to vacate or modify a decision within the same term that the decision is rendered. *Talkington v. Womens Servs., supra.* Accordingly, a district court has equitable power to vacate a judgment during the term in which it was entered on grounds which include, but are not limited to, those enumerated in § 25-2001(4).

[3] Because the decision to vacate an order within the same term is within the discretion of the court, the decision will be reversed only if it is shown that the district court abused its discretion. *Talkington, supra.* An abuse of discretion occurs when the 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. *Id.*

Denise argues that the district court abused its discretion in failing to vacate the decree because the court did not appoint a guardian ad litem for Denise in the dissolution proceedings pursuant to § 42-362. Section 42-362 provides in pertinent part, "When the pleadings or evidence in any action pursuant to sections 42-347 to 42-381 indicate that either spouse is mentally ill,

a guardian ad litem or an attorney, or both, shall be appointed to represent the interests of such spouse."

Section 42-362 does not define the term "mentally ill." Denise, however, urges an interpretation of "mentally ill" that would require courts to appoint a guardian ad litem pursuant to § 42-362 for any party in a dissolution proceeding who suffers from mental illness, regardless of the nature and severity of that illness. We need not decide this issue of statutory interpretation, however, because we conclude that the district court did not abuse its discretion in denying the application to vacate the decree, regardless of how the term "mentally ill" in § 42-362 is interpreted.

In its ruling, the district court noted that Denise was represented by counsel throughout the dissolution proceedings and that she did not file a motion for new trial or to perfect an appeal from the decree. The record reflects no explanation for why these steps were not taken. In addition, nothing in the record indicates that Denise's interests were adversely affected by not having a guardian ad litem appointed.

Denise does not allege that she could not communicate effectively with her counsel during the proceedings. Furthermore, she does not offer any concrete example of how she was prejudiced by not having a guardian ad litem appointed. Denise testified generally that her purpose in attempting to have the court vacate the judgment was to "make sure that my interests are looked out for, so in case I become depressed again or give up, that that doesn't happen." She did not, however, specify which of her "interests," if any, were not "looked out for" in the dissolution proceedings. Denise did testify that she "was not told that [she] could not be present when the children were picked up" following visitations. However, when asked if there was anything else she did not understand, Denise responded, "That was it."

We also note that the claim which Denise asserts as grounds for vacating the decree could have been asserted on appeal. Indeed, we held in *Penn Mutual Life Ins. Co. v. Sweeney*, 132 Neb. 624, 273 N.W. 46 (1937), that the failure of the trial court to appoint a guardian ad litem for an allegedly incompetent party in a mortgage foreclosure proceeding "is at most only erroneous and the appropriate remedy is by direct appeal and not by an original action to vacate the judgment." 132 Neb. at 627, 273 N.W. at 48.

The denial of the motion to vacate was not "untenable or unreasonable or . . . clearly against justice or conscience, reason, and evidence," see *Talkington v. Womens Servs.*, 256 Neb. 2, 5, 588 N.W.2d 790, 794 (1999), because (1) Denise was represented by counsel throughout the dissolution proceedings, (2) she did not appeal from the decree, and (3) the record does not show that her interests were adversely affected by the fact that a guardian ad litem was not appointed. The district court did not abuse its discretion in denying the motion to vacate, and we therefore affirm.

AFFIRMED.

TERRENCE L. KUBICEK ET AL., APPELLANTS, V.
CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES.
658 N.W.2d 291

Filed March 21, 2003. No. S-01-1036.

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1. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but, instead, whether any real issue of material fact exists.
2. ____: ____. In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Municipal Corporations: Statutes.** A provision of a home rule charter takes precedence over a conflicting state statute in instances of local municipal concern.
5. **Municipal Corporations.** A charter defining powers and duties is essential to the creation and existence of a municipal corporation.
6. ____. While legislative charters are always grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power.
7. **Municipal Corporations: Ordinances: Words and Phrases.** A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance.
8. ____: ____: ____. If an ordinance enacts a law or lays down a course of policy to guide the citizens, there can be no question that it is legislative in character; but if

it serves simply to put into execution previously enacted laws, it is clearly executive or administrative in nature.

9. ____: ____: ____. The crucial test for determining that which is legislative (ordinance) from that which is administrative or executive (resolution) is whether the action taken was one making a law, or executing or administering a law already in existence.
10. **Municipal Corporations: Initiative and Referendum.** Referendum provisions within the Nebraska statutes apply to legislative acts, but not to administrative or executive matters.
11. ____: ____. The right to referendum on a measure passed by a municipal council is ordinarily confined to those acts of the council which are in the exercise of its legislative power and does not extend to administrative or executive acts, even though such acts are exercised by resolution or ordinance.
12. ____: ____. It is fundamental that to permit a referendum to be invoked to annul or delay executive or administrative action would be to destroy the efficiency of the business affairs of a municipality.
13. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there.
14. **Appeal and Error.** An appellate court will not consider an issue on appeal that is not presented to or passed upon by the trial court.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Terrence L. Kubicek, pro se, and for appellants.

Dana W. Roper, Lincoln City Attorney, and Joel D. Pedersen for appellee City of Lincoln.

Richard R. Wood for appellee Board of Regents of the University of Nebraska.

Steven G. Seglin for appellee Lower Platte South Natural Resources District.

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

MCCORMACK, J.

NATURE OF CASE

Appellants, Terrence L. Kubicek; Homestead Reliance, Inc.; Malone Neighborhood Association, Inc.; and One Community Alliance, filed this suit seeking a preliminary injunction, declaratory relief, and a writ of mandamus against appellees, the City of

Lincoln, Nebraska; Board of Regents of the University of Nebraska; and the Lower Platte South Natural Resources District. Appellants challenge the Lincoln City Council's creation and participation in the Joint Antelope Valley Authority (JAVA). Appellants and appellees both filed motions for summary judgment. The district court granted appellees' motion. Appellants filed this appeal. We moved the case to our docket pursuant to our statutory authority. We conclude that the city properly entered into JAVA, pursuant to an interlocal agreement, as permitted by state statute and the city charter. Therefore, we affirm the order of the district court.

BACKGROUND

The material facts are not in dispute. Both Neb. Const. art. XV, § 18, and the Interlocal Cooperation Act (ICA), Neb. Rev. Stat. § 13-801 et seq. (Reissue 1997), permit subdivisions and governments in the State of Nebraska to cooperate with one another for the purpose of jointly exercising governmental authority and responsibilities. Furthermore, the Lincoln City Charter, art. II, § 5 (1992) (political subdivision provision) permits the city to enter into interlocal agreements with other political subdivisions. In 2000, appellees formed JAVA by entering into an interlocal cooperation agreement. The Lincoln City Council approved and authorized the city's participation in JAVA by resolution, without first seeking voter approval.

JAVA is an administrative entity created and empowered to implement the Antelope Valley Project (project). JAVA is composed of three partners—appellees. JAVA's business affairs are conducted by an administrative board composed of one representative for each partner. Each member of the administrative board has one vote, and JAVA may take action only upon the unanimous vote of the board. The project generally includes community revitalization, transportation, and drainage-flood control improvements along the Antelope Creek. JAVA was formed in order to create a joint entity that could properly address, in a timely and coordinated fashion, all the issues and detailed decisions needed to be made on the interrelated and multijurisdictional aspects of the project over a multiyear timeframe. Before the creation of JAVA, each partner had the statutory

authority to implement certain aspects of the project. Together, through JAVA, the three partners have complete statutory authority to implement the whole project.

According to the interlocal cooperation agreement, the project has two components: "Phase One" is the preparation period, and "Phase Two" is the implementation period. The preparation period was to commence in the spring of 2000 and take approximately 6 to 24 months to complete, followed by the implementation period which is estimated to take 6 to 10 years to complete. During the implementation period, each partner is to transfer to JAVA, or the city, the necessary property interest to enable JAVA to carry out its responsibilities. After completion of the project, JAVA is to transfer all real estate and improvements thereon to the appropriate individual partner. At such time, the operation, maintenance, repairs, and inspection will be the sole responsibility of each individual partner. The project's estimated financial plan includes federal, state, city, and private funding. JAVA's enumerated powers, as set forth in the interlocal cooperation agreement, include, but are not limited to, the following: the power to receive gifts, grants, bequests, devises, exchanges, and appropriations; to contract; to acquire property, including by condemnation if necessary; to relocate residences, buildings, and structures; to lease or purchase material and equipment; to borrow, mortgage, pledge, or secure loans; to construct; to bond its appropriated revenue and assets; and to sue and be sued.

Appellants appeared before the city council, challenging the legality of JAVA absent an enabling plebiscite by the electorate. Appellants requested that the matter be subject to voter approval. Appellants' request was based on their interpretation of the Lincoln City Charter, art. IV, § 25 (1966) (department provision). The city council denied appellants' request for a vote by the electorate. Thereafter, in January 2001, appellants filed for a preliminary injunction, declaratory relief, and writ of mandamus in the district court. Appellants' motion for a preliminary injunction was denied by the district court. In March, both appellants and appellees filed motions for summary judgment. In granting appellees' motion, the district court determined that the department provision of the city charter did not apply to the city's authority to enter into interlocal agreements. The court held that

the city's authority to form interlocal agreements was found exclusively in the political subdivision provision of the city charter and that no further vote of the electorate was necessary.

ASSIGNMENTS OF ERROR

The essence of appellants' argument is whether the city has the authority to form or participate in a new authority, JAVA, through an interlocal agreement without first obtaining voter approval. Specifically, appellants assign, consolidated and rephrased, that the district court erred in (1) granting summary judgment in favor of appellees, while denying appellants' motion for summary judgment; (2) failing to enjoin the city from participating in JAVA pending a plebiscite per the city charter; (3) failing to issue a writ of mandamus ordering the city to conduct an election regarding the city's participation in JAVA; (4) denying appellants' motion to join JAVA as a necessary party; (5) denying appellants' motion for declaratory judgment based on the facts of the case and issues of law; (6) joining the Board of Regents of the University of Nebraska and the Lower Platte South Natural Resources District as necessary parties; (7) failing to disclose the fact that the judge's spouse is a faculty member at the University of Nebraska; (8) ignoring the issue of whether the city council's action authorizing creation of and participation in JAVA by resolution rather than by ordinance is a lawful exercise of power delegated to a home rule city; (9) applying the ICA, which is permissive and subject to local procedural requirements, as not subject to the procedural requirements of the city charter requiring a plebiscite as a condition precedent when the city council creates a department, board, agency, or authority; (10) subrogating the superior reservation of the power of a plebiscite by the electorate expressed in the city charter to later provisions that merely enabled the city to pursue interlocal agreements; and (11) failing to award appellants costs and reasonable attorney fees.

STANDARD OF REVIEW

[1,2] In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but, instead, whether any real issue of material fact exists. *Shlien v. Board of Regents*, 263 Neb. 465, 640 N.W.2d 643 (2002); *Bates v. Design of the Times, Inc.*, 261 Neb. 332, 622 N.W.2d 684

(2001). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999).

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000).

ANALYSIS

The main issue in this case, as asserted by appellants, is whether the city can form a new authority, JAVA, through an interlocal agreement without a vote of the electorate. To resolve this issue, we examine the city's statutory authority to join interlocal agreements.

Nebraska permits interlocal agreements pursuant to the ICA. See § 13-801. The ICA's purpose is to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on the basis of mutual advantage. See § 13-802. One provision within the act provides:

> The provisions of the Interlocal Cooperation Act shall be deemed to provide an additional, alternative, and complete method for the doing of the things authorized by the act and shall be deemed and construed to be supplemental and additional to, and not in derogation of, powers conferred upon political subdivisions, agencies, and others by law. *Insofar as the provisions of the Interlocal Cooperation Act are inconsistent with the provisions of any general or special law, administrative order, or regulation, the provisions of the Interlocal Cooperation Act shall be controlling.*

(Emphasis supplied.) § 13-825.

The city charter also allows for interlocal cooperation as provided by the political subdivision provision, enacted in 1992, which provides:

> **Sec. 5. Join Other Political Subdivisions.** The city shall have the power to join with other political or governmental

subdivisions, agencies, or public corporations, whether federal, state or local, or with any number or combination thereof, by contract or otherwise, as may be permitted by the laws of the State of Nebraska, in the joint ownership, operation, or performance of any property, facility, power or function, or in agreements containing provisions that one or more thereof operate or perform for the other or others.

. . . .

The provisions of this section shall govern and apply notwithstanding any existing provisions of this charter to the contrary.

(Emphasis supplied.) Lincoln City Charter, art. II, § 5 (1992).

Appellants do not challenge the constitutionality of JAVA or the city's authority to enter into interlocal agreements. Appellants allege only that the department provision of the city charter confers an absolute duty on the city to subject the city's participation in JAVA to a vote of the electorate. In 1966, the department provision of the city charter was enacted, which provision states:

Sec. 25. Assignment of Departmental Duties. In the event that the city is to undertake any new functions or programs, the council, after hearing the recommendation of the mayor, and after a favorable vote of the people where such vote is required by this charter, may by ordinance assign such new functions or programs to established departments, but to the extent that such assignments would not be practicable, the council may create additional departments. Any such additional department shall in all respects be subject to the provisions of this charter.

. . . .

Administrative boards, commissions, and authorities may be established by ordinance when such are deemed necessary by the council to administer programs and functions, *but no such board, commission or authority which is to be assigned responsibility for the control or management of property, personnel, facilities, equipment or finances shall be established until such action has been approved by a majority vote of the electors.* The provisions of this section requiring a vote shall apply regardless of whether the

> establishment of the proposed administrative board, commission, or authority is based on a permissive law of the State of Nebraska, the exercise of the city's home rule powers, or both.

(Emphasis supplied.) Lincoln City Charter, art. IV, § 25 (1966).

[4] In support of their argument, appellants correctly assert that a provision of a home rule charter takes precedence over a conflicting state statute in instances of local municipal concern. See *Omaha Parking Authority v. City of Omaha*, 163 Neb. 97, 77 N.W.2d 862 (1956). Nevertheless, in this case, appellants' assertion is misplaced because the city charter does not conflict with the state statute allowing interlocal agreements. The alleged conflict in this case arises between two city charter provisions, the political subdivision provision and the department provision. Our analysis focuses on the effect of each provision.

Lincoln City Charter

[5,6] The city adopted the city charter in 1917, pursuant to Neb. Const. art. XI, § 2. This provision permits a city having a population of more than 5,000 to "frame a charter for its own government, consistent with and subject to the constitution and laws of this state." Neb. Const. art. XI, § 2. A charter defining powers and duties is essential to the creation and existence of a municipal corporation. 2A Eugene McQuillin, The Law of Municipal Corporations § 9.01 (3d ed. 1996). While legislative charters are always grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power. *Id.*, § 9.08. The current city charter is a limitations of power charter, not a grant of powers charter. See *In re Application of Lincoln Electric System, ante* p. 70, 655 N.W.2d 363 (2003).

In 1966, the city charter was amended by a majority vote of the electorate to include the department provision, which applies "[i]n the event that the city is to undertake any new functions . . . ." Lincoln City Charter, art. IV, § 25 (1966). The provision requires a vote of the electorate when the city council establishes by *ordinance* administrative boards, commissions, and authorities who are to be assigned responsibility for the control or management of property, personnel, facilities, equipment, or finances.

In 1992, the people of the city once again amended the city charter to include the political subdivision provision. This provision allows the city to join with other political subdivisions by contract or otherwise, in the joint ownership, operation, or performance of any property, facility, power, or function. The provision is silent as to requiring a vote of the electorate before the city can join with other political subdivisions.

Appellants allege that JAVA is a new authority as defined by the department provision of the city charter and that thus, voter approval is required. Appellants also allege that the city's approval of JAVA by resolution delegated significant legislative powers that may be delegated and exercised only by ordinance pursuant to state law and the city charter. Appellees, on the other hand, contend that the city's participation in JAVA is exclusively authorized pursuant to the political subdivision provision and that JAVA was properly entered into by resolution because the interlocal agreement was administrative in nature. We agree with appellees.

[7-9] An ordinance is distinguishable from a resolution. The term *ordinance* is generally used to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality. 5 Eugene McQuillin, The Law of Municipal Corporations § 15.01 (3d ed. 1996). A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance. Charles S. Rhyne, The Law of Local Government Operations § 8.1 (1980 & Supp. 1985). *Sommerfeld v. City of Seward*, 221 Neb. 76, 375 N.W.2d 129 (1985). If an ordinance enacts a law or lays down a course of policy to guide the citizens, there can be no question that it is legislative in character; but if it serves simply to put into execution previously enacted laws, it is clearly executive or administrative in nature. *State ex rel. Ballantyne v. Leeman*, 149 Neb. 847, 32 N.W.2d 918 (1948). As appellants concede, "[t]he crucial test for determining that which is legislative [ordinance] from that which is administrative or executive [resolution] is whether the action taken was

one making a law, or executing or administering a law already in existence." *Kelley v. John*, 162 Neb. 319, 321, 75 N.W.2d 713, 715 (1956); *State ex rel. Ballantyne v. Leeman, supra*; *State ex rel. Nelson v. Butler*, 145 Neb. 638, 17 N.W.2d 683 (1945); *Read v. City of Scottsbluff*, 139 Neb. 418, 297 N.W. 669 (1941).

For the following reasons, we conclude that the city's participation in and formation of JAVA through an interlocal cooperation agreement was administrative in nature and not a legislative act. JAVA is a joint administrative entity consistent with the ICA and the political subdivision provision of the city charter. JAVA cannot be a "new" city function or program or an exclusive city department, board, or commission, as defined by the department provision. The agreement combines three governmental entities: a state agency, a municipal corporation, and a political subdivision in an effort to manage existing statutory authority under one organizing body. Each partner maintains some independent responsibility to contribute its fair share of the funds, assets, and administrative services throughout the agreement. Furthermore, JAVA is a temporary entity inconsistent with the ordinance requirement in the department provision. The project's duration purports to last no more than 12 years. At the completion of the project, JAVA will terminate and each individual partner will be responsible for its own property. Therefore, the city correctly authorized its participation in JAVA by resolution and not by an ordinance.

[10-12] The distinction between a resolution and an ordinance in referendum actions is useful in arriving at the correct determination of this case. It is the rule in our state that the referendum provisions within our statutes apply to legislative acts, but not to administrative or executive matters. *Kelley v. John, supra*. The right to referendum on a measure passed by a municipal council is ordinarily confined to those acts of the council which are in the exercise of its legislative power and does not extend to administrative or executive acts, even though such acts are exercised by resolution or ordinance. *State ex rel. Ballantyne v. Leeman, supra*. It is fundamental that to permit a referendum to be invoked to annul or delay executive or administrative action would be to destroy the efficiency of the business affairs of a municipality. *State ex rel. Ballantyne v. Leeman, supra*; *Read v. City of Scottsbluff, supra*.

In *State ex rel. Ballantyne v. Leeman*, 149 Neb. 847, 32 N.W.2d 918 (1948), the Omaha City Charter was amended by majority vote to direct the city council to issue municipal bonds for the purpose of acquiring land for the construction of a municipal auditorium. Subsequent to the amendment, the city council by ordinance selected a site for the publicly owned auditorium. The appellants, in a mandamus proceeding, sought to compel the city council to submit the selection site to a referendum vote. We held that it was an act of legislation to direct and authorize the construction of a public building, but that the selection of the site was administrative in nature and thus not subject to referendum actions. *Id.* We stated that to permit such a referendum would delay executive conduct of the council. *Id.*

In the case at bar, the city charter was amended by a vote of the electorate to permit the city council to join with other political subdivisions or public corporations for joint ownership, operation, or performance of any power or function. It is now contended in this appeal that another vote of the electorate is required before the city council can join with other entities in the formation of JAVA. We disagree. Amending the city charter to include the political subdivision provision which permits interlocal cooperation agreements was clearly a legislative act and thus subject to voter approval. However, executing an agreement pursuant to the political subdivision provision is administrative in nature and thus not subject to voter approval. The city council, in joining JAVA, is simply putting into effect the political subdivision provision. To require a separate vote of the electorate each time the city council chooses to undertake a joint effort would clearly delay administrative action already approved of by the electorate in adopting the political subdivision provision. Such delay would destroy the efficiency of the business affairs of a municipality that we disapproved of in *State ex rel. Ballantyne v. Leeman, supra.*

[13] Furthermore, the political subdivision provision provides that "this section shall govern and apply notwithstanding any existing provisions of this charter to the contrary." We determine that the political subdivision provision of the city charter provides the exclusive authority for the city to enter into interlocal agreements and that the department provision is not controlling. The political subdivision provision does not require voter

approval before the city council can act. The city, when adopting the political subdivision provision, could have included a requirement of voter approval if that was its intention. It is not within the province of the courts to read a meaning into a statute that is not there. *Shaul v. Lang*, 263 Neb. 499, 640 N.W.2d 668 (2002); *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000). Therefore, we refuse to write in such requirement when the electorate, who had the opportunity to provide for voter approval, did not do so. Therefore, we affirm the district court's decision to grant appellees' motion for summary judgment.

[14] The assignment of error we now address is that the district court erred in not disclosing the relationship of the judge's spouse as a faculty member of the University of Nebraska. Our review of the record does not disclose any allegation of this sort, nor does it disclose an appellants' motion for the judge to recuse herself. An appellate court will not consider an issue on appeal that is not presented to or passed upon by the trial court. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001); *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001).

Finally, we note that we have considered all other assignments of error not specifically addressed in this opinion and find them to be without merit.

CONCLUSION

We conclude that the city properly entered into JAVA, an interlocal agreement, as permitted by state statute and the city charter. We also conclude that the formation of JAVA was administrative in nature and not subject to voter approval. For the above-stated reasons, we affirm the district court's decision to grant appellees' motion for summary judgment.

AFFIRMED.

STEPHAN, J., not participating.

BORLEY STORAGE AND TRANSFER CO., INC., APPELLEE, V. WARREN R. WHITTED, JR., APPELLANT.

657 N.W.2d 911

Filed March 21, 2003. No. S-01-1139.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in 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. **Rules of the Supreme Court: Records: Waiver.** The official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.
4. **Trial: Records: Waiver.** All evidentiary proceedings require the presence of a court reporter who shall make a verbatim record of the proceedings, and such recording may not be waived by the court or the parties.
5. **Summary Judgment: Records: Appeal and Error.** Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before such evidence can be considered during appellate review of the motion.
6. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Reversed and vacated, and cause remanded for further proceedings.

Jeffrey H. Jacobsen and Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Daniel L. Aschwege and John H. Marsh, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellee.

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

McCORMACK, J.

NATURE OF CASE

Borley Storage and Transfer Co., Inc. (Borley Storage), brought this malpractice action against Warren R. Whitted, Jr., a licensed attorney in Nebraska. The district court on May 18, 1999, entered partial summary judgment in Borley Storage's favor on the issues of Whitted's employment and his breach of duty. The case proceeded to trial on the issues of proximate causation and damages, and a jury returned a verdict in favor of Borley Storage and against Whitted in the amount of $90,000. Whitted appeals and assigns various errors at summary judgment and at trial.

BACKGROUND

Given the grounds on which we decide this case, a detailed recitation of the facts is unnecessary.

From 1980 to 1987, Whitted was an attorney in the Hastings, Nebraska, office of the law firm of Fitzgerald, Brown, Leahy, McGill & Strom. During that time, Whitted provided legal services to Borley Storage. In 1982, Borley Storage sold various assets to Borley Moving and Storage (Borley Moving). Whitted drafted several documents to effectuate the sale of the assets, including a purchase agreement, security agreement, and promissory note. In addition, Whitted filed a financing statement with the Nebraska Secretary of State on July 12, 1983, to perfect Borley Storage's security interest in some of the assets sold. It is undisputed that Whitted did not file a continuation statement to continue this financing statement, which expired on July 12, 1988.

In 1990, another creditor of Borley Moving filed a financing statement to perfect a security interest in various assets of Borley Moving. Several years later, Borley Moving filed for bankruptcy. Borley Storage claimed an interest in some of the assets of Borley Moving, but Borley Storage's lien on these assets was found to be a second lien to the other creditor. Because the value of the claim of the other creditor exceeded the value of the underlying collateral, Borley Storage did not receive any equity on its claim.

In September 1991, Borley Storage filed this legal malpractice action against Whitted. Borley Storage's amended petition

alleged, among other things, that Whitted breached the applicable standard of care by failing to continue the July 12, 1983, financing statement and by failing to inform Borley Storage of the need to file a continuation statement. Borley Storage further alleged that, as a result, it was damaged by its loss of its lien priority status. In his answer, Whitted denied the material allegations of Borley Storage's petition.

Both parties filed motions for summary judgment. The district court granted Borley Storage's motion and denied Whitted's motion. The court found as a matter of law that Whitted was employed as an attorney for Borley Storage and that Whitted "failed to perform in accordance with the proper standard of care for protecting a client's security interest." The court also rejected Whitted's argument that the action was barred by the 2-year statute of limitations in Neb. Rev. Stat. § 25-222 (Reissue 1995), finding that the discovery exception applied.

The case proceeded to trial on the issues of proximate causation and damages. The jury returned a verdict in favor of Borley Storage and against Whitted in the amount of $90,000. Whitted's motion for remitter and motion for new trial or, in the alternative, motion for judgment notwithstanding the verdict were both overruled, and this appeal followed.

ASSIGNMENTS OF ERROR

Whitted assigns that the district court erred in (1) granting Borley Storage's motion for summary judgment on liability; (2) granting Borley Storage's motion for summary judgment on the discovery exception to the statute of limitations; (3) overruling Whitted's motions for directed verdict because Borley Storage's action was premature or, alternatively, because Whitted was not the proximate cause of Borley Storage's alleged loss; (4) overruling Whitted's motion for directed verdict because Borley Storage failed to mitigate its damages; (5) overruling Whitted's motion for directed verdict because the court improperly admitted exhibits 20 through 25 under the business record exception to the hearsay rule; (6) denying Whitted's motion for mistrial; (7) overruling Whitted's motion for remitter and motion for new trial or, alternatively, motion for judgment notwithstanding the verdict because the trial court should have instructed the jury as to

Whitted's affirmative defenses; (8) overruling Whitted's motion for remitter and motion for new trial because Whitted was entitled to a reduction of the judgment for the moneys received by Borley Storage under the bankruptcy plan; and (9) overruling Whitted's motion for new trial because the jury verdict was the result of speculation, guess, or conjecture.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002).

[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. *Egan v. Stoler, ante* p. 1, 653 N.W.2d 855 (2002).

ANALYSIS

In his first two assignments of error, Whitted argues that the district court erroneously granted partial summary judgment in favor of Borley Storage. Whitted argues that the evidence at the summary judgment hearing created genuine issues of material fact as to whether he owed a duty to Borley Storage and whether he breached that duty.

Before reaching the merits of Whitted's arguments, we must consider the status of the appellate record. The record on appeal contains what purports to be a bill of exceptions from the summary judgment hearing. This "bill of exceptions" is certified by the official court reporter as containing exhibits 1 through 12, offered in evidence on July 7, 1996, and April 24, 1997. Also included is a certificate, signed by the district court judge, certifying that exhibits 1 through 12 were offered by the parties and received in proceedings held on July 2, 1996, and April 24, 1997. This certificate further indicates that no court reporter was present at these proceedings, a fact which was confirmed by the parties at oral argument before this court. We also note that the district court's order disposing of the parties' summary judgment

motions, which is included in the transcript, states that "[e]xhibits one (1) through twelve (12) were received" and that the summary judgment hearing occurred on December 23, 1998. From our review of the record, we are unable to determine what proceedings took place on July 2 and 7, 1996, or April 24, 1997.

[3,4] Pursuant to Neb. Ct. R. of Prac. 5A(1) (rev. 2000), "[t]he official court reporter shall in all instances make a *verbatim record* of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived." (Emphasis supplied.) All evidentiary proceedings require the presence of a court reporter who shall make a verbatim record of the proceedings, and such recording may not be waived by the court or the parties. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002).

The record in this case does not include a verbatim record of the proceedings. Without a valid bill of exceptions conforming to our rules, an appellate court cannot determine which exhibits were offered by each party, whether any party objected to any of the exhibits, how the trial court may have ruled on any objections, or which exhibits were ultimately received into evidence. If, for whatever reason, a court reporter cannot be present at an evidentiary proceeding, another reporter should be obtained or the proceeding should be postponed until a court reporter can be present. As we made clear in *Presle v. Presle*, 262 Neb. 729, 634 N.W.2d 785 (2001), we will not permit evidentiary proceedings to occur without the presence of a court reporter to record the proceedings.

[5] Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before such evidence can be considered during appellate review of the motion. *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000). Without a proper bill of exceptions of the summary judgment proceeding before us, our review of the summary judgment is limited to the pleadings.

[6] Generally, in civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the

proximate cause of loss (damages) to the client. *Rodriguez v. Nielsen*, 264 Neb. 558, 650 N.W.2d 237 (2002). These elements are the same general elements required in any other case based on negligence, i.e., duty, breach, proximate cause, and damages. *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987).

Whitted's second amended answer admits that Whitted performed legal services for Borley Storage concerning the sale of the business. The district court correctly concluded on summary judgment that there were no genuine issues of material fact as to Whitted's employment as an attorney for Borley Storage. However, Whitted denied the remaining allegations of Borley Storage's amended petition, including whether he breached any duty owed to Borley Storage. Thus, genuine issues of material fact exist to preclude the district court's conclusion that Whitted "failed to perform in accordance with the proper standard of care." The district court erred in granting partial summary judgment in favor of Borley Storage. Without a finding that Whitted breached any duty owed to Borley Storage, we decline to consider Whitted's remaining assignments of error.

CONCLUSION

In this case, no court reporter was present to record the summary judgment proceedings. Without a valid bill of exceptions to preserve the evidence presented at summary judgment, our review is limited to the pleadings, which reveal genuine issues of material fact on the issue of breach of duty. Therefore, we vacate the judgment entered by the court in favor of Borley Storage and reverse the district court's order granting partial summary judgment in Borley Storage's favor. The cause is remanded for further proceedings.

REVERSED AND VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

CONNOLLY, J., not participating.

LANCE D. BAILEY, APPELLEE, V. LUND-ROSS CONSTRUCTORS CO., A NEBRASKA CORPORATION, APPELLANT, AND MERRIMAC STONE CO., A NEW HAMPSHIRE CORPORATION, APPELLEE.

657 N.W.2d 916

Filed March 21, 2003. No. S-02-174.

1. **Jurisdiction: Appeal and Error.** It is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
2. **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.
3. **Final Orders.** Since Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002) is substantially similar to Fed. R. Civ. P. 54(b), federal cases construing rule 54(b) may be used for guidance in determining when a decision is a "final judgment" for purposes of § 25-1315(1).
4. **Final Orders: Words and Phrases.** The term "final judgment" as used in Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002) is the functional equivalent of a "final order" within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
5. **Actions: Parties: Final Orders: Appeal and Error.** With the enactment of Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002), 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.
6. **Final Orders: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1902 (Reissue 1995), 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.
7. **Statutes: Words and Phrases.** A special proceeding means civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
8. **Pleadings: Final Orders.** An order overruling a motion for leave to amend a petition to assert a new cause of action is not a final, appealable order.
9. ____: ____. An order denying a motion for leave to assert a cross-claim is not a final, appealable order.

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

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., for appellant.

Michael F. Scahill and James D. Garriott, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Merrimac Stone Co.

William E. Gast, P.C., L.L.O., and James E. Bachman for appellee Lance D. Bailey.

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

HENDRY, C.J.

INTRODUCTION

Lund-Ross Constructors Co. (Lund-Ross) appeals the district court's order overruling its motion for leave to file a cross-claim against Merrimac Stone Co. (Merrimac). Lund-Ross sought to assert a cross-claim against Merrimac to proportionately diminish its liability to Lance D. Bailey, if any, by the percentage of contributory negligence attributable to Merrimac pursuant to Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995). Lund-Ross appealed after the district court entered a "final judgment" pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002). We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

Bailey filed a petition naming both Lund-Ross and Merrimac as defendants. In his petition, Bailey alleged that Lund-Ross, as the general contractor of a building under construction in Omaha, Nebraska, entered into a contract with Merrimac to "perform, as sub-contractor, certain stone masonry services in connection with the construction of the aforementioned building." Bailey further alleged that in August 2000, he was employed by Merrimac and, during the course of his employment, assisted in placing stone masonry on the side of the building under construction while on scaffolding approximately 40 feet above ground level. Bailey asserted that as a direct and proximate result of Lund-Ross' negligent failure to safely construct and monitor the scaffolding, the scaffolding collapsed, causing him to fall and sustain injuries.

Bailey named Merrimac as a defendant "solely for the purpose of determining [Merrimac's] subrogation rights under the

Nebraska Workers' Compensation Law." Bailey prayed for both a determination of Merrimac's "rights and liabilities under the Workers' Compensation Act" and for a judgment against Lund-Ross for general and special damages.

Merrimac filed an answer in which it admitted all the allegations contained in Bailey's petition. Merrimac additionally alleged that it had paid workers' compensation benefits in the amount of $2,675 to Bailey for the injury Bailey suffered during the course of his employment with Merrimac. Merrimac asserted that pursuant to Neb. Rev. Stat. § 48-118 (Cum. Supp. 2002), it was entitled to recover from Lund-Ross "its workers' compensation subrogation interest" in the amount of $2,675.

Lund-Ross filed an answer admitting that it had entered into a contract with Merrimac to perform stone masonry services and that Bailey "fell from scaffolding" and "sustained some injuries" while working for Merrimac on the building under construction. Lund-Ross denied that its negligence either caused the scaffolding to collapse or caused Bailey to suffer injuries. Additionally, Lund-Ross alleged as an affirmative defense, inter alia, that Bailey was contributorily negligent in a percentage sufficient to bar his recovery. Lund-Ross prayed that Bailey's petition be dismissed.

After filing its answer, Lund-Ross filed an amended motion for leave to file a cross-claim against Merrimac on the following grounds: "1. [Lund-Ross] is entitled to a determination by the jury of the relative negligence or fault of Merrimack [sic] Stone Company; and 2. Evidence as to the negligence of Merrimack [sic] Stone will come into evidence, in any event, as to the issue of proximate causation." Lund-Ross attached a proposed cross-claim to its amended motion alleging that its liability to Bailey, if any, should be reduced by the extent of contributory negligence apportioned to Merrimac pursuant to § 25-21,185.10.

In an order dated January 9, 2002, the district court overruled Lund-Ross' amended motion for leave to file its proposed cross-claim. In response, Lund-Ross filed a "Motion for Determination of Final Judgment," in which it requested the court to determine that (1) the January 9 order overruling Lund-Ross' motion for leave to file a cross-claim was a final judgment and (2) there was

no just reason for delay of the entry of judgment so that Lund-Ross could immediately pursue an appeal.

In a February 5, 2002, order, the court granted Lund-Ross' motion. The court determined with respect to its January 9 order that

> pursuant to Neb. Rev. Stat. § 25-1315 . . . there is no just reason for delay of such final judgment and [the court] hereby expressly directs the entry of a final judgment denying Defendant's Amended Motion for Leave to File a Cross-Claim against Defendant Merrimac Stone Company and related entities. . . .
>
> . . . [T]he issues presented by the proposed Cross-Claim are issues that affect a substantial right of Defendant Lund-Ross Constructors Co.

Lund-Ross appeals the district court's denial of its motion for leave to file its proposed cross-claim.

ASSIGNMENTS OF ERROR

Lund-Ross assigns that the district court erred in (1) overruling its amended motion for leave to file a cross-claim; (2) "ruling that a cross-claim against [Bailey's] employer, in order to permit the trier of fact to apportion negligence pursuant to Neb. Rev. Stat. § 25-21,185.07 et seq., would violate the 'exclusivity provision' of Neb. Rev. Stat. § 48-148"; and (3) "finding that the negligent employer's subrogation claim could not be reduced by its percentage of negligence."

STANDARD OF REVIEW

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000); *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999).

ANALYSIS

[1,2] Before reaching the assignments of error asserted by Lund-Ross, this court must first determine whether it has jurisdiction. 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. *Vopalka v.*

Abraham, 260 Neb. 737, 619 N.W.2d 594 (2000). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002); *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

The appeal of the district court's order denying Lund-Ross' motion for leave to amend was brought pursuant to § 25-1315(1), after the district court determined that "there is no just reason for delay of such final judgment." Explaining such determination, the court stated:

> By ruling that the Order [dated] January 9, 2002, is a final judgment, the Court states that the issues presented by the proposed Cross-Claim are issues that affect a substantial right of Defendant Lund-Ross Constructors Co. Specifically, Defendant Lund-Ross Constructors Co. seeks to have the alleged negligence of Merrimac Stone Company considered by the jury for purposes of apportionment and, among other things, defeating the subrogation claim of Merrimac for workers' compensation benefits. This Court notes that, if the Nebraska Court of Appeals or the Nebraska Supreme Court were to ultimately reverse this Court's ruling denying the filing of the Cross-Claim after a trial on the merits, the case could ultimately be tried twice. This Court believes that it is in the best interest of judicial economy to declare the Order overruling the Motion for Leave to File Cross-Claim as a final order to allow an appeal to be taken forthwith by Defendant Lund-Ross Constructors Co.

The jurisdictional issue presented is whether § 25-1315(1) permits an immediate appeal of an order denying a motion for leave to assert a cross-claim.

Section 25-1315(1) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only

> upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In *Keef v. State*, 262 Neb. 622, 627, 634 N.W.2d 751, 757 (2001), this court determined that "a 'claim for relief' within the meaning of § 25-1315(1) is equivalent to a separate cause of action, as opposed to a separate theory of recovery." Thus, "§ 25-1315(1) is implicated only where multiple causes of action are presented or multiple parties are involved" and the trial court expressly directs the entry of a final judgment as to one cause of action or party and expressly determines that there is no just reason for delay of an immediate appeal. 262 Neb. at 629, 634 N.W.2d at 758. See, also, *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000); *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000).

[3] In the instant case, Bailey's petition named both Lund-Ross and Merrimac as defendants. Thus, "multiple parties are involved." See § 25-1315(1). However, even though we have multiple parties, § 25-1315(1) still requires the entry of a "final judgment" before a party can utilize § 25-1315(1) to initiate an immediate appeal. See *Keef, supra*. This court has not had occasion to discuss when a decision is a "final judgment" for purposes of § 25-1315(1). See, *Keef, supra*; *Scottsdale Ins. Co., supra*; *Chief Indus., supra*. Since § 25-1315(1) is substantially similar to Fed. R. Civ. P. 54(b), we will look to federal cases construing rule 54(b) for guidance. See *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000).

In an action involving either multiple claims or multiple parties, rule 54(b) permits a federal district court to enter a judgment as to fewer than all parties or claims, and such judgment is immediately appealable even though the action may continue as to the other parties or claims. 19 James Wm. Moore et al., Moore's

Federal Practice § 202.06[1] (3d ed. 2002). The purpose of rule 54(b) is

> "to facilitate the entry of an order of final judgment in a multi-claim/multi-party action where the parties [demonstrate] a need for making review available on some of the claims or parties before entry of final judgment as to all . . . . The advent of the relaxed joinder provisions in the Federal Rules of Civil Procedure made necessary a revision of what could be considered a 'judicial unit' for purposes of appellate jurisdiction. Sound judicial administration warrants allowing appeal on some claims or parties before the entire case is finally adjudicated, but it does not warrant blurring the concept of finality as to a single claim or as to one party . . . . Rule 54(b) therefore does not countenance piecemeal review of a claim. . . ."

Soliday v. Miami County, Ohio, 55 F.3d 1158, 1163 (6th Cir. 1995) (quoting *COMPACT v. Metro. Gov. of Nashville & Davidson Co.*, 786 F.2d 227 (6th Cir. 1986)). A similar purpose is served by § 25-1315(1) in view of Nebraska's liberal joinder rules. See, e.g., Neb. Rev. Stat. §§ 25-311, 25-320, 25-701, and 25-705 (Cum. Supp. 2002).

Rule 54(b), however, does not dispense with the requirement of finality. Federal courts of appeals have jurisdiction of appeals from "final decisions" of federal district courts, 28 U.S.C. § 1291 (2000), and "Rule 54(b) does not and cannot relax in any way the statutory requirement of finality . . . ," 10 James Wm. Moore et al., *supra*, § 54.28[1] at 54-102. Thus, a federal court of appeals is not vested with jurisdiction over a decision that is not final within the meaning of 28 U.S.C. § 1291 by virtue of a rule 54(b) certification:

> "If the district court enters judgment on something less than a final disposition of an entire claim, the Rule 54(b) judgment is improper, and the court of appeals is without jurisdiction to hear the appeal. Such a non-final ruling is an inherently interlocutory order that may not be made appealable under Rule 54(b)." 10 James Wm. Moore et al., *Moore's Federal Practice* § 54.22[2][a][i], at 54-43 (3d ed. 1998). Such a ruling may not be certified "regardless of whether the district court makes the requisite express

> determination that there is no just cause for delay." 19 *id.* § 202.06[2], at 202-23.

Information Resources v. Dun and Bradstreet, 294 F.3d 447, 451-52 (2d Cir. 2002).

The requirement of finality is the second of three requirements for an appeal of a judgment as to fewer than all parties or claims pursuant to rule 54(b). To bring an appeal pursuant to rule 54(b):

> "(1) [M]ultiple *claims* or multiple *parties* must be present, (2) at least one claim, or the rights and liabilities of at least one party, must be finally decided within the meaning of 28 U.S.C. § 1291, and (3) the district court must make 'an express determination that there is no just reason for delay' and expressly direct the clerk to enter judgment."

Information Resources, 294 F.3d at 451. The standards of review applicable to these three requirements are as follows:

> Because "[f]actors (1) and (2) address the issue of whether rule 54(b) applies at all to the circumstances of the case," they are reviewed *de novo*. . . . "Factor (3), on the other hand, is addressed to the ultimate decision to direct the entry of judgment; given the permissive nature of rule 54(b) . . . , this decision is left to the sound judicial discretion of the district court and is to be exercised in the interest of sound judicial administration."

(Citation omitted.) *Information Resources*, 294 F.3d at 451 (quoting *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085 (2d Cir. 1992)).

[4,5] We find the foregoing cases construing rule 54(b) persuasive. Rule 54(b) did not remove the jurisdictional requirement of finality within the meaning of 28 U.S.C. § 1291. See, *Information Resources, supra*; 10 James Wm. Moore et al., *supra*, § 54.28[1]. We therefore determine that for purposes of Nebraska law, 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). *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). With 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. See, *Information Resources, supra*; *Keef, supra*.

[6,7] Since multiple parties are present in the instant case, the issue before us is whether the district court's order denying Lund-Ross' motion for leave to assert a cross-claim against Merrimac is a final order within the meaning of § 25-1902. Pursuant to § 25-1902, 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. *Keef, supra*. This case does not fit within the third category because no judgment had been entered when the motion for leave to file a cross-claim was filed. See *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000). Neither does it fall within the second category of final orders because a "special proceeding" means civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. See Neb. Rev. Stat. § 25-812 (Reissue 1995) (repealed by 2002 Neb. Laws, L.B. 876). Thus, the issue becomes whether Lund-Ross' motion for leave to assert a cross-claim affects a substantial right and in effect determines the action and prevents a judgment.

[8] This court has held that an order overruling a motion for leave to amend a petition to assert a new cause of action is not a final, appealable order. *Knoell Constr. Co., Inc. v. Hanson*, 208 Neb. 373, 303 N.W.2d 314 (1981). Additionally, in *Slaymaker, supra*, this court determined that an order denying leave to amend an answer to assert a third party claim is not a final, appealable order. We stated:

> Assuming without deciding that the order potentially affects a substantial right, we conclude that it is not a final, appealable order because it does not determine the action and prevent a judgment. . . . By its nature, the Breyers' claim against Green Valley [Irrigation, Inc.] is dependent

> upon the outcome of Slaymaker's negligence claim against the Breyers, which has yet to be resolved in the trial court. If the Breyers are successful in defending that claim, no issue of indemnity, contribution, or comparative negligence will ever arise. On the other hand, if Slaymaker obtains a final judgment against the Breyers, the Breyers would then have a right to an appeal in which they could obtain review of the order denying them leave to assert the third-party claim against Green Valley. Further action by the trial court is necessary before an appellate court can determine whether the order denying the Breyers leave to commence third-party proceedings affects a substantial right.

Slaymaker, 258 Neb. at 948-49, 607 N.W.2d at 511-12.

[9] Assuming without deciding that the order denying Lund-Ross' motion for leave to assert a cross-claim against Merrimac affects a substantial right, we determine that it is not a final, appealable order because "it does not determine the action and prevent a judgment." See *id.* at 948-49, 607 N.W.2d at 512. It does not "dispose of the whole merits" of the pending negligence claim asserted by Bailey against Lund-Ross. See *id.* at 949, 607 N.W.2d at 512. Lund-Ross' cross-claim seeking apportionment is, similarly to *Slaymaker, supra*, "dependent upon the outcome" of Bailey's negligence claim against Lund-Ross, since no issue of apportionment will ever arise if Lund-Ross is successful in defending such claim. On the other hand, if Bailey obtains a final judgment against Lund-Ross, Lund-Ross would then have a right to an appeal, in which it could obtain review of the order denying leave to assert a cross-claim against Merrimac. See *Slaymaker, supra*. See, also, *Pyca Industries v. Harrison County Waste Water Mngmt.*, 81 F.3d 1412 (5th Cir. 1996) (determining that district court's denial of motion for leave to amend is not final for purposes of rule 54(b)); *Agretti v. ANR Freight System, Inc.*, 982 F.2d 242, 248 (7th Cir. 1992) (determining that district court's denial of motion to amend answer to include two cross-claims "is not considered a final judgment within the meaning of section 1291, title 28 of the United States Code").

We determine as a matter of law that the instant appeal does not satisfy the requirement of finality necessary to bring an appeal pursuant to § 25-1315(1) and that, as such, we are without

jurisdiction. Having so determined, we need not consider whether the district court abused its discretion by expressly determining that there was no just reason for delay of an immediate appeal of its order denying Lund-Ross' motion for leave to file its cross-claim. See, *Hogan v. Consolidated Rail Corp.*, 961 F.2d 1021 (2d Cir. 1992) (applying rule that even if appeal brought pursuant to rule 54(b) is determined to be final within meaning of 28 U.S.C. § 1291, appeals court still must determine whether district court abused its discretion in determining there was no just reason for delay); *United States General, Inc. v. Albert*, 792 F.2d 678, 681 (7th Cir. 1986) (stating that in determining whether jurisdiction is proper over appeal brought pursuant to rule 54(b), "[i]f we agree with the district court that its decision is final, we must then determine whether that court abused its discretion in certifying the decision as ready for appeal").

CONCLUSION

The court is without jurisdiction over the instant appeal because the order denying Lund-Ross leave to assert a cross-claim against Merrimac is not a final, appealable order. Therefore, the appeal is dismissed.

APPEAL DISMISSED.

ALLIED MUTUAL INSURANCE COMPANY, APPELLEE, V. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, APPELLANT.

657 N.W.2d 905

Filed March 21, 2003. No. S-02-347.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
2. **Insurance: Contracts: Motor Vehicles: Liability.** When a conflict exists because automobile insurance policies contain mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance, the automobile owner's policy provides primary coverage and the driver's policy provides excess coverage.
3. ____: ____: ____: ____. Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability

policy apparently conflict, the no-liability clause is ineffective and the driver's insurance is excess.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Tim B. Streff, of Govier, Milone & Streff, L.L.P., and J. Patrick Green, of Creighton Law School, for appellant.

Thomas B. Wood, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

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

WRIGHT, J.

NATURE OF CASE

In this declaratory judgment action, the parties sought a determination as to which of two insurance policies provided coverage for the loss of an automobile that was destroyed by fire. The district court found that Universal Underwriters Insurance Company (Universal), which issued the policy insuring the automobile, provided coverage, and the court entered summary judgment in favor of Allied Mutual Insurance Company (Allied), which insured the driver of the automobile. Universal appeals.

SCOPE OF REVIEW

[1] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002).

FACTS

The parties entered into a stipulation of facts which indicates the following: Allied provided automobile insurance coverage to Kevin Hollister, and Universal provided comprehensive property and liability insurance to Kerr Chevrolet (Kerr). In December 1999, Kerr loaned Hollister a 1998 Chevrolet Monte Carlo while his car was being serviced. (We will refer to this service loaner automobile as "the loaner.") The loaner was operated under dealer plates. The loaner was destroyed by fire when Hollister

drove it off the road and grass underneath it ignited. When Kerr sought indemnification for the loss from Allied and/or Universal, a dispute arose between the insurance companies. Allied loaned Kerr $7,250 to indemnify for the loss of the loaner, as evidenced by a loan receipt. Allied sued Universal seeking subrogation.

In a petition for declaratory judgment filed on September 7, 2000, Allied claimed that the Universal policy provided coverage for the loaner which was primary to the coverage provided by Allied to Hollister, which coverage was "secondary." Allied alleged that Kerr had demanded indemnification for the loss from Universal.

Universal claimed that the loaner was under Hollister's care, custody, and control, which therefore created a bailment relationship, and that Hollister had neglected to return the property to Kerr in the same condition as it was delivered to him. Universal admitted that it insured Kerr for the relevant timeframe. Universal also claimed that Hollister was not an insured under its policy with Kerr because the loaner was being operated under dealer plates and Hollister was not required to be an insured under Nebraska's Motor Vehicle Safety Responsibility Act. Universal asserted that the petition failed to state a cause of action, that a bailment relationship existed between Kerr and Hollister, and that, therefore, Allied was responsible for the damages as Hollister's insurer.

Both Universal and Allied moved for summary judgment. On February 12, 2002, the district court sustained Allied's motion for summary judgment and overruled Universal's motion. The court found that coverage for the damages resulting from Hollister's actions was provided by the Universal policy and not by the Allied policy. Universal's motion for new trial was overruled, and Universal appealed.

ASSIGNMENTS OF ERROR

Universal claims the district court erred in holding that certain language in the Universal policy ("[i]f the permissive driver has no other insurance, the most WE will pay is the minimum financial responsibility law limits in the jurisdiction where the OCCURRENCE took pla[c]e") was solely a statement as to the limits of the coverage provided. It also asserts that the court

erred in failing to hold that the language was also a condition of coverage of a customer using a service loaner automobile and in finding that Hollister was an additional insured under "Coverage Part 500" of the Universal policy.

ANALYSIS

The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002). We therefore interpret the insurance policies independent of the determination made by the district court.

The "State Amendatory Part" of Universal's insurance policy provided the following additions to "Coverage Part 500":

> WHO IS AN INSURED, With respect to the AUTO HAZARD — the following insureds are added:
>
> (5) any driver of a . . . SERVICE LOANER AUTO, but only within the scope of YOUR permission.
>
> . . . THE MOST WE WILL PAY, item (1) — the following paragraph is added:
>
> With respect to the AUTO HAZARD part (5) of WHO IS AN INSURED:
>
> (a) If the permissive driver has no other insurance, the most WE will pay is the minimum financial responsibility law limits in the jurisdiction where the OCCURRENCE took pla[c]e.
>
> (b) If the permissive driver has other insurance (whether primary, excess or contingent) that is less than the minimum financial responsibility law limits where the OCCURRENCE took place, the most WE will pay is the amount by which the minimum financial responsibility law limits exceed the limit of their other insurance.

Universal argues that the district court erred in holding that language in its policy concerning the most it would pay was a statement as to the limits of the coverage provided, rather than finding that the language was also a condition of coverage for a customer using a service loaner automobile. Universal claimed that it provided coverage to Hollister only if his coverage from

the Allied policy was less than required by the minimum financial responsibility law, which is $25,000 for property damage. (See Neb. Rev. Stat. § 60-534 (Cum. Supp. 2002)). Under Universal's interpretation of its policy, it was required to provide coverage for Hollister only if he had no insurance or had insurance which covered damages of less than $25,000. The court found that this clause provided a limit on the amount Universal would pay, rather than an exclusion of coverage.

The liability portion of Allied's policy provides:

> If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

Thus, Allied's policy provided excess coverage for the particular risk in this case because Hollister was driving a nonowned automobile as a temporary substitute. Universal's policy was written to restrict its liability because Hollister had other insurance. Therefore, these policies contain mutually repugnant language. Both transfer liability to the other existing policy of insurance. Universal limits its liability based on other insurance, and Allied designates its coverage as excess.

"[W]hen controversies arise regarding insurance coverage because the applicable documents contain 'mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance . . . the owner's policy . . . provide[s] primary coverage and the driver's policy . . . provide[s] excess coverage.'" *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 1011, 614 N.W.2d 302, 309 (2000).

In that case, the driver of a rental car owned by Cheeper's Rent-A-Car, Inc. (Cheeper's), was involved in a car accident. The driver had an insurance policy with State Farm Mutual Automobile Insurance Company (State Farm) which provided liability coverage resulting from the use of a temporary substitute car or a nonowned car. An amendment to the policy provided that the coverage for a temporary substitute car was excess over self-insurance. The rental agreement signed by the

driver provided that the liability policy of Cheeper's was secondary to the renter's liability insurance.

The trial court was therefore presented with two contracts: the rental agreement which incorporated liability insurance and the driver's insurance policy with State Farm. Each of the contracts "contain[ed] language which purport[ed] to place the primary responsibility in terms of liability on the issuer of the opposing contract." *Id.* This court found that the language in the driver's insurance policy and the rental agreement was mutually repugnant and that Cheeper's, the owner of the rental car, had primary liability for the damages to the car.

[2] The holding in *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car, supra*, follows a line of cases in which this court has stated that when a conflict exists because insurance policies contain "mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance . . . . the owner's policy . . . provide[s] primary coverage and the driver's policy . . . provide[s] excess coverage." See *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 508, 406 N.W.2d 640, 644 (1987), citing *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981); *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969); *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, 180 Neb. 555, 143 N.W.2d 923 (1966); *Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963); and *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959).

[3] In *Jensen v. Universal Underwriters Ins. Co., supra*, the driver was involved in an accident while driving a temporary replacement automobile. The automobile was covered by a garage policy issued by Universal, which stated that it covered insureds who had no liability insurance of their own. The driver's policy stated that it was excess with respect to a temporary substitute automobile. This court held that the owner's policy afforded coverage. " 'Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess.' " *Id.* at 492, 304 N.W.2d at 54, quoting *Bituminous Cas. Corp. v. Andersen, supra.*

In the present case, Universal's policy contained a limitation of liability clause, and Allied's policy contained an excess insurance clause. Following this court's precedent, Universal's attempt to avoid liability through the limitation of liability clause must be held to be ineffective, and Allied's insurance policy must be held to provide excess coverage.

The same type of situation arose in *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co., supra.* A temporary substitute automobile that was covered by a garage liability insurance policy with Allied was involved in an accident. The automobile was driven by a person who had received permission from a driver who was insured by Farm Bureau Insurance Company of Nebraska (Farm Bureau). The Farm Bureau policy provided that it was excess in the case of a temporary substitute automobile, and the Allied policy contained an endorsement which covered damages for a rental car provided by the garage while a customer's car was being serviced or repaired. This court held that the Allied garage policy provided primary coverage and that the Farm Bureau policy provided excess coverage to the extent of its policy limits. We stated:

> In Turpin v. Standard Reliance Ins. Co., 169 Neb. 233, 99 N. W. 2d 26 [1959], we held: "Where two motor vehicle liability policies contained identical omnibus clauses relating to prorating of loss occurring under the provisions of such policies and a driver, not the owner of the motor vehicle, was driving it with the owner's permission and became involved in an accident resulting in injury and property damage for which a judgment was obtained against him, the insurance carried by such driver would be excess over all other insurance, *and the insurance carrier of the owner of the motor vehicle would be liable for the entire judgment sustained against the driver to the extent of the limit of such policy.*"

(Emphasis supplied.) *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, 180 Neb. at 560-61, 143 N.W.2d at 926-27.

The mutually repugnant language in the two policies in the present case requires a finding that the owner's policy, written by Universal, provides the primary coverage.

Universal also assigns as error the district court's finding that Hollister was an additional insured under "Coverage Part 500" of the Universal policy. The policy defined an insured as "any

driver of a . . . SERVICE LOANER AUTO . . . within the scope of [the policyholder's] permission." A service loaner automobile is defined as "an AUTO that YOU provide for a customer's use while that CUSTOMER'S AUTO is in YOUR possession for safekeeping, storage, service or repair." The loaner destroyed in the fire was one provided by Kerr for Hollister's use while his automobile was in Kerr's possession for service. Hollister was an insured under Universal's policy when he was driving the loaner. It is clear that Hollister was an insured under Universal's policy at the time of the loss. There is no merit to this assignment of error.

Universal argues that this case is controlled by *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996), because it claims the policy language is the same in each case. We disagree.

In *Leader Nat. Ins. v. American Hardware Ins., supra*, Thomas Lustgraaf was insured by Leader National Insurance Company (Leader). He took a vehicle from Bellevue Nissan, Inc., for a test drive and had a collision which resulted in the filing of two lawsuits against him for property damage. Bellevue Nissan was insured by American Hardware Insurance Group (American). Lustgraaf demanded that American defend, indemnify, and pay all damages stemming from the accident, and American denied coverage. Leader defended Lustgraaf and settled all claims for $9,418.05.

Leader sued American, claiming that American provided the primary coverage. This court concluded that customers of Bellevue Nissan who with permission borrowed a vehicle owned by Bellevue Nissan were insured only if the customers carried vehicle liability insurance less than that required by law. Since Lustgraaf was sufficiently insured as required by law to cover the damages he caused while driving the dealership's vehicle, Lustgraaf was not an insured under the policy issued by Leader. We concluded that Leader provided no coverage to Lustgraaf and that American had the primary duty to defend him.

In the present case, the district court distinguished *Leader Nat. Ins. v. American Hardware Ins., supra*, because the Universal policy specifically covered a demonstrator or service loaner automobile. The court concluded that Universal did provide coverage for

an automobile supplied for a customer's use while the customer's automobile was in Kerr's possession for service or repair.

Universal also relies on *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co.*, 243 Neb. 194, 498 N.W.2d 333 (1993). The facts in that case are different from the case at bar. There, a service loaner was damaged, and Universal paid the automobile dealer, its insured. Universal then sought subrogation from Farm Bureau, the driver's insurer. The trial court found that the driver was an insured person under Universal's policy and that therefore Farm Bureau's coverage was excess to Universal's coverage. We reversed because we held that the driver was not an insured under Universal's policy, and therefore, the coverage provided by Farm Bureau was primary. In the present case, coverage was provided by Universal for the automobile driven by Hollister as a service loaner automobile.

This court is obligated to reach a conclusion independently of the determination made by the lower court. See *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002). The insurance policies at issue contain mutually repugnant language, and when such is the case, the owner's policy provides primary coverage and the driver's policy provides excess coverage. Thus, in the case at bar, Universal's policy provides primary coverage and Allied's policy provides excess coverage.

CONCLUSION

Allied is entitled to a judgment against Universal as a matter of law. The judgment of the district court is affirmed.

AFFIRMED.

CONTINENTAL CASUALTY COMPANY, APPELLEE, V.
WALTER M. CALINGER, APPELLANT, AND KAY KONZ, APPELLEE.
657 N.W.2d 925

Filed March 21, 2003. No. S-02-565.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts

and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002).

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. ____: ____. In an appellate review, the grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.
4. **Insurance: Contracts: Actions.** If it is contended by an insured that a policy issued does not conform to the policy allegedly ordered from the agent, the remedy of the insured is not a suit at law, but, rather, the proper remedy is for a reformation of the policy to conform to the alleged oral understanding.
5. ____: ____: ____. An insured cannot disregard the written contract as evidenced by the policy of insurance issued to the insured and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery not warranted by the policy.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

John J. Reefe, Jr., for appellant.

Dean F. Suing, of Katskee, Henatsch & Suing, for appellee Continental Casualty Company.

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

CONNOLLY, J.

In this appeal, we decide whether an agreement reached before the issuance of an insurance policy can provide coverage when the terms of the agreement are contrary to the express terms of the policy later issued to the insured. Continental Casualty Company (CNA) sought a declaratory judgment holding that CNA was not required to provide coverage for Walter M. Calinger for a $1.5 million judgment rendered against him. In his answer and counterclaim, Calinger alleged that the terms of the insurance contract were provided by a letter from his insurance broker rather than by the policy language. Calinger, however, did not seek to reform the policy. The district court entered summary judgment for CNA.

We conclude that an agreement predating the issuance of an insurance policy cannot directly provide coverage different from that in the policy. Instead, the insured must first seek to reform the

policy in equity to conform to the agreement. Because Calinger did not seek to reform the policy, we affirm.

FACTUAL BACKGROUND

Underlying this case is a legal malpractice action brought by Kay Konz against Calinger. The circumstances giving rise to the malpractice case occurred in July 1988 when Calinger represented Konz in proceedings before the Iowa Industrial Commission. Konz filed suit against Calinger in May 1992, and the court entered a $1.5 million judgment for her in August 1993. In June 2001, Konz filed a claim with CNA, asserting that CNA was required to provide coverage to Calinger under an insurance policy that it had issued to him in 1990. CNA denied the claim and filed this declaratory judgment action.

It is undisputed that sometime between December 1989 and February 1990, Calinger purchased CNA legal malpractice insurance. The parties, however, dispute if the terms of the insurance contract are provided by the policy or by an agreement that Calinger reached with Doris Goodwin, the insurance broker who sold him the insurance.

POLICY LANGUAGE

CNA argues that the terms of the policy issued to Calinger govern the scope of coverage. The policy clearly states in several places, including on the front page, that it is written on a " 'claims-made' basis." A claims-made policy is "[a]n agreement to indemnify against all claims made during a specified period, regardless of when the incidents that gave rise to the claims occurred." Black's Law Dictionary 809 (7th ed. 1999). The policy language also provided that CNA had no obligation for a claim, unless the claim was made against Calinger and reported to CNA during the policy term. Here, the policy term was December 29, 1989, to December 29, 1990. Konz did not file her malpractice action until 1992, and no claim was reported to CNA until 2001. Thus, if CNA's argument that the policy governs the scope of coverage is correct, the insurance does not cover the Konz claim.

LETTERS

Calinger does not dispute that under the unambiguous terms of the policy, CNA has no obligation to provide coverage for the

Konz claim. Instead, he claims that when he purchased the policy, he and CNA, acting through Goodwin, reached an agreement about the scope of coverage. Calinger argues that this agreement, instead of the policy, should provide the terms of the contract. He contends that because a question exists whether the terms of the agreement with Goodwin are broad enough to cover the Konz claim, the court erred in granting summary judgment.

To support his argument, Calinger relies on an exchange of letters between him and Goodwin. On January 4, 1990, Goodwin sent a letter to Calinger, apparently in response to an application for insurance. It states:

> Just received a memo from the Company [CNA] stating that they can offer your firm coverage for $1,000,000 per claim, $1,000,000 aggregate, with a $1,000 deductible, and WITH FULL PRIOR ACTS COVERAGE, for an annual premium indication of $1,721.00, to be effective December 29, 1989.
>
> There is also available at an additional annual premium of $30.00 per attorney Defendants Reimbursement. See enclosed and let us know if you desire this coverage.
>
> If this would meet with your approval send your request to issue and your check for the full annual premium to this office by January 18, 1990, for processing.

(Emphasis in original.)

Calinger's secretary responded to the letter from Goodwin on January 18, 1990. The January 18 letter states: "Enclosed please find Mr. Calinger's check . . . in the amount of $1,751.00 for *the coverage stated in your letter dated January 4, 1990.* This check is for the annual premium of $1,721.00, and the added annual coverage of $30.00 for the Defendants Reimbursement." (Emphasis supplied.)

According to Calinger, the January 4, 1990, letter does not offer claims-made coverage. Rather, he construes the language "WITH FULL PRIOR ACTS COVERAGE" in the January 4 letter as offering coverage for any act occurring before the effective date of the policy, regardless of when the claim was made. Under this interpretation of the language in the January 4 letter, the CNA insurance would cover the Konz claim because the acts giving rise to the Konz claim occurred before the effective date of the policy.

PROCEDURAL BACKGROUND

CNA brought a declaratory judgment action against Konz and Calinger. In its petition, CNA sought a declaration that no coverage existed under the policy. Calinger denied the allegations in CNA's petition and filed a counterclaim in which he asked the court to find that CNA was required to represent him in the Konz action and to pay any damages arising from the action. Calinger did not ask the court to reform the policy so that it reflected the alleged agreement that he reached with Goodwin. CNA moved for summary judgment against Calinger and Konz.

The district court granted the motion as to both parties. In rejecting Calinger's argument that the letters governed the scope of coverage, the court found that "no reasonable fact finder could construe the letter which Calinger received from his broker as constituting the contract that he had with the insurance company." Only Calinger appealed.

ASSIGNMENT OF ERROR

Calinger assigns, consolidated and restated, that the district court erred in its entry of summary judgment for CNA.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. See Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002) (proposition to be used only in case where summary judgment from which appeal is taken was entered on or after September 1, 2001).

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Day v. Heller*, 264 Neb. 934, 653 N.W.2d 475 (2002).

[3] In an appellate review, the grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon. *Id.*

ANALYSIS

Calinger argues that a question of disputed fact exists whether he reached an agreement with Goodwin before the policy was issued. We agree that a disputed fact question exists. But the mere existence of a disputed fact question is not enough to preclude summary judgment. The fact question must be material. See *Day v. Heller, supra*. The disputed fact question in this case is only material if an agreement predating the issuance of an insurance policy can provide coverage when the terms of the agreement are contrary to the express terms of the policy later issued to the insured.

[4,5] We addressed the legal question presented by this case in *Rodine v. Iowa Home Mutual Cas. Co.*, 171 Neb. 263, 106 N.W.2d 391 (1960). We said:

> [I]f it is contended by an insured that a policy issued does not conform to the policy allegedly ordered from the agent, the remedy of the insured is not a suit at law . . . but[, rather,] the proper remedy is for a reformation of the policy to conform to the alleged oral understanding. . . . A litigant cannot, however, disregard the written contract as evidenced by a policy of insurance issued to him and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery not warranted by the policy.

Id. at 280, 106 N.W.2d at 400.

Here, CNA brought a declaratory judgment action against Calinger. Calinger sought to defend the lawsuit and to file his own counterclaim because the agreement with Goodwin, rather than the policy, provided coverage. *Rodine* forbids this type of direct reliance on an agreement that precedes the issuance of the policy. Calinger should have filed a counterclaim in equity seeking to reform the policy language. Having failed to do this, the question whether he reached an agreement with Goodwin is immaterial. The plain and unambiguous language of the policy controls, and CNA had no obligation to provide coverage to Calinger.

CONCLUSION

The district court did not err in granting summary judgment for CNA. We affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY W. KELLEY, APPELLANT.

658 N.W.2d 279

Filed March 21, 2003. No. S-02-742.

1. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Constitutional Law: Search and Seizure.** In Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7.
3. **Constitutional Law: Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure, in violation of the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, is inadmissible in a state prosecution and must be excluded.
4. **Search and Seizure: Search Warrants: Probable Cause: Police Officers and Sheriffs: Proof.** Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable; consequently, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable.
5. **Search Warrants.** Neb. Rev. Stat. § 29-411 (Reissue 1995) codifies the common-law requirement of knocking and announcing when serving a search warrant prior to breaking into a person's dwelling.
6. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** The Fourth Amendment to the U.S. Constitution requires that officers knock and announce their purpose and be denied admittance prior to breaking into a dwelling, absent certain circumstances. The common-law knock-and-announce principle forms a part of a Fourth Amendment inquiry into reasonableness, and an officer's unannounced entry into a home might, in some circumstances, be unreasonable under the Fourth Amendment.
7. **Search and Seizure: Police Officers and Sheriffs.** In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime.
8. **Constitutional Law: Search Warrants: Police Officers and Sheriffs.** Following a knock and announcement, the requirement that officers executing a search warrant be "refused admittance," within the meaning of statutory and constitutional requirements, is not restricted to an affirmative refusal, but encompasses circumstances that constitute constructive or reasonably inferred refusal.
9. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.

10. **Police Officers and Sheriffs: Probable Cause.** In determining whether a police officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience.
11. ____: ____. Whether a police officer has a reasonable suspicion based upon sufficient, articulable facts requires taking into account the totality of the circumstances. The "totality of the circumstances" principle governs the existence vel non of "reasonable suspicion."
12. **Search Warrants: Police Officers and Sheriffs: Case Disapproved.** Forced entry in the execution of a search warrant is justified if police have a reasonable suspicion that knocking and announcing, or continuing to knock and announce, would be dangerous, futile, or destructive to the purposes of the investigation. Whether such a reasonable suspicion exists depends in no way on whether police must destroy property in order to enter, disapproving *State v. Moore*, 3 Neb. App. 909, 535 N.W.2d 417 (1995).
13. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question.
14. **Effectiveness of Counsel: Evidence: Appeal and Error.** Some types of attack upon effectiveness of counsel cannot be reached upon a direct appeal because the evidence which may bear upon such a determination is not shown in the trial record.
15. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
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 Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

W. Randall Paragas, of Paragas Law Offices, for appellant.

Don Stenberg, Attorney General, and George R. Love for appellee.

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

GERRARD, J.

NATURE OF CASE

Terry W. Kelley, the appellant, was convicted by the district court of possession of methamphetamine with intent to deliver and was sentenced to imprisonment for a term of 6 to 12 years. The issue presented in this appeal is whether the district court

erred in denying Kelley's motion to suppress evidence obtained in a search of his home, based on his claim that the police failed to properly knock and announce their presence prior to entering the dwelling.

BACKGROUND

On January 16, 2001, officers of the Omaha Police Department and deputies of the Sarpy County Sheriff's Department obtained a search warrant for Kelley's residence in Sarpy County. The affidavit supporting issuance of the warrant averred facts generally indicating that the residence was being used for the sale and consumption of methamphetamine. The validity of the affidavit and warrant is not at issue in this appeal. The warrant specified that service should occur during the daytime hours between 7 a.m. and 8 p.m. and that the police were to knock and announce their presence. The police did not seek issuance of a no-knock search warrant. However, an Omaha police officer testified at the hearing on Kelley's motion to suppress that methamphetamine in ounce or even multi-ounce weights can be easily destroyed by flushing it down a toilet or sink.

The warrant was executed on January 17, 2001, at about 6:55 p.m., by a team of approximately 15 officers and deputies. Initial entry into the dwelling was made by three deputies from the Sarpy County Sheriff's Department: John Sorensen, Rick Wheeler, and Brian Fjelstad. The three approached the door, wearing helmets and uniforms that read " 'Sheriff' " in bold letters. Wheeler knocked. Shortly thereafter, Wheeler opened the door and Fjelstad led the deputies into the dwelling.

The testimony given at the hearing on Kelley's motion to suppress regarding execution of the warrant generally described a similar sequence of events, but differed somewhat on some of the details. Sorensen testified as follows:

> I was the third person in our stack as we walked up to that front door. As we go to the door, one officer has a shield. He steps back. Deputy Wheeler knocks on the door.
>
> As soon as Deputy Wheeler knocked or about the same time, I saw a female look out the front window which is right next to that front door and looked very surprised and took off, appeared to be running.

> At that time I yelled "compromise" which means somebody has seen us. Deputy Wheeler continued knocking three to five seconds, kept knocking; heard a loud commotion inside the house. And with that, we went in and entered the residence.

Sorensen testified that Wheeler knocked loudly on the door and yelled " 'sheriff's office.' " Sorensen later testified that in his opinion, approximately 5 to 10 seconds elapsed between the time Sorensen yelled "compromise" and the time they entered the dwelling. Fjelstad also testified that the time from the initial knock to entry into the dwelling was about 5 to 15 seconds.

Wheeler testified that he had knocked loudly, calling out his "standard words," " '[S]heriff's office. We demand entry. We have a search warrant.' " According to Wheeler, 5 seconds later, Sorensen said they had been compromised. Wheeler testified that he continued knocking, waiting for the individual who had appeared in the window to come to the door. Wheeler said that the window through which the woman had been seen was right next to the door, but no one came to the door or spoke to the deputies. Unlike Sorensen, Wheeler did not hear people inside the house. Wheeler testified that about 5 seconds after they had been compromised, Wheeler checked the door handle and found that the door was unlocked, so he opened the door and the deputies entered.

Kelley's wife testified that she had been sitting on the couch when she heard her dogs make a noise. She testified that she looked out the window, heard two knocks on the door, and then the deputies came through the door. Kelley's wife testified that the time that elapsed between her looking out the window and the deputies' entry into the dwelling was less than 5 seconds, "like a second." Kelley's wife did not hear the deputies yell "police" or any words to that effect.

Kelley testified that he had been upstairs at the time. Kelley testified:

> I'd walked out of the bathroom. And just instantly, you know, my wife said, "Terry," and there was a bam, bam, very abrupt, two knocks on the door, bam, bam, and the door flew open and "get down on the ground," you know. "Sheriff's Department," blah, blah, blah, after they entered the house.

Kelley testified that no more than 5 seconds elapsed—that the door opened on the second knock. Kelley stated that neither he nor his wife had a chance to get to the door before it was opened. Both Kelley and his wife testified that the deputies forced their way through the front door, damaging the door in the process.

Once inside, officers discovered drug paraphernalia and a substance later determined to be methamphetamine. Kelley was arrested. He was charged by information in the district court with possession of a controlled substance and possession of a controlled substance with intent to deliver. Kelley filed a pretrial motion to suppress evidence obtained during the search. The district court denied Kelley's motion, making detailed findings as follows:

> The primary issue is whether the evidence showed sufficient circumstances and necessity for the officers to enter the premises without further knocking or announcing when considering officer safety and prevention of the destruction of evidence. This Court accepts Deputy Wheeler's testimony as the more credible, that being that there was several seconds of knocking and announcing followed by Deputy Sorenson's [sic] warning of compromise, and then continued knocking and announcing for a time sufficient to allow an occupant to get to the door and open it prior to the entry of the team. Even though Deputy Wheeler testified the total time he spent knocking would not have been more than 10 to 15 seconds, this seems the more credible version of events. I also find it more credible that the door was opened without the use of a battering ram and that there was no damage to the door.
>
> . . . .
>
> [I]n the case at bar, the credible evidence supports a finding that an announcement was made, and additionally, that an exigent circumstance existed to permit entry into the home. That exigency was the presence of defendant's wife, who, by her own admission, looked out the window near the front door and saw the deputies outside. Once the officers were detected, considering the officers were executing a warrant in search of controlled substances which could have been destroyed, it was reasonable for the officers to

> only knock and announce for a few more seconds before gaining entry to the residence. The more credible testimony, and that which is accepted by this Court, supports the conclusion that the execution of the "knock and announce" warrant was reasonable under the Fourth Amendment . . . .

After the motion to suppress was denied, Kelley waived a jury trial and trial was had to the court on stipulated facts subject to Kelley's motion to suppress. Kelley was convicted of possession of a controlled substance with intent to deliver and, on July 2, 2001, was sentenced to 6 to 12 years' imprisonment. Kelley did not appeal initially, but later filed a motion for postconviction relief based on his attorney's failure to perfect an appeal; Kelley was awarded a new direct appeal, which he timely filed. See, generally, *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). We moved Kelley's new direct appeal to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Kelley assigns that the district court erred in finding that the deputies properly executed their " 'knock and announce' " search warrant and in overruling his motion to suppress evidence. Kelley also claims that he is entitled to "a re-hearing on his Motion to Suppress" due to the ineffective assistance of trial counsel.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. See, *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996); *State v. Keup*, *ante* p. 96, 655 N.W.2d 25 (2003); *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997).

ANALYSIS

[2-4] Kelley's first argument is that the evidence against him should have been suppressed as the fruit of an illegal search. In

Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999). Evidence obtained as the fruit of an illegal search or seizure, in violation of the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, is inadmissible in a state prosecution and must be excluded. *State v. Cuny*, 257 Neb. 168, 595 N.W.2d 899 (1999). Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable; consequently, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable. *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996).

[5,6] Neb. Rev. Stat. § 29-411 (Reissue 1995) provides, in relevant part:

> In executing a warrant for the arrest of a person charged with an offense, or a search warrant, or when authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance . . . .

This statute codifies the common-law requirement of knocking and announcing when serving a search warrant prior to breaking into a person's dwelling. *State v. Moore*, 3 Neb. App. 909, 535 N.W.2d 417 (1995), citing *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995). In addition, the U.S. Supreme Court held in *Wilson, supra*, that the Fourth Amendment requires that officers knock and announce their purpose and be denied admittance prior to breaking into a dwelling, absent certain circumstances. The common-law knock-and-announce principle forms a part of a Fourth Amendment inquiry into reasonableness, and an officer's unannounced entry into a home might, in some circumstances, be unreasonable under the Fourth Amendment. *Wilson, supra*. But not every entry must be preceded by an announcement. *Id.* The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. *Wilson, supra*. The *Wilson* Court declined, however,

to "attempt a comprehensive catalog of the relevant countervailing factors." 514 U.S. at 936.

[7] The U.S. Supreme Court revisited the *Wilson* knock-and-announce principle in *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997). In that case, the Wisconsin Supreme Court had held that *Wilson, supra*, did not preclude its pre-*Wilson* rule that because of the special circumstances of the drug culture, police officers are *never* required to knock when executing a search warrant in a felony drug investigation. The U.S. Supreme Court, relying on *Wilson*, rejected this "blanket exception" to the knock-and-announce principle. See *Richards, supra*. The Court held:

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable-cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.

520 U.S. at 394. The Court determined, however, that under the circumstances presented in the case, the entry by officers into the premises in question was justified. Those circumstances merit a more detailed examination, because of the evident similarities between them and the facts of the instant case.

> On December 31, 1991, police officers in Madison, Wisconsin, obtained a warrant to search Steiney Richards' motel room for drugs and related paraphernalia. The search warrant was the culmination of an investigation that had uncovered substantial evidence that Richards was one of several individuals dealing drugs out of hotel rooms in Madison. The police requested a warrant that would have given advance authorization for a "no-knock" entry into the motel room, but the Magistrate explicitly deleted those portions of the warrant. . . .
>
> The officers arrived at the motel room at 3:40 a.m. Officer Pharo, dressed as a maintenance man, led the team.

> With him were several plainclothes officers and at least one man in uniform. Officer Pharo knocked on Richards' door and, responding to the query from inside the room, stated that he was a maintenance man. With the chain still on the door, Richards cracked it open. Although there is some dispute as to what occurred next, Richards acknowledges that when he opened the door he saw the man in uniform standing behind Officer Pharo. . . . He quickly slammed the door closed and, after waiting two or three seconds, the officers began kicking and ramming the door to gain entry to the locked room. At trial, the officers testified that they identified themselves as police while they were kicking the door in. . . . When they finally did break into the room, the officers caught Richards trying to escape through the window. They also found cash and cocaine hidden in plastic bags above the bathroom ceiling tiles.

Richards v. Wisconsin, 520 U.S. 385, 388-89, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997). The Court determined:

> Although we reject the Wisconsin court's blanket exception to the knock-and-announce requirement, we conclude that the officers' no-knock entry into Richards' motel room did not violate the Fourth Amendment. We agree . . . that the circumstances in this case show that the officers had a reasonable suspicion that Richards might destroy evidence if given further opportunity to do so.
>
> The judge who heard testimony at Richards' suppression hearing concluded that it was reasonable for the officers executing the warrant to believe that Richards knew, after opening the door to his motel room the first time, that the men seeking entry to his room were the police. . . . Once the officers reasonably believed that Richards knew who they were, the court concluded, it was reasonable for them to force entry immediately given the disposable nature of the drugs. . . .
>
> . . . At the time the officers obtained the warrant, they did not have evidence sufficient, in the judgment of the Magistrate, to justify a no-knock warrant. Of course, the Magistrate could not have anticipated in every particular the circumstances that would confront the officers when

> they arrived at Richards' motel room. These actual circumstances—petitioner's apparent recognition of the officers combined with the easily disposable nature of the drugs—justified the officers' ultimate decision to enter without first announcing their presence and authority.

520 U.S. at 395-96.

[8] Also pertinent to our analysis is the principle that following a knock and announcement, the requirement that officers executing a search warrant be "refused admittance," within the meaning of statutory and constitutional requirements, is not restricted to an affirmative refusal, but encompasses circumstances that constitute constructive or reasonably inferred refusal. See, e.g., *U.S. v. Bonner*, 874 F.2d 822 (D.C. Cir. 1989). See, also, *State v. Moore*, 3 Neb. App. 909, 535 N.W.2d 417 (1995). In making such judgments, courts employ a highly contextual analysis, examining all the circumstances of the case, to determine whether the record establishes the existence of a constructive refusal. *Bonner, supra.*

Based on the principle of constructive refusal, courts have determined, under circumstances very comparable to those of the instant case, that officers acted reasonably in determining that they had been denied admittance to premises to be searched. For instance, in *Bonner, supra*, police officers knocked on the front door of an apartment and announced their identity and presence to those they knew to be within. After approximately 11 to 12 seconds, the officers heard footsteps running from the door, and some " 'faint thumping or bumping inside the premises,' " and they forced the door open. *Id.* at 823.

The D.C. Circuit determined that the record "strongly support[ed]" the conclusion that the officers had been refused admittance, and for the reasonableness of their actions. *Id.* at 824. First, the court noted that drugs and evidence of drug trafficking are peculiarly susceptible to ready destruction. Second, the court noted that when police officers are entering a premises investigating drug activity and have announced their presence and identity, they face a "danger-fraught situation" in which they may reasonably infer refusal more readily than under other circumstances. *Id.* Third, the court noted that while the warrant issued had not been a no-knock warrant, the warrant process had tested

and certified the information supporting the search. Fourth, the court stated that in view of the officers' knowledge that persons were present inside the small apartment, and the execution of the warrant during the early evening hours, the lack of response within approximately 10 seconds following the first announcement of purpose was particularly probative of refusal. Fifth, the officers heard sounds from inside the premises consistent with both refusal of admittance and destruction of the object of the search. "When conducting a search for evidence that is readily destroyed, officers may resolve the ambiguity of a noise from within the place to be searched in a manner consistent with executing the warrant safely and successfully." *Id.* at 825. Finally, the court stated that the delay of approximately 11 to 12 seconds from the start of the officers' first announcement, with no indication that they would be admitted, supported the conclusion that they had been refused admittance. *Id.*

In light of the foregoing analysis, the court determined that the delay before entering the premises supported a reasonable conclusion that the officers had been refused admittance. See *id.* See, also, e.g., *United States v. Chambers*, 382 F.2d 910, 914 (6th Cir. 1967) (refusal of admittance after "brief interval of time" inferred from person coming to door and pulling back shade, but retreating from door); *State v. Long*, 163 Wis. 2d 261, 471 N.W.2d 248 (Wis. App. 1991) (delay of 7 to 10 seconds at outer door, and another 5 to 7 seconds at inner door, reasonable where officer spoke to occupant through window); *People v. Hill*, 3 Cal. App. 3d 294, 83 Cal. Rptr. 305 (1970) (breaking of door reasonable when occupant pulled curtains apart, then disappeared from view, followed by sound of quick movement inside apartment).

[9-11] Similarly, we conclude that the record in the instant case supports a reasonable suspicion that it would have been futile, and that it would have inhibited the effective investigation of the crime, for the deputies to continue to knock and announce their identity and purpose prior to their entry into Kelley's residence. See *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997). Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause. *State v.*

Anderson, 258 Neb. 627, 605 N.W.2d 124 (2000). See *United States v. Arvizu*, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). It is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience. *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997). See *Arvizu, supra*. Whether a police officer has a reasonable suspicion based upon sufficient, articulable facts requires taking into account the totality of the circumstances. *Anderson, supra*. The "totality of the circumstances" principle governs the existence vel non of "reasonable suspicion." *Arvizu, supra*.

The district court in this case made clear and detailed findings of historical fact that are supported by the record and are not clearly erroneous. The record supports the district court's findings that 10 to 15 seconds elapsed from the initial announcement to the forced entry and that during that time, the deputies saw Kelley's wife, in close proximity to the door, observe their presence. The record also reveals that a "commotion" was heard inside the house and that the evidence being sought was of a kind that is easily destroyed. As in *Richards, supra*, once the deputies reasonably believed that Kelley's wife knew who they were, and did not respond to the knock at the door, it was reasonable for them to force entry shortly thereafter, given the disposable nature of the drugs. The "apparent recognition of the officers combined with the easily disposable nature of the drugs—justified the officers' ultimate decision to enter" without continuing to announce their presence and authority. See 520 U.S. at 396.

There is no dispute that Kelley's wife was seen looking out a window directly adjacent to the door on which the deputies were knocking. The district court credited Wheeler's testimony that the deputies gave Kelley's wife enough time to proceed directly to the door and open it, or to communicate with them. Instead, Sorensen testified that Kelley's wife "looked very excited and left," followed by the "commotion" inside the house. Given these circumstances, as in *U.S. v. Bonner*, 874 F.2d 822 (D.C. Cir. 1989), it was reasonable for the deputies to conclude that they had constructively been refused admittance to the premises.

Taking into account the totality of the circumstances, the record contains sufficient, articulable facts from which the deputies could reasonably infer that it would have been futile, and that it would inhibit the effective investigation of the crime, to continue to knock and announce their identity and purpose for a substantial period of time given that Kelley's wife looked out the window and proceeded away from the directly adjacent door rather than responding to the deputies' knocking. Kelley's assignment of error regarding his motion to suppress is without merit.

[12] In arguing to the contrary, Kelley, in his appellant's brief, relies extensively on *U.S. v. Mendonsa*, 989 F.2d 366 (9th Cir. 1993), for the proposition that a heightened standard is applied to exigent circumstances when property damage results from entry into the premises. However, Kelley's brief fails to mention that the Ninth Circuit's property-based exigency rule was squarely rejected by the U.S. Supreme Court in *United States v. Ramirez*, 523 U.S. 65, 118 S. Ct. 992, 140 L. Ed. 2d 191 (1998), or that this rejection was recognized by the Ninth Circuit in *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000). Under *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997), forced entry in the execution of a search warrant is justified if police have a reasonable suspicion that knocking and announcing, or continuing to knock and announce, would be dangerous, futile, or destructive to the purposes of the investigation. Whether such a reasonable suspicion exists depends in no way on whether police must destroy property in order to enter. *Ramirez, supra.* In short, that aspect of *Mendonsa* was overruled by the U.S. Supreme Court in *Ramirez*. We also note that the rule set forth in *Mendonsa* was referred to by the Court of Appeals, prior to the *Ramirez* decision, in *State v. Moore*, 3 Neb. App. 909, 535 N.W.2d 417 (1995). *Moore* is disapproved to that limited extent.

Finally, Kelley claims that he is entitled to a rehearing on his motion to suppress due to the ineffective assistance of trial counsel. Kelley complains of deficiencies in his counsel's cross-examination of certain witnesses, his counsel's failure to object to certain fruits of the purportedly illegal search, and his counsel's failure to object to certain evidence that Kelley claims was irrelevant.

[13,14] A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question. *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). Some types of attack upon effectiveness of counsel cannot be reached upon a direct appeal because the evidence which may bear upon such a determination is not shown in the trial record. *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994).

[15,16] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). An appellate court gives due deference to defense counsel's discretion in formulating trial tactics. See *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). We conclude, in the instant case, that absent an evidentiary hearing regarding trial strategy, the record before us is insufficient to determine whether counsel's performance was deficient or was the result of reasonable trial strategy. For that reason, we decline to address Kelley's ineffective assistance of counsel claim.

CONCLUSION

Considering the totality of the circumstances and giving due weight to the district court's findings of historical fact, we conclude that the record contains sufficient, articulable facts from which the deputies could reasonably infer that it was futile and that it would have inhibited the effective investigation of the crime to continue to knock and announce their presence prior to entering Kelley's dwelling. The record is not sufficient for us to evaluate Kelley's claim of ineffective assistance of counsel. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

ROBERT L. ANDERSON AND LAVISTA LOTTERY, INC., APPELLEES, V. RICHARD T. BELLINO AND LAVISTA KENO, INC., APPELLANTS.

658 N.W.2d 645

Filed March 28, 2003. No. S-01-584.

1. **Actions: Trusts: Equity.** An action to impose a constructive trust 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 when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Corporations.** In order to be a corporate opportunity, the business must generally be one of practical advantage to the corporation and must fit into and further an established corporate policy.
4. **Corporations: Equity.** Directors occupy a fiduciary relation toward the corporation and its stockholders and are treated by courts of equity as trustees.
5. **Corporations.** A corporate director may not compete with the corporation if the director's competition causes or contributes to the injury or damage of the corporation or deprives it of business.
6. ____. The general rule is that a director cannot acquire an interest adverse to that of the corporation when dealing individually with third persons.
7. **Trusts: Property: Title: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.
8. **Trusts: Property: Stock.** Intangible property and liquid assets such as stocks and bank and investment accounts may be held subject to a constructive trust.
9. **Trusts: Property: Title: Equity.** Regardless of the nature of the property upon which the constructive trust is imposed, a plaintiff seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
10. **Equity.** Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.
11. **Corporations: Trusts: Courts.** The traditional remedy imposed by courts upon a finding of a misappropriation of a corporate opportunity is the impression of a constructive trust in favor of the corporation upon the property.
12. **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.
13. **Trusts: Accounting.** The purpose of an accounting for a constructive trust is to adjust the accounts of the parties and render complete justice.
14. **Trusts: Unjust Enrichment.** In the theory of unjust enrichment, a constructive trustee may be compelled to convey or assign the corpus of a trust property and to account for and pay over rents, profits, issues, and income which the constructive

trustee has actually received or, in general, which he or she might by exercise of reasonable care and diligence have received.

15. **Trusts.** A trustee, including a constructive trustee, may be reimbursed or indemnified for expenses incurred or advances made in the execution of the trust, so long as the expenses or advances are considered proper in the administration of the trust.
16. **Trial: Evidence: Records: Appeal and Error.** The admission of evidence which is primarily duplicative of other evidence admitted into the record is not reversible error.

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

William F. Hargens and Kathryn D. Folts, of McGrath, North, Mullin & Kratz, P.C., for appellants.

Thomas J. Culhane and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellees.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Appellees, Robert L. Anderson and LaVista Lottery, Inc. (Lottery), brought this action in Cass County District Court against appellants, Richard T. Bellino and LaVista Keno, Inc. (Keno). Anderson and Lottery alleged that Bellino had breached a fiduciary duty he owed to Anderson and Lottery by usurping a corporate opportunity belonging to Lottery and directing such opportunity to Keno. Bellino and Keno denied the critical allegations in the petition, and Bellino further responded by filing a claim for a setoff and a counterclaim seeking, inter alia, compensation for services he had provided to Lottery.

Trial in the case was bifurcated. At the conclusion of the liability phase, the district court concluded that Bellino, an officer, director, and 50-percent shareholder in Lottery, had breached the duty of " 'utmost good faith and loyalty' " which he owed to Anderson and Lottery. The district court reached this conclusion because Bellino had formed his own corporation, Keno, and had successfully bid against Lottery for the 1998 contract to operate a keno parlor in LaVista, Nebraska. The district court imposed a constructive trust upon Keno for the benefit of Anderson and

Lottery and reserved further ruling until completion of the accounting phase of the case. The district court denied Bellino relief on his claim for a setoff and on his counterclaim. Trial was had on the accounting. In view of the breach of fiduciary duty and in furtherance of the constructive trust, following the accounting phase of the trial, the district court awarded relief to Anderson and Lottery. The district court, inter alia, ordered Bellino to pay Anderson and Lottery $644,992.63, representing sums by which Keno had been improperly diminished and other sums Bellino had inequitably received in connection with the operation of Keno, which amount could be reduced by $172,514.63 if Bellino were successfully to transfer the stock of Keno to Lottery and persuade the city of LaVista to relicense the keno contract from Keno in favor of Lottery.

Bellino and Keno appeal. Following our review, we conclude that the district court did not err in determining there had been a breach of fiduciary duty, imposing a constructive trust, and accounting therefor. Accordingly, we affirm.

II. STATEMENT OF FACTS

In 1989, the city of LaVista was seeking bids for the operation of a keno-type lottery for the city. Bellino, an electrician by training and experience, became interested in bidding. The bid specifications included a restaurant and lounge to be operated in connection with the keno operation. Bellino testified that he wanted someone to share the financial risk of a potential keno operation. In addition, Bellino wanted to find someone with experience in the restaurant and lounge business. At least two people declined to bid with Bellino, and he eventually approached Anderson, who evidently was involved in a number of successful businesses, liked to play keno, and knew people in the gaming industry. Anderson was aware of the bidding. Anderson and Bellino began investigating the keno business. They sought the advice of experienced operators in Reno, Nevada, who had contacts with keno equipment suppliers and who explained the mechanics of the industry. In addition, Bellino and Anderson investigated potential locations for the keno operation.

In March 1989, Bellino and Anderson submitted their bid for the LaVista keno contract. In April 1989, Bellino and Anderson

formed Lottery, a Nebraska corporation, for the purpose of operating the keno parlor if they were awarded the contract. Anderson and Bellino each owned 50 percent of the shares of stock of Lottery, and both were officers and directors of the corporation. Bellino was the president and treasurer, and Anderson was the vice president and secretary.

The bid submitted by Anderson and Bellino was successful. Lottery entered into a lottery operation contract with the city of LaVista on May 16, 1989. The initial contract was for a 5-year term. After the keno parlor was opened, the contract was amended several times. Pursuant to the fifth amendment, executed on October 13, 1992, the fixed term of the contract was extended through July 31, 1998, with a provision that the term would continue indefinitely beyond that fixed term until one party served 60 days' written notice of termination upon the other.

Following the award of the contract, Bellino and Anderson arranged for Lottery to lease space for the keno operation, purchase necessary equipment, and hire management and nonmanagement employees. Bellino and Anderson shared the initial investment of around $300,000 plus equipment.

Lottery initially entered into a lease with LaVista Commercial Partnership for space in the LaVista Plaza. Subsequently, Bellino purchased LaVista Plaza. Thereafter, Bellino leased the space in LaVista Plaza to Lottery.

The keno parlor operated by Lottery was successful. During the approximately 9 years that Lottery operated the keno parlor, the district court found, and the record supports the finding, that Lottery "had total gross receipts in excess of 100 million dollars" and that "Bellino and Anderson each personally received over 4 million dollars in salary and distributions during that time period." Initially, Anderson and Bellino received salaries from Lottery. In 1993, following the advice that Bellino told Anderson he had received from an accountant, Anderson and Bellino stopped receiving salaries from Lottery. Anderson and Bellino, as equal shareholders in Lottery, divided the profits from the operation of the keno parlor equally. In addition, because Lottery rented space in LaVista Plaza which was owned by Bellino, Bellino received monthly rental payments from Lottery.

Prior to their formation of Lottery, Anderson and Bellino were each involved in other businesses. Before Lottery commenced operation, a general manager was identified who would be responsible for the day-to-day activities of Lottery. The general manager hired and fired employees, purchased supplies, operated the keno game, and scheduled and supervised the employees. In addition to the general manager, Lottery hired keno managers, supervisors, and keno writers. Lottery also opened a lounge and a restaurant in conjunction with its keno operation. At some point, an additional manager was hired and put in charge of the day-to-day operations of both the lounge and the restaurant. If problems arose that could not be handled by the general manager or the general manager's staff, Anderson and Bellino were generally available. The district court found, and the record supports the finding, that

> [t]here was no express agreement between Bellino and Anderson as to the amount of time that each would devote to the lottery business. To the contrary, their agreement, as even evidenced by the testimony of Bellino, was simply that each would participate as much as they [sic] could in the business and that the day-to-day operations of the business would be conducted by managers hired by Lottery.

Neb. Rev. Stat. § 9-646(3) (Reissue 1997) was amended in October 1993 to provide in part that "[n]o owner or officer of a lottery operator with whom the county, city, or village contracts to conduct its lottery shall play any lottery conducted by such county, city, or village." The Nebraska Department of Revenue brought administrative charges against Anderson relating to a December 1993 gambling incident. Anderson agreed to pay an administrative fine of $4,500. As part of the stipulation of the settlement, the department agreed that the settlement would have no impact on Anderson's license to operate Lottery.

Subsequently to the award of the LaVista keno contract to Lottery, Anderson and Bellino became involved in other ventures, including a racetrack near Omaha, the I-80 Speedway. Anderson was a part owner from 1994 to 1996. Both Anderson and Bellino spent significant time from 1994 through 1996 operating the speedway. In addition, Bellino invited Anderson to bid with him for a Fremont keno contract. Eventually, Anderson and

his brother agreed to and became investors in a corporation that was awarded a Fremont keno contract. Along with Bellino, they were still investors in the Fremont venture as of April 2000.

From 1994 to 1998, Lottery employed general managers, keno managers, supervisors, and keno writers. Although Bellino and Anderson continued to be involved in Lottery, the evidence indicated that Bellino began to spend more time in the lounge of Lottery due, in part, to his personal relationship with Lottery's lounge manager. Anderson continued to be involved in the business to a lesser degree than Bellino. According to Lottery's bookkeeper, Anderson would come to the Lottery facilities at least once or twice a week in the mornings to review records and effect repairs. The bookkeeper testified that she talked to Anderson on a daily basis regarding Lottery's business. Bellino acknowledged in his testimony that he did not complain to Anderson about Anderson's degree of involvement in Lottery until approximately March 1998 and that Anderson never refused to do anything that Bellino asked him to do.

Shortly before Christmas 1997, Anderson met with Bellino and discussed with him the fact that Lottery's keno contract with LaVista was set to expire on July 31, 1998. Anderson advised Bellino that if the contract was not extended, Lottery would need to submit a new bid. Bellino told Anderson that he was aware the contract would expire in the summer and that he would meet with Anderson after the holidays to discuss Lottery's course of action.

On or about March 7, 1998, Anderson received a letter from Bellino, dated February 26, 1998, in which Bellino stated that he felt that he was doing a disproportionate amount of work for Lottery and receiving inadequate compensation. As a result, Bellino indicated he no longer intended to be associated with Lottery after the corporation's keno contract expired on July 31, 1998. As the owner of the premises where Lottery operated its keno parlor, Bellino also informed Anderson that Lottery would have to vacate the premises when the keno contract with the city of LaVista expired. Finally, Bellino informed Anderson that when the lottery contract comes "up for rebid, I will bid on it myself, either individually or through another entity which I will establish." At the time Bellino sent the February 26 letter, he

was Lottery's president, as well as a director and a 50-percent shareholder in the corporation.

After receiving the February 26, 1998, letter, Anderson attempted on several occasions to meet in person with Bellino to discuss the letter. Although the date is not clear in the record, some time prior to April 21, Anderson met with Bellino at the keno parlor. During that meeting, Anderson advised Bellino that he was unaware that Bellino thought he was doing more than his share of the work and Anderson expressed his willingness to try to resolve any concerns that Bellino had with Lottery or with Anderson. Following the meeting with Bellino, Anderson contacted an attorney regarding the situation with Bellino. In a letter dated April 21, 1998, the attorney informed Bellino that it was Lottery's belief that the keno contract with the city of LaVista was a corporate opportunity. The letter expressed Lottery's desire to have Bellino cooperate with Lottery in bidding for the new contract.

During the first quarter of 1998, Bellino met in person with LaVista's city administrator, Cara L. Pavlicek. During that meeting, Bellino inquired as to the city's intentions with regard to the keno contract when it expired in July. Pavlicek testified that she had several conversations with Bellino, all of which occurred while Bellino continued to be the president, a director, and a 50-percent shareholder of Lottery. Pavlicek testified that prior to her conversations with Bellino, she was not aware that the keno contract was due to expire in July 1998. Pavlicek testified that the city had been satisfied with the keno operation as conducted by Lottery. However, after her initial conversation with Bellino, Pavlicek reviewed the contract, discussed the city's options with the city attorney, and recommended to the city council that the keno contract be put up for competitive bid. Indeed, the agenda for the city council meeting of April 21, 1998, regarding the keno contract, states, "The current contractor has advised he is not interested in renewal of the contract with his existing business partnership. It is anticipated that the City will receive an independent proposal from Mr. Bellino."

On April 21, 1998, the LaVista City Council voted to accept Pavlicek's recommendation and put the keno contract up for bids. On April 23, Bellino incorporated Keno for the purpose of

bidding for the keno contract with the city of LaVista. Bellino was the sole shareholder of Keno.

On May 4, 1998, Bellino's attorney sent a letter to Anderson and Lottery, informing them that Bellino had no interest in trying to resolve matters with Lottery and would not bid for the contract as part of Lottery. In the letter, Bellino tendered his resignation as an officer and director of Lottery "effective upon termination of the corporation's current keno lottery contract with the City of LaVista." (Emphasis in original.)

Bellino prepared and submitted a bid on behalf of Keno for the keno contract. At the time Bellino incorporated Keno and prepared Keno's bid, Bellino remained an officer of Lottery, as well as a director and a 50-percent shareholder of Lottery. Because Bellino was still an officer, director, and shareholder of Lottery at the time the Lottery bid was submitted, Anderson requested that Bellino provide him with certain personal information required by the bid specifications from all persons associated with the bidder, which information Bellino supplied to Anderson. At the time it was bidding for the new keno contract, Lottery was in good financial condition.

Only the bids by Lottery and Keno were received by the city of LaVista. The city awarded the new keno contract to Keno. Bellino admitted during trial that he knew when he formed Keno and submitted a bid on its behalf for the keno contract that if he and his new company were awarded the contract, Lottery would be harmed. Bellino also acknowledged in his testimony that he knew that Anderson objected to Keno's bidding on the contract.

The new keno contract between LaVista and Keno was signed on July 24, 1998. Lottery ceased conducting its keno operations on August 18. Shortly after August 18, Keno opened its new keno parlor in the same location where Lottery had operated. Keno hired most of the employees previously employed by Lottery. Keno has continued to operate the keno parlor since being awarded the LaVista keno contract. Bellino has invested in improvements, and the district court found that the keno parlor has continued to be successful, with gross revenues increasing in 1998 and 1999.

The evidence from the accounting trial shows that Bellino owns 100 percent of the issued and outstanding shares of Keno.

Since it began operations, Keno has paid Bellino a salary at a rate of $120,000 per year. As of December 31, 2000, Bellino had received salary payments totaling $211,199 and was due accrued but unpaid salary in the amount of $61,318.

On July 29, 1998, Anderson and Lottery filed suit against Bellino and Keno. In their petition, Anderson and Lottery alleged, inter alia, that Bellino had breached a fiduciary duty he owed to Lottery as an officer, director, and shareholder of Lottery by forming Keno and bidding on the LaVista keno contract. Anderson and Lottery alleged that Bellino had diverted a corporate opportunity and directed the opportunity to Keno. As a remedy, Anderson and Lottery sought the imposition of a constructive trust on Keno's business operations for the benefit of Anderson and Lottery.

In their amended answer and counterclaim filed on December 17, 1998, Bellino and Keno, inter alia, denied that Bellino had breached any fiduciary duty which Bellino owed to Lottery and further denied that Bellino had misappropriated a corporate opportunity belonging to Lottery. Bellino also claimed that he was entitled to "offset" any amounts claimed by Anderson and Lottery against the "reasonable value of Bellino's services provided to . . . Lottery."

For his counterclaim, Bellino alleged two "causes of action." For his first cause of action, entitled "Quantum Meruit," Bellino claimed that he was due in excess of $480,000 from Lottery for services he had provided to Lottery. For his second cause of action, entitled "Breach of Contract," Bellino alleged that he and Anderson had an oral agreement to contribute their services equally to Lottery and that Anderson had breached this agreement. Bellino sought damages in excess of $480,000 as a result of Anderson's purported breach.

As stated above, trial in this case was bifurcated. The record consists of over 900 pages of testimony and approximately 100 documentary exhibits. A total of 20 witnesses testified in person or by deposition. The liability phase of the case was tried on April 4 through 6, 2000. In an order filed May 9, the district court concluded that Bellino and Keno had obtained the LaVista lottery contract in breach of Bellino's fiduciary duty to Lottery and that the appropriate remedy for Bellino's breach was the imposition of a constructive trust for the benefit of Anderson and Lottery. The

district court ordered that a subsequent hearing be held in connection with the accounting for the trust. The district court concluded that Bellino's claim for a setoff and his two-count counterclaim were without merit and dismissed these claims.

The accounting phase of the trial was held on February 1 and 2, 2001. The accounting evidence relative to the issues on appeal is supplied as necessary in our analysis of the assignments of error. In an order filed May 9, 2001, the district court, inter alia, ordered Bellino to pay Anderson and Lottery $644,992.63, representing various items including "rents, profits and benefits resulting from Keno and Bellino receiving the keno contract from the city of LaVista." The May 9 order also provided that Bellino could receive a credit of $172,514.63 against the judgment, an amount equal to Bellino's shareholder's equity in Keno, if Bellino could transfer the stock of Keno to Lottery and persuade LaVista to relicense the keno contract from Keno in favor of Lottery. In this connection, the district court indicated in its May 9 order that the transfer of stock occur within 60 days of the date of the order, but that in the event such a transfer could not be complied with "for any reason," Bellino and Keno were ordered to hold Keno's interest in the keno contract in a constructive trust for the benefit of Anderson and Lottery. Bellino and Keno appeal the district court's orders to the extent such orders granted relief to Anderson and Lottery. Bellino does not appeal the district court's order denying his claim for a setoff and dismissing his counterclaim.

III. ASSIGNMENTS OF ERROR

On appeal, Bellino and Keno assign nine errors, which we restate as four. Bellino and Keno claim, restated, that the district court erred (1) in finding the existence of a corporate opportunity and in further finding that Bellino had breached his fiduciary duty to Lottery by diverting such corporate opportunity belonging to Lottery, (2) in imposing a constructive trust, (3) in ordering Bellino and Keno to transfer the keno contract and all of Keno's stock to Lottery, and (4) in its accounting for the constructive trust.

IV. STANDARDS OF REVIEW

[1,2] An action to impose a constructive trust sounds in equity. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002);

ProData Computer Servs. v. Ponec, 256 Neb. 228, 590 N.W.2d 176 (1999). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Burk v. Demaray*, 264 Neb. 257, 646 N.W.2d 635 (2002).

V. ANALYSIS

1. Corporate Opportunity and Breach of Fiduciary Duty

Bellino and Keno contend that the district court erred when it determined that the 1998 keno contract with the city of LaVista was a corporate opportunity for Lottery and that by diverting such opportunity from Lottery to Keno, Bellino breached his fiduciary duty of "utmost good faith and loyalty" to Lottery. There is no dispute among the parties that at the time Bellino, on behalf of Keno, bid for the LaVista keno contract, he was an officer of Lottery, a member of Lottery's board of directors, and a 50-percent shareholder of Lottery. There is no dispute that Bellino continued to be a member of the Lottery board of directors at the time the contract was awarded to Keno. Bellino and Keno do not dispute that as a director, Bellino owed a fiduciary duty to Lottery. Bellino and Keno claim, however, that no corporate opportunity existed. Bellino and Keno further claim that if a corporate opportunity existed, it was limited to the opportunity to bid for the 1998 keno contract, that Bellino did nothing to impede Lottery from bidding for the 1998 keno contract by merely submitting a competing bid, and that, therefore, Bellino did not usurp a corporate opportunity. In addition, Bellino and Keno claim that in the absence of a noncompete agreement, Bellino was free to compete with Lottery for the keno contract and did not breach his fiduciary duty to Lottery. We reject the arguments of Bellino and Keno.

(a) Corporate Opportunity

[3] Bellino and Keno argue that Lottery had no expectancy in the 1998 keno contract and that, therefore, no corporate

opportunity existed. They further argue that if a corporate opportunity existed, then the opportunity was limited to the opportunity "to bid" for the keno contract. Brief for appellant at 27. We have previously stated that "in order to be a corporate opportunity, the business must generally be one of practical advantage to the corporation and must fit into and further an established corporate policy." *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 289, 333 N.W.2d 900, 905 (1983). The facts demonstrate that the business for which Lottery was bidding in 1998 was the business of operating a keno parlor for the city of LaVista pursuant to a contract issued by the city, the same business in which Lottery had been engaged for the previous 9 years and the purpose for which Lottery was incorporated. Bellino admitted that if Lottery were not awarded the keno contract, the corporation would be harmed. Contrary to the arguments asserted by Bellino and Keno, the corporate opportunity was not the right to bid; the bidding process was merely the "preliminary step" by which Lottery sought to acquire the opportunity embodied in the award of the keno contract. See *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 78, 139 N.W. 839, 843 (1913). The record shows that the keno contract would have served as a "practical advantage" to Lottery and would have "fit into and further[ed] an established corporate policy." See *Anderson*, 214 Neb. at 289, 333 N.W.2d at 905. The facts thus establish that the 1998 keno contract was a corporate opportunity for Lottery.

(b) Breach of Fiduciary Duty

[4] In considering the claim asserted by Bellino and Keno regarding the fiduciary duty a director owes the corporation, we are guided by our previous decisions. In *Koenig*, 93 Neb. at 75, 139 N.W. at 841-42, we long ago described a corporate director's fiduciary duty to the corporation as follows:

> "The rule is thoroughly embedded in the general jurisprudence of . . . America . . . that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders, and are treated by courts of equity as trustees. Courts hold the directors of a corporation to the strictest accountability. Conduct inconsistent with any duty

> is condemned. The fiduciary relation is so vital that directors are not only prohibited from making profit out of corporate contracts, and from dealing with the corporation except upon the most open and on the fairest terms, but the rule of accountability is so strict that they are not permitted to anticipate the corporation in the acquisition of property reasonably necessary for carrying out the corporate purposes or conducting the corporate business." 2 Thompson, Corporations (2d ed.) secs. 1215, 1246.

When discussing a corporate officer or director's fiduciary duty to the corporation, we have also stated:

> [A]lthough an officer or a director of a corporation is not necessarily precluded from entering into a separate business because it is in competition with the corporation, his fiduciary relationship to the corporation and its stockholders is such that if he does so he must prove . . . that he did so in good faith and did not act in such a manner as to cause or contribute to the injury or damage of the corporation, or deprive it of business; if he fails in this . . . proof, there has been a breach of that fiduciary trust or relationship. . . . The general rule is stated to be that a director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons. 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 861 (rev. perm. ed. 1975).

Anderson v. Clemens Mobile Homes, 214 Neb. 283, 288, 333 N.W.2d 900, 904 (1983).

Bellino and Keno claim that because Bellino did nothing to impede Lottery from bidding for the keno contract and cooperated with Anderson when Lottery prepared its bid for the keno contract, Bellino satisfied his fiduciary duty to Lottery. This argument ignores, however, that Bellino's bid through Keno for the keno contract, was "an act of distinct hostility" to Lottery. See *Koenig*, 93 Neb. at 74, 139 N.W. at 841. Bellino's actions and ultimately Keno's bid created a contest which, if Keno were successful, would necessarily deprive Lottery of business and damage Lottery. See *Anderson, supra*. As a director, Bellino's fiduciary duty was to procure the keno contract for Lottery and to forbear from obtaining it for his exclusive benefit. See *Koenig, supra*.

Bellino argues that he acquitted his fiduciary responsibilities to Lottery by cooperating with Lottery in the preparation of its keno contract bid. We do not accept this argument. The record shows that Bellino's cooperation, consisting of providing personal financial data to Anderson to be included in Lottery's bid documents and attending the meeting with LaVista officials when Lottery's bid was discussed, was of little consequence and were eclipsed by Bellino's acts which were antagonistic to Lottery.

[5] Additionally, Bellino cannot successfully claim that he was free to submit a bid on behalf of his own corporation against Lottery simply because he had not signed a noncompete agreement. The absence of a noncompete agreement is of no significance in the context of this case. Under the law, a corporate director may not compete with the corporation if the director's competition "cause[s] or contribute[s] to the injury or damage of the corporation, or deprive[s] it of business." *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 288, 333 N.W.2d 900, 904 (1983). The evidence is uncontroverted that Bellino's successful bid for the LaVista keno contract deprived Lottery of its only source of business. Thus, under the law governing the fiduciary duty of corporate directors and given the facts of this case, Bellino, through Keno, should not have competed with Lottery for the LaVista keno contract.

[6] As a director of Lottery, Bellino occupied a fiduciary relationship toward the corporation. " 'The general rule is . . . that a director . . . cannot acquire an interest adverse to that of the corporation . . . when dealing individually with third persons.' " *I. P. Homeowners v. Radtke*, 5 Neb. App. 271, 283, 558 N.W.2d 582, 590 (1997). By submitting a bid on behalf of Keno for the city of LaVista's keno contract, Bellino acted in a manner directly adverse to Lottery's interests and contrary to his duty as a fiduciary of Lottery. Based upon our de novo review of the record, we conclude that the district court did not err when it determined that Bellino had breached his fiduciary duty of "utmost good faith and loyalty" which he owed to Lottery by usurping a corporate opportunity belonging to Lottery. Accordingly, we conclude there is no merit to Bellino and Keno's assignments of error regarding corporate opportunity and breach of fiduciary duty.

2. IMPOSITION OF CONSTRUCTIVE TRUST

Bellino and Keno contend that the district court erred when it imposed a constructive trust against Keno and ordered that Keno hold its interest in the LaVista keno contract for the benefit of Anderson and Lottery. We conclude that on the facts of this case, the district court did not err in imposing a constructive trust.

[7-9] A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002); *ProData Computer Servs. v. Ponec*, 256 Neb. 228, 590 N.W.2d 176 (1999). We have stated:

> A constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of the legal title.

Fleury v. Chrisman, 200 Neb. 584, 588-89, 264 N.W.2d 839, 842 (1978). Intangible property and liquid assets such as stocks and bank and investment accounts may be held subject to a constructive trust. *Manker, supra*; *ProData Computer Servs., supra*. Regardless of the nature of the property upon which the constructive trust is imposed, a plaintiff seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *Id.*

[10,11] We have recognized that where "a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation." *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 287, 333 N.W.2d 900, 904 (1983). Furthermore, the "traditional remedy imposed by courts upon a

finding of a misappropriation of a corporate opportunity is the impression of a constructive trust in favor of the corporation upon the property." See *I. P. Homeowners v. Radtke*, 5 Neb. App. 271, 284, 558 N.W.2d 582, 590 (1997) (citing 3 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 861.50 (rev. perm. ed. 1994)). See, generally, *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N.W. 839 (1913) (imposing constructive trust in favor of corporation when application to divert river for hydroelectric plant was filed by corporate director on his own behalf).

Upon our de novo review of the facts and having concluded that Bellino breached his fiduciary duty to Lottery by submitting a bid and gaining the LaVista keno contract on behalf of Keno to the detriment of Lottery, we conclude that the district court did not err in imposing a constructive trust against Keno for the benefit of Lottery.

3. Transfer of Keno Stock to Lottery

Following the accounting phase of the trial, the district court entered an order providing for alternative forms of relief. In one portion of the order, the district court directed Bellino and Keno to transfer all of Keno's stock to Lottery and to take steps to obtain licensing approval of Lottery from LaVista for the purpose of reassigning the contested keno contract from Keno to Lottery. If the stock transfer and relicensing were accomplished, Bellino and Keno would receive a credit against the judgment. The order further provided that if such steps could not be accomplished "for any reason," a constructive trust would be imposed in lieu of such relief. Under the constructive trust, Bellino and Keno would hold Keno's interest in the keno contract as trustees in favor of Anderson and Lottery. On appeal, Bellino and Keno argue that the district court erred in ordering the stock transfer and relicensing because such relief is impossible for a variety of reasons.

[12] The record in this case does not permit us to comment on this assignment of error, nor are we required to do so. Whether the transfer of stock, even if permissible, would be accompanied by the relicensing of the keno contract from Keno to Lottery by the city is speculative. Even if Bellino and Keno were correct that this portion of the order cannot be complied with, the relief

of a constructive trust remains available and has been approved by this court elsewhere in this opinion. Having concluded that the imposition of a constructive trust is an appropriate remedy, we need not consider the claim asserted by Bellino and Keno relative to the hypothetical alternative remedy. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). See *In re Estate of Reading*, 261 Neb. 897, 626 N.W.2d 595 (2001).

4. ACCOUNTING FOR CONSTRUCTIVE TRUST

Following the accounting phase of the trial, and in the absence of the potential credit for $172,514.63, the district court entered judgment in favor of Anderson and Lottery in the amount of $644,992.63.

Bellino and Keno claim the district court erred in various respects in its accounting for the constructive trust, including relying on inadmissible testimony by the witness Dennis Hein, requiring Bellino to reimburse Lottery for compensation he received from Keno, refusing to allow Bellino and Keno a "credit" for various "expenses" allegedly incurred during Keno's operation, and ordering the payment of other items denominated by Bellino and Keno as "attorneys' fees" and "interest." We reject the arguments asserted by Bellino and Keno regarding these claimed errors.

[13] The purpose of an accounting "is to adjust the accounts of the parties and render complete justice." 1A C.J.S. *Accounting* § 38 b. at 35 (1985). In the instant case, the district court imposed a constructive trust upon Keno, requiring Keno to hold the LaVista keno contract for the benefit of Lottery. Once the district court determined that Keno would be held in a constructive trust for the benefit of Lottery, it was necessary to have an accounting and properly determine the corpus of the trust. In the accounting, the district court examined the expenses and revenue of Keno. When the district court determined that an expense was reasonably incurred by Keno, such as Keno's lease payment for the space it rented to operate the keno parlor, it approved the expense as the ordinary cost of doing business. If, however, during the accounting, the district court determined that an expense incurred by Keno was unusual or unjustified, such sum had to be repaid to

avoid an improper reduction in the trust corpus to the detriment of Lottery, which had become the beneficiary of the trust. In this regard, the district court determined that several expenses incurred by Keno were inequitably paid to or for the benefit of Bellino, and Bellino and Keno take issue with such determinations on appeal.

[14,15] In the theory of unjust enrichment, a constructive trustee may be compelled to convey or assign the corpus of a trust property and to account for and pay over rents, profits, issues, and income which the constructive trustee has actually received or, in general, which he or she might by exercise of reasonable care and diligence have received. *Ryan v. Plath*, 18 Wash. 2d 839, 140 P.2d 968 (1943) (cited with approval in *I. P. Homeowners v. Radtke*, 5 Neb. App. 271, 558 N.W.2d 582 (1997)). Generally, a trustee, including a constructive trustee, may be reimbursed or indemnified for expenses incurred or advances made in the execution of the trust, so long as the expenses or advances are considered proper in the administration of the trust. See, generally, 76 Am. Jur. 2d *Trusts* § 628 (1992); 90 C.J.S. *Trusts* § 471 (1955). The party seeking reimbursement bears the burden of demonstrating the appropriateness of the expenses. *I. P. Homeowners, supra.* When considering the expenses incurred by a constructive trustee, we articulated the rule that "any advantage beyond proper expenses and compensation belongs to the *cestui que trust*." *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 77, 139 N.W. 839, 842 (1913). We have stated that "[t]o rule otherwise would permit wrongdoers to be unjustly enriched or otherwise benefit parties who have obtained property with actual or constructive knowledge of [their improper] actions . . . in acquiring the property." *City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc.*, 212 Neb. 137, 144-45, 322 N.W.2d 369, 373 (1982).

[16] As a threshold matter, Bellino and Keno claim that the testimony of Hein, an accountant, called as a witness by Anderson and Lottery, should have been excluded as irrelevant and that the district court erred in relying on this inadmissible testimony in performing its accounting. Our review of the record shows that Hein primarily testified concerning Keno's income and expenses and that his testimony was based upon financial documents produced by Keno. Financial documents, including Keno's general

ledgers and financial statements, were admitted into evidence without objection by Bellino and Keno. We have previously recognized that the admission of evidence which is "primarily duplicative" of other evidence admitted into the record is not reversible error. See, generally, *State v. Bradley*, 236 Neb. 371, 390, 461 N.W.2d 524, 538 (1990) (*cert. denied* 502 U.S. 846, 112 S. Ct. 143, 116 L. Ed. 2d 109 (1991)).

Bellino and Keno also claim that Hein's testimony went to money "damages" and that such damages are not available in this case. Brief for appellant at 36. We do not accept the characterization placed on Hein's testimony by Bellino and Keno. Our review of the record shows that Hein testified as to the nature and extent of Keno's expenses and compared those expenses to Lottery's expenses when it operated the LaVista keno parlor. Such testimony is relevant to an accounting action, where the goal of an accounting for a constructive trust is to identify "any advantage beyond proper expenses and compensation [which advantage] belongs to the [constructive trust]." See *Koenig*, 93 Neb. at 77, 139 N.W. at 842. Based upon our de novo review of the record, see *Burk v. Demaray*, 264 Neb. 257, 646 N.W.2d 635 (2002), we conclude that Hein did not opine on "damages," but instead provided calculations from which the district court could determine, based on application of the law, what expenses paid by Keno or benefits received by Bellino improperly diminished Keno.

Finally, we note that to the extent Bellino and Keno object to the relevance of Hein's testimony concerning the nature of Keno's expenses and also object to documents Hein prepared summarizing his review of those expenses and comparing the same to Lottery's expenses in order to determine those amounts he concluded were unnecessary or unreasonable, Bellino and Keno elicited similar evidence during their cross-examination of Hein. Indeed, Bellino and Keno introduced into evidence, through Hein, albeit with limitations, their own exhibit summarizing Hein's calculations concerning Keno's expenses in comparison to Lottery's expenses. See, generally, *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999). See, also, *Pauley Lumber Co. v. City of Nebraska City*, 190 Neb. 94, 206 N.W.2d 326 (1973). In sum, the district court did not commit reversible error by admitting Hein's testimony.

Turning to the results of the accounting, under our de novo review of the record, we conclude that the district court did not err in its accounting for the constructive trust, and we recite below some, but not all, of the items in the accounting which form the basis of our approval of the district court's order. In conducting our review of the accounting, we are mindful that following the imposition of the constructive trust of Keno for the benefit of Lottery, on the record before us, it appears that Bellino, as a 50-percent shareholder of Lottery, will share in the benefit from Lottery's status as beneficiary.

Among its specific orders, the district court directed that the salary which Bellino received from Keno in the approximate amount of $211,000 be repaid. The court likewise ruled that "management fees" and fees Bellino received for supervising remodeling work for Keno be refunded. The court reasoned that Bellino had not received a salary or management fees from Lottery, despite performing similar tasks for that corporation, and to allow him to keep these sums would diminish Keno and amount to Bellino's benefiting from the breach of his fiduciary duty. The district court also determined that the interest Bellino charged Keno on a loan he made to the corporation was not reasonable. We agree with the district court that paying these various expenses amounted to a benefit to Bellino as a result of his breach of fiduciary duty.

Similarly, the district court scrutinized the purported expenses incurred by Keno during its operation of the keno parlor. To the extent that the district court determined that the expenses were unique to Keno, such as the approximately $34,000 in salary paid to Bellino's wife or the $35,000 paid to "'sponsor'" a race car belonging to Bellino's son, or were amounts that would not have been incurred if Keno had not competed for the keno contract, such as Keno's attorney and accountant fees, the district court ordered Bellino to pay such amounts. We find no error in such order.

As for other, potentially legitimate expenses, such as bills for a cellular telephone, office supplies, or postage purportedly incurred by Keno, the district court properly found an insufficient relationship between these expenses and Keno. For example, Bellino admitted in his testimony that he used postage for his

personal business as well as for the other businesses he operated, but he was unable to allocate a portion of the postage bill to Keno's operations.

Bellino and Keno claim that the district court erred in ordering them to pay Anderson and Lottery's attorney fees and interest on the judgment. We do not find language in the court's order directing that these items be paid by Bellino and Keno. We do note language in the order directing Lottery, upon receipt of money from Keno, "to first repay to Anderson all expenses, if any, actually incurred by him in pursuing this action on Lottery's behalf." Such language directs Lottery, not Bellino and Keno, to reimburse Anderson for litigation expenses.

Bellino and Keno further claim that the district court improperly awarded "prejudgment interest." We see no merit to this assertion. The district court determined that Keno borrowed money to fund its operations at the same time it was making payments to or for the benefit of Bellino. The district court further found that money taken from Keno by or on behalf of Bellino "caused Keno to incur unnecessary interest expenses total[ing] $40,006." The district court ordered Bellino to pay the $40,006. The characterization of this payment as "prejudgment interest" by Bellino and Keno is not accurate. The district court determined that as a result of Bellino's receipt of compensation and other unreasonable financial benefits, Keno was forced to borrow money, and that had Keno not been forced to borrow money, it would not have had to pay interest. This order was appropriate in an accounting for a constructive trust. See *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N.W. 839 (1913).

In view of the record, the assignments of error regarding the accounting are without merit. Based on our de novo review of the record, we conclude that the district court did not err in its accounting for the constructive trust.

VI. CONCLUSION

For the reasons stated herein, and based upon our de novo review of the record, we conclude that Bellino, as a director of Lottery, breached the fiduciary duty he owed Lottery when he caused Keno to bid against Lottery for the LaVista keno contract. We affirm the district court's order imposing a constructive trust

upon Keno for the benefit of Anderson and Lottery as a result of Bellino's breach of fiduciary duty. We also affirm the district court's order which provided an accounting for the constructive trust and entered judgment in the amount of $644,992.63.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ARTHUR LEE GALES, JR., APPELLANT.
658 N.W.2d 604

Filed March 28, 2003. No. S-01-1231.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Constitutional Law: Sentences: Death Penalty.** In order for a capital sentencing scheme to comply with the Eighth Amendment to the U.S. Constitution, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry.
3. **Criminal Law: Due Process: Proof.** Due process of law requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.
4. **Criminal Law: Sentences: Prior Convictions: Juries: Proof.** Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.
5. **Criminal Law: Sentences: Appeal and Error.** During the pendency of an appeal in a criminal case, the execution of the sentence or judgment shall be suspended until such time as the appeal has been determined.
6. **Sentences: Final Orders: Appeal and Error.** A sentence is not a final judgment until the entry of a final mandate of an appellate court.
7. **Constitutional Law: States: Appeal and Error.** New constitutional rules apply to all state or federal cases which are pending on direct review or are not yet final when the rule is announced.
8. **Constitutional Law: Death Penalty: Juries.** It is the determination of "death eligibility" which exposes the defendant to greater punishment, and such exposure triggers the Sixth Amendment right to jury determination as delineated in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).
9. **Statutes: Time.** Statutes covering substantive matters in effect at the time of a transaction govern, not later-enacted statutes. However, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding, and not those in effect when the act or violation allegedly took place.

10. **Statutes: Constitutional Law: Sentences.** Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
11. **Statutes: Legislature: Intent: Presumptions.** If, in a subsequent amendment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law.
12. **Statutes: Constitutional Law: Legislature: Intent: Appeal and Error.** To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to passage of the statute, (4) whether severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating that the Legislature would have enacted the bill without the invalid portion.
13. **Statutes: Time.** While procedural statutes do apply to pending litigation, it is a general proposition of law that new procedural statutes have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. All things performed and completed under the old law must stand.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed in part, and in part vacated and remanded with directions for new penalty phase hearing and resentencing on counts I and II.

J. William Gallup, of Gallup & Schaefer, for appellant.

Jon Bruning, Attorney General, J. Kirk Brown, and, on brief, Don Stenberg, former Attorney General, for appellee.

Denise E. Frost and Clarence E. Mock III, of Johnson & Mock, for amicus curiae American Civil Liberties Union Nebraska Foundation, Inc.

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

PER CURIAM.

I. INTRODUCTION

After a jury found Arthur Lee Gales, Jr., guilty of two counts of first degree murder and one count of attempted second degree murder, the trial judge conducted a sentencing hearing, made

factual findings, and sentenced Gales to death on each count of first degree murder and to not less than 50 nor more than 50 years' imprisonment on the count of attempted second degree murder. This is an automatic direct appeal from the death sentences as required by Neb. Rev. Stat. § 29-2525 (Cum. Supp. 2002). During the pendency of the appeal, but before it was briefed and argued, the U.S. Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), in which it held that a defendant in a capital case has a Sixth Amendment right to a jury determination of certain factual issues which determine whether a death sentence may be imposed. Subsequent to oral argument and submission of this appeal, the Nebraska Legislature enacted amendments to Nebraska's capital sentencing statutes in response to *Ring*. This case presents our first opportunity to assess the impact of *Ring* on Nebraska's capital sentencing statutes and to determine the applicability of the recent amendments to those statutes.

II. FACTS AND PROCEDURAL HISTORY

A three-count information was filed against Gales on May 22, 2001. Count I charged Gales with first degree murder based on an allegation that on or about November 12, 2000, he purposely and with deliberate and premeditated malice or during the perpetration of a first degree sexual assault killed Latara Chandler (Latara). Count II charged first degree murder based upon an allegation that on or about November 12, Gales purposely and with deliberate and premeditated malice killed Tramar Chandler (Tramar). Count III charged Gales with attempted second degree murder, alleging that on or about November 12, he intentionally, but without premeditation, attempted to kill Judy Chandler (Chandler). Gales entered pleas of not guilty to all charges.

A jury trial commenced on August 20, 2001. Evidence received at trial revealed that Gales was present with Chandler and her children, Latara and Tramar, at Chandler's apartment in Omaha, Nebraska, between 10 and 11 p.m. on November 11, 2000. On the following morning, Chandler was found badly beaten and incoherent near 15th and Grace Streets in Omaha. After Chandler was identified, police learned that she had children. At approximately 5:30 p.m. on November 12, police entered Chandler's apartment

to check on the children and discovered 13-year-old Latara's body, nude from the waist down, in a bedroom. Seven-year-old Tramar's body was found with his torso positioned face up in the bathtub and his legs outside the bathtub. Autopsies revealed that Latara died as a result of manual strangulation and that Tramar died as a result of drowning and manual strangulation. The examining pathologist testified that each child had been subjected to at least 4 minutes of continuous compression of the neck before death. Latara had been sexually assaulted. The pathologist could not pinpoint the exact time of death for either child.

The State's theory at trial was that Gales and Chandler left Chandler's children at her apartment on the evening of November 11, 2000, and subsequently became involved in an altercation in which Gales severely beat Chandler and left her for dead. The State contended that Gales realized the children were witnesses who could place him with Chandler that evening and that he therefore returned to the apartment and killed them. Gales did not testify or offer evidence at trial and did not dispute the State's general theory of how the deaths of the children occurred. His defense was that he was not the person who assaulted Chandler and killed the children. The State presented DNA evidence which linked Gales to both crime scenes and excluded other potential suspects.

On August 27, 2001, the jury returned a verdict finding Gales guilty of two counts of first degree murder and one count of attempted second degree murder. On August 28, the district court entered an "Order of Judgment of Conviction," in which it accepted the verdict of the jury and adjudged Gales guilty on all three counts. The court scheduled a sentencing hearing for October 23.

Subsequently to entry of the judgment of conviction and prior to the sentencing hearing, Gales filed a motion challenging the constitutionality of the Nebraska capital sentencing statutes. He asserted that "[p]ursuant to *Jones v. United States*, 526 U.S. 227[, 119 S. Ct. 1215, 143 L. Ed. 2d 311] (1999) and *Apprendi v. New Jersey*, [530] U.S. [466], 120 S. Ct. 2348[, 147 L. Ed. 2d 435] (2000), the Defendant is entitled to a new trial for jury determination of sentence." In the alternative, Gales sought a new trial "for Jury determination of statutory aggravating and

mitigating circumstances." This motion was heard at the commencement of the sentencing hearing and overruled. At the same time, the court overruled a defense motion to convene a three-judge sentencing panel.

The sentencing hearing was conducted by the judge who presided at Gales' trial. On November 6, 2001, Gales appeared before the court for the imposition of sentence. The court issued a written order of sentence on that date in which it found that certain statutory aggravating circumstances existed. First, the court found that Gales was previously convicted of another crime involving the use or threat of violence to a person, the aggravating circumstance enumerated in Neb. Rev. Stat. § 29-2523(1)(a) (Cum. Supp. 2002), because Gales had prior convictions for armed sexual battery and strong-armed robbery. The court found this aggravating circumstance applicable to both counts of first degree murder.

Second, the court found that Gales committed the murders of both children in an effort to conceal his identity as the perpetrator of the attempted murder of Chandler, thus meeting aggravating circumstance § 29-2523(1)(b). Relying upon evidence produced at trial, the court concluded that Gales assaulted Chandler, left her for dead, and then returned to the apartment to kill the children because they were witnesses.

Third, the court found that the murder of Latara was "especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence," so that aggravating circumstance § 29-2523(1)(d) was met. Relying upon evidence produced at trial, the court concluded that the sexual abuse inflicted upon Latara prior to her death combined with the manual strangulation were sufficient to satisfy this aggravator. The court concluded that this aggravating circumstance was not met as to the death of Tramar.

Finally, the court found that aggravating circumstance § 29-2523(1)(e), "[a]t the time the murder was committed, the offender also committed another murder," was applicable to the deaths of both children. Relying upon evidence received at trial, the court found that Gales was present in Chandler's apartment at 11 p.m. on November 11, 2000. The court further found that Gales was the man who witnesses indicated was inside the

apartment at 4 a.m. on November 12. Reasoning that no one reported seeing or hearing from the children after 11 p.m. on November 11, the court found that the children were murdered some time during the early morning hours of November 12.

In addressing mitigating circumstances, the court determined that no evidence supported a finding of any statutory mitigator. The court found evidence to support a nonstatutory mitigator that Gales maintained a strong relationship with his family. In balancing the aggravating and mitigating circumstances, the court concluded that the one mitigator did not approach or exceed the aggravators in either murder. The court then considered whether a sentence of death in either murder was excessive or disproportionate to the penalty imposed in similar cases and concluded that it was not. Accordingly, the court imposed consecutive sentences of death on each count of first degree murder and a sentence of imprisonment for a period of not less than 50 nor more than 50 years on the count of attempted second degree murder.

III. ASSIGNMENT OF ERROR

Gales' sole assignment of error is that the district court "erred in denying appellant's motions challenging the constitutionality of Nebraska Revised Statute Section 29-2519 (1995) et seq. and requesting a jury determination of sentencing issues." He assigns no error with respect to the jury's determination of guilt on the two counts of first degree murder, or with respect to his conviction and sentence on the one count of attempted second degree murder.

IV. STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002); *State v. Turner*, 263 Neb. 896, 644 N.W.2d 147 (2002).

V. ANALYSIS

1. Background

The Sixth Amendment to the U.S. Constitution guarantees the right to "public trial, by an impartial jury" in criminal prosecutions. The Eighth Amendment to the U.S. Constitution forbids

the infliction of "cruel and unusual punishments." Both are made applicable to the states through the 14th Amendment. See, *Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002) (Eighth amendment); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (Sixth amendment). The recent decision of the U.S. Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), marks the convergence of two lines of federal constitutional authority: one addressing procedures which states must follow in order to implement capital punishment in conformity with the Eighth Amendment, and the other dealing with the extent to which the Sixth Amendment guarantees a right to a jury determination of the existence of facts which increase the penalty for a crime. Because the parties dispute the scope of the Court's holding in *Ring*, we begin our analysis by examining its jurisprudential underpinnings.

(a) Eighth Amendment Capital Sentencing Requirements

"Murder in the first degree" was first defined as a separate offense in Nebraska in 1873. Gen. Stat., ch. 2, § 3, p. 720 (1873). It was made punishable by death. 2 Comp. Laws, ch. 2, § 3, p. 647 (1866-77); Consol. Stat., ch. 1, § 5579, p. 1123 (1891); *Sundahl v. State*, 154 Neb. 550, 48 N.W.2d 689 (1951). In 1893, the Legislature amended the law to provide that a person convicted of first degree murder "shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury." 1893 Gen. Laws, ch. 44, § 1, p. 386, subsequently codified at Neb. Rev. Stat. § 28-401 (1943), and later recodified at Neb. Rev. Stat. § 28-303 (Reissue 1995). In *Sundahl*, this court rejected a contention that the trial court erred in refusing to give a jury instruction that specified factors which the jury could or could not consider in exercising its discretion to impose a penalty of death pursuant to § 28-401. This court relied upon the interpretation of a similar federal statute by the U.S. Supreme Court in *Winston v. United States*, 172 U.S. 303, 313, 19 S. Ct. 212, 43 L. Ed. 456 (1899), in which the Court construed the jury's right to impose the death penalty as follows: "The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its

exercise to the judgment and the consciences of the jury." This court subsequently applied this same principle in holding that a trial court was not required to instruct the jury that it should impose a sentence of life imprisonment under § 28-401 if it had a reasonable doubt as to whether the death penalty was appropriate. *Grandsinger v. State*, 161 Neb. 419, 73 N.W.2d 632 (1955).

The principle of unrestricted discretion to impose the death penalty met its constitutional demise in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). In that case, which involved appeals from death sentences imposed under the laws of Georgia and Texas, the U.S. Supreme Court was asked to declare that the death penalty was unconstitutional because it constituted cruel and unusual punishment in violation of the Eighth Amendment. Two members of the Court held that the death penalty constituted cruel and unusual punishment under any circumstances. *Furman, supra* (Brennan, J., concurring; Marshall, J., concurring). Three other members of the Court, Justices Douglas, White, and Stewart, did not reach that issue, but concluded that the Georgia and Texas statutory procedures which gave a jury complete discretion to impose a death sentence violated the Eighth Amendment because they afforded "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J., concurring). Justice Stewart further noted that the death penalty as administered in Georgia and Texas was cruel and unusual "in the same way being struck by lightning is cruel and unusual" in that it was "wantonly and . . . freakishly imposed." *Furman*, 408 U.S. at 309-10. The remaining four justices dissented.

> The Court subsequently characterized *Furman* as requiring that in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Gregg v. Georgia, 428 U.S. 153, 199, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). In *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the Court further interpreted *Furman* and *Gregg* to mean that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor

and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." More specifically, the Court stated that capital sentencing statutes "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Id.* While articulating these general principles, the Court has been "unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). See, *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984); *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976); *Gregg, supra.*

In response to *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the Nebraska Legislature enacted a new capital sentencing procedure, 1973 Neb. Laws, L.B. 268. See, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1995 & Cum. Supp. 2002) (entitled "Special Procedure in Cases of Homicide"); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). In enacting this new procedure, the Legislature specifically found that "it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death"; that prior law "fail[ed] to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court." 1973 Neb. Laws, L.B. 268. See § 29-2519.

Nebraska's statutory capital sentencing procedures which were in effect at the time that Gales was convicted and sentenced were substantially similar to those enacted following *Furman*. Under these procedures, the determination of whether the defendant should be sentenced to death or life imprisonment was required to be made following a sentencing hearing by the judge who presided over the trial or accepted the guilty plea, or by a three-judge sentencing panel. § 29-2520. Section 29-2521 further provided:

> In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to

any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The court shall set forth the general order of procedure at the outset of the sentence determination proceeding.

Section 29-2523, which was in effect at the time of Gales' convictions and sentencing, provided:

> The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:
>
> (1) Aggravating Circumstances:
>
> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity;
>
> (b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime;
>
> (c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;
>
> (d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;
>
> (e) At the time the murder was committed, the offender also committed another murder;
>
> (f) The offender knowingly created a great risk of death to at least several persons;
>
> (g) The victim was a public servant having lawful custody of the offender or another in the lawful performance of his or her official duties and the offender knew or should have known that the victim was a public servant performing his or her official duties;
>
> (h) The murder was committed knowingly to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws; or
>
> (i) The victim was a law enforcement officer engaged in the lawful performance of his or her official duties as a law

enforcement officer and the offender knew or reasonably should have known that the victim was a law enforcement officer.

The facts upon which the applicability of an aggravating circumstance depends must be proved beyond a reasonable doubt.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his or her participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

Section 29-2522 provided:

After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.
>
> If an order is entered sentencing the defendant to death, a date for execution shall not be fixed until after the conclusion of the appeal provided for by section 29-2525.

The law further provided for automatic review of a death sentence by this court. § 29-2525.

[2] Nebraska's post-*Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), capital sentencing procedure was similar to that of many states in that it employed a process of determining and balancing aggravating and mitigating circumstances. The U.S. Supreme Court has characterized this process as consisting of an "eligibility decision," in which there must be a determination of the existence of one or more of the prescribed aggravating circumstances before a defendant convicted of a capital crime is eligible for a sentence of death, and a "selection decision," in which the sentencer determines whether a defendant eligible for the death penalty should in fact receive it, based upon an individualized determination of the character of the individual and the circumstances of the crime. *Tuilaepa v. California*, 512 U.S. 967, 971, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994). See, also, *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). The Court has stated that in order for a capital sentencing scheme to comply with the Eighth Amendment to the U.S. Constitution, "it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry." *Jones v. United States*, 527 U.S. 373, 381, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999).

Nebraska's capital sentencing scheme, as it existed at the time of Gales' sentencing, differed from that of most other states in that it required a judge or panel of judges to decide whether a defendant convicted of a capital crime should be sentenced to

death or life imprisonment. See § 29-2520. After *Furman, supra*, most state legislatures chose to place this responsibility on a jury. See, Ark. Code Ann. § 5-4-602 (1997); Cal. Penal Code Ann. § 190.3 (West 1999); Conn. Gen. Stat. § 53a-46a (2001); Ga. Code Ann. § 17-10-31.1 (1997); 720 Ill. Comp. Stat. Ann. § 5/9-1(d) (Lexis Cum. Supp. 2002); Kan. Stat. Ann. § 21-4624(b) (1995); Ky. Rev. Stat. Ann. § 532.025(1)(b) (Michie Cum. Supp. 2002); La. Code Crim. Proc. Ann., art. 905.1 (West 1997); Md. Ann. Code Crim. Law § 2-303(c) (2002); Miss. Code Ann. § 99-19-101 (2000); Mo. Ann. Stat. §§ 565.030 and 565.032 (West Supp. 2003); Nev. Rev. Stat. § 175.552 (2001); N.H. Rev. Stat. Ann. § 630:5(II) (1996); N.J. Stat. Ann. § 2C:11-3c (West Supp. 2002); N.M. Stat. Ann. § 31-20A-1 (Michie 2000); N.Y. Crim. Proc. Law § 400.27 (McKinney Cum. Supp. 2003); N.C. Gen. Stat. § 15A-2000 (2002); Ohio Rev. Code Ann. § 2929.03 (West 2002); Okla. Stat. Ann. tit. 21, § 701.10(A) (West 2002); Ore. Rev. Stat. § 163.150 (2001); 42 Pa. Stat. Ann. § 9711 (West Cum. Supp. 2002); S.C. Code Ann. § 16-3-20(B) (West Cum. Supp. 2000); S.D. Codified Laws § 23A-27A-2 (Michie 1998); Tenn. Code Ann. § 39-13-204 (Supp. 2002); Tex. Crim. Proc. Code Ann. § 37.071 (Vernon Cum. Supp. 2003); Utah Code Ann. § 76-3-207 (Supp. 2002); Va. Code Ann. § 19.2-264.3 (2000); Wash. Rev. Code § 10.95.050 (2002); Wyo. Stat. Ann. § 6-2-102 (2001). Of the 38 states which authorized capital punishment at the time that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), was decided, 29 states committed sentencing decisions to juries; 5 states, including Arizona and Nebraska, entrusted both capital sentencing factfinding and sentencing determination to judges; and 4 states utilized hybrid systems, whereby juries rendered advisory verdicts but a judge made the final sentencing determination. *Ring, supra.*

After *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and prior to *Ring, supra*, the U.S. Supreme Court decided several cases addressing the issue of whether jury sentencing is constitutionally required in capital cases. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), was the first in a series of U.S. Supreme Court cases involving Florida's capital sentencing statutes which permitted a jury to

return an advisory verdict on sentencing, but reserved to the trial judge the ultimate authority to determine the sentence after independently weighing the aggravating and mitigating circumstances. The Court observed that the principal difference between Florida's post-*Furman* capital sentencing statutes and those of Georgia which were upheld in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), was the fact that in Florida, the sentence was determined by the judge rather than by the jury. Noting its observation in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), that jury sentencing in a capital case can perform an important societal function, the plurality in *Proffitt* reasoned

> but it has never [been] suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition [of sentence] at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

428 U.S. at 252. The plurality concluded that because Florida gave trial judges "specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life," the Florida statutes, like those of Georgia upheld in *Gregg*, "pass[ed] constitutional muster." *Proffitt*, 428 U.S. at 253, 259.

This court relied upon *Proffitt* in rejecting a challenge to Nebraska's post-*Furman* capital sentencing scheme in *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). The defendant argued that our capital sentencing scheme was unconstitutional because it did not provide for the involvement of a jury in sentencing. Based upon *Proffitt*, we unanimously concluded:

> As we understand the federal and the state constitutional provisions, they do not require or even suggest that jury sentencing is constitutionally required. Whatever the relative merits of sentencing by a judge or jury may be, we need not consider them. Our concern is the constitutionality of the Nebraska system, under the federal and state Constitutions.

> The relative merits of the one or the other is for legislative and not judicial determination.

Simants, 197 Neb. at 559, 250 N.W.2d at 888.

The U.S. Supreme Court revisited the Florida capital sentencing scheme in *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), a first degree murder case in which the trial judge set aside the jury's advisory life sentence and imposed the death penalty based in part upon evidence of a prior conviction which had not been submitted to the jury. Rejecting the petitioner's "fundamental premise . . . that the capital sentencing decision is one that, in all cases, should be made by a jury," the Court held:

> This Court's decisions indicate that the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable. . . . The sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty. Thus, even if it is a jury that imposes the sentence, the "community's voice" is not given free rein. The community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined. . . .
>
> We do not denigrate the significance of the jury's role as a link between the community and the penal system and as a bulwark between the accused and the State. . . . *The point is simply that the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge.*

(Citations omitted.) (Emphasis supplied.) *Spaziano*, 468 U.S. at 458, 462-63. The Court acknowledged that the majority of state capital sentencing statutes authorized juries to impose the sentence, but held that this fact did not invalidate Florida's scheme by which the trial judge had final sentencing authority. The Court reasoned that "[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." 468 U.S. at 464. It concluded:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.
>
> As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.

468 U.S. at 464.

In *Hildwin v. Florida*, 490 U.S. 638, 640, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), the Court characterized the statutory aggravating circumstances which must be found before a death sentence may be imposed as "'sentencing factor[s]'" which come into play only after a determination of guilt, and not as elements of the offense. The Court concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." 490 U.S. at 640-41. This court specifically relied on *Hildwin* in rejecting a claim that § 29-2522 was unconstitutional on the ground that it denied a criminal defendant the right to have a jury determine the factual issues comprising first degree murder. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989).

In *Enmund v. Florida*, 458 U.S. 782, 797, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), the Court held that the principles of proportionality embodied in the Eighth Amendment preclude the imposition of the death penalty on "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." In *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), *abrogated on other grounds, Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987), the Court was presented with the issue of whether the existence of facts necessary to impose the death penalty under the rule in *Enmund* must be determined by a jury. The Court began its analysis by noting that neither the Mississippi jury's verdict of guilt nor its sentence of death "necessarily reflect[ed] a finding that Bullock

killed, attempted to kill, or intended to kill." *Cabana*, 474 U.S. at 383. Although the Court determined that the Mississippi court would be required to make the *Enmund* determination in order for the death sentence to stand, it concluded that "[t]he proceeding that the state courts must provide Bullock need not take the form of a new sentencing hearing before a jury." *Cabana*, 474 U.S. at 392. The Court observed that it had never required a jury to make the determination of whether a particular sentence was appropriate in any given case and noted that in *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), it "specifically rejected the argument that the Sixth Amendment or any other constitutional provision provides a defendant with the right to have a jury consider the appropriateness of a capital sentence." *Cabana*, 474 U.S. at 385-86. The Court concluded that the categorical rule of *Enmund* is a "substantive limitation on sentencing, and like other such limits it need not be enforced by the jury." *Cabana*, 474 U.S. at 386. The Court reiterated its prior statements to the effect that a state "has considerable freedom to structure its capital sentencing system as it sees fit" and that there is no " 'one right way' " to accomplish this task. 474 U.S. at 386-87, quoting *Spaziano, supra*.

The U.S. Supreme Court first considered a challenge to Arizona's capital sentencing scheme in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). The Arizona statutes at issue provided that when a defendant was convicted by a judge or jury of first degree murder, the sentence would be determined after the judge, sitting without a jury, determined the existence of aggravating and mitigating circumstances, and whether there were sufficient mitigating circumstances to warrant a sentence of life imprisonment instead of death. Walton argued on appeal that

> every finding of fact underlying the sentencing decision must be made by a jury, not by a judge, and that the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those findings.

497 U.S. at 647. In rejecting this argument, the Court noted that it had "repeatedly . . . rejected constitutional challenges to Florida's

death sentencing scheme, which provides for sentencing by the judge, not the jury." *Id.*, citing *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), *Spaziano, supra*, and *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). The Court also rejected Walton's claim that aggravating circumstances under the Arizona statute were " 'elements of the offense,' " noting that the finding of any particular aggravating circumstance does not in itself convict a defendant or require the death penalty, and the failure to find any particular aggravating circumstance does not " '"acquit"' " or preclude the death penalty. *Walton*, 497 U.S. at 648. The Court further relied on its holding in *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), *abrogated on other grounds, Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987), that the findings required by *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), need not be made by a jury. In rejecting another of Walton's claims, the Court held that a "defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 650.

(b) Sixth Amendment Right to Jury Determination of Facts Affecting Punishment

[3] Due process of law requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Applying this principle, the U.S. Supreme Court held that a Maine law which required a defendant charged with murder to prove that he acted " 'in the heat of passion on sudden provocation' " in order to reduce the charge to manslaughter constituted a denial of due process. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). The Court reasoned that because the absence of "heat of passion" was a critical fact distinguishing the offense of murder from the offense of manslaughter, which carried a lesser penalty, due process "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U.S. at 702, 704.

However, in *Patterson v. New York*, 432 U.S. 197, 198, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), the Court upheld the constitutionality of a statute which created an affirmative defense whereby a defendant charged with second degree murder could obtain a reduction of the charge to manslaughter by showing that he acted under " 'extreme emotional disturbance.' " The Court reasoned that *Mullaney* could not be read so broadly as to prohibit the State from permitting "the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact . . . beyond a reasonable doubt." *Patterson*, 432 U.S. at 214. The majority in *Patterson* reasoned that the State's recognition of extreme emotional disturbance as a "mitigating circumstance" which differentiates murder from manslaughter "does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." 432 U.S. at 209. The dissent in *Patterson* rejected the majority's distinction of *Mullaney*, noting that the majority's explanation of the *Mullaney* holding "bears little resemblance to the basic rationale of that decision." *Patterson*, 432 U.S. at 222-23 (Powell, J., dissenting; Brennan and Marshall, JJ., join).

The majority opinion in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), addressed the tension in *Mullaney* and *Patterson* by focusing upon the distinction between elements of an offense and sentencing considerations which affect punishment, noting that only facts which constitute elements must be proved by the prosecution beyond a reasonable doubt. The Pennsylvania statute under consideration in *McMillan* provided that anyone convicted of certain enumerated felonies was subject to a mandatory minimum sentence of 5 years' imprisonment if the judge determined, at a sentencing hearing, that the defendant " 'visibly possessed a firearm' " during the commission of the offense. 477 U.S. at 81. The majority reasoned that by enacting this mandatory minimum sentencing scheme, the Pennsylvania Legislature did not change the elements of existing offenses, but, rather, dictated the weight which

should be given to "one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony." 477 U.S. at 89. Citing *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), the Court also rejected a claim that the mandatory minimum sentencing scheme impinged upon the petitioners' right to trial by jury, noting that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *McMillan*, 477 U.S. at 93.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), the Court relied upon its reasoning in *Spaziano, supra*, and *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). In *Almendarez-Torres*, the Court considered a federal criminal statute forbidding a deported alien to return to the United States without special permission. One section of the statute authorized a prison term of up to 2 years, but another section authorized a sentence of imprisonment of up to 20 years if the initial " 'deportation was subsequent to a conviction for commission of an aggravated felony.' " 523 U.S. at 229, quoting 8 U.S.C. § 1326(b)(2) (1994). The Court held that the provision of the statute authorizing the greater penalty constituted a "sentencing factor." 523 U.S. at 235. In rejecting a contention that the Court should treat the prior conviction as a separate element of the offense, the Court noted that "such a rule would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty." 523 U.S. at 247, citing *Walton, supra*, *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), and *Spaziano, supra*.

However, a year later, in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), the Court considered a federal carjacking statute which provided for an enhanced penalty if serious bodily injury resulted from the carjacking, and a further enhancement in the event of a resulting death. See 18 U.S.C. § 2119 (2000). The majority concluded that the statute defined three separate offenses, each of which must be charged by indictment and proved to a jury beyond a reasonable doubt. Writing in dissent, Justice Kennedy noted that the reasoning of

the majority was inconsistent with *Walton* and predicted that "[r]eexamination of this area of our capital jurisprudence can be expected." *Jones*, 526 U.S. at 272.

[4] The next decision in this line of authority was *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Apprendi*, the defendant entered a guilty plea to two counts of possession of a firearm for an unlawful purpose, an offense carrying a penalty range of 5 to 10 years' imprisonment. After the pleas were accepted, the trial judge conducted an evidentiary hearing pursuant to the New Jersey "'hate crime'" enhancement statute which permitted an enhanced penalty if the crime was committed "'with a purpose to intimidate . . . because of race.'" *Apprendi*, 530 U.S. at 468-69. Based on a preponderance of the evidence, the trial judge found the requisite intent because the crime was "'motivated by racial bias'" and imposed an enhanced sentence. 530 U.S. at 471. The New Jersey Supreme Court affirmed. *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485 (1999). The U.S. Supreme Court granted certiorari and reversed, with the majority holding that under the Due Process Clause of the 14th Amendment, "[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." *Apprendi*, 530 U.S. at 490. Noting the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors'" drawn in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), the Court stated: "Despite what appears to us the clear 'elemental' nature of the [intent] factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494. The majority concluded that the New Jersey hate crime enhancement statute had that effect and therefore triggered a constitutional requirement that pertinent facts be determined by a jury beyond a reasonable doubt. Relying in part upon a dissenting opinion of one of its members in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), the *Apprendi* majority concluded that its holding was not inconsistent with *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047,

111 L. Ed. 2d 511 (1990). Writing in dissent, Justice O'Connor disagreed, stating:

> If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed.

Apprendi, 530 U.S. at 537.

2. *Ring v. Arizona*

Timothy Stuart Ring participated in an armored van robbery in Glendale, Arizona, in which the driver of the van was killed. At his trial, the jury was instructed on alternative charges of premeditated murder and felony murder. The jury reached a deadlock on the premeditated murder charge, but convicted Ring of felony murder. A separate sentencing hearing was then conducted by the trial judge, sitting without a jury, as required under Arizona's capital sentencing statutes then in effect. See Ariz. Rev. Stat. Ann. § 13-703(C) (West Supp. 2001). Arizona law provided that the penalty for first degree murder was death or life imprisonment, but specified that the death penalty could be imposed only if the trial judge found at least 1 of 10 statutory "aggravating circumstance[s]" and "'no mitigating circumstances sufficiently substantial to call for leniency.'" *Ring v. Arizona*, 536 U.S. 584, 593, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); § 13-703(F) and (G).

Based upon testimony at the sentencing hearing by one of Ring's accomplices, the trial judge found that Ring was a major participant in the robbery and that he fired the fatal shot. The judge found that two statutory aggravating circumstances existed and that one nonstatutory mitigator existed but did not warrant leniency. Based upon these findings, Ring was sentenced to death.

On direct appeal to the Arizona Supreme Court, Ring argued on the basis of *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), that the Arizona capital sentencing scheme violated the 6th and 14th Amendments to the U.S. Constitution. *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001). While noting that the U.S. Supreme

Court did not overrule *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), in its subsequent decisions in *Jones* and *Apprendi*, the Arizona Supreme Court acknowledged that those cases cast doubt upon the continued viability of *Walton*. After quoting Justice O'Connor's dissenting opinion which took issue with the manner in which the *Apprendi* majority characterized Arizona's capital sentencing scheme in distinguishing *Walton*, the Arizona Supreme Court agreed with Justice O'Connor's characterization, stating:

> In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for "natural life" without the possibility of release. . . . It is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death. . . . And even then a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt. . . . Thus, when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present. The judge makes that finding on the basis of the evidence presented at trial and any other evidence presented at the aggravation/mitigation hearing. . . . If the judge finds an aggravating circumstance, he must then proceed to determine if there are any mitigating circumstances. . . . If the judge finds mitigating circumstances, he must then weigh them against the aggravators and decide by "special verdict" whether a death sentence is appropriate.

(Citations omitted.) *State v. Ring*, 200 Ariz. at 279, 25 P.3d at 1151. Rejecting Ring's argument that *Walton* could not stand after *Apprendi*, the Arizona Supreme Court determined that it was bound by the Supremacy Clause to follow the "controlling authority" of *Walton*. *State v. Ring*, 200 Ariz. at 280, 25 P.3d at 1152. Although it determined that there was insufficient evidence to

support one of the aggravating circumstances found by the trial judge, the court concluded that the mitigating circumstance balanced against the remaining aggravating circumstance did not warrant leniency, and therefore affirmed the death sentence. *Id.*

The U.S. Supreme Court granted Ring's petition for certiorari and reversed the judgment. The Court began its analysis with the premise, derived from the Arizona Supreme Court's construction of that state's capital sentencing laws, that "[b]ased solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment." *Ring v. Arizona*, 536 U.S. 584, 597, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Rejecting the Arizona Supreme Court's reliance on the distinction drawn in *Walton* between elements of an offense and sentencing factors, the Court noted that "*Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." *Ring*, 536 U.S. at 604-05. The Court concluded

> that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. . . . Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury.

(Citation omitted.) *Ring*, 536 U.S. at 609. Accordingly, the U.S. Supreme Court reversed the judgment of the Arizona Supreme Court and remanded the cause for further proceedings not inconsistent with its opinion.

3. Application of *Ring v. Arizona* to This Case

[5-7] *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), was the controlling Sixth Amendment precedent when Gales was sentenced to death on November 6, 2001. Under *Walton*, it was constitutionally permissible to impose a

death sentence on the basis of aggravating circumstances determined by a judge sitting without a jury. However, during the pendency of an appeal in a criminal case, "the execution of the sentence or judgment shall be suspended until such time as the appeal has been determined." Neb. Rev. Stat. § 29-2301 (Reissue 1995); *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997). A sentence is not a final judgment until the entry of a final mandate of an appellate court. *Jones, supra*; *State v. Warner*, 192 Neb. 438, 222 N.W.2d 292 (1974). *Ring* was decided during the pendency of this automatic direct appeal, at a time when Gales' sentences had not yet become final. The Supreme Court has held that new constitutional rules apply to all state or federal cases which are pending on direct review or are not yet final when the rule is announced. *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Because *Ring* is now the law of the land and Gales preserved the Sixth Amendment issue it addresses prior to his sentencing, we are required to review his death sentences in accordance with the constitutional principle announced in *Ring*.

The statutory capital sentencing procedures under which Gales was sentenced required the judge to base the sentence imposed on three considerations:

> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

§ 29-2522. Gales argues that under *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), all three considerations must be submitted to a jury. We conclude that the holding in *Ring* is not that broad. In characterizing Ring's claim as "tightly delineated," the U.S. Supreme Court stated:

> [Ring] contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge

> *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. See *Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. See *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. See *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See *Apprendi*, 530 U.S., at 477, n. 3 (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

Ring, 536 U.S. at 597-98 n.4.

While one member of the Court concurred in *Ring* based upon his opinion that "jury sentencing in capital cases is mandated by the Eighth Amendment," no other Justice joined in this concurrence. *Ring*, 536 U.S. at 614 (Breyer, J., concurring in judgment). Accordingly, we interpret *Ring* as affecting only the narrow issue of whether there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based.

In holding that such a right existed under Arizona's capital sentencing scheme, the U.S. Supreme Court emphasized that while the statute authorized a maximum sentence of death for the offense of first degree murder, it required the finding of an aggravating circumstance before a death sentence could be imposed. Applying the principle of *Apprendi v. New Jersey*, 530

U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), that it is the function, not the characterization, of a fact or circumstance which determines " 'who decides,' judge or jury," the Court held that because aggravating circumstances under the Arizona statute "operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 605, 609.

At the time of Gales' trial and sentencing, Nebraska statutes classified murder in the first degree as a Class IA felony punishable by life imprisonment or a Class I felony punishable by death, depending upon the factual determinations made under §§ 29-2520 to 29-2524. See Neb. Rev. Stat. §§ 28-105(1) (Cum. Supp. 2002) and 28-303. Under these statutes, a death sentence could not be imposed absent the existence of at least one of the aggravating circumstances set forth in § 29-2523. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). Stated another way, a person convicted of first degree murder in Nebraska was not "eligible" for the death penalty unless the State proved one or more of the statutory aggravating circumstances beyond a reasonable doubt. See, *Tuilaepa v. California*, 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994); *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). In this sense, our capital sentencing scheme was similar to that of Arizona, and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), therefore requires that in order to fulfill the guarantee of rights conferred by the Sixth Amendment, the existence of any aggravating circumstance utilized in the imposition of Gales' sentence of death, other than a prior criminal conviction, must be determined by a jury.

It is clear that the jury made no explicit determination that any of the statutory aggravating circumstances existed in this case. Instead, that determination was made by a judge. This procedure violated the constitutional principle articulated in *Ring*, and Gales' death sentences imposed on each count of first degree murder must therefore be vacated.

4. RESENTENCING

This court lacks statutory authority to resentence a criminal defendant to death in a homicide case when we have found a reversible error in the sentencing proceedings. *Reeves, supra.* The parties agree that this cause must be remanded to the district court for resentencing based upon *Ring* error. They disagree, however, as to the law applicable to resentencing and the permissible scope thereof. On July 5, 2002, Gales filed in this court a motion to vacate his death sentence and a request for the imposition of a sentence of life imprisonment. In this filing, Gales stated:

> The U.S. Supreme Court has recently determined that no one can be given a death sentence unless the sentence is imposed by a jury. Ring v. Arizona No. 01-488 slip op. (U.S.S. Court June 24, 2002). Since the appellant was sentenced by a single judge to a death sentence, and since his appeal was pending before this court at the time that Ring, supra, was decided, this [c]ourt should vacate the death sentence and impose a sentence of life imprisonment because the death sentence was incorrectly imposed.

The State filed a response in which it asserted that "[a]lthough *Ring* does not require jury sentencing, *Ring* does require jury fact finding in the penalty phase of a Nebraska first degree murder trial." The State concluded:

> The appropriate relief would be an order of remand to the district court to conduct a new penalty phase hearing in the following manner: (a) the summoning and selection of a jury, by the same means any criminal jury is summoned and selected when required by the 6th Amendment, to hear the State's evidence of aggravating circumstances; (b) specific findings of the jury as to which, if any, of the statutory aggravating circumstances upon which evidence was offered by the State have been proven to exist beyond a reasonable doubt; (c) the dismissal of the jury once that fact finding is completed; and (d) the determination of an appropriate sentence by the trial court under §§ 29-2520 and 29-2522 based upon the factual findings of the jury and the record of that proceeding.

It was in this procedural posture that the case was originally briefed and argued to this court on November 5, 2002.

On November 26, 2002, while this matter was under submission, the State filed a "Notice of Legislation" advising this court that during a special session, the Nebraska Legislature enacted 2002 Neb. Laws, L.B. 1, of the 97th Legislature, Third Special Session, with the emergency clause "to satisfy the new 6th Amendment requirements articulated in *Ring*." The State requested that this cause be remanded for resentencing pursuant to L.B. 1. Gales filed a written objection to this request in which he renewed his request that he be resentenced to life imprisonment. We ordered supplemental briefs on the issues raised by the State's request that we remand for resentencing pursuant to L.B. 1.

(a) L.B. 1: Content

L.B. 1 was enacted with the emergency clause and signed by the Governor on November 22, 2002. The new legislation amends various statutes dealing with the offense of murder in the first degree, including the capital sentencing statutes codified in chapter 29, article 25, of the Nebraska Revised Statutes. Section 29-2519, which sets forth the Legislature's statement of intent with respect to the capital sentencing statutes, is amended by § 10 of L.B. 1 to include the following additional language:

> (2) The Legislature hereby finds and declares that:
>
> (a) The decision of the United States Supreme Court in Ring v. Arizona (2002) requires that Nebraska revise its sentencing process in order to ensure that rights of persons accused of murder in the first degree, as required under the Sixth and Fourteenth Amendments of the United States Constitution, are protected;
>
> (b) The changes made by this legislative bill are intended to be procedural only in nature and ameliorative of the state's prior procedures for determination of aggravating circumstances in the sentencing process for murder in the first degree;
>
> (c) The changes made by this legislative bill are not intended to alter the substantive provisions of sections 28-303 and 29-2520 to 29-2524;
>
> (d) The aggravating circumstances defined in section 29-2523 have been determined by the United States Supreme Court to be "functional equivalents of elements

> of a greater offense" for purposes of the defendant's Sixth Amendment right, as applied to the states under the Fourteenth Amendment, to a jury determination of such aggravating circumstances, but the aggravating circumstances are not intended to constitute elements of the crime generally unless subsequently so required by the state or federal constitution; and
>
> (e) To the extent that such can be applied in accordance with state and federal constitutional requirements, it is the intent of the Legislature that the changes to the murder in the first degree sentencing process made by this legislative bill shall apply to any murder in the first degree sentencing proceeding commencing on or after the effective date of this act.

Generally, L.B. 1 makes two significant changes in Nebraska's capital sentencing procedure. First, it provides for an "aggravation hearing" following a determination of guilt in a first degree murder case, at which a jury determines whether aggravating circumstances alleged by the State exist, unless such determination by a jury is waived by the defendant. L.B. 1, § 11. Second, it removes the option of sentencing by the trial judge and requires sentencing by a panel of three judges. *Id.*, § 12. L.B. 1 does not change the statutory definitions of aggravating and mitigating circumstances or the manner in which they are to be balanced. *Id.*, §§ 14 and 15. However, L.B. 1 does amend the specified minimum penalty for a Class IA felony from "[l]ife imprisonment" to "[l]ife imprisonment without parole." *Id.*, § 1. Finally, L.B. 1 includes a severability provision stating that "[i]f any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions." *Id.*, § 18.

(b) L.B. 1: Application

As noted, in enacting L.B. 1, the Legislature expressly stated that it intended the changes to apply to all first degree murder sentencing proceedings commencing on or after November 23, 2002, the effective date of the amendment. L.B. 1, § 10. In his supplemental briefs, Gales makes several arguments why the provisions of L.B. 1 should not be applied in this case on

remand. We interpret these as facial challenges to the constitutionality of L.B. 1.

*(i) Sixth Amendment/*Apprendi *Challenge*

We initially address Gales' argument that L.B. 1 fails to meet the Sixth Amendment requirements defined in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because L.B. 1 does not authorize a jury to weigh aggravating circumstances against mitigating circumstances or conduct a proportionality review prior to the determination of the sentence. Gales acknowledges that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), does not address these issues because they were not presented in that case. However, he argues that because *Ring* relied upon *Apprendi* in holding that an accused in a capital case has a right to a jury determination of whether aggravating circumstances exist, we should determine, based upon *Apprendi*, that a jury must also conduct the weighing and proportionality review functions of capital sentencing. Based upon a similar rationale, Gales contends that a sentencing judge may not consider facts set forth in a presentence investigation.

[8] We reject both arguments. As noted above, we understand *Ring* as recognizing a Sixth Amendment right to a jury determination of the existence of aggravating circumstances which determine "death eligibility," because in the absence of at least one such circumstance, the death penalty cannot be imposed. It is the determination of "death eligibility" which exposes the defendant to greater punishment, and such exposure triggers the Sixth Amendment right to jury determination as delineated in *Apprendi* and *Ring*. In contrast, the determination of mitigating circumstances, the balancing of aggravating circumstances against mitigating circumstances, and proportionality review are part of the "selection decision" in capital sentencing, which, under the current and prior statutes, occurs only after eligibility has been determined. See § 29-2522; L.B. 1, § 14. These determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination. Accordingly, we do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances,

the balancing function, or proportionality review be undertaken by a jury.

Moreover, we note that the constitutionality of judicial sentencing was specifically upheld in that portion of *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), which was not overruled by *Ring*. *Walton* thus remains binding constitutional precedent on this issue, which we are obligated to follow even if we were to read *Ring* as casting doubt on its future viability. The U.S. Supreme Court has clearly stated that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). Subsequent to the decision in *Ring*, the Florida Supreme Court relied in part upon this principle in denying habeas corpus relief to a person sentenced to death under the Florida capital sentencing statutes which the U.S. Supreme Court found constitutional in *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), and *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), noting that these decisions were not overruled in *Ring*. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002).

Gales' argument that provisions of L.B. 1 which require a sentencing panel to make use of a presentence investigation report are unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), is similarly without merit. Section 9 of L.B. 1 amends Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2000) to include the following language:

> When an offender has been convicted of murder in the first degree and (a) a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520 or (b)(i) the information contains a notice of aggravation as provided in section 29-1603 and (ii) the offender waives his or her right to a jury determination of the alleged aggravating circumstances, the court shall not commence the sentencing determination proceeding as

> provided in section 29-2521 without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation.

In capital cases where a jury is not waived, this provision requires the sentencing panel to utilize a presentence investigation only in the selection phase of the capital sentencing, which occurs *after* the defendant has been determined by a jury to be eligible to receive the death penalty. Because the defendant is already exposed to the maximum punishment permitted by law at the time the sentencing panel is required by this statute to consider the presentence investigation report, the statutory provision is not facially unconstitutional under *Apprendi, supra*, or *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

(ii) Substantive or Procedural Change

[9] Gales argues that L.B. 1 "confers a substantive right that previously never existed in Nebraska's death penalty statutes," specifically, "the right to a jury determination of aggravating factors." Supplemental brief for appellant at 5. He argues that this "substantive change in the law . . . is prospective only." *Id.* Statutes covering substantive matters in effect at the time of a transaction govern, not later-enacted statutes. *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995). However, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding, and not those in effect when the act or violation allegedly took place. *State v. Wilcox*, 230 Neb. 123, 430 N.W.2d 58 (1988); *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977).

It is of course true that at the time of the commission of the murders for which Gales was found guilty, Nebraska capital sentencing law required the trial judge or a three-judge sentencing panel to determine whether one or more of the aggravating circumstances existed in order to determine whether a defendant found guilty of first degree murder was eligible to receive the death penalty. §§ 29-2520 through 29-2522. With the enactment of L.B. 1 in response to *Ring*, the law has been changed to provide that the existence of aggravating circumstances is to be determined by a jury unless waived by the defendant. L.B. 1, § 11. To determine whether the law as amended can be applied to Gales'

resentencing, we must determine under the foregoing principles whether the change in the law effected by L.B. 1 was substantive or procedural in nature.

We conclude that the change was procedural. The amendment in question does not alter the substantive nature of the statutory aggravating circumstances, one or more of which must be proved by the State beyond a reasonable doubt before the death penalty may be considered for a defendant found guilty of first degree murder. Instead, the amendment simply provides that the existence of one or more aggravating circumstances must now be determined by a jury, instead of by a judge, unless the right to a jury determination is waived by the defendant.

Early in our history, this court twice considered a first degree murder prosecution affected by legislative changes in Nebraska's capital sentencing statutes, *Marion v. State*, 16 Neb. 349, 20 N.W. 289 (1884) *(Marion I)*, and *Marion v. State*, 20 Neb. 233, 29 N.W. 911 (1886) *(Marion II)*. In April 1883, Jackson Marion was indicted for a murder committed in May 1872. He was subsequently tried, convicted, and sentenced to death. In his initial appeal to this court, we determined that at the time of the crime, murder was defined by statute as "'the unlawful killing of a human being, with malice aforethought, either express or implied,'" and that the prescribed punishment was death or life imprisonment, as determined by the jury trying the case. *Marion I*, 16 Neb. at 351-52, 20 N.W. at 290. After the alleged murder and before Marion's trial, the statute defining murder was amended to define first and second degree murder, with death as the sole prescribed punishment for the former. Marion was tried for first degree murder under the amended statute. This court reversed the conviction, holding that the application of the amended statute violated the ex post facto clause. Because at the time the murder was committed the possible punishment for first degree murder was either life imprisonment or death, but the only possible punishment at the time defendant was tried was death, we determined that it was "evident that the law under which [defendant] was tried 'inflicts a greater punishment than the law annexed to the crime when committed.'" *Marion I*, 16 Neb. at 354, 20 N.W. at 291.

Upon remand, Marion was retried, convicted, and again sentenced to death. He appealed from that conviction. See *Marion II*.

In affirming that conviction, this court addressed whether a provision of the criminal code in effect at the time of the murder should have been applied at trial. The provision stated that " 'juries in all cases shall be judges of the law and the fact.' " *Marion II*, 20 Neb. at 247, 29 N.W. at 918. The provision had been repealed prior to trial. This court noted that the issue presented was "whether or not the right to have the jury pass upon the law was one of which [defendant] could not legally be deprived; the law being in force at the time of the alleged homicide." *Id.* Recognizing the decision in *Marion I*, this court analyzed whether the repeal of the provision "disadvantage[d]" defendant in any way. *Id.* at 248, 29 N.W. at 919. This court concluded:

> The procedure only has been changed. The degree of punishment, the character of the offense, and the rules of evidence, remain as under the former law. It may be observed that the only change in the law is to provide another tribunal to pass upon the law of the case. Prior to the change, if the words in the former code are to be taken at their full meaning and import, the jury were the judges as to the law of a case on trial. After the change the court sits in that capacity and is the judge of the law. No vested right of [defendant] is affected. A new tribunal may be erected, or a new jurisdiction given to try him, and no right is abridged.

Id. at 248-49, 29 N.W. at 919. This court further noted that "[r]emedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose." *Id.* at 249, 29 N.W. at 919.

In much the same manner, the most recent amendment to our capital sentencing statutes which reassigns responsibility for determining the existence of any aggravating circumstance from judges to juries effects a procedural change in the law which applies to all proceedings which occur after the effective date of the amendment. See, also, *Brice v. State*, 815 A.2d 314 (Del. Supr. 2003) (finding post-*Ring* change in Delaware statute making jury's determination of existence of aggravating factors binding upon trial judge was procedural change). Thus, the capital sentencing procedures as amended by L.B. 1 apply to the new

penalty phase proceeding which is necessitated in this case by *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

(iii) Ex Post Facto Challenge

[10] Gales also contends that because § 1 of L.B. 1 amended the penalty for a Class IA felony from "Life imprisonment" to "Life imprisonment without parole," application of the amendment would subject him to a more onerous penalty than he faced at his first sentencing in violation of constitutional ex post facto principles. Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts. *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). This ex post facto analysis applies when a statutory amendment changes the punishment of a crime. *Id.*

[11] If, in a subsequent amendment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law. *Johnson v. Kenney, ante* p. 47, 654 N.W.2d 191 (2002). Because the language used in L.B. 1 to describe the minimum penalty for first degree murder is clearly different than the prior statutory language, we presume that the Legislature intended to change the minimum penalty. For this reason, we conclude that subjecting Gales to the enhanced minimum sentence of life without parole upon remand for resentencing would violate ex post facto principles.

[12] Contrary to Gales' assertions, however, this conclusion does not necessitate a finding that none of the provisions of L.B. 1 may be constitutionally applied to him upon resentencing. To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to

passage of the statute, (4) whether severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating that the Legislature would have enacted the bill without the invalid portion. See *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002). In this regard, § 18 of L.B. 1 expressly provides that "[i]f any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions." It is also clear that a workable statutory scheme remains if the "without parole" amendments to L.B. 1 are not applied to Gales. After considering all of the factors, we conclude that although the "without parole" amendments cannot apply to Gales upon resentencing, application of the remaining provisions of L.B. 1 will not violate ex post facto principles. Thus, on remand, Gales is subject to a minimum punishment of life imprisonment.

(iv) Scope of L.B. 1's Application Upon Remand

Gales argues that even if the changes in L.B. 1 are procedural in nature, they cannot apply upon remand because his conviction has not been vacated. This argument is premised upon a misunderstanding of the relief granted by this appeal. Gales alleges, and this court has found, no trial error occurring prior to the acceptance of the guilty verdict and the entry of the judgment of conviction. The only error alleged and found to exist in this appeal occurred during the sentencing phase when the requirements of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), were not met because the judge, rather than the jury, determined the existence of statutory aggravators. Therefore, the only new proceedings in this cause on remand will be those directly relating to the determination of the existence of aggravating circumstances and resentencing.

[13] Section 29-2520, as amended by L.B. 1, § 11, is the new statutory procedure for the determination of the existence of aggravating circumstances by a jury. We recognize that this procedure is triggered by the filing of a "notice of aggravation," pursuant to Neb. Rev. Stat. § 29-1603 (Reissue 1995), as amended by L.B. 1, § 5, and that no such notice was filed in this case. As amended by § 5 of L.B. 1, § 29-1603 provides in pertinent part:

> (2)(a) Any information charging a violation of section 28-303 and in which the death penalty is sought shall contain a notice of aggravation which alleges one or more aggravating circumstances, as such aggravating circumstances are provided in section 29-2523. The notice of aggravation shall be filed as provided in section 29-1602. It shall constitute sufficient notice to describe the alleged aggravating circumstances in the language provided in section 29-2523.
>
> (b) The state shall be permitted to add to or amend a notice of aggravation at any time up to and including the thirtieth day prior to the trial of guilt.

The filing of a notice of aggravation is a new procedure established by L.B. 1. There was no such requirement at the time the information in this case was filed, or at any time prior to Gales' trial and original sentencing. Under the former statute, the State was not constitutionally required to provide a defendant with notice as to which particular aggravating circumstance or circumstances it would rely upon in pursuing the death penalty. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *judgment vacated* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409. While procedural statutes do apply to pending litigation, it is a general proposition of law that new procedural statutes have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. *State v. Russell*, 194 Neb. 64, 230 N.W.2d 196 (1975). All things performed and completed under the old law must stand. *Id.* We conclude that because the pretrial and trial "steps" of Gales' litigation were completed and became final at a time when the law did not require the State to file a notice of aggravation in order to seek the death penalty, this new procedural requirement is not applicable to Gales.

The district court is therefore directed to conduct proceedings pursuant to § 29-2520, as amended by L.B. 1, in order to determine whether aggravating circumstances exist with respect to each of the two murders committed by Gales. Such determination will be made by a jury impaneled for this purpose, unless waived by Gales. See L.B. 1, § 11 (to be codified as § 29-2520(2)(b)(ii)). The scope of such proceedings will be limited in that the State

may seek to prove only those aggravating circumstances which were determined to exist in the first trial, and as to which Gales is therefore on notice. With respect to the murder of Latara, these include only the aggravating circumstances specified in L.B. 1, § 15 (to be codified as § 29-2523(1)(a), (b), (d), and (e)). With respect to the murder of Tramar, the State may seek to prove only the aggravating circumstances specified in L.B. 1, § 15 (to be codified as § 29-2523(1)(a), (b), and (e)). Upon completion of this proceeding, the district court is directed to resentence Gales pursuant to L.B. 1, § 11 (to be codified as § 29-2520(h)), or L.B. 1, §§ 12 and 14 (to be codified as §§ 29-2521 and 29-2522), with a minimum sentence of life imprisonment.

VI. CONCLUSION

Gales has assigned no error with respect to his conviction and sentence on the charge of attempted second degree murder, and we therefore affirm that portion of the judgment of the district court.

Gales has assigned no error with respect to the guilt phase of his trial on two counts of first degree murder, and we therefore do not disturb the guilty verdicts returned by the jury on those counts or the entry of judgment of conviction thereon by the district court. However, based upon the intervening decision of the U.S. Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), we conclude that reversible error occurred at the penalty phase of the first degree murder prosecution because a judge, rather than a jury, made the finding that statutory aggravating circumstances existed. We therefore vacate Gales' death sentences on both counts of first degree murder and remand the cause to the district court with directions to conduct a new penalty phase hearing and to resentence Gales on those counts.

The provisions of L.B. 1 shall apply to Gales' new penalty phase hearing, with the following qualifications: First, the minimum penalty to which Gales may constitutionally be exposed on resentencing is life imprisonment, not life imprisonment without parole. Second, at the aggravation hearing to be conducted on remand pursuant to § 29-2520 as amended by L.B. 1, the State may seek to prove only those aggravating circumstances specified

in L.B. 1, § 15, to be codified as § 29-2523(1)(a), (b), (d), and (e), with respect to the murder of Latara, and the aggravating circumstances specified in L.B. 1, § 15, to be codified as § 29-2523(1)(a), (b), and (e), with respect to the murder of Tramar.

To the extent that pending motions of the parties seek appellate relief which is not specifically ordered herein, the motions are denied.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS FOR NEW PENALTY PHASE HEARING AND RESENTENCING ON COUNTS I AND II.

STOETZEL & SONS, INC., APPELLANT, V. CITY OF HASTINGS AND BOARD OF PUBLIC WORKS, APPELLEES.

658 N.W.2d 636

Filed March 28, 2003. No. S-01-1379.

1. **Equity: Appeal and Error.** An action for injunction sounds in equity.
2. **Actions: Equity: Public Meetings: Appeal and Error.** Actions for relief under the public meetings law are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases.
3. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, 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.
4. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **Directed Verdict: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
6. **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.

7. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
8. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
9. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
10. **Injunction.** Injunctive relief is preventive, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury has been done.
11. **Moot Question: Appeal and Error.** The public interest exception to the rule precluding consideration of issues on appeal because of mootness requires the consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for guidance of public officials, and the likelihood of recurrence of the same or a similar problem.
12. **Public Meetings.** To preserve an objection that a public body failed to make documents available at a public meeting as required by Neb. Rev. Stat. § 84-1412(8) (Cum. Supp. 2002), a person who attends a public meeting must not only object to the violation, but must make that objection to the public body or to a member of the public body.

Appeal from the District Court for Adams County: TERRI HARDER, Judge. Affirmed.

Christopher D. Curzon, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, for appellant.

Robert T. Grimit, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., and Stephen A. Scherr, of Whelan & Scherr, for appellees.

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

CONNOLLY, J.

The appellant, Stoetzel & Sons, Inc. (Stoetzel), bid on a contract to construct a service department warehouse for the City of Hastings (City). At an open meeting held on November 13, 1998, the board of public works (Board) accepted the lower bid of a competing contractor. Stoetzel claims it is entitled to injunctive relief because of alleged irregularities in the bidding process. It also claims that the Board violated the public meetings law by failing to make the submitted bids available at the November 13 meeting. See Neb. Rev. Stat. § 84-1412(8) (Cum. Supp. 2002).

The district court granted summary judgment for the City on Stoetzel's cause of action for injunctive relief and directed a verdict for the City on the public meetings law cause of action. Because we conclude that the cause of action for injunctive relief is moot and that Stoetzel waived its public meetings law cause of action, we affirm.

FACTUAL BACKGROUND

Bid Proposal and Specifications

In 1998, the Board authorized Hastings Utilities to let bids for the construction of a service department warehouse. The Board directs the operations of Hastings Utilities for the City. The Hastings Utilities staff prepared a document entitled "Bid Proposal and Specifications" and distributed it to prospective bidders. The document divided the warehouse project into three sections: section I was a prefabricated metal building, section II was the site work, and section III was a pond ash fill. Bidders could bid on any one or all of the sections.

The bid proposal and specifications set out instructions for how the bids were to be made. These instructions stated, "All Proposals shall be submitted on the Proposal forms hereto attached . . . ." Stoetzel contends that the instructions and the proposal forms required a unit-price bid, rather than a lump-sum bid, for each section of the project for which a contractor submitted a bid. A unit-price bid requires the bidder to itemize the elements and materials of a project. By contrast, a lump-sum bid is a single bid for the full amount of a project. Stoetzel argues that it is entitled to injunctive relief because the City gave other bidders oral permission to submit lump-sum bids on section I of the warehouse without timely notifying Stoetzel of the change.

The parties dispute to what extent the City could alter or waive the requirements in the bid proposal and specifications. It provided that Hastings Utilities reserves the right (1) to accept the proposal which best suits its needs whether the price is the lowest or not, (2) to reject any or all bids, (3) to waive any informalities, and (4) to reject any and all proposals and to waive technical errors as may be deemed best for the interest of the City. The City argues that under these provisions, Hastings Utilities was responsible for the bidding process and had broad discretion to waive

errors and alter the bidding requirements. Stoetzel conceded that the City had the authority to waive minor errors or omissions, but contends that the actions taken by the City went beyond this authority. It also argues that under the bid proposal and specifications, any changes to the bidding instructions had to be in writing.

BIDDING PROCESS

The bidding was set to close on November 10, 1998. On November 6, a representative of Westland Building Company (Westland), one of the competing bidders, telephoned Marty Stange, Hastings Utilities' chief civil and environmental engineer. The representative told Stange that Westland was having difficulty "getting all the subcontractor prices." Stange told the representative that Westland did not have to fill out every unit price, but warned that if Westland did not fill out the unit prices, it "should take that as an exception at [its] own risk."

According to Stange, on November 9, 1998, he contacted another bidder, Farris Construction, Inc. (Farris), and told it that, like Westland, it did not have to fill out every unit price if it was having difficulty getting information from subcontractors. Stoetzel was also notified that it did not have to fill out every unit price, but the parties dispute when it received the information. The City claims that an employee of Hasting Utilities telephoned Stoetzel and left a message with someone on November 9. Stoetzel claims that it never received the message and was not notified of the change until November 10, 2 to 3 hours before the bids were due.

Six bidders eventually submitted sealed bids for all or part of the service department warehouse project. Stoetzel bid on sections I and II of the project. It is undisputed that Stoetzel's bid complied with the requirements of the original bid proposal and specifications. Two other bidders, Westland and Farris, bid on section I. Both submitted lump-sum, rather than unit-price, bids. Of the three bids, Westland's was the lowest, Farris' was the second lowest, and Stoetzel's was the highest.

Stoetzel, Westland, Farris, and Werner Construction (Werner) submitted bids on section II of the project. Both Farris and Westland submitted unit-price bids for section II. Werner's bid was the lowest, and Stoetzel's bid was the second lowest.

The bids were opened on November 10, 1998. Later that day, Stange telephoned Westland and requested several unit prices so that he could evaluate Westland's lump-sum bid on section I of the project. Stange wrote these estimates on Westland's bid. Stoetzel argues that in requesting and writing down the unit prices, Stange acted inconsistently with several provisions of the bid proposal and specifications.

On November 11, 1998, Hastings Utilities released a table identifying the bidders and the amounts of their bids. In an accompanying report, Hastings Utilities recommended to the Board that Westland be awarded section I of the project and that Werner be awarded section II. The Board accepted these recommendations at an open meeting on November 13. This meeting is discussed in greater detail below.

November 13, 1998, Board Meeting

As previously noted, the Board held a regularly scheduled open meeting on November 13, 1998. During the meeting, the Board discussed the bids on the warehouse project and accepted Hastings Utilities' recommendations. Stoetzel now complains that the November 13 meeting failed to comply with the public meetings law. See Neb. Rev. Stat. § 84-1408 et seq. (Reissue 1999 & Cum. Supp. 2002).

Stoetzel complains that the City violated § 84-1412(6) (Reissue 1999), which provided, at the time of the meeting, that "[p]ublic bodies shall make available at the meeting, for examination and copying by members of the public, at least one copy of all reproducible written material to be discussed at an open meeting." Isadore H. Stoetzel (Isadore), the owner of Stoetzel, attended the November 13, 1998, meeting and expressed his concerns that the bidding process had been unfair. According to Isadore, the only document circulated at the meeting was the summary of the bids prepared by Hastings Utilities. He complains that under § 84-1412(6), the underlying bids should also have been made available.

Isadore admitted that before the Board adjourned, he did not object to the fact that the bids were unavailable. According to Isadore, immediately after the Board adjourned, he approached Stange and requested that he be allowed to see the bids. Stange

refused and directed Isadore to Marvin Schultes, the Hastings Utilities' manager. Isadore then contacted Schultes and asked to see the bids. Schultes refused. Although Schultes and Stange were present at the meeting, neither was a member of the Board. No evidence suggests that Isadore expressed his desire to see the bids to a Board member either before or after the Board adjourned.

Since the board meeting, the Legislature has amended § 84-1412(6), and it has been moved to § 84-1412(8). The differences between §§ 84-1412(6) (Reissue 1999) and 84-1412(8) (Cum. Supp. 2002) are not material for the purposes of this appeal, and to simplify our discussion, we will hereinafter refer to § 84-1412(8) only.

PROCEDURAL BACKGROUND

On December 8, 1998, the City executed a contract with Westland. Construction on the warehouse apparently began shortly thereafter.

Stoetzel initially filed this action on December 30, 1998, and filed an amended petition on May 25, 1999. The amended petition named the City, the Board, and Westland as defendants. Although Westland was named as a defendant, it apparently did not receive a summons.

In its amended petition, Stoetzel alleged four causes of action. In its first cause of action, it sought a permanent injunction and alleged that the City, "without proper authority to do so pursuant to the Bid Documents it approved, orally amended the terms of the Bid Documents to provide for a 'lump sum' bid and failed to give proper notice to Plaintiff." In its second cause of action, specific performance, Stoetzel alleged that it was the only bidder which followed the bidding requirements and that it was entitled to have the contract awarded to it. For its third cause of action, Stoetzel sought to void the Board's acts in approving and ratifying the contract because the November 13, 1998, meeting violated the public meetings law. In its fourth cause of action, Stoetzel sought to recover lost profits.

On May 26, 1999, Stoetzel moved for a temporary injunction. The court held a hearing on the temporary injunction on June 28. By this time, Westland had completed a substantial portion of the project and the City had paid about 40 percent of the contract

price to Westland. The court denied the temporary injunction on August 2, reasoning that the "motion [was] neither timely nor appropriate under the facts of the case."

At some point after the denial of the temporary injunction but before trial, Westland was dismissed from the action. The record does not show why or the exact date of the dismissal, and Westland is not a party to this appeal.

In November 1999, both Stoetzel and the City moved for summary judgment. On January 25, 2001, the court granted partial summary judgment for the City on Stoetzel's causes of action for injunctive relief, specific performance, and lost profits, but concluded that a genuine issue of material fact existed on the public meetings law cause of action.

Final payment for the warehouse project was made in February 2000. By the time of trial, the project was complete.

Trial on the public meetings law cause of action was held on October 29, 2001. At the close of Stoetzel's evidence, the court entered a directed verdict for the City. The court held that to maintain an action for the failure of a public body to produce documents at a public meeting, a party must have requested the documents during the meeting. The court rejected Stoetzel's argument that Isadore had preserved its cause of action by requesting the bids from Stange and Schultes immediately after the Board adjourned. The court also found that Stoetzel failed to prove that the documents it sought were not available at the meeting.

ASSIGNMENTS OF ERROR

Stoetzel assigns as error the court's entry of (1) summary judgment on its cause of action for injunctive relief and (2) directed verdict on its public meetings law cause of action.

STANDARD OF REVIEW

[1,2] An action for injunction sounds in equity. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). Actions for relief under the public meetings law are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases. *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 944, 653 N.W.2d 240 (2002).

[3] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

[4] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

[5] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

[6] 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. *Fischer v. Cvitak*, 264 Neb. 667, 652 N.W.2d 274 (2002).

ANALYSIS

On appeal, Stoetzel does not assign as error the entry of summary judgment on its claims for specific performance and lost profits. It does, however, assign as error the entry of summary judgment on its cause of action for injunctive relief and the entry of a directed verdict on its public meetings law cause of action. We address these two causes of action separately.

INJUNCTIVE RELIEF

Stoetzel sought to enjoin the execution of the contract with Westland and the construction of the service warehouse because of alleged irregularities in the bidding process. Before reaching the merits of Stoetzel's argument that the court erred in granting

summary judgment on its cause of action for injunctive relief, we must determine if the completion of the service warehouse has rendered the issue moot.

[7-9] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999). A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Id.* As a general rule, a moot case is subject to summary dismissal. *Id.*

[10] On several previous occasions, we have addressed situations where the action a party is seeking to enjoin has been completed before we can review the lower court's decision. See, e.g., *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000); *Putnam v. Fortenberry, supra*; *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989). We have recognized that "injunctive relief is preventive, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury has been done." *Putnam v. Fortenberry*, 256 Neb. at 270, 589 N.W.2d at 842-43. We have also said:

> " 'Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong, rights already lost and wrongs already perpetrated cannot be corrected by injunction.' "

Id. at 271, 589 N.W.2d at 843 (quoting *Conrad v. Kaup*, 137 Neb. 900, 291 N.W. 687 (1940)).

In *Putnam*, the plaintiff sought to enjoin the City of Lincoln from selling a publicly owned hospital to a private company. A few days after the plaintiff had brought her action, the city council passed an ordinance approving the sale. Within 3 weeks, the city and the private company had entered into an affiliation agreement that set a closing date. Three weeks later, the court denied the plaintiff's request for temporary and permanent injunctive relief. Before the plaintiff appealed, the city and the private company had closed the sale and the title to the

hospital was transferred. The record did not reveal a stay or a supersedeas bond before or after the filing of the notice of appeal. *Id.* We said "[b]ecause the act which [the plaintiff] sought to enjoin is complete, our opinion on the trial court's denial of injunction would be nugatory. We, therefore, conclude that the issue of injunctive relief is moot." *Id.* at 272, 589 N.W.2d at 843.

Here, Stoetzel waited 6 weeks after the November 13, 1998, meeting before filing suit. By that time, the City had executed the contract with Westland. Although it was aware that Westland had began construction on the warehouse, Stoetzel waited 6 months before seeking a temporary injunction. By that time, the construction was almost 50 percent complete. After the court denied its temporary injunction, Stoetzel waited almost 15 months before moving for summary judgment. By the time Stoetzel moved for summary judgment, the warehouse was complete and the contract with Westland was fully executed. The record does not show either a stay or a supersedeas bond filed before or after the filing of the notice of appeal.

The actions which Stoetzel sought to enjoin—the execution of the contract with Westland and the construction of the warehouse—have long been completed and, just as in *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999), any opinion would be worthless. In short, the " 'bell has been rung,' " and no court in Nebraska could " 'unring it.' " *Knaust v. City of Kingston N.Y.*, 157 F.3d 86, 88 (2d Cir. 1998) (quoting *CMM Cable Rep. v. Ocean Coast Properties, Inc.*, 48 F.3d 618 (1st Cir. 1995)). See, also, *Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Engineers*, 217 F.3d 393, 396 (5th Cir. 2000) ("[w]hen a party seeks an injunction to halt a construction project the case may become moot when a substantial portion of that project is complete"); *Winter Brothers v. City of Beresford*, 652 N.W.2d 99 (S.D. 2002); *Natick Auto Sales, Inc. v. DPGS*, 47 Mass. App. 625, 715 N.E.2d 84 (1999). Thus, we conclude that Stoetzel's cause of action for injunctive relief is moot.

As a general rule, a moot case is subject to summary dismissal. *Putnam v. Fortenberry, supra.* Nebraska, however, recognizes a public interest exception to the mootness doctrine, and we must consider whether the exception applies to this case. See

Koenig v. Southeast Community College, 231 Neb. 923, 438 N.W.2d 791 (1989).

[11] The public interest exception to the rule precluding consideration of issues on appeal because of mootness requires the consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for guidance of public officials, and the likelihood of recurrence of the same or a similar problem. *Putnam v. Fortenberry, supra.* If we were to reach the merits of Stoetzel's cause of action for an injunction, it would require an analysis of factors unique to this case. Such factors would include the proper interpretation of the terms of the bid proposal and specifications, the conduct of Stange before and after the bids, and the failure of Stoetzel to expedite the litigation. It is unlikely that we will be presented with a similar factual situation. We decline to apply the public interest exception to the mootness doctrine.

PUBLIC MEETING

Stoetzel claims that the Board violated the public meetings law, § 84-1408 et seq. The court directed a verdict for the City on this cause of action.

Section 84-1414(1) requires a court to declare any formal action taken by a public body in violation of the public meetings law void if the suit is commenced within 120 days of the meeting at which the violation occurred. Stoetzel claims that the Board's acceptance of the bids at the November 13, 1998, meeting violated § 84-1412(8), which states that "[p]ublic bodies shall make available at the meeting . . . for examination and copying by members of the public, at least one copy of all reproducible written material to be discussed at an open meeting." At the November 13 meeting, the Board discussed only the bid summary and the recommendations prepared by Hastings Utilities. Stoetzel concedes that the Board made both of these documents available to the public at the meeting. It argues, however, that the City violated § 84-1412(8) by failing to make the underlying bids available at the November 13 meeting of the Board as well.

The City, however, argues that even if the Board violated § 84-1412(8), Stoetzel waived its right to challenge the alleged violation. The trial court's order directing a verdict for the City is

somewhat ambiguous, but it appears that the City's waiver argument was at least one reason for the court's decision. Accordingly, we address the question.

In several prior cases, we have recognized that when a person attends a public meeting and fails to object to a purported violation of the public meetings law, that person is prevented from asserting the violation in a subsequent court action. See, *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 944, 653 N.W.2d 240 (2002); *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992); *Witt v. School District No. 70*, 202 Neb. 63, 273 N.W.2d 669 (1979); *Alexander v. School Dist. No. 17*, 197 Neb. 251, 248 N.W.2d 335 (1976). The rule recognizes that a timely objection permits "the public body to remedy its mistake promptly and defer formal action until" the deficiency can be rectified. *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. at 949, 653 N.W.2d at 244.

The same reasoning is equally applicable to violations of § 84-1412(8). If a person who attends a public meeting believes that § 84-1412(8) requires that documents be made available at the meeting, a timely objection will give the Board an opportunity to remedy the situation.

Here, the parties dispute whether Isadore made a timely objection. Isadore did not request to see the documents until immediately after the Board adjourned. The City argues that an objection to a violation of § 84-1412(8) must be made during the meeting and that the meeting ends when the public body adjourns. Stoetzel argues that a meeting begins when a majority of public officials have begun to arrive, mingle, and prepare for the meeting and that it ends when a majority of public officials are no longer mingling after the meeting.

However, we find it unnecessary to reach the question of when an objection to a violation of § 84-1412(8) must be made. When Isadore requested to see the underlying bids, he did not make the request to a Board member. Instead, after the meeting, he approached Stange, a Hastings Utilities engineer. Stange refused to let him see the bids, but directed him to Schultes, the Hastings Utilities manager. Schultes also declined to show the bids to

Isadore. Although both Stange and Schultes were at the meeting, neither were Board members.

It is implicit in our rule requiring a person attending a public meeting to object to a public meetings law violation that the objection must be made to the public body or to a member of the public body. Section 84-1412(8) creates duties running directly from public bodies to members of the public. If the objection is made directly to the public body or to a member of the public body, it guarantees that the public body has an opportunity to consider and correct any alleged violation. But if the objection is made to a public employee or to another member of the public who is at the meeting, there is no guarantee that the public body will receive the objection and have the opportunity to correct it.

[12] We hold that to preserve an objection to a § 84-1412(8) violation, a person who attends a public meeting must not only object to the violation, but must make that objection to the public body or to a member of the public body. Because Isadore never made his request to see the bid documents to a Board member, he waived his claim that the Board violated § 84-1412(8).

CONCLUSION

Stoetzel's cause of action for injunctive relief is moot, and it waived its public meetings law cause of action. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JAMES C. HART, JR., RESPONDENT.

658 N.W.2d 632

Filed March 28, 2003. No. S-02-921.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

On August 19, 2002, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, James C. Hart, Jr. Respondent's answer disputed the allegations. A referee was appointed and heard evidence. The referee filed a report on February 5, 2003. With respect to the single count in the formal charges, the referee concluded that respondent's conduct had breached disciplinary rules of the Code of Professional Responsibility. The referee did not make any determination as to whether respondent's conduct violated his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended that respondent should be publicly reprimanded. Neither relator nor respondent filed exceptions to the referee's report.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska in 1972. He has practiced in Douglas County.

The substance of the referee's findings may be summarized as follows: The single count of the formal charges involves respondent's handling of a client's employment discrimination claims. The detailed facts as found by the referee are not disputed by the parties and are not repeated here. In sum, the facts show that from May to October 5, 2001, respondent undertook to represent Vicky Wright with regard to her employment discrimination claims. The referee found that on or about October 5, respondent wrote to Wright and advised her that he was withdrawing as counsel. The referee found that in the course of respondent's representation of Wright, respondent failed to contact relevant agencies concerning Wright's discrimination claims, failed to discuss Wright's claims with her former employer or former coworkers, failed to review documents provided to him by Wright, failed to conduct any research on Wright's claims, and failed to advise Wright of any statute of limitations issues. The referee also found that respondent failed to communicate in a timely manner with Wright regarding her discrimination claims, failed to withdraw from his representation of Wright in a timely manner, and failed to refer Wright to

other attorneys practicing in the area or to otherwise protect Wright's interests as those interests were affected by respondent's withdrawal as counsel. The referee found by clear and convincing evidence that as a result of respondent's conduct, respondent had violated Canon 1, DR 1-102(A)(1) (disciplinary rule violation); Canon 6, DR 6-101(A)(3) (neglect); and Canon 7, DR 7-101(A)(2) (failure to carry out contract of employment with client for professional services). The referee also found, however, that contrary to the allegations of paragraph 15 in the formal charges, relator had failed to prove that any " 'time for filing suit [based on Wright's employment discrimination claims] had expired.' "

In his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules recited above. With respect to the sanction which ought to be imposed for the foregoing violations, and considering the mitigating factors the referee found present in the case, the referee recommended that respondent should be publicly reprimanded.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion under Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence.

A proceeding to discipline an attorney is a trial de novo on the record. *Apker, supra.* To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), DR 6-101(A)(3), and

DR 7-101(A)(2). We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

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

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

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case establishes, inter alia, that respondent neglected a legal matter entrusted to him and failed to carry out a contract of employment entered into with the client for

professional services. As mitigating factors, we note the isolated nature of respondent's misconduct and respondent's cooperation with regard to the disciplinary proceeding.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court agrees with the referee's recommendation and finds that respondent should be publicly reprimanded.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that respondent should be and hereby is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. MICHAEL L. CRUISE, RESPONDENT.

658 N.W.2d 300

Filed March 28, 2003. No. S-02-1093.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

Respondent, Michael L. Cruise, was admitted to the practice of law in the State of Nebraska on April 18, 1988. On September 25, 2002, formal charges were filed against respondent. On December 5, amended formal charges were filed. Respondent's alleged misconduct involved, inter alia, engaging in conduct that was prejudicial to the administration of justice, neglecting legal matters entrusted to him, and failing to preserve the identity of funds or property belonging to a client.

FACTS

On February 7, 2003, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent states that he "knowingly" did not challenge or contest the truth of the allegations that he engaged in conduct that violated Canon 1, DR 1-102(A)(1) and (5); Canon 6, DR 6-101(A)(3); Canon 9, DR 9-102(A)(1) and (2); and DR 9-102(B)(1) through (4), of the Code of Professional Responsibility, as well as his oath of office as an attorney. In addition to surrendering his license, respondent voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment. In surrendering his license, respondent knowingly does not challenge or contest the following allegations in the amended formal charges: that he failed to deposit clients' funds and advanced fee payments into his attorney trust account; that he neglected three separate clients' child support cases, by failing to file pleadings and failing to respond to discovery requests in a timely manner; that he neglected his duties as a court-appointed guardian and conservator, including failing to file an accounting for conservatorship funds in a timely manner; that he neglected a client's personal injury case, including failing to file pleadings; that he was out of trust with respect to his attorney trust account, including maintaining a negative balance for a period of several months; and that he neglected a client's federal court appeal, including failing to file a brief on appeal.

ANALYSIS

Neb. Ct. R. of Discipline 15 (rev. 2001) provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to rule 15, we find that respondent has voluntarily surrendered his license to practice law, admitted in writing that he knowingly does not challenge or contest the truth of the amended formal charges, and waived all proceedings against him in connection therewith. We further find that respondent has not challenged or contested the truth of the allegations that he engaged in conduct that violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), DR 9-102(A)(1) and (2), DR 9-102(B)(1) through (4), and the attorney oath of office and that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the pleadings in this matter, the court finds that respondent knowingly did not challenge or contest the truth of the allegations that he engaged in conduct that violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), DR 9-102(A)(1) and (2), and DR 9-102(B)(1) through (4) and that his waiver was knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Costs to be taxed against respondent.

JUDGMENT OF DISBARMENT.

FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLEE, v. JOHN D. KMENT AND BRIAN M. DETLEF, APPELLANTS.

658 N.W.2d 662

Filed April 4, 2003. No. S-01-1238.

1. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.

3. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
4. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
5. **Jury Instructions.** The submission of proposed instructions by counsel does not relieve the parties in an instruction conference from calling the court's attention by objection to any perceived omission or misstatement in the instructions given by the court.
6. ____. The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission.
7. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.
8. **Insurance: Contracts: Proof.** The burden to prove that an exclusionary clause applies rests upon the insurer.
9. **Insurance: Contracts: Intent: Proof.** In order for the intentional or expected injury exclusion in a liability insurance policy to apply, the insurer must show that the insured acted with the specific intent to cause harm to a third party, but does not have to show that the insured intended the specific injury that occurred.
10. **Insurance: Negligence: Intent.** An injury is "expected or intended" from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law.
11. **Courts: Jury Instructions.** A trial court need not instruct the jury on an issue where the facts do not justify such an instruction.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Norman Denenberg and James A. Mullen for appellant Brian M. Detlef.

Donald L. Stern for appellant John D. Kment.

Thomas A. Grennan and Donald P. Dworak, of Gross & Welch, P.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This is an appeal from a declaratory judgment action brought by appellee, Farmers Mutual Insurance Company of Nebraska

(FMI), against appellants, John D. Kment and Brian M. Detlef. The jury determined that the injuries sustained by Detlef were intended by Kment and that thus, FMI was not obligated under its homeowner's insurance contract issued to Kment to provide coverage. The appellants filed this appeal. The specific issue we address is whether an instruction should have been given as to the effect of voluntary intoxication by Kment. For the reasons set forth below, we affirm.

BACKGROUND

Kment owned his own house and rented the basement apartment to Detlef for $100 per month. On January 28, 1995, Kment went down to Detlef's apartment with a 12 gauge Winchester shotgun and shot Detlef twice, which ultimately necessitated that Detlef's right hand be amputated.

Detlef sued Kment in district court. Following a bench trial, the district court entered judgment in favor of Detlef in the amount of $1,400,000. Detlef sought to recover the amount under Kment's homeowner's insurance policy issued by FMI. FMI denied Detlef's claim, citing an exclusion in the policy which excludes coverage for intentional acts. The policy provided personal liability coverage for accidents, but not "**[b]odily injury** or **property damage** expected or intended by an **insured person**." The appellants alleged that the shooting was an accident; that Kment only intended to frighten Detlef; that Kment thought the gun was unloaded at the time of the shooting; that the injury was the result of a "stupid prank," possibly combined with alcohol; and that Kment did not intend to injure Detlef.

FMI brought the present declaratory judgment action alleging that Kment intended to injure Detlef and that there was, therefore, no coverage under the policy. Both parties moved for summary judgment, and both motions were overruled. The court found a genuine issue of material fact existed as to whether the shooting was intentional or accidental. Prior to trial, FMI filed a motion in limine seeking to exclude evidence at the trial of Kment's alleged intoxication on the day of the shooting. The court overruled FMI's motion in limine.

At the declaratory judgment trial, Kment gave conflicting testimony. He testified that he was not drunk at the time of the

incident, but also testified that he was not sober. He further testified that he intended only to take the shotgun down to Detlef's apartment to show him the gun. Thinking the gun was not loaded, Kment decided to play a joke on Detlef by aiming the gun at Detlef and pulling the trigger. The gun discharged, surprising Detlef, and a scuffle ensued between Detlef and Kment. In the scuffle, Detlef pulled on the gun, the gun discharged again, and Detlef's right hand was blown off at the wrist. A jury verdict was returned in FMI's favor determining that the injuries were "expected or intended" by Kment. This appeal followed.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in the following: (1) refusing to give the instruction requested by Detlef that voluntary intoxication may destroy the capacity to form the intent required to invoke a policy exclusion for acts " 'intended or expected' " by the insured and that the burden is on FMI to prove and persuade the jury that the injuries were within the scope of the exclusion; (2) refusing to give the requested instruction that an injury resulting from gross negligence or recklessness is not expected or intended unless there is a specific intent to harm or injure another; (3) refusing to give the tendered instruction that any reasonable doubt in interpreting the expected or intended clause of the insurance policy is to be resolved in favor of the appellants; (4) refusing to give the requested instruction that when a gun is fired intentionally with the purpose of frightening, but there was no intent to shoot a person, any resulting injury would not be expected or intended by the insured; and (5) refusing to give the requested instruction that "if the policy holder, Kment, mistakenly believed that the shotgun was not loaded, then [the jury] must find that the injury to Detlef was not expected or intended."

STANDARD OF REVIEW

[1,2] Whether a jury instruction given by a trial court is correct is a question of law. *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001); *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001); *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). To establish reversible error from a court's

failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

ANALYSIS

[3-7] Before addressing the substantive issues raised by the appellants on appeal, we first determine if the assigned errors are properly before our court. Our review is guided by the following principles of law: An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996). Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Russell v. Stricker, supra*; *Maxwell v. Montey, supra*. The submission of proposed instructions by counsel does not relieve the parties in an instruction conference from calling the court's attention by objection to any perceived omission or misstatement in the instructions given by the court. *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973). The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission. *Id.* It is not error for a trial court to refuse to give a requested instruction if the substance of the proposed instruction is contained in those instructions actually given. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000); *Kent v. Crocker*, 252 Neb. 462, 562 N.W.2d 833 (1997); *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997).

The record in this case shows that prior to the instruction conference, Detlef's counsel submitted six instructions for the court's review. The court refused all six. On appeal, the appellants assign as error the refusal of the trial court to submit four of the six jury instructions, which we number according to the assignments of error as follows: Nos. 1, voluntary intoxication; 2, gross negligence; 4, firing a gun for the purpose of frightening; and 5, mistaken belief that the gun was loaded. Assignment of error No. 3

concerning the interpretation of the expected or intended clause of the insurance policy cannot be found in the record. Because this assignment of error was never presented to the trial court as a jury instruction, we conclude that it is not properly before this court on appeal.

At the instruction conference, 18 instructions were approved by the court, none of which included counsel's requested instructions. As to the requested instructions, the record reveals that counsel only objected to the court's refusal to submit the instruction on voluntary intoxication. Because no objection was made to the following requested instructions concerning assignments of error Nos. 2, gross negligence; 4, firing a gun for the purpose of frightening; and 5, mistaken belief that the gun was loaded, we conclude those instructions are not properly before us.

We next compare counsel's tendered jury instruction on voluntary intoxication to the submitted jury instructions. The tendered instruction was as follows: "Voluntary intoxication may destroy the capacity to form the intent required to invoke a policy exclusion for acts 'intended or expected' by the insured, and that the burden is on the carrier to prove and persuade that the injuries were within the scope of the exclusion." The instruction can be broken down into two parts: (1) the effect voluntary intoxication may have on the capacity to form intent and (2) the insurer has the burden of proof to prove that the injuries were within the scope of the exclusion. A review of the record reveals that the second part of the tendered instruction concerning the insurer's burden was submitted to the jury. Instruction No. 8 states in part: "The burden of proof is on the Plaintiff Farmers Mutual to establish by the greater weight of the evidence that the bodily injuries sustained by Defendant Detlef on January 28, 1995 were expected or intended by Defendant John Kment." The district court correctly found this to be the law of Nebraska and submitted such instruction to the jury. See *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). Because its substance was submitted to the jury, we find the second part of the appellants' assigned error to be without merit.

Our analysis focuses only on the part of the tendered instruction rejected by the court concerning the effect voluntary intoxication may have on the capacity to form intent and its relation

to the exclusion of expected or intentional acts in the insurance policy.

[8-10] Under Nebraska law, the burden to prove that an exclusionary clause applies rests upon the insurer. *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993). The exclusion provision at issue in this case provides that "**[b]odily injury** or **property damage** expected or intended by an **insured person**" will not be covered. In order for the intentional or expected injury exclusion in a liability insurance policy to apply, the insurer must show that the insured acted with the specific intent to cause harm to a third party, but does not have to show that the insured intended the specific injury that occurred. *State Farm Fire & Cas. Co. v. Muth*, 190 Neb. 248, 207 N.W.2d 364 (1973). An injury is "expected or intended" from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law. *Jones v. Norval*, 203 Neb. 549, 279 N.W.2d 388 (1979).

In the case at bar, the appellants allege that the district court erred in refusing to give their tendered instruction that "[v]oluntary intoxication may destroy the capacity to form the intent required to invoke a policy exclusion for acts 'intended or expected' by the insured." To establish reversible error because of a trial court's failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

[11] The district court denied the appellants' instruction on voluntary intoxication, concluding that the evidence required for the instruction was not put in front of the jury. We agree. A trial court need not instruct the jury on an issue where the facts do not justify such an instruction. *Battle Creek State Bank v. Haake*, 255 Neb. 666, 587 N.W.2d 83 (1998). The charge as requested would have allowed the jury to decide whether Kment's intoxication *destroyed* his capacity to form the specific intent to harm a third person. Assuming without deciding that the appellants' tendered instruction is an accurate statement of the law, it is

clear that the evidence does not justify the charge. No evidence, empirical, expert, or otherwise, was offered to show that Kment lacked the capacity to form intent. While there is evidence that Kment may have been intoxicated, perhaps even very intoxicated, the record is devoid of any evidence that Kment was so intoxicated that he lacked the capacity to form the intent to harm another person. Exhibiting signs of intoxication is different from the inability to form an intent to injure.

Even those parts of the record that are disputed demonstrate that Kment was capable of engaging in rational thought on the night of the shooting. No witness who observed Kment on the night of the shooting testified that his conduct or conversation demonstrated any inability to form the intent to injure. Two police officers testified that after Kment's arrest immediately following the shooting, he was not confused as to time, place, and date. Neither officer indicated that Kment lacked the capacity to form the required intent. The claim that Kment was so intoxicated as to lack the capacity to form the intent to injure is implausible in light of Kment's own testimony and statements he made to the officers. The evidence shows that Kment engaged in rational thought before and after the shooting. Kment remembered retrieving the gun and going downstairs. He even recalled which lights were on downstairs and in which hand he was carrying the gun. Kment also testified that he intended to pull the trigger and that he knew what he was doing at the time of the incident.

Moreover, Kment's own theory of the case presupposes that he had the capacity to form the requisite intent. He did not claim that at the time of the shooting, he blacked out or was hallucinating. Rather, Kment testified that he intended to play a practical joke on Detlef. He went downstairs, pointed the gun at Detlef, and pulled the trigger, not knowing the gun was loaded. This presupposes that Kment was capable of rational thought. To have offered an instruction to the jury that he was so drunk that he could not have formed the requisite intent would have been inconsistent with Kment's own theory. Because the evidence did not warrant the instruction of voluntary intoxication, we conclude that the court did not err in refusing to give the requested instruction.

CONCLUSION

Having concluded that the appellants' tendered instruction on voluntary intoxication was not warranted by the evidence, we affirm the judgment of the district court.

AFFIRMED.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
KANDIE A. LEE, APPELLANT.
658 N.W.2d 669

Filed April 4, 2003. No. S-01-1321.

1. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
3. **Motor Vehicles: Rules of the Road.** Nebraska law provides that local authorities are permitted to place and maintain traffic control devices to indicate and to carry out provisions of the Nebraska Rules of the Road or to regulate, warn, or guide traffic.
4. ____: ____. A violation of the Nebraska Rules of the Road constitutes a traffic infraction.
5. **Investigative Stops: Police Officers and Sheriffs: Motor Vehicles.** When an officer has stopped a vehicle for a traffic violation, the officer is entitled to conduct an investigation reasonably related in scope to the circumstances that justified the interference in the first place.
6. ____: ____: ____. A reasonable investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, or asking the driver about his or her destination or purpose. A computer check may also be run to determine whether the vehicle involved in the stop has been stolen or whether there are outstanding arrest warrants for any of the individuals in the vehicle.
7. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause.
8. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances.
9. ____: ____: ____. A finding of reasonable suspicion must be determined on a case-by-case basis.

10. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** An individual's criminal history may be a relevant factor when determining whether an officer has reasonable suspicion to detain an individual.
11. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Nervousness, though an appropriate factor for consideration within the totality of the circumstances, is of limited significance in determining whether an officer has reasonable suspicion to detain an individual.
12. **Investigative Stops: Probable Cause.** An individual's inconsistent explanation of the reason for being at a particular location is an appropriate factor in evaluating the existence of reasonable suspicion.
13. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The location of an individual as well as the time of day or night and year are appropriate factors in determining whether an officer has reasonable suspicion to detain an individual.
14. **Constitutional Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** In determining whether an investigatory stop supported by reasonable suspicion is otherwise reasonable under the Fourth Amendment, a court considers both the length of the detention and the efforts of police to conduct their investigation quickly and unintrusively.
15. **Search Warrants: Affidavits: Probable Cause: Words and Phrases.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a warrant means a fair probability that contraband or evidence of a crime will be found.
16. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.
17. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. As a general rule, an appellate court is restricted to consideration of the information and circumstances found within the four corners of the affidavit.
18. **Police Officers and Sheriffs: Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information received from an informant, the affidavit in support of the issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity, and must also either establish the informant's credibility or set forth a police officer's independent investigation of the information supplied by the informant.
19. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** Where the affidavit before the issuing magistrate contains information that an appellate court will not consider in a probable cause determination, the decision of the issuing magistrate is not entitled to deference, but, rather, must be reviewed de novo.
20. **Search Warrants: Affidavits: Probable Cause: Case Disapproved: Appeal and Error.** Although a de novo review was conducted in *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999), to the extent that *Ortiz* could be read as giving deference to the issuing magistrate's probable cause determination after excision of averments from the search warrant affidavit, it is disapproved.

21. **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 Saline County: ORVILLE L. COADY, Judge. Affirmed.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and David Arterburn for appellee.

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

PER CURIAM.

I. INTRODUCTION

Kandie A. Lee was involved in a traffic stop during which sheriff's deputies became suspicious that Lee was involved in drug activity. After a canine sniff alerted the officers to the presence of illegal drugs in Lee's vehicle, a search warrant was obtained. A search of Lee's vehicle produced methamphetamine.

Following a hearing, Lee's motion to suppress was denied. A trial was held in Saline County District Court on stipulated facts, and Lee was convicted of possession of a controlled substance. Lee was sentenced to a term of 20 months' to 5 years' imprisonment. This appeal followed. We moved this case to our docket pursuant to our authority to regulate the caseload between this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. FACTUAL BACKGROUND

On November 30, 2000, Sgt. Jeff Mulbery and Deputy Anthony Lytle of the Saline County sheriff's office were on routine patrol in Saline County. At approximately 9 p.m., the officers conducted a security check of the Walnut Creek Recreation Area, an area owned by the local natural resources district and operated by the Nebraska Game and Parks Commission. Information received by the Saline County sheriff's office prior to this incident indicated that "drug dealers and users are meeting at this location for drug transactions."

During this security check, Mulbery and Lytle observed a green 1993 Plymouth Laser automobile being operated in an area marked by a sign indicating there were to be no unauthorized vehicles beyond that point. This area, according to Mulbery, was not "well lighted" and was "dark." Mulbery and Lytle then stopped the vehicle, which was occupied by Lee.

Upon contacting Lee at approximately 9:03 p.m., Mulbery inquired as to why Lee was present in an area restricted to authorized vehicles. Lee's initial response was that she was there to meet her boyfriend, Stacy Talbott. According to Mulbery, Lee appeared "really nervous" while being questioned. Lytle, who had accompanied Mulbery to Lee's vehicle, requested Lee's operator's license, after which request both officers returned to the patrol car. Lytle then requested the dispatcher at the sheriff's office to run a check of Lee's operator's license. The check disclosed that there were no outstanding warrants and that Lee's operator's license was not under suspension. In addition, at approximately the same time, Mulbery contacted Deputy Kenneth Uher, requesting that Uher report to the scene with the county's drug dog. Shortly thereafter, Mulbery and Lytle received information from Uher that Lee had "prior drug arrests."

Upon being advised of Lee's prior drug arrests, Mulbery and Lytle approached Lee a second time and again asked why she was at the recreation area. This time, according to Mulbery, Lee's story "turned around." Lee now told the officers she was there to meet her boyfriend, whose name was "Johnson," and that Talbott, whom Lee had earlier identified as her boyfriend, was in fact Lee's brother. The officers then asked for consent to search Lee's vehicle, which Lee refused.

Uher and the county's drug dog arrived on the scene at 9:21 p.m. After sniffing the vehicle, the dog alerted to the presence of illegal drugs. At that point, Lee was again asked for permission to search the vehicle, and again permission was denied. Lee was then told she was free to leave, but that her vehicle would need to remain at the scene until a search warrant was obtained. After the search warrant was issued, Lee's vehicle was searched. Methamphetamine was found in Lee's purse, which was located on the front seat of the vehicle.

III. ASSIGNMENTS OF ERROR

Lee assigns, rephrased, that the district court erred in (1) failing to excise from the probable cause affidavit averments regarding a canine sniff which were the product of an illegal detention and seizure, (2) failing to grant her motion to suppress evidence found in the search of her vehicle on the ground that there was no probable cause to issue a search warrant, and (3) finding that the search of her vehicle was justified under the search incident to an arrest exception to the warrant requirement.

IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Kelley, ante* p. 563, 658 N.W.2d 279 (2003).

V. ANALYSIS

Lee's primary contention is that the officers were not justified in detaining her while awaiting the arrival of the drug dog and that, therefore, "the detention of herself and her vehicle [was] illegal; and, the subsequent warrant issued was the fruit of this illegality." Brief for appellant at 6. As a result, Lee argues that any averment relating to the canine sniff must be excised from the affidavit in support of the search warrant. Lee contends that once the canine sniff is excised, the remaining averments do not support a finding of probable cause justifying the issuance of the warrant.

1. Initial Stop

[2-4] We determine that the initial traffic stop was valid. It is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). Nebraska law provides that local authorities, including natural resources districts and the Game and Parks Commission, are permitted to "place and maintain such traffic control devices upon highways under their jurisdictions . . . to indicate and to carry out the provisions of the Nebraska Rules of the Road or to regulate, warn, or

guide traffic." Neb. Rev. Stat. § 60-6,121 (Reissue 1998). Furthermore, Neb. Rev. Stat. § 60-682 (Reissue 1998) provides that "a violation of any provision of the rules shall constitute a traffic infraction." Mulbery and Lytle's observation of Lee's vehicle in an unauthorized area provided probable cause for the officers to stop Lee.

[5,6] At the time Lee was initially stopped, the officers were entitled to conduct an investigation "'"reasonably related in scope to the circumstances that justified the interference in the first place."'" *State v. Anderson*, 258 Neb. 627, 634, 605 N.W.2d 124, 131 (2000) (quoting *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994)). Such an investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, or asking the driver about his or her destination or purpose. *State v. Anderson, supra.* A computer check may also be run to determine whether the vehicle involved in the stop has been stolen or whether there are outstanding arrest warrants for any of the individuals in the vehicle. *Id.* In order to expand the scope of the traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference. *Id.* See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

We must therefore initially determine the point at which the "'"circumstances that justified the interference in the first place"'" ceased and continued detention began. See *State v. Anderson*, 258 Neb. at 634, 605 N.W.2d at 131.

2. Point at Which Continued Detention Began

The record shows that Lee was not given a citation as a result of her vehicle's being found in an unauthorized location within the recreation area. As such, the event which frequently determines the point after which reasonable suspicion must be found is not present. See, e.g., *State v. Anderson, supra*; *State v. Gutierrez*, 9 Neb. App. 325, 611 N.W.2d 853 (2000); *State v. McGinnis*, 8 Neb. App. 1014, 608 N.W.2d 605 (2000). The record does establish, however, that shortly after Uher advised Mulbery that Lee "had prior drug arrests," the officers requested permission to search the vehicle, which request was denied. Thereafter, Lee and

her vehicle were detained at the scene until the arrival of Uher and the drug dog. That such continued detention constituted a seizure for purposes of the Fourth Amendment is not contested by the State in its brief. The State acknowledges that "[f]ollowing the completion of the initial traffic stop and after consent to search had been denied, Sgt. Mulbery continued to detain Lee until such time as the drug dog arrived." Brief for appellee at 9. Based on our de novo review of the record, we determine that Lee's continued detention by the officers after consent to search was denied constituted a seizure for purposes of the Fourth Amendment. See *State v. Anderson, supra.*

We further determine it was at this point that the reasonable scope of the initial traffic stop ended. Once Lee denied permission to search, she had a right to proceed, unless during the period of lawful detention, Mulbery and Lytle developed a reasonable, articulable suspicion that Lee was involved in illegal activity beyond that which justified the interference in the first place. See, *State v. Anderson, supra*; *State v. McGinnis, supra.* See, also, *Terry v. Ohio, supra.*

3. Reasonable, Articulable Suspicion

[7-9] Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances. *Id.* A finding of reasonable suspicion must be determined on a case-by-case basis. *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991).

4. Totality of Circumstances

The State contends that the "totality of the circumstances" which justify a reasonable suspicion to continue Lee's detention includes: (a) information previously received that the recreation area had been used for drug transactions, (b) Lee's prior drug arrest history, (c) Lee's extreme nervousness, (d) Lee's divergent stories of whom she was meeting, and (e) Lee's operation of her vehicle in a restricted area at an unusual time.

(a) Use of Recreational Area for Drug Transactions

The evidence pertaining to the use of this area for drug transactions comes from paragraph 8 of the affidavit in support of the search warrant, which was received into evidence at the suppression hearing. Paragraph 8 states: "The Saline County Sheriff's Office has received information prior to this incident that drug dealers and users are meeting at this location for drug transactions." This averment, the State contends, provides an appropriate circumstance for consideration in evaluating reasonable suspicion to detain. Lee's motion to suppress challenges the basis of such averment, contending that "[s]aid warrant contains information from unnamed sources whose reliability has not been demonstrated or otherwise appropriately qualified." The difficulty in evaluating the parties' respective arguments, however, is that one cannot tell from the district court's order whether it made a factual determination that the recreation area was being used for drug transactions and, if so, whether Mulbery and Lytle had knowledge of such information when they detained Lee.

While determinations of reasonable suspicion are made de novo, findings of historical fact to support reasonable suspicion are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court. *State v. Kelley, ante* p. 563, 658 N.W.2d 279 (2003). Thus, while an appellate court will independently analyze the facts found by the trial court to determine if they amount to reasonable suspicion, it will nevertheless accept the trial court's factual findings unless they are clearly erroneous. *Id.*

We acknowledge that the averment in paragraph 8 of the affidavit in support of the search warrant may infer that Mulbery and Lytle were in possession of information that the recreation area in question had been used for drug transactions prior to Lee's continued detention. However, the evidence in this record amounts to little more than conclusory assertions by the State that drug transactions had occurred at the recreation area. Nothing in the record indicates where this information came from, why the source of the information was reliable, or whether the officers had the information when they detained Lee. Thus, even assuming that the trial court did find that the

recreation area was being used for drug transactions and that Mulbery and Lytle had knowledge of such information when they detained Lee, such finding was clearly erroneous. As a result, this evidence will not be considered in our reasonable suspicion analysis.

(b) Prior Drug Arrest History

The State further relies upon information obtained from the Saline County sheriff's office dispatcher and from the Crete Police Department regarding Lee's drug arrest history to support the conclusion that Mulbery and Lytle had reasonable suspicion to detain Lee. Testimony was presented at the motion to suppress hearing that Mulbery and Lytle were aware of Lee's drug arrest history when they detained her while awaiting the arrival of Uher and the drug dog. Mulbery testified that while Uher was en route to the recreation area with the drug dog, Uher informed Mulbery and Lytle that Lee "had prior drug arrests."

[10] An individual's criminal history may be a relevant factor when determining whether an officer has reasonable suspicion to detain an individual. *U.S. v. Sandoval*, 29 F.3d 537 (10th Cir. 1994) (cases collected). However, such history cannot form the sole basis to determine reasonable suspicion to support detention. *Id.* See, also, *People v. Ortiz*, 317 Ill. App. 3d 212, 738 N.E.2d 1011, 250 Ill. Dec. 542 (2000). We therefore conclude that Lee's prior drug arrest history is an appropriate factor for inclusion within the "totality of the circumstances" in our ultimate determination of reasonable suspicion.

(c) Lee's Nervousness

In further support of the district court's finding of reasonable suspicion, the State argues in its brief that "[w]hen Lee was contacted by the officers, she was found to be extremely nervous." Brief for appellee at 10.

In *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), we discussed nervousness as a factor in evaluating reasonable suspicion. In *Anderson*, citing *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998), we observed that "nervousness, as a basis for reasonable suspicion, must be treated with caution." 258 Neb. at 638, 605 N.W.2d at 135. The reason nervousness is of limited value is the recognition that " '[i]t is common knowledge that

most citizens . . . whether innocent or guilty, when confronted by a law enforcement officer who asks them potentially incriminating questions are likely to exhibit some signs of nervousness.'" *U.S. v. Hall*, 978 F.2d 616, 621 n.4 (10th Cir. 1992).

[11] Although nervousness is an appropriate factor for consideration within the "totality of the circumstances," its presence is of limited significance generally. *U.S. v. McRae*, 81 F.3d 1528, 1534 n.4 (10th Cir. 1996) (stating that "nervousness alone is not sufficient to justify further detention; however, in combination with other suspicious circumstances, it might contribute to a finding of articulable suspicion"); *State v. Anderson, supra.* We will therefore include Lee's nervousness as a factor within the "totality of the circumstances" in our ultimate determination of reasonable suspicion. However, such factor will be accorded minimal significance.

(d) Lee's Divergent Stories

The State argues that the "divergent stories as to who[m] [Lee] was meeting and who her boyfriend was" is another appropriate factor for consideration within the "totality of the circumstances" supporting the trial court's determination of reasonable suspicion. Brief for appellee at 13. Specifically, the State points to the testimony of Mulbery to the effect that Lee's story "turned around" the second time Lee was asked her reasons for being in an unauthorized location in the recreation area. According to Mulbery, the first time Lee was asked why she was in the recreation area, her response was that she was there to meet her boyfriend, Talbott. The second time Lee was asked, however, she told Mulbery she was there to meet her boyfriend, "Johnson," and that Talbott was in fact her brother.

[12] An individual's inconsistent explanation of the reason for being at a particular location is a factor which may be considered within the "totality of the circumstances" in evaluating the existence of reasonable suspicion. See *U.S. v. Johnson*, 58 F.3d 356 (8th Cir. 1995) (indicating that inconsistent answers relating to purpose of trip may enable trooper to expand scope of stop). As such, we shall consider this circumstance in our ultimate determination of reasonable suspicion.

(e) Presence in Unauthorized Location Within Recreation Area

As its final factor supporting Lee's continued detention, the State argues that Lee's operation of a vehicle in an unauthorized area at 9 p.m. in late November when no other activities were being conducted in the vicinity is an appropriate circumstance for consideration in a determination of reasonable suspicion.

[13] Lee's presence in the recreation area at 9 p.m. in late November in a location where vehicles were not authorized and when no other activities were being conducted in the vicinity does not amount to reasonable suspicion. However, it is a factor which can be considered in determining reasonable suspicion for continued detention. See *U.S. v. Dawdy*, 46 F.3d 1427 (8th Cir. 1995) (finding factors that may reasonably lead experienced officer to investigate to include time of day or night and location of suspect parties).

5. Evaluation of Totality of Circumstances

Based upon this record, the factors which we have concluded are appropriately within the "totality of the circumstances" for consideration in our de novo determination of reasonable suspicion are as follows: (1) Lee's drug arrest history, (2) Lee's nervousness, (3) Lee's divergent stories, and (4) Lee's presence in an unauthorized location within the recreation area at 9 p.m. in late November when no other activities were being conducted in the vicinity.

A determination of reasonable suspicion is based on the totality of the circumstances. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). The U.S. Supreme Court has concluded that even where each factor in a reasonable suspicion determination, considered independently, is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). We evaluate those factors determined to be appropriate considerations in our totality of the circumstances analysis in such context.

When Lee was initially stopped, she was operating her vehicle in an unauthorized location within a recreation area at approximately 9 p.m. in late November when no other activities were

being conducted in the vicinity. This location, as described by Mulbery, was not "well lighted" and was "dark." When the officers approached Lee, they found her to be "really nervous." While conducting a check of Lee's license and registration, the officers learned of her prior drug arrest history. Having gained this knowledge, the officers again approached Lee. When Lee was asked a second time why she was present in the recreation area, her story "turned around." This time, Lee stated that she was there to meet a boyfriend whose last name was "Johnson" and that "Talbott" was, in fact, her brother. Upon our de novo review of the totality of the circumstances, we determine that these factors, when considered collectively, amount to reasonable, articulable suspicion to believe that "criminal activity was afoot." See, *Reid v. Georgia*, 448 U.S. 438, 441, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Accord *State v. Anderson, supra*. Viewed collectively, they amount to something more than an inchoate and unparticularized suspicion or "'"hunch"'" and support Lee's continued detention. *Reid v. Georgia*, 448 U.S. at 441. See, also, *State v. Anderson, supra*; *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997) (officers allowed to draw specific reasonable inferences from facts in light of their experience).

[14] Having so determined, we need also consider whether the detention of Lee and her vehicle was reasonable in the context of an investigative stop. In doing so, we are guided by several considerations:

> We consider both the length of the detention and the efforts of police to conduct their investigation quickly and unintrusively in determining whether a detention is reasonable in the context of an investigative stop: "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."

U.S. v. Bloomfield, 40 F.3d 910, 916 (8th Cir. 1994) (quoting *U.S. v. Willis*, 967 F.2d 1220 (8th Cir. 1992)).

First, we consider the length of Lee's detention. In *U.S. v. Hardy*, 855 F.2d 753 (11th Cir. 1988), the court determined that a

wait of 50 minutes for the arrival of a drug dog was not unreasonable for Fourth Amendment purposes. See, also, *U.S. v. White*, 42 F.3d 457 (8th Cir. 1994) (1-hour-20-minute wait for arrival of drug dog not unreasonable for Fourth Amendment purposes); *U.S. v. Bloomfield, supra* (1-hour wait for arrival of drug dog not unreasonable for Fourth Amendment purposes). The record indicates that just minutes after Lee was initially stopped, Uher was ordered to report to the recreation area with the drug dog, and further that Lee was detained for approximately 20 minutes. We determine that under the circumstances presented in this case, the length of Lee's detention was not unreasonable under the Fourth Amendment.

Second, we must consider whether the "investigative methods employed [were] the least intrusive means reasonably available to verify or dispel the officer's suspicion." See *U.S. v. Bloomfield*, 40 F.3d at 916. In this case, the officers chose to use a canine sniff to dispel their reasonable suspicion.

> [A] canine sniff does not require the opening of luggage and does not reveal intimate but noncontraband items to public view. "[T]he manner in which information is obtained through this investigative technique is much less intrusive than a typical search." [*United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983).] Nor does a canine sniff involve the time-consuming disassembly of luggage or an automobile frequently required in a thorough search for contraband.

U.S. v. Hardy, 855 F.2d at 759. Accord *State v. Chronister*, 3 Neb. App. 281, 526 N.W.2d 98 (1995). We agree that a canine sniff is minimally intrusive and was also not unreasonable for Fourth Amendment purposes.

Finally, we acknowledge that Mulbery called Uher, requesting the drug dog's presence, prior to Mulbery and Lytle's completion of their initial investigation. However, we find this irrelevant in our ultimate determination of reasonable suspicion. In our review of the record, it is clear that the drug dog did not arrive until after such time as the officers had reasonable suspicion to continue to detain Lee.

6. Probable Cause for Issuance of Warrant

Having determined that the officers had reasonable suspicion to continue Lee's detention, we further determine that the canine

sniff need not be excised from the affidavit in support of the search warrant. Therefore, the following averments in the affidavit upon which we must evaluate probable cause include, inter alia: (1) information that the area in question was known to be used for drug transactions, (2) Lee's drug arrest history, (3) Lee's divergent stories, (4) Lee's "driving in a restricted area . . . posted 'No Unauthorized Vehicles beyond this point,' " and (5) the drug dog's positive alert after performing a sniff of Lee's vehicle.

[15-18] In evaluating the validity of a search warrant, we consider familiar principles:

> A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *State v. Johnson*[, 256 Neb. 133, 589 N.W.2d 108 (1999)]. "Probable cause" sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997). Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time. *State v. Johnson, supra.* Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found. *State v. Craven, supra.*
>
> In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). As a general rule, an appellate court is restricted to consideration of the information and circumstances found within the four corners of the affidavit. *State v. Johnson, supra.* . . .
>
> . . . .
>
> When a search warrant is obtained on the strength of information received from an informant, the affidavit in

> support of the issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity. The affidavit must also either establish the informant's credibility or set forth a police officer's independent investigation of the information supplied by the informant. [Citations omitted.] This is so because without information regarding the informant's credibility, "'[t]he magistrate would have no way of ascertaining whether this tip was rumor, speculation, vendetta, reprisal, or gossip.'" *State v. Lytle*, 255 Neb. at 749, 587 N.W.2d 672, quoting with approval *State v. Valley*, 252 Mont. 489, 830 P.2d 1255 (1992). If an affidavit does not establish that an informant is reliable, a search warrant issued solely upon the information supplied by the informant is invalid. *State v. Lytle, supra.*

State v. Ortiz, 257 Neb. 784, 790-91, 805, 600 N.W.2d 805, 813-14, 822 (1999).

With respect to the information that the area was used for drug transactions, the record does not disclose the source of that information. We simply do not know whether the source was a citizen informant or an informant who has given reliable information in the past. See, *State v. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Furthermore, there is no evidence that establishes how long "prior to this incident" drug dealers were meeting at this location. We are left to speculate as to whether the averment in paragraph 8 occurred within a reasonable time so as not to be stale. See, *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002); *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). Without any information as to the credibility of the source of this averment, the judge issuing this warrant would "'have no way of ascertaining whether this tip was rumor, speculation, vendetta, reprisal, or gossip.'" See *State v. Lytle*, 255 Neb. 738, 749, 587 N.W.2d 665, 672 (1998), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). We therefore determine for the foregoing reasons that such averment is entitled to no weight in our ultimate determination of probable cause.

This, however, does not end the inquiry. As noted above, "if an affidavit does not establish that an informant is reliable, a search warrant issued solely upon the information supplied by the informant is invalid." *State v. Ortiz*, 257 Neb. at 805, 600 N.W.2d at 814. We are not presented with such a situation here. The affidavit in support of the search warrant contains information which is independent of the averment that the recreation area was being used for drug transactions. Thus, while such averment is entitled to no weight in our analysis, we will nevertheless assess the remainder of the affidavit, based on the totality of the circumstances, in concluding whether such affidavit provided probable cause to issue the search warrant for Lee's vehicle. See, *State v. Faber, supra*; *State v. Ortiz, supra.*

[19,20] When reviewing an issuing magistrate's decision with respect to the establishment of probable cause, we traditionally apply a standard of review which gives a magistrate's determination great deference. See *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996) (citing *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). However, where the affidavit before the issuing magistrate contains information that an appellate court will not consider in a probable cause determination, the decision of the issuing magistrate is not entitled to such deference, but, rather, must be reviewed de novo. " '[A]s a matter of logic and common sense, a reviewing court cannot defer to a magistrate's consideration of an application for search warrant that the magistrate in effect did not review.' " See *Montana v. St. Marks*, 312 Mont. 468, 474, 59 P.3d 1113, 1117 (2002). See, also, 5 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 11.4 (3d ed. 1996). Here we do not give deference to the magistrate's decision, since we do not consider the averment that the recreation area was being used for drug transactions. Instead, we review the affidavit de novo. Although we conducted a de novo review in *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999), to the extent that *Ortiz* could be read as giving deference to the issuing magistrate's probable cause determination after excision of averments from the search warrant affidavit, it is disapproved.

The remaining circumstances as set forth in the affidavit in support of the search warrant show that Lee had prior drug arrests,

was present on "November 30, 2000 at 2103 hours . . . in an area posted 'No Unauthorized Vehicles beyond this point,' " and gave divergent explanations as to the reason for her presence at the recreation area. In addition, the canine sniff resulted in a positive alert for the presence of drugs. See, e.g., *U.S. v. Gregory*, 302 F.3d 805 (8th Cir. 2002) (positive alert by drug dog provides probable cause for search); *State v. Chronister*, 3 Neb. App. 281, 526 N.W.2d 98 (1995) (positive alert from drug dog constitutes probable cause for issuance of search warrant). See, also, *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991) (positive alert by drug dog constitutes probable cause for arrest).

When these factors are considered collectively, we determine upon our de novo review, based upon a standard of objective reasonableness, that the totality of the above circumstances is sufficient "to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime" would be found in Lee's vehicle. See *State v. Craven*, 253 Neb. 601, 610, 571 N.W.2d 612, 619 (1997).

7. Remaining Assignments of Error

[21] Having concluded that the officers had reasonable suspicion to detain Lee following the conclusion of the initial traffic stop and further that probable cause existed for the issuance of a search warrant for her vehicle, it is unnecessary for us to consider whether the district court erred in its "alternative" finding that the search of Lee's vehicle was justified as a search incident to arrest. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). We also need not consider the State's contention that Lee's continued detention was supported by a de minimis exception to the Fourth Amendment. See *State v. Burdette, supra.*

VI. CONCLUSION

The officers who approached Lee for operating her vehicle in an unauthorized area had reasonable suspicion to continue to detain her after the initial traffic stop was complete. Thus, Lee's continued detention was not an unreasonable seizure for Fourth Amendment purposes. As such, the relevant averments contained in the affidavit in support of the search warrant were sufficient for

its issuance, and the action of the district court in overruling Lee's motion to suppress was correct.

AFFIRMED.

HENDRY, C.J., dissenting.

I respectfully dissent. In my view, Sgt. Jeff Mulbery and Deputy Anthony Lytle did not have reasonable suspicion to continue Kandie A. Lee's detention after completing their initial investigation. As such, the positive canine sniff resulting from Lee's continued detention should be excised from the affidavit for search warrant. See *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999). Considered without the averments regarding the canine sniff and the area's being known to be used for drug transactions, the affidavit for search warrant would not, in my opinion, establish probable cause to justify its issuance. Therefore, because the search warrant was invalidly issued, the resulting search was illegal and the fruit of that illegal search—the methamphetamine—should have been suppressed.

I concur with the majority's conclusion that insofar as the trial court made a factual finding that Mulbery and Lytle possessed information prior to Lee's continued detention that the recreation area in question had been used for drug transactions, such finding was clearly erroneous. I agree, therefore, that such factor should not be considered within the totality of the circumstances in evaluating whether the officers had reasonable suspicion to continue Lee's detention.

I disagree with the majority's determination, however, that the remaining four factors amount to reasonable suspicion. For the reasons discussed below, I believe the record demonstrates that each of the factors is of minimal significance in the ultimate determination of reasonable suspicion.

Lee's arrest record lacks a "temporal nexus" to the officers' suspicion that Lee was involved in drug activity. See *State v. Johnson*, 256 Neb. 133, 144, 589 N.W.2d 108, 116 (1999), *overruled on other grounds, State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000) (concluding averment in affidavit regarding suspect's prior drug conviction was insufficient to establish probable cause due to absence of additional facts establishing temporal nexus to current investigation of suspect). See, also, *State v. Ortiz, supra*. Unless there is some temporal nexus between a

suspect's arrest record and the circumstances of the suspect's detention, such factor is of limited significance and, therefore, does not establish reasonable suspicion. *Id.* Since the State's evidence that "drug dealers and users are meeting at this location for drug transactions" cannot be considered within the totality of the circumstances, the required nexus is not present. See *State v. Johnson, supra.*

I agree with the majority's conclusion that Lee's nervousness is "of limited significance" since, as a general matter, most citizens become nervous when confronted by law enforcement officers. However, I believe the significance of Lee's nervousness is even further diminished by the fact that the record with respect to Lee's nervousness would appear to consist primarily of the four following words: "she was really nervous." Nowhere in the record can there be found a description of Lee's conduct from which Mulbery concluded Lee was "really nervous." We do not know, inter alia, whether Lee was shaking or had difficulty locating her registration, see *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), or failed to make eye contact, see *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998). In my view, the absence of any particularized description of Lee's nervousness or an explanation as to why Lee's nervousness was suspicious prevents the court from accurately assessing whether such factor reasonably led the officers to suspect Lee was involved in drug activity.

With respect to Lee's "divergent stories," it is clear from the record that any divergence was, at the very most, minor. At the suppression hearing, Mulbery testified:

> Q. What was, what did she say that led to your conclusion that her story was misleading or false?
>
> A. Well, she first said she was out to meet her boyfriend Stacy Talbott. And then she turned around and said that her brother, Stacy Talbott is her brother. And then said that her boyfriend was with Stacy Talbott with the last name of Johnson.
>
> Q. Isn't it entirely possible that what she was saying was that she was there to see her boyfriend and Stacy Talbott?
>
> . . . .
>
> A. Could have been.

Moreover, given Lee's nervousness, there was an equally innocent explanation for the inconsistency.

With respect to Lee's presence in the unauthorized location within the recreation area at 9 p.m. in late November, I find little indication in the record that such factor was objectively suspicious or indicative of drug activity. Although Lee's vehicle was in an unauthorized area, the record demonstrates that it was only the presence of Lee's vehicle that was unauthorized. At all relevant times, the recreation area was open to the public. Had Lee parked her vehicle in an authorized area and walked to the location in question, there would have been no violation and no reason for the officers to stop her. Additionally, since the evidence relating to this area's being used for "drug transactions" cannot be considered, any link between Lee's presence in the recreation area and drug activity is further attenuated.

The majority determines that when all four of the above factors are considered collectively, they amount to reasonable suspicion. I disagree. Missing is any nexus between Lee's presence and drug activity. I find no adequate explanation in the record as to why such seemingly innocent factors, considered collectively, led the officers to suspect that Lee was involved in drug activity. To the contrary, I believe the record demonstrates the officers simply acted out of an inchoate hunch rather than suspicion based on articulable facts. I believe this conclusion is inescapable given that (1) the officers radioed for the drug dog *before* learning of Lee's drug arrest history and (2) there is no evidence in the record from which to conclude the officers knew that drug activity had occurred previously in the recreation area.

Therefore, I believe there is insufficient evidence in this record from which to conclude that the officers' suspicion was reasonable under the circumstances. The court is left to simply adopt the State's characterization of the officers' conduct. I do not believe this is permissible, since

> [i]t is for the courts to determine when an officer's conduct squares with the Fourth Amendment, giving "due weight," as the Court put it in *Terry* [*v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)], "to the specific reasonable inferences which he is entitled to draw from the facts *in light of his experience*." And, it is for the police to

> articulate the facts and what their experience reveals as to those facts. Such generalities as "he didn't look right" will not suffice; . . . the officer must relate what he has observed, and, when appropriate, indicate why his knowledge of the crime problem and the habits of the residents on his beat or of the practices of those planning or engaging in certain forms of criminal conduct gives special significance to what he observed.

(Emphasis in original.) 4 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 9.4(a) at 141-42 (3d ed. 1996).

In view of the record, the four factors relied upon by the majority are not, in my opinion, inherently or objectively indicative of drug activity. Moreover, any inferences of drug activity the officers were permitted to draw from such factors are simply not adequately set forth or thoroughly explained. Based upon this record, I am unable to conclude that the officers' suspicion that Lee was involved in drug activity was reasonable. I would reverse.

STEPHAN, J., joins in this dissent.

JASON SCOTT WALLS, APPELLANT, V.
JAMES SHRECK, M.D., APPELLEE.
658 N.W.2d 686

Filed April 4, 2003. No. S-02-149.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
3. **Malpractice: Physicians and Surgeons: Expert Witnesses.** A physician's duty to obtain informed consent is measured by the standard of a reasonable medical practitioner under the same or similar circumstances and must be determined by expert medical testimony establishing the prevailing standard and the defendant-practitioner's departure therefrom.

4. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony.
5. **Malpractice: Physicians and Surgeons: Expert Witnesses: Presumptions.** One of the exceptions to the requirement of expert testimony in a medical malpractice case is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laypersons.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Reversed and remanded for further proceedings.

J. Blake Edwards and Robert Harvoy, of McGinley, O'Donnell, Reynolds & Edwards, P.C., L.L.O., for appellant.

William R. Settles, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Jason Scott Walls appeals from a directed verdict in favor of James Shreck, M.D. In his operative petition, Walls alleged that Shreck performed surgery on Walls' right eye without obtaining informed consent.

SCOPE OF REVIEW

[1] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Reicheneker v. Reicheneker*, 264 Neb. 682, 651 N.W.2d 224 (2002).

FACTS

As a child, Walls had a condition that caused his left eye to be out of alignment with his right eye. He had surgery on his left

eye to correct the condition, but it reoccurred several years later. In March 1999, Walls sought medical treatment from Shreck in North Platte. Shreck is a physician and surgeon licensed under the laws of the State of Nebraska and is a health care provider under the Nebraska Hospital-Medical Liability Act.

Walls met with Shreck and discussed the possibility of strabismus surgery on his left eye to correct the condition. This surgery involves a procedure on the affected eye or on the opposite eye, and the object of the surgery is to bring both eyes into alignment. Walls and Shreck agreed that the best approach to treating Walls was to attempt surgery on the left eye. Shreck testified he told Walls that although the goal was to operate on the left eye, he might have to operate on the right eye instead. Walls testified that he specifically informed Shreck that he did not want surgery performed on his right eye. Shreck admitted that he did not discuss operating on both eyes at the same time.

Prior to surgery, Walls signed an authorization and consent form that included the following language:

> a. I hereby authorize Dr. Shreck . . . to perform the following procedure and/or alternative procedure necessary to treat my condition: . . . Recesion [sic] and Resection of the Left Eye[.]
>
> b. I understand the reason for the procedure is: to straighten [sic] my left eye to keep it from going to the left[.]
>
> . . . .
>
> d. It has been explained to me that conditions may arise during this procedure whereby a different procedure or an additional procedure may need to be performed and I authorize my physician and his assistants to do what they feel is needed and necessary.

During surgery on April 13, 1999, Shreck encountered excessive scar tissue on the muscles of Walls' left eye and elected to adjust the muscles of the right eye instead.

When Walls awoke from the anesthesia, he expressed surprise and anger at the fact that both of his eyes were bandaged. The next day, Walls went to Shreck's office for a followup visit and adjustment of his sutures. Walls questioned Shreck as to the reason he operated on Walls' right eye, and Shreck responded that he had reserved the right to change his mind during surgery.

Walls testified that he would never have entered the hospital if he had known there was a possibility of surgery on his right eye, because he had so many problems with his left eye after the childhood surgery. He said that prior to surgery, he had no problems with his right eye. He also testified that following the April 1999 surgery, he has had daily problems with his right eye.

At trial, Dr. Thomas Roussel provided expert medical testimony on behalf of Walls. Roussel was the only expert witness to testify regarding the standard of care for obtaining informed consent prior to strabismus surgery.

After Walls presented his evidence and rested his case, Shreck moved for a directed verdict and a dismissal. He alleged that Walls had failed to prove a prima facie case. Shreck claimed that there had been no expert testimony that he had failed to obtain Walls' informed consent for the procedure. The trial court concluded that Walls had failed to establish the standard of care required in this situation or that Shreck had violated the standard of care. It sustained Shreck's motion for directed verdict and dismissed the action. Walls timely appealed.

ASSIGNMENTS OF ERROR

Walls assigns the following errors: The trial court erred (1) as a matter of law in granting Shreck's motion for directed verdict and (2) in viewing the testimony presented by Walls in a light that was not most favorable to him when considering the motion for directed verdict.

ANALYSIS

[2] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Reicheneker v. Reicheneker*, 264 Neb. 682, 651 N.W.2d 224 (2002). A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

In sustaining Shreck's motion for directed verdict, the trial court noted that Walls bore the burden to establish the standard of care by expert testimony. It concluded that Walls failed to meet this burden. The court stated:

> [Y]our position is that you did not consent to surgery on your right eye, but based upon the consent form which you signed . . . and the testimony specifically of Dr. Roussel . . . there can be extenuating circumstances when the surgeon exceeds the scope of what was discussed pre-surgery with the patient — and I didn't get the impression from Dr. Roussel that he was talking about an emergency situation.
>
> I got the impression that he was talking about surgeries in general. And that's exactly what Dr. Shreck has said; that he started working on your left eye and determined that because of either prior surgery or scarring, that he could not make the necessary corrections in his opinion, and that's why he went to the right eye to try to solve the problem.
>
> . . . I don't feel that there has been any expert evidence that Dr. Shreck violated the standard of care with reference to an informed consent situation here.

A physician's duty to obtain informed consent is measured by the standard of a reasonable medical practitioner under the same or similar circumstances and must be determined by expert medical testimony establishing the prevailing standard and the defendant-practitioner's departure therefrom. *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997).

We review the evidence to determine whether Walls has established by expert testimony (1) the standard of care in North Platte and similar communities for obtaining informed consent prior to performing surgery and (2) whether there was sufficient evidence to establish that Shreck violated such standard of care. We are required to give Walls the benefit of every inference that can reasonably be deduced from the evidence. See *Reicheneker v. Reicheneker, supra.*

STANDARD OF CARE

The Legislature has defined informed consent as follows:

> Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to

> the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

See Neb. Rev. Stat. § 44-2816 (Reissue 1998).

Under § 44-2816, there are two parts to the definition of informed consent. The first part refers to the information that is provided to the patient regarding the procedure that is to be performed. Depending on the established standard of care, the information might include a description of what is going to be done, an assessment of the risks involved, and other options that might be considered. The second part refers to the obligation of the health care provider to obtain the patient's express or implied consent to perform any operation, treatment, or procedure.

Roussel, an ophthalmologist from Scottsbluff, testified on behalf of Walls. Roussel stated that it was customary to discuss with patients the potential risks of a surgery, the potential benefits, and the alternatives to surgery. Roussel opined that the standard of care for obtaining informed consent required a physician to discuss with his or her patients on which part of the body surgery would be performed. Roussel stated that he thought the standard for performing a strabismus surgery would be the same as for any type of operation. When asked whether that standard was centralized to Scottsbluff or North Platte, Roussel testified that "in our country[,] medical ethics requires informed consent." Roussel also stated that the standard of care for surgery involving nonemergency procedures requires informed consent.

Roussel was then asked a hypothetical question: "[I]f surgery . . . to a body part of a patient is not discussed with that patient and surgery is then performed, does that violate the standard for informed consent?" The trial court instructed Roussel to express his opinion if it was based on a reasonable degree of medical certainty in his field of ophthalmology. Roussel responded: "Well, my feeling is that if there are extenuating circumstances, that can

cause a surgeon to, you know, make a judgment that is in the best interests of the patient to do what he feels at the time is necessary." Walls' attorney asked: "Are you saying that talking to the patient is required about the surgery or not required?" Roussel responded: "Well, you normally discuss as many contingencies as you can think of ahead of time." Roussel was not asked to define extenuating circumstances, and he was not asked any further questions on this topic.

Giving Walls the benefit of every inference which can reasonably be deduced from the evidence, we conclude that Roussel's testimony established that the standard of care in North Platte and similar communities required Shreck to obtain informed consent before performing strabismus surgery on Walls' right eye. To obtain Walls' informed consent, Shreck was not only required to provide certain information regarding the operation, but he was also required to obtain Walls' express or implied consent for the operation. See § 44-2816. Walls presented sufficient evidence by expert testimony to establish the standard of care in this case.

Alleged Breach

We next examine whether Walls presented sufficient evidence to establish that Shreck violated the standard of care by operating on Walls' right eye without obtaining informed consent. The trial court concluded that Walls had failed to prove that Shreck had violated the standard of care.

Shreck argues that he obtained informed consent:

> Walls may argue that Dr. Shreck testified that this consent form did not give "permission to do surgery on both eyes." . . . However, this misconstrues Dr. Shreck's testimony. Dr. Shreck opined that he had obtained the patient's informed consent not from the form but from "what we discussed with the patient in the office." . . . The form itself does not operate to give or deny permission for anything. Rather, it is *evidence* of the discussions which occurred and during which informed consent was obtained. *See, e.g., Hondroulis v. S[c]huhmacher*, 553 So.2d 398 (La. 1988).

Brief for appellee at 12. Shreck therefore asserts that he obtained informed consent to operate on both eyes based on his office discussions with Walls.

[3] In *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997), we held that a physician's duty to obtain informed consent is measured by the standard of a reasonable medical practitioner under the same or similar circumstances and must be determined by expert medical testimony establishing the prevailing standard and the defendant-practitioner's departure therefrom. In deciding whether a patient was properly informed concerning an operation, expert testimony would be required to determine whether the information furnished to the patient was that which would ordinarily be provided to a patient under like circumstances. See *id.* However, whether expressed or implied consent to an operation was obtained does not necessarily require expert testimony. The performance of surgery upon part of a patient's anatomy that the patient has instructed the surgeon not to operate falls within an exception to the requirement of expert testimony on the issue of informed consent.

[4,5] Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony. *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000). In *Fossett*, we recognized an exception to the rule that expert testimony is required to prove whether the treatment by a physician or a surgeon demonstrated a lack of skill or knowledge or a failure to exercise reasonable care, citing *Halligan v. Cotton*, 193 Neb. 331, 227 N.W.2d 10 (1975). In *Halligan*, we stated: "One of the exceptions to the requirement of expert testimony is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen." 193 Neb. at 335-36, 227 N.W.2d at 13. This exception is referred to as the "common knowledge exception."

Generally, this exception is applicable in cases where the physician fails to remove a foreign object from a patient's body or where a patient enters the hospital for treatment of one part of the body and sustains injury to another part of the body. See, *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996); *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991). In *Swierczek*, we stated that it is "within the common knowledge and experience of a layperson to determine that an individual does not enter the hospital for extraction of her teeth and come out with an injury to

nerves in her arms and hands, without some type of negligence occurring." 237 Neb. at 478, 466 N.W.2d at 518.

Shreck obtained Walls' informed consent to perform surgery on his left eye. However, the issue of whether Shreck obtained Walls' informed consent to perform surgery on the right eye is problematic. Failure to obtain informed consent includes failure to obtain express or implied consent for any operation in which a reasonably prudent health care provider would have obtained such consent. See § 44-2816. Thus, the lack of express or implied consent to operate on a particular part of one's anatomy or a refusal to give express or implied consent to so operate is a failure to obtain informed consent. Roussel opined that medical ethics requires informed consent.

The evidence shows that Shreck did not discuss with Walls that surgery might be required on both eyes during the same operation. There is evidence that Walls specifically told Shreck he did not want surgery performed on the right eye. Walls stated that he would never have entered the hospital had he known there was a possibility of surgery on his right eye.

Shreck stated that he was unable to complete the strabismus surgery on Walls' left eye and therefore switched his focus to the right eye and performed the surgery on that eye. When questioned as to the reason for operating on the right eye, Shreck stated that he had reserved the right to change his mind. However, he also stated to Walls' father that he should have done a better job of informing Walls as to the possibility of surgery on the right eye. This evidence creates an inference that Shreck did not obtain informed consent to operate on the right eye.

Giving Walls the benefit of every inference which can reasonably be deduced from the evidence, we conclude that the facts are not such that reasonable minds can draw but one conclusion with regard to whether Shreck obtained informed consent to perform surgery on Walls' right eye. There is evidence that Walls specifically told Shreck he did not want surgery performed on the right eye. Evidence of the discussions which occurred between Walls and Shreck do not establish as a matter of law that Shreck obtained informed consent to perform surgery on both eyes or that he obtained such consent to operate on the right eye.

Expert testimony was not required to establish that Walls did not give express or implied consent for Shreck to operate on his right eye. If Shreck operated on the right eye without Walls' express or implied consent, then the common knowledge exception is applicable in establishing whether Shreck met the standard of care regarding informed consent to perform the surgery. Therefore, it would not be necessary to establish by expert testimony that Shreck violated the standard of care by operating on Walls' right eye. Absent an emergency, it is common knowledge that a reasonably prudent health care provider would not operate on part of a patient's body if the patient told the health care provider not to do so.

CONCLUSION

The trial court erred in directing a verdict in favor of Shreck. The evidence presented and the reasonable inferences therefrom establish that the standard of care in North Platte and similar communities requires health care providers to obtain informed consent before performing surgery on a particular part of a patient's anatomy. The requirement for obtaining a patient's informed consent includes the duty to obtain his or her express or implied consent to the surgery. In this case, the applicable standard of care required Shreck to obtain Walls' express or implied consent to perform surgery on his right eye. Walls claims he refused to give such consent. The facts are not such that reasonable minds can draw but one conclusion as to whether Shreck deviated from the standard of care in North Platte when he operated on Walls' right eye.

For the reasons set forth herein, the judgment of the trial court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ALONZO NEAL, APPELLANT.

658 N.W.2d 694

Filed April 4, 2003. No. S-02-239.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** When judicial discretion is not a factor in assessing admissibility, the court's application of the Nebraska Evidence Rules will be upheld unless clearly erroneous.
3. **Rules of Evidence: Hearsay.** A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is consistent with his or her testimony and is offered to rebut an express or implied charge against him or her of recent fabrication or improper influence or motive.
4. ____: ____. Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1995) permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive.
5. **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.
6. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded for a new trial.

W. Patrick Dunn for appellant.

Don Stenberg, Attorney General, and Mark D. Raffety for appellee.

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

HENDRY, C.J.

INTRODUCTION

Alonzo Neal was convicted of first degree murder and use of a deadly weapon in the commission of a felony in the death of Garry Morris. The Douglas County District Court sentenced Neal

to a period of life imprisonment on the first degree murder conviction and a term of 20 years' imprisonment on the use of a deadly weapon conviction. The two sentences were to be served consecutively. The latter sentence was enhanced pursuant to the district court's determination that Neal was a habitual criminal.

FACTUAL BACKGROUND

At approximately 12:10 a.m. on Monday, January 15, 2001, Officer Larry Bakker of the Omaha Police Department was on routine patrol when he was flagged down by an individual, later identified as Martin Carroll. Carroll informed Bakker that he had just discovered his roommate, Morris, lying in a pool of blood at their apartment. During the subsequent investigation, the Omaha Police Department determined from Carroll that some of Morris' personal property was missing, including Morris' vehicle, a green Ford Focus.

A radio broadcast was put out on the car, which was located and stopped. The driver of the car was identified as Joseph Keyes. Keyes informed the officers who had stopped him that he had received the vehicle from a friend around midnight. There was testimony at trial indicating that the remainder of Morris' personal property was either purchased by Katherinea Hytche and Adrian Page, acquaintances of Neal's, or traded by Neal for drugs. Neal was subsequently arrested, charged, and convicted of first degree murder and use of a deadly weapon to commit a felony.

Dr. Blaine Roffman testified as to his examination and autopsy of Morris. Roffman's external examination noted that Morris had "six deep irregular shaped lacerations that penetrated down to the skull" on the left side of his scalp, and there was some bruising of the skin and abrasions on Morris' left arm. An internal examination of Morris' skull showed two skull fractures, one above the right ear and the other in the midportion of the back of the skull.

Roffman identified the cause of the fractures as blunt trauma, stating that "[i]t would take excessive, significant force to produce a fracture of a skull to this degree. Particularly a depressed skull fracture, to go through the thickness of the skull in those areas and produce those type[s] of fractures would take a great deal of force." Roffman testified that Morris had sustained

between six and eight blows to the head. Roffman further testified that the cause of Morris' death was the two skull fractures in association with the six major lacerations. According to Roffman, these injuries occurred from blunt trauma resulting in brain hemorrhage. Roffman also testified that the wounds indicated Morris was struck from behind, but that if Morris was lower than the attacker and the attacker was standing in front of Morris, it would be possible for the blows to have been struck from above Morris. Finally, Roffman testified that he could not estimate a time of death or which blow Morris received first, but that it was likely that the blows Morris received would have rendered him unconscious.

Several individuals who were involved in the processing of evidence from the crime scene testified. Their testimony disclosed that Neal's fingerprints were found on the toilet tank at the scene and on one of the lamps that was missing from the apartment. There was also testimony indicating that a blood sample from the front door of the apartment, as well as a sample from the floor of the bathroom, matched Neal's blood type.

Neal also testified. On direct examination, Neal described his relationship with Morris prior to Morris' death. He then testified to his version of the events surrounding Morris' death on the evening of Saturday, January 13, 2001. Neal stated that he had called Morris because Morris had offered to make Neal supper. Morris picked Neal up at Neal's sister's home, and together they rented three movies and stopped at a store to purchase food. Neal testified that after they had run those errands, they went to Morris' apartment. While Morris began to make supper, Neal sat down on a chair in Morris' living room and began to watch a movie. According to Neal, Morris also gave Neal a hammer and nail and asked Neal to hang a wall hanging. At some point, Morris came into the living room and lay down on the floor to watch the movie. They later ate supper while continuing to watch the movie. Neal then testified as follows:

> [Neal's counsel:] Still drinking?
>
> [Neal:] Well, I'm drunk now really. I done — I done dozed off basically. I dozed off.
>
> Q. While the movie was still on?
>
> A. Yeah.

Q. What's the next thing you remember?

A. I guess I tried to move, I don't know. But I woke up and this dude had my — my — my penis in his hand.

Q. Let me ask you this: Describe when you woke up the position of his body.

[Neal]: Could I show?

[Court]: (The [judge] nods head in the affirmative.)

[Neal]: Like this. I'm like this in the — in the — in the chair (indicating).

Q. . . . All right.

A. Then he's just like — like this on — like this on me. He was more or less up here like this on me (indicating).

Q. What happened at that point? Did you look at him?

A. No I didn't. Well, yeah, I noticed that, and I just —

Q. What else did you notice?

A. My penis in his hand.

Q. Okay.

A. And I hit him. You know, I hit him, hit him (indicating). When I got up, I stood up this way (indicating).

[Neal]: Is it cool?

[Court]: (The [judge] nods head in the affirmative.)

[Neal]: I stood up this way (indicating), and I pushed up off the table, and whatever I grabbed I started swinging with it.

Neal testified that he continued hitting Morris until something hit him in the face. He then noticed that his hand was bleeding, so he ran to the bathroom where he set the hammer down on the bathroom sink to look for a bandage to stop the blood. Unable to find a bandage, he wrapped a towel around his hand and went into the kitchen to continue his search. He opened a drawer and found a car key, which he took. He then ran out of the apartment, getting about halfway down the stairs before realizing how cold it was and that he did not have his coat or shoes. He returned to the apartment, but the door was locked. Neal stated that he then went to Morris' car to look for a spare apartment key. Finding none, he testified that he used a hook from a wall shelf he found in the trunk of Morris' car to open the locked apartment door. After reentering the apartment, Neal grabbed not only his coat and shoes, but Morris' stereo. Neal then testified that he put the

stereo in the trunk of Morris' car and went back up to the still-open apartment and took Morris' television. Neal also testified that at some point, he took a cellular telephone from Morris' back pocket.

Neal then testified that after he left the scene, driving Morris' car, he exchanged the stereo and television for drugs, which he then smoked at a friend's house. Later that night, remembering he had left the hammer in Morris' bathroom, Neal returned to the scene to retrieve it. Again using the hook to gain entrance, Neal reentered Morris' apartment and grabbed the hammer, which he threw in the sewer. He also stole more of Morris' property, which he then sold to Hytche and Page. The following exchange then took place:

> [Neal's counsel:] Do you know, other than the ladies and gentlemen of this jury and myself, is there anyone that you've told what happened inside Garry Morris's apartment?
>
> [Neal:] Yeah, three people.
>
> Q. Who?
>
> A. LaShawn Grant, Neshee (phonetic), I don't know her last name, and a friend of mine, he's dead now, his name is Derrick Brown.
>
> Q. Let's talk about LaShawn Grant and Neshee. When did you talk to them?
>
> A. Well, uh, I think that was Monday. It might have been Tuesday when they showed my face on TV about the car.
>
> Q. What happened?
>
> A. Well, Joseph Keyes, I let him get the car. He wanted to use it for a few, and but I wanted — told him to give it to me at a certain time and he never brought it back to me, and he got caught with the car.
>
> Q. And so sometime after Sunday you talked to Neshee and LaShawn?
>
> A. Yeah.
>
> Q. How did that come about?
>
> A. I was, uh — I'm on the run, really, you know, and I seen — I stopped her and told her I needed a ride. And, uh, she was: What happened, Alonzo, you know, what's going on? She cryin'. And I told her what happened.

Q. What did you tell her?
[State]: Objection; it's hearsay.
[Neal's counsel]: I asked what he told her.
[Court]: What he told her?
[State]: It's hearsay.
[Court]: Overruled. Unless you want to have a sidebar.
[Neal's counsel]: I'll withdraw the question, Judge.
[Court]: Okay.

The record indicates that Neal, Dineshee Thornton, and LaShawn Grant had this conversation on either Monday, January 15, or Tuesday, January 16, 2001. The record further reflects that Neal was arrested on January 23.

On cross-examination, Neal testified:

> [State:] So when you wake up, he's holding onto your penis and he's hovering over your penis; is that what you're trying to say?
>
> [Neal:] Yeah, I don't know if he done — if he put it in his mouth already or nothin'. I just noticed this man got my penis in his hand.
>
> . . . .
>
> Q. So you wake up when this is going on, and what's the first thing that you do?
>
> A. I punch him in the face.
>
> Q. All right. With what?
>
> A. My right hand.
>
> Q. And do you know where you hit him in the face?
>
> A. No, I just swung like that (indicating) and at the same time pushing him. And I got up, I leaned to get up, you know, 'cause my foot was on — both my feet was on the stool, and I leaned to get up (indicating).
>
> Q. All right. Did he fall after you hit him in the face?
>
> A. Yeah, he went down like, but he came back up 'cause he outstretched his arm at me.
>
> Q. How many times did you hit him in the face?
>
> A. Just that once when I pushed him up off me that I remember.
>
> . . . .
>
> Q. But you hit him in the face, and then he stands up and puts his hand out at you. What happened then?

A. He didn't stand. He was on his knees like, and when I got him up off me he was like on his knees or something. He was falling like, you know, leaning and he did like this (indicating).

Q. All right. And what did you do?

A. I got up. I'm getting up like this, and I moved around. Like he's facing this way and I'm above him like that (indicating), and —

Q. So you're standing above him?

A. And when I got up, I got up off the table. Like the chair was closer to the table. So when I stepped off of this side of the chair, I first used the table to get up, and I had the hammer in my hand, and —

Q. Go ahead.

A. — and then he — he right here, basically, when I stand up, and I swing and I swing.

Continuing its cross-examination, the State asked Neal:

Q. And once you were arrested in this case, at some point in time you became aware of all of the information through the police reports, the DNA reports, the reports regarding the fingerprints, as to what sort of evidence the police had against you in this case; isn't that right?

A. Well, they said they had fingerprints of mine at the house.

Q. Well, you're aware through the process of discovery and preliminary hearings of what the evidence was in this case; isn't that right?

A. Well, no. That night I got caught I was informed that they . . . had my fingerprints, was the ones that they found at the house.

Following Neal's testimony and after learning of Neal's plans to call Thornton and Grant to testify, the State filed a motion in limine seeking to exclude such evidence. In opposing the State's motion, Neal argued that Thornton and Grant should be permitted to testify pursuant to Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1995). It was Neal's contention that this testimony was proper to rebut the State's implication that his version of events was fabricated to comport with the forensic evidence found at the scene. After a hearing, the district court, relying upon *State v. Morris*,

251 Neb. 23, 554 N.W.2d 627 (1996), and *State v. Anderson*, 1 Neb. App. 914, 511 N.W.2d 174 (1993), sustained the motion.

An offer of proof was then made, in which both Thornton and Grant testified that shortly after Morris was killed, Thornton and Grant gave Neal a ride. When Grant asked questions relating to Neal's being "on the news," Neal reportedly told both of them that "it didn't happen like that." According to Thornton and Grant, Neal told them he was at Morris' apartment and that when he woke up, Morris was "sucking on his penis so he grabbed something and hit him with it."

During closing arguments, the State pointed out, with regard to Neal's knowledge of the evidence against him:

> The defense says, well, we [the State] don't contest everything else that he says. Well, no, that's not true. We contest everything that he says. We know that Alonzo Neal was there that night because the physical and the forensic evidence support that. I don't know about anything else that he says. *There's nothing to corroborate any of that testimony.*
>
> . . . [W]hen we talked about the DNA evidence and the fingerprint evidence, when [Neal was] arrested on January 23rd the police interviewed him. All right? He doesn't know that there's DNA evidence that shows that his blood is in that apartment. He doesn't know at that time that his fingerprints are going to be discovered. And his version of events at that time when he's interviewed by the police as to what's taken place is: I don't know anybody by the name of Garry Morris and Porky [Joseph Keyes] was driving some kind of green car and I saw it that night.
>
> So think about that when he's talking about the credibility of the defendant. So at that point in time it's, well, I don't know what they know. Okay. And I can always say, hey, Porky gave me the stuff from the apartment. Well, Porky gave me the stolen car, or Porky had the car, whatever. Okay. And maybe that's where I'm going to try and work the angle on this thing. But that's his — that's his statement to the police on January 23rd before he knows what the police have got as far as the evidence in this case, before he knows that his blood has been found at that apartment, before he

> knows that his fingerprints have been found on these lamps, the lamps and the bathroom on the tank. That's his version. And is that something that is very important when you judge his credibility as a witness? Certainly.
>
> The judge will instruct you about that, any prior inconsistencies that he would have along with a motive not to tell you the truth along with the factor of him having five felony convictions is a factor to consider with regard to his credibility. Very important factors. Because Alonzo Neal has a problem, here, okay?

(Emphasis supplied.)

The jury found Neal guilty of first degree murder and use of a deadly weapon to commit a felony. Neal's motion for a new trial was overruled. This appeal followed.

ASSIGNMENTS OF ERROR

Neal assigns, rephrased, that the district court erred by (1) refusing to allow him to adduce evidence of his prior consistent out-of-court statement to rebut an express or implied charge of recent fabrication or improper influence or motive, (2) violating due process by refusing to allow him to adduce evidence of his prior consistent out of court statement, and (3) overruling his motion for a new trial.

STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002). When judicial discretion is not a factor in assessing admissibility, the court's application of the Nebraska Evidence Rules will be upheld unless clearly erroneous. *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

ANALYSIS

APPLICABILITY OF § 27-801(4)(a)(ii)

[3,4] In his first assignment of error, Neal argues that he should have been permitted to call Thornton and Grant to testify concerning statements Neal made to them prior to his arrest

and questioning by the police. He argues that the statements made to Thornton and Grant were prior consistent statements excluded from the definition of hearsay and admissible under § 27-801(4)(a)(ii), which provides:

> (4) A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive[.]

While this rule has no explicit requirement relating to the timing of prior consistent statements, this court has adopted the reasoning of the U.S. Supreme Court in *Tome v. United States*, 513 U.S. 150, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995), which concluded that a prior consistent statement must have been made before the motive to fabricate arose in order to be admissible. This court has stated:

> In order to minimize the amount of judicial discretion and therefore control the admissibility of evidence by rule as much as possible, we interpret rule 801(4)(a)(ii) to permit the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive.

State v. Morris, 251 Neb. 23, 33-34, 554 N.W.2d 627, 633-34 (1996).

The district court, in rejecting Neal's argument that § 27-801(4)(a)(ii) permitted him to call Thornton and Grant, reasoned that "the statements you're going to offer that the defendant made to those ladies occurred sometime at least hours after this act had occurred, and as such I'm going to sustain the State's motion." Thus, the district court concluded that Neal's motive to fabricate arose at the time the crime was committed and that, therefore, the statements made to Thornton and Grant did not comport with § 27-801(4)(a)(ii). As a result, the district court concluded that § 27-801(4)(a)(ii) was not applicable.

The State does not argue in its brief that Neal was not the declarant of the statements made to Thornton and Grant or that

those statements were not consistent with Neal's trial testimony. See *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992). See, also, *U.S. v. Vest*, 842 F.2d 1319 (1st Cir. 1988), *cert. denied* 488 U.S. 965, 109 S. Ct. 489, 102 L. Ed. 2d 526 (holding that trial testimony and out-of-court statements need not be entirely consistent for statement to be considered consistent under this exclusion); G. Michael Fenner, The Hearsay Rule ch. 2B(4) (2003) (citing *Vest, supra*, to suggest that trial testimony and out-of-court statement need not be entirely consistent to fit under exclusion). Further, the record is clear that Neal testified and was subject to cross-examination. Moreover, the record discloses that an implied "charge of recent fabrication or improper influence or motive" was made by the State. As noted previously, during the State's cross-examination, Neal was asked, inter alia:

> And once you were arrested in this case, at some point in time you became aware of all of the information through the police reports, the DNA reports, the reports regarding the fingerprints, as to what sort of evidence the police had against you in this case; isn't that right?

That such question implies Neal fabricated his testimony regarding his motivation for killing Morris becomes inescapable when viewed in context with the State's closing argument as previously set forth.

Having determined the record supports Neal's claim that the State's question implied Neal fabricated his testimony, we now consider the issue of whether the statements made to Thornton and Grant were made "before the charged recent fabrication or improper influence or motive." See *State v. Morris*, 251 Neb. at 34, 554 N.W.2d at 634. As noted previously, the district court determined that any such motive arose at the time the crime was committed, thus the statements were inadmissible. Neal, however, argues that any motive he might have had to fabricate his story in the manner implied by the State would not arise until he had learned of the evidence against him, in other words, after his arrest.

The State's question to Neal on cross-examination implied that he fabricated his motive testimony given the forensic evidence found at the scene. The very nature of such a charge requires that any fabrication could not have occurred until Neal was aware of

the forensic evidence. The record discloses that such knowledge would not have occurred until after Neal's arrest. At the time Neal made his statements to Thornton and Grant, he had not been arrested nor had he given any statement to law enforcement. Accordingly, it is not possible for Neal's motive to fabricate to have arisen prior to the time he made his statements to Thornton and Grant.

We further note that the State, in its brief, does not offer any argument in support of the district court's determination that Neal's motive to fabricate arose at the time the crime was committed. The State instead argues:

> The questions asked by the prosecutor were simple questions concerning the defendant's knowledge of the evidence in this case. The record does not reflect that the prosecutor ever asked the defendant whether he modified his story to "fit" the evidence which appears to be what the defendant is now claiming is implied by these questions. . . . The only thing implied by these questions and answers is that the defendant's knowledge of the evidence possessed by the State was very limited, which could hardly be used to form an argument for the State that the defendant fabricated his testimony to fit the evidence.

Brief for appellee at 11-12.

In support of this argument, the State relies on *State v. Buechler*, 253 Neb. 727, 733, 572 N.W.2d 65, 70 (1998), wherein this court stated that "[a]ttempts at impeachment cannot be equated to charges of recent fabrication." In *Buechler*, the defendant testified on direct examination that he had been threatened by the victim. During cross-examination, the State attempted to impeach this testimony by noting that there was no mention of any threats by the victim in Buechler's recorded confession and also by establishing that the defendant had not realized that his confession was being recorded.

Buechler is distinguishable. In *Buechler*, we recognized that it is sometimes difficult to determine whether a question attempts impeachment or "rises to the level of a charge [of] a recent fabrication." 253 Neb. at 733, 572 N.W.2d at 70. We stated that " '[w]e will not find abuse of discretion where, as here, the impeachment is susceptible of either interpretation.' " *Id.*, quoting *Thomas v.*

U.S., 41 F.3d 1109 (7th Cir. 1994). We have no such difficulty in this case. Viewing the State's question in the context of its closing argument convinces us that in this case, it is not "susceptible of either interpretation."

The State's argument further overlooks the fact that § 27-801(4)(a)(ii) provides for both express and implied charges of recent fabrication. While the State is correct in stating that the State's question to Neal never expressly accused him of modifying "his story to 'fit' the evidence," the State's question clearly implied such fabrication. This implication was reinforced during the State's closing argument.

As a result of the foregoing, we hold that the statements made to Thornton and Grant were admissible as prior consistent statements under § 27-801(4)(a)(ii) and that the district court's ruling to the contrary was clearly erroneous. See *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

HARMLESS ERROR

Having concluded that the district court erred in not allowing Thornton's and Grant's testimonies to be admitted pursuant to § 27-801(4)(a)(ii), we must now determine whether such error was harmless.

[5] 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. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999); *State v. Buechler, supra.*

[6] Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002); *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

At trial, Neal did not dispute that he killed Morris, claiming instead that Morris' death was not first degree murder but manslaughter. Neal's claim was that he had fallen asleep in a chair and had awakened to discover his penis had been exposed by Morris; he then stood up, and with Morris below him,

struck him. Such an explanation is not inconsistent with Roffman's testimony:

> [Neal's counsel:] Okay. Did the location of those wounds suggest anything to you —
>
> . . . .
>
> Q. — about the position of the victim's body?
>
> [Roffman:] It would appear he was struck from behind.
>
> Q. Or someone standing over him?
>
> A. More likely from behind. *But unless the individual, the victim, was lower and the person was standing in front over him, that would be also possible.*

(Emphasis supplied.) After Neal presented his version of the events surrounding Morris' death, including his motivation for committing the crime, the State, in cross-examination, implied that this version had been fabricated to meet the forensic evidence discovered at the scene. In response, Neal attempted to introduce his own prior consistent statements, which rebutted the State's implied charge of fabrication and tended to corroborate Neal's story regarding his motivation. The evidence Neal thus sought to introduce went to the very essence of his defense and would be "possible," given Roffman's testimony. As such, we cannot determine the actual guilty verdict was surely unattributable to the error and that as a result, the error was harmless beyond a reasonable doubt. See *State v. Canady, supra.*

Remaining Assignments of Error

Since we have concluded that the district court erred in not admitting Thornton's and Grant's testimonies under § 27-801(4)(a)(ii) and that such error was not harmless, we need not consider Neal's remaining assignments of error.

Reversed and remanded for a new trial.

CITY OF SCOTTSBLUFF, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. EMPLOYERS MUTUAL INSURANCE COMPANY, AN INSURANCE COMPANY AUTHORIZED TO DO BUSINESS IN NEBRASKA, APPELLEE.

658 N.W.2d 704

Filed April 4, 2003. No. S-02-398.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
4. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
5. **Insurance: Contracts.** An insurance policy is a contract.
6. **Insurance: Contracts: Intent.** An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
7. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.
8. **Insurance: Contracts.** 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 against the preparer of the contract.
9. **Insurance: Contracts: Liability.** Generally, where the event for which an insured seeks coverage is plainly outside the scope of the coverage encompassed in the policy according to a plain reading of its terms, an insurer may not be obligated to provide coverage to the insured.
10. **Insurance: Contracts: Claims.** Although a liability insurer is legally obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.

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

Paul E. Hofmeister, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, P.C., L.L.O., and Steven C. Smith, of Pahlke, Smith, Snyder, Petitt & Eubanks, P.C., L.L.O., for appellant.

Terrance O. Waite and Keith A. Harvat, of Waite, McWha & Harvat, for appellee.

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

GERRARD, J.

NATURE OF CASE

The City of Scottsbluff is suing for coverage under the insurance contract it has with Employers Mutual Insurance Company (EMC). On September 3, 1999, Scottsbluff experienced a large amount of rainfall. On that day, several homeowners sustained water and sewage accumulation in their basements and consequently sued the city for damages. Responding to a request from the city, EMC refused to cover these damages and refused to supply the city a defense, alleging that the damages fell within an exclusion of the insurance contract. The city and some of the homeowners settled the claims between themselves, and the city now seeks to have EMC reimburse it for these settlement payments. The district court granted EMC's motion for summary judgment and denied the city's motion for summary judgment. In its order, the district court found that the damage to the homes was not covered by the insurance policy. The city appeals.

FACTUAL BACKGROUND

The facts are largely undisputed. On or about September 3, 1999, the city experienced a heavy rainfall. This same day, several homeowners in the Westmoor area of the city suffered damage to their homes by water and sewage entering and accumulating in their basements. Many of these homeowners filed claims against the city for these damages. The city notified its insurer, EMC, of these claims and requested that EMC acknowledge coverage and provide a defense. EMC responded on November 19 by denying both the coverage and the defense, indicating that the

damage to the homes fell within an exclusion found in section VI, paragraph 5, of an endorsement to the insurance policy. That exclusion reads:

> This insurance does not apply to "bodily injury," "property damage," "personal injury" or "advertising injury" arising out of any hazard listed below, unless that hazard is specifically declared in the policy schedule and the applicable premium is shown.
>
> . . . .
>
> 5. The overflow of rivers or streams, or the flooding of basements, or damage to property caused by the backing up of sanitary sewers or the backing up of water in storm sewers, drains or other facilities due to the runoff of precipitation, surface waters or flood.

At least 11 of the homeowners' claims against the city were settled between September 25 and November 9, 2000. The city filed a petition with the district court for Scotts Bluff County on October 11, 2000, seeking reimbursement from EMC under the insurance policy for the obligations flowing from the settlement agreements it had made and would make with the aggrieved homeowners.

The city filed a motion for summary judgment on October 9, 2001, and EMC filed its motion for summary judgment on November 8. After a December 11 hearing, the court entered an order, granting EMC's motion for summary judgment and denying the city's motion for summary judgment. The court considered that the damage to the homes may have been caused by either ground water seepage or sanitary sewer backup, or by a combination of the two. According to the court, the insurance policy terms excluded coverage for damage caused by sanitary sewer backup. Therefore, the court determined that to the extent the damage was caused by the backing up of the sanitary sewers, EMC was not liable because the policy excludes it.

The court further found that the city would not be liable to the homeowners for damage caused by ground water seepage and that as a result, the insurance policy did not cover such damage. Therefore, the court determined that to the extent the damage was caused by ground water seepage, EMC was not liable because the city was not liable. Since ground water seepage and

sanitary sewer backup were alleged to be the only causes of the damage, EMC was not liable. Accordingly, the district court granted EMC's motion for summary judgment and denied the city's motion for summary judgment. The city timely appeals.

ASSIGNMENTS OF ERROR

The city assigns, restated, that the district court erred by (1) finding that the policy excluded from coverage damage caused by the backup of the sanitary sewer system, (2) finding that the city had no legal liability to the affected homeowners for damage caused by ground water seepage, (3) finding that the insurance policy did not cover damage caused by ground water seepage, and (4) sustaining EMC's motion for summary judgment and overruling the city's motion for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Continental Cas. Co. v. Calinger, ante* p. 557, 657 N.W.2d 925 (2003).

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Finch v. Farmers Ins. Exch., ante* p. 277, 656 N.W.2d 262 (2003).

[3] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Id.*

[4] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Id.*

ANALYSIS

In its consideration of the motions for summary judgment, the district court made no findings regarding the cause of the damage. Neither party alleged that the cause was other than some combination of sanitary sewer backup and ground water seepage, although EMC denied any of it was caused by ground water seepage. The court then considered each cause separately to determine whether this factual dispute might be material, precluding summary judgment.

SANITARY SEWER BACKUP

[5-8] The court found that the portion of damage caused by the sanitary sewer backup fell under an exclusion in the insurance contract. The city assigns this finding as error. Familiar general principles guide our determination whether, as a matter of law, the claimed coverage exclusion applies to the undisputed facts of this case. An insurance policy is a contract. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002). An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *Finch, supra.* Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute. *Neff Towing Serv., supra.* 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 against the preparer of the contract. *Finch, supra.*

The insurance contract excludes damages caused by "[t]he overflow of rivers or streams, or the flooding of basements, or damage to property caused by the backing up of sanitary sewers or the backing up of water in storm sewers, drains or other facilities due to the runoff of precipitation, surface waters or flood." The city reads the phrase "due to the runoff of precipitation, surface waters or flood" to modify the damage caused by the backing up of sanitary sewers as well as of the storm sewers. The city then contends that the sanitary sewer backup was not due to the runoff of precipitation, surface waters, or flood, thus falling

outside this exclusion. However, a plain reading of the contract does not support the city's position.

We determine that the phrase "due to the runoff of precipitation, surface waters or flood" modifies "the backing up of water in storm sewers, drains or other facilities" and does not modify "the backing up of sanitary sewers." This conclusion is drawn from both the context and the contractual scheme. As the district court noted, the runoff of precipitation, surface waters, and floods directly affects only an open sewer system like the storm sewer system. A closed sewer system, such as a sanitary sewer system, is not directly affected by such water. The modifying phrase, in its plain and ordinary meaning, limits only the storm sewer damage. The storm sewer system fails and causes damage to the public when water backs up due to the runoff of precipitation, surface waters, or flood. The sanitary sewer system, on the other hand, fails and causes damage to the public by simply backing up.

It is clear that the limitation to damages caused only by runoff of precipitation, surface water, and flood does not apply to the sanitary sewer system exclusion. We determine that the ordinary meaning of the plain language of this paragraph excludes from coverage: (1) the overflow of rivers or streams, or (2) the flooding of basements, or (3) damage to property caused by (a) the backing up of sanitary sewers, or (b) the backing up of water in storm sewers, drains, or other facilities due to the runoff of precipitation, surface waters, or flood.

The district court concluded that the portion of the damage not attributable to ground water seepage was "damage to property caused by the backing up of sanitary sewers." This damage, falling as it does under this exclusion, is not covered by EMC. The city's first assignment of error is without merit.

GROUNDWATER SEEPAGE

Considering the damages caused by the ground water seepage, the court found that this damage is also not covered by the insurance contract. The city claims the court erred. Since the insurance contract by its own language covers only the sums the insured is "legally obligated to pay" to the injured, see section I, coverage A, paragraph 1a, the dispositive question is whether

the city was legally obligated to the Westmoor area homeowners for the damage to their homes.

The court found that the city was not legally liable to the Westmoor area homeowners for that portion of the damage caused by ground water seepage. The court based this conclusion on the absence of any causally related act or omission attributable to the city—essentially the lack of any breach of duty. The city posits two grounds for reversing the court's finding that the city did not have any legal liability to the homeowners for damage caused by ground water seepage: (1) even if the city is not legally liable in tort, the city is legally liable in contract by operation of the settlement agreements, and (2) the contractual exclusion of the settlement agreements should not have been considered by the court, and even if it were, it is ambiguous and should have been construed to favor the insured to afford coverage.

[9] Generally, where the event for which an insured seeks coverage is plainly outside the scope of the coverage encompassed in the policy according to a plain reading of its terms, an insurer may not be obligated to provide coverage to the insured. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002). An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *Finch v. Farmers Ins. Exch., ante* p. 277, 656 N.W.2d 262 (2003).

The contract in the instant case states that EMC

> will pay those sums that the insured becomes legally obligated to pay as damages because of [damage] to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for [damage] to which this insurance does not apply.

Section I, coverage A, paragraph 1a. We determine that the plain meaning of the phrase "becomes legally obligated to pay" is limited to those obligations which flow as a direct consequence of an " 'occurrence,' " defined within the contract. The city was not legally liable to pay the homeowners for those damages caused by ground water seepage. The eventual obligation in contract came as a result of the city's voluntary agreement with certain

individuals, which does not in this instance legally bind the third-party insurance carrier. The parties to the insurance contract at the time the contract was made could not have reasonably intended it to cover the voluntary agreements of the insured to pay for damage it was not otherwise legally obligated to pay.

[10] The city also alleges that EMC was obligated to defend them against the homeowner suits. Although a liability insurer is legally obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy. *Neff Towing Serv., supra.* Similarly, the contractual duty to defend covers suits seeking damages only "to which this insurance applies." The district court was correct in its conclusion that the city was in fact under no legal obligation regarding damages caused by ground water seepage. Because the city was not legally liable, EMC was under no duty to defend or indemnify the city.

Next, the city claims that the provision which excludes from coverage any contractual assumption of liability by the city is an affirmative defense. The city further alleges both that EMC's failure to raise this defense amounts to waiver or estoppel and that the exclusion is ambiguous and should be read to afford coverage. However, neither EMC in its answer nor the district court in its decision relied upon this exclusion. The ground water seepage damage simply falls outside the scope of the insurance contract. The fact that the damages here also fall under a contract exclusion does not change the soundness of the court's actual basis for its decision.

Lastly, the city argues that the only issue actually before the court was whether the damages caused by sanitary sewage are covered by the policy, since this was the only source of damages conceded by EMC and the only contingency for which EMC prepared a defense. As a result, the city contends, the court erred in considering either the city's liability toward the Westmoor area homeowners or the insurance policy's coverage of damages caused by ground water seepage. However, in its pleadings, the city alleged that the damage resulted from either the sanitary sewage backup or the ground water seepage. Since EMC alleged that the damage was caused completely by the sanitary sewage backup, this was an issue of fact. Before the court could rule on

either motion for summary judgment, it had to determine whether these disputed facts were material. Summary judgment would have been inappropriate had the facts in dispute been material. See *Continental Cas. Co. v. Calinger, ante* p. 557, 657 N.W.2d 925 (2003).

The court analyzed the case, as was proper on a motion for summary judgment, assuming without deciding that the damage might have been caused in either or both ways, as suggested by the city. Having considered that some of the damage may have been caused by ground water seepage, the court was dutybound to determine the ultimate inferences that may be drawn from those facts, see *id.*, in particular, whether the insurance contract covered damages so caused. As we have determined above, the answer to that question flows in part from whether the city had become legally liable to the homeowners for that damage. The court appropriately considered both the insurance policy's coverage of damages caused by ground water seepage and the city's liability toward the Westmoor area homeowners. We conclude that the district court did not err in denying the city's motion for summary judgment or in granting EMC's motion for summary judgment, finding EMC not liable to indemnify or defend the city for any damages set forth in the operative petition.

CONCLUSION

The district court correctly determined both that damages caused by sanitary sewer backup fell into an exclusion to the insurance contract and that damages caused by ground water seepage fell outside the scope of the insurance contract. Without any issues of material fact and without any duty of EMC to defend or indemnify the city flowing from the ultimate inferences that may be drawn from the settled facts, summary judgment was proper. The judgment of the district court is affirmed.

AFFIRMED.

BRIAN M. HALL, APPELLANT, V. AUTO-OWNERS INSURANCE COMPANY, APPELLEE.

658 N.W.2d 711

Filed April 4, 2003. No. S-02-491.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
4. **Insurance: Contracts.** An insurance policy is a contract.
5. **Contracts.** When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
6. **Insurance: Contracts.** A court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous.
7. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Names.** Doing business under another name or several names does not create an entity separate and distinct from the person operating the business.

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

Michael F. Coyle and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

Brian M. Hall appeals from the entry of summary judgment in favor of Auto-Owners Insurance Company (Auto-Owners). The district court for Douglas County determined that an insurance

policy issued by Auto-Owners did not provide coverage for injuries sustained by Hall and that Auto-Owners was entitled to judgment as a matter of law. The question presented by this appeal is whether an individual doing business as a sole proprietor under a trade name is a separate legal entity. We answer the question in the negative and affirm the judgment of the district court.

BACKGROUND

This case stems from a May 22, 1996, automobile accident. Sixteen-year-old Justin Gearhart was the driver of a 1979 Pontiac Trans Am when he was involved in an accident at the intersection of LaPlatte Road and Highway 75 in Sarpy County. Justin died as a result of his injuries, and Hall, a passenger in the Trans Am, was seriously injured. The Trans Am was owned by Kenneth Gearhart (Gearhart) and Rhonda Gearhart, Justin's parents. Prior to the accident, the Trans Am had been rebuilt at Gearhart's business, Kenny's Truck Repair. Gearhart is the sole proprietor of Kenny's Truck Repair.

Following the accident, Hall's father, Thomas S. Hall, individually and as next friend for Hall, filed a negligence action against, among others, Gearhart. At trial, the parties stipulated that Justin was negligent in operating the vehicle and that Justin's negligence was the proximate cause of the collision. The parties further stipulated that Gearhart was liable to Hall's father pursuant to the family purpose doctrine and that Hall's damages were proximately caused by the negligence of Gearhart. The only issue addressed at trial was the amount of damages, which was resolved with the court's entering judgment in favor of Hall's father and against Gearhart for more than $11.8 million. At oral argument, Hall's counsel stated that Hall had received $1.8 million of this sum from defendants other than Gearhart. After the judgment was entered, Gearhart assigned to Hall any claims and causes of action Gearhart had against Auto-Owners.

Hall brought this declaratory judgment action against Auto-Owners, seeking a declaration that an Auto-Owners insurance policy issued to Gearhart, in effect at the time of the accident, provided coverage for Hall's injuries. The policy includes two types of coverage at issue here—commercial general liability (CGL) coverage and garage liability coverage.

Under section I of the garage liability coverage provisions, Auto-Owners agreed "[t]o pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed under any contract as defined herein, for damages" due to "bodily injury . . . neither expected nor intended from the standpoint of the insured and arising out of the hazards defined in Section II of this coverage form."

The applicable division of section II of the garage liability coverage defines hazards as follows:

> The insurance under this division covers the ownership, maintenance, occupation or use of the premises for the purposes of an automobile repair shop, service station, storage garage or public parking place and all operations which are necessary or incidental thereto, including the use for any purpose in connection with the foregoing of any automobile not hired, registered or owned in whole or in part by the named insured, any partner or officer thereof.

Section I of the CGL coverage provisions states, in relevant part, "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." However, the policy excludes coverage for " '[b]odily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any insured." The declarations pages of the insurance policy designate "KENNETH L GEARHART DBA KENNYS TRUCK REPAIR" as the insured.

Each party filed for summary judgment. At the summary judgment hearing, the insurance policy was received into evidence. In addition, Hall offered, and the court received, several other insurance documents into evidence. These documents variously listed the insured as "Kenny's Truck Repair, Kenneth L. Gearhart dba," "Kenneth L. Gearhart," or "Kenny's Truck Repair."

On April 18, 2002, the district court granted Auto-Owners' motion for summary judgment and denied Hall's motion for summary judgment. The court, relying on a number of cases from other jurisdictions, determined that Kenny's Truck Repair was not a legal entity separate and distinct from Gearhart. Thus, the court

found that the insurance policy did not provide coverage for Hall's injuries where the automobile in question was owned by the insured. Hall filed a timely appeal, and we moved the case to our own docket.

ASSIGNMENTS OF ERROR

Hall assigns that the district court erred in (1) finding that the identity of the named insured under the garage liability and CGL provisions of the policy was not ambiguous as a matter of law, (2) finding that "Kenneth L. Gearhart" was the named insured under both the garage liability and CGL provisions, (3) granting summary judgment based on the owned automobile exclusion of the garage liability and CGL provisions, (4) denying Hall's cross-motion for summary judgment based on the owned automobile exclusion of the garage liability and CGL provisions, and (5) entering summary judgment in favor of Auto-Owners.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002); *Finch v. Farmers Ins. Exch., ante* p. 277, 656 N.W.2d 262 (2003). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Id.*

ANALYSIS

[4-6] An insurance policy is a contract. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002). When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would

understand them. *Reisig v. Allstate Ins. Co.*, 264 Neb. 74, 645 N.W.2d 544 (2002). Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous. *Id.*

Under the CGL provisions of the insurance policy, coverage is excluded for bodily injury arising out of the "ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . *owned . . . by . . . any insured.*" (Emphasis supplied.) Similarly, coverage under the garage liability provisions extends to bodily injury arising from "the use . . . of any automobile *not . . . owned in whole or in part by the named insured.*" (Emphasis supplied.) Thus, we must determine if the automobile in this case is owned by the insured, where the automobile is owned by Gearhart and the insured is designated as "KENNETH L GEARHART DBA KENNYS TRUCK REPAIR."

[7] Hall contends that the district court erred in finding that the identity of the insured in the insurance policy was not ambiguous as a matter of law. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Reisig v. Allstate Ins. Co., supra.* In addition to the policy declarations pages, where the insured is designated as "KENNETH L GEARHART DBA KENNYS TRUCK REPAIR," Hall relies on other documents in the record variously listing the insured as "Kenny's Truck Repair," "Kenny's Truck Repair, Kenneth L. Gearhart dba," or "Kenneth L. Gearhart." In effect, Hall argues that Kenny's Truck Repair is an entity separate from Gearhart and that, therefore, the automobile is not owned by the insured.

[8] We are not persuaded by Hall's argument. The Nebraska Court of Appeals has recognized that doing business under another name or several names does not create an entity separate and distinct from the person operating the business. *Toulousaine de Distrib. v. Tri-State Seed & Grain*, 2 Neb. App. 937, 520 N.W.2d 210 (1994). Many courts in other jurisdictions are in agreement. See, e.g., *O'Hanlon v. Hartford Acc. & Indem. Co.*, 639 F.2d 1019 (3d Cir. 1981) (holding that where insured purchases policy in trade name, policy will be viewed as if issued in his given name); *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), *affirmed* 578 F.2d 721 (8th Cir. 1978);

Pinkerton's v. Superior Court (Schrieber), 49 Cal. App. 4th 1342, 57 Cal. Rptr. 2d 356 (1996); *Providence Wash. Ins. v. Valley Forge*, 42 Cal. App. 4th 1194, 50 Cal. Rptr. 2d 192 (1996); *Allstate Ins. Co. v. Willison*, 885 P.2d 342 (Colo. App. 1994); *Chmielewski v. Aetna Cas. and Sur. Co.*, 218 Conn. 646, 668, 591 A.2d 101, 113 (1991) ("property owned by an individual in a trade name is nonetheless owned by him"); *Purcell v. Allstate Ins. Co.*, 168 Ga. App. 863, 310 S.E.2d 530 (1983); *Samples v. Ga. Mutual Ins. Co.*, 110 Ga. App. 297, 138 S.E.2d 463 (1964) (holding that fact that plaintiff's husband purchased automobile in name that he used in doing business does not contradict fact that he owned automobile as individual); *Georgantas v. Country Mut. Ins. Co.*, 212 Ill. App. 3d 1, 570 N.E.2d 870, 156 Ill. Dec. 394 (1991); *Trombley v. Allstate Ins. Co.*, 640 So. 2d 815 (La. App. 1994); *Bushey v. Northern Assurance*, 362 Md. 626, 637, 766 A.2d 598, 603 (2001) ("sole proprietorship form of business provides 'complete identity of the business entity with the proprietor himself' "); *Gabrelcik v. National Indemnity Co.*, 269 Minn. 445, 131 N.W.2d 534 (1964); *Carlson v. Doekson Gross, Inc.*, 372 N.W.2d 902, 906 (N.D. 1985) (holding that "when the designation of the named insured is in the form 'Individual dba . . .' the individual is the named insured, irrespective of whatever language follows the 'dba' "); *Recalde v. ITT Hartford*, 254 Va. 501, 492 S.E.2d 435 (1997) (holding that individual owner and proprietorship are single entity in insurance context). We recognize that some courts have diverged from this rule, although not without criticism. See, *Rosen v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 249 So. 2d 701 (Fla. App. 1971); *Consolidated American Ins. Co. v. Landry*, 525 So. 2d 567 (La. App. 1988); *Hertz Corp. v. Ashbaugh*, 94 N.M. 155, 607 P.2d 1173 (N.M. App. 1980). See, *Providence Wash. Ins. v. Valley Forge*, 42 Cal. App. 4th at 1202, 50 Cal. Rptr. 2d at 196 (stating "*Ashbaugh* is inattentive to the force of the principle that a trade name does not create a separate entity and wrongly relies on cases finding individual partners distinct from the insured partnership" and questioning validity of *Landry* in light of *Trombley*); *Recalde v. ITT Hartford, supra* (finding *Ashbaugh* unpersuasive because *Ashbaugh* court relied upon inapposite case involving insurance issued to partnership).

We conclude that the insured in this case ("KENNETH L GEARHART DBA KENNYS TRUCK REPAIR") was not a legal entity separate and distinct from the owner of the automobile in question (Gearhart). This conclusion provides a distinction between the case at bar and *Townley v. Whetstone*, 190 Neb. 541, 209 N.W.2d 350 (1973), upon which Hall relies. In *Townley*, this court held that an automobile owned by Martin J. Whetstone was not "owned by the 'named insured'" where the named insured consisted of two different individuals, "Larry W. and Martin J. Whetstone," each with separate legal identities. 190 Neb. at 544-45, 209 N.W.2d at 352. We held that the policy language "could reasonably be construed as meaning that only both together, not either one alone, constituted the 'named insured.'" *Id.* The policy language at issue in this case cannot be so construed. The garage liability coverage clearly provides that it does not extend to a vehicle "owned in whole or in part by the named insured," and the CGL provisions exclude coverage for vehicles owned by "any insured." The only reasonable construction of these unambiguous policy provisions is that no coverage is provided for a vehicle in which the insured, Gearhart, has either a sole or joint ownership interest.

CONCLUSION

In the present case, the insurance policy was not ambiguous because Gearhart is legally identical to "KENNETH L GEARHART DBA KENNYS TRUCK REPAIR." The insurance policy did not extend coverage to the injuries suffered by Hall because the automobile was owned by the insured. Accordingly, the district court did not err in granting summary judgment in favor of Auto-Owners.

AFFIRMED.

RIVER CITY LIFE CENTER LIMITED PARTNERSHIP AND PRAIRIE LIFE CENTER OF Q STREET, LTD., APPELLANTS, V. DOUGLAS COUNTY BOARD OF EQUALIZATION AND COMMUNITY HEALTH VISION, INC., NOW KNOWN AS ALEGENT HEALTH, DOING BUSINESS AS LAKESIDE WELLNESS CENTER, APPELLEES.

658 N.W.2d 717

Filed April 4, 2003. No. S-02-953.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes: Judicial Construction: Legislature: Presumptions.** In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation.
5. ____: ____: ____: ____. It is presumed that when a statute has been construed by the Supreme Court and the same statute is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, MICHAEL W. AMDOR, Judge. Judgment of Court of Appeals affirmed.

Frederick S. Cassman and Harvey B. Cooper, of Abrahams, Kaslow & Cassman, L.L.P., for appellants.

Edward D. Hotz and Patrick M. Flood, of Hotz, Weaver, Flood & Breitkreutz, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

The appellants, River City Life Center Limited Partnership and Prairie Life Center of Q Street, Ltd., seek further review of

the summary dismissal by the Nebraska Court of Appeals. The sole issue on appeal is whether the district court and Court of Appeals erred in dismissing the appeal for lack of jurisdiction for the reason that the appellants' praecipe was not filed with the clerk of the district court, as required by Neb. Rev. Stat. § 25-1905 (Reissue 1995), within the time period prescribed by Neb. Rev. Stat. § 25-1931 (Cum. Supp. 2002). For the reasons discussed below, we affirm.

BACKGROUND

On April 9, 2002, the Douglas County Board of Equalization (Board) granted continued approval of a partial property tax exemption to Community Health Vision, Inc., now known as Alegent Health, doing business as Lakeside Wellness Center (Lakeside). On April 23, the appellants filed a petition in error in the district court. The appellants alleged that the exemption from property tax granted by the Board to Lakeside was contrary to applicable statutes when the property considered as a whole is not used exclusively for exempt purposes. On the same date, the appellants filed a praecipe with the Douglas County clerk, the custodian of the Board's records. On May 28, the appellants filed a certificate of transcript with the district court, which was beyond the requirement of § 25-1931 that the certificate be filed 30 days after the rendition of judgment. In their respective answers, the appellees, the Board and Lakeside, alleged that the district court lacked jurisdiction over the proceeding in error because the appellants failed to file a transcript of the proceedings or praecipe with the district court, as required by § 25-1905, within the time period prescribed by § 25-1931. The appellees also filed separate motions for summary judgment.

In an order dated August 13, 2002, the district court sustained the appellees' motions for summary judgment. The court held that there were no issues of material fact and that the appellees were entitled to judgment as a matter of law. The court construed § 25-1905 to require that for jurisdiction to attach, a praecipe must be filed with the district court requested to review such judgment, and not with the tribunal, board, or officer charged with preparing the transcript. Therefore, the district court dismissed the appellants' petition in error for lack of jurisdiction because the

praecipe was not timely filed with the clerk of the district court. The appellants then filed an appeal, which was summarily dismissed on October 15, 2002, by the Court of Appeals on the same grounds as that of the district court. We granted the appellants' petition for further review.

ASSIGNMENTS OF ERROR

The appellants assign that the Court of Appeals erred in summarily dismissing their appeal and in (1) construing § 25-1905 to mean that the praecipe for transcript must be filed specifically with the clerk of the district court rather than with a tribunal, board, or officer charged with preparing the transcript and (2) concluding that Neb. Rev. Stat. § 77-202.04 (Cum. Supp. 2002) deprived the appellants of standing to challenge the granting by the Board of an exemption from taxation to the appellees.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Egan v. Stoler, ante* p. 1, 653 N.W.2d 855 (2002); *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002); *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002).

ANALYSIS

The sole issue on appeal is whether § 25-1905 requires a praecipe for transcript to be filed specifically with the court requested to review a judgment in order to confer jurisdiction on such court. The appellants construe § 25-1905 to require the praecipe to be filed with the tribunal, board, or officer charged with preparing the transcript. This is a matter of statutory interpretation.

Prior to 1991, § 25-1905 (Reissue 1989) provided in relevant part: "The plaintiff in error shall file with his petition a transcript

of the proceedings containing the final judgment or order sought to be reversed, vacated or modified." The statute was amended in 1991. Section 25-1905 (Reissue 1995), now at issue in this appeal, provides in relevant part: "The plaintiff in error shall 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.* The transcript shall contain the final judgment or order sought to be reversed, vacated, or modified." (Emphasis supplied.) In addition to the filing requirements of § 25-1905, proceedings in error must be commenced within 30 days after rendition of the judgment or making of the final order. § 25-1931.

Prior to the amendment of § 25-1905, we have repeatedly held that where a proceeding in error pursuant to § 25-1905 is utilized seeking reversal, vacation, or modification of a final judgment or order, jurisdiction of a court does not attach until a petition and transcript, containing the final judgment or order, are filed in the court requested to review such judgment or order. See, *Transcon Lines, Inc. v. O'Neal*, 230 Neb. 31, 429 N.W.2d 718 (1988); *Clark v. Cornwell*, 223 Neb. 282, 388 N.W.2d 848 (1986); *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986); *Fisher v. Housing Auth. of City of Omaha*, 214 Neb. 499, 334 N.W.2d 636 (1983); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976); *Lanc v. Douglas County Welfare Administration*, 189 Neb. 651, 204 N.W.2d 387 (1973); *Anania v. City of Omaha*, 170 Neb. 160, 102 N.W.2d 49 (1960). The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings is mandatory and jurisdictional. *Glup v. City of Omaha, supra*; *Marcotte v. City of Omaha, supra*; *Anania v. City of Omaha, supra.* In the absence of a transcript as the statute requires, the court in which a petition in error is filed has no jurisdiction to proceed further than to dismiss the petition in error. *Anania v. City of Omaha, supra.*

[3-5] This being the construction of § 25-1905 prior to its 1991 amendment, we now consider the effect of the amendment. Statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Neb. Account. & Disc. v. Citizens for Resp. Judges,*

256 Neb. 95, 588 N.W.2d 807 (1999); *Kimball v. Nebraska Dept. of Motor Vehicles*, 255 Neb. 430, 586 N.W.2d 439 (1998). The amended version of § 25-1905 provides that "[t]he plaintiff in error shall file *with* his or her petition a transcript of the proceedings or a praecipe . . . ." (Emphasis supplied.) The amendment does not expressly change the jurisdictional requirements of prior case law. In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation. *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995). It is presumed that when a statute has been construed by the Supreme Court and the same statute is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court. *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000). Because the Legislature did not change the jurisdictional requirements, we conclude the statute's plain language requires that for jurisdiction to attach, the transcript of the proceedings or praecipe must be filed specifically with the petition in error in the court requested to review such judgment. Our conclusion is consistent with the language of the statute and prior case law.

The appellants allege that to require the filing of the praecipe in the same court as the petition rather than with the tribunal, board, or officer charged with preparing the transcript leads to an absurd result contrary to the Legislature's intent. The appellants assert that the praecipe is not self-executing and as such that the preparation of the transcript may be indefinitely delayed. We disagree. Prior to the 1991 amendment, § 25-1905 was silent as to how the petitioner was to secure the transcript. The appellants had the problem of obtaining the transcript from the tribunal and filing it with the district court within 30 days of the tribunal's decision. After the 1991 amendment, 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.

In this case, the appellants timely filed the petition in error with the district court, but filed the praecipe with the county clerk. The appellants subsequently filed an untimely certificate of transcript with the district court. Because the appellants failed to timely file a transcript or praecipe with the petition in error in district court in accordance with § 25-1905, we conclude the court lacked jurisdiction to hear the case.

We also decline to address the appellants' assignment of error as to standing under § 77-202.04 because the court below did not have jurisdiction. Therefore, we affirm the summary dismissal by the Court of Appeals.

CONCLUSION

We conclude that in a proceeding in error, a plaintiff must file with the petition a transcript of the proceedings or praecipe in the court requested to review such judgment or order to confer jurisdiction on such court. Because the appellants failed to timely file a transcript or praecipe with the petition in district court, we conclude that the district court lacked jurisdiction to hear the case. Therefore, we affirm the summary dismissal by the Court of Appeals.

AFFIRMED.

ERICA J., APPELLEE, AND STATE OF NEBRASKA, INTERVENOR-APPELLANT, V. DENNIS J. DEWITT, APPELLEE.

659 N.W.2d 315

Filed April 11, 2003. No. S-02-415.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Child Support: Rules of the Supreme Court.** Deviations from the Nebraska Child Support Guidelines are permissible whenever the application of the guidelines in an individual case would be unjust or inappropriate.
3. **Child Support: Rules of the Supreme Court: Bankruptcy: Presumptions.** A payment to a bankruptcy plan in and of itself is not sufficient to rebut the presumption that the Nebraska Child Support Guidelines should be applied or to require a deviation from the guidelines to avoid an unjust result.

4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification.
6. **Modification of Decree: Child Support.** In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part, and in part reversed and remanded with directions.

Anthony R. Medina for intervenor-appellant.

Michael A. Klusaw for appellee Dennis J. Dewitt.

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

WRIGHT, J.

NATURE OF CASE

The State of Nebraska appeals from a judgment of the Douglas County District Court which adopted the findings of a district court referee concerning a child support modification.

SCOPE OF REVIEW

[1] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

FACTS

A decree was entered on December 29, 1993, pursuant to the Uniform Reciprocal Enforcement of Support Act, which found that Dennis J. Dewitt is the father of Natasha J., who was born May 9, 1991. Dewitt was ordered to pay $159.30 per month for her support and maintenance commencing January 1, 1994.

On December 15, 2000, the State, as intervenor, filed a petition for modification of child support. The petition alleged that

the Department of Health and Human Services (DHHS) had conducted a review of the decree pursuant to Neb. Rev. Stat. §§ 43-512.10 to 43-512.18 (Reissue 1998) and had determined that the current support obligation varied by more than 10 percent from the Nebraska Child Support Guidelines. The variation was alleged to be due to financial circumstances which had lasted at least 3 months and which were reasonably expected to last for an additional 6 months.

Dewitt denied that the child support obligation varied from the guidelines. He also requested a deviation from the guidelines based on the geographical difficulty of visitation with Natasha, who lives in Minnesota. The guidelines do not provide for a deviation based on the ease or difficulty of visitation, and the parties have not raised this issue on appeal.

After a hearing, the district court referee filed a report indicating that Dewitt worked for a baking company on a commission basis and earned an average of $695 per week in gross wages. At the time of the hearing, Dewitt lived with his wife and their 4-year-old daughter. Dewitt's wife testified that she earned $8.05 per hour as an assistant manager at a daycare.

In 1998, Dewitt and his wife began a repayment plan with the U.S. Bankruptcy Court for the District of Nebraska which required them to pay $200 per month. Two years remained on the plan at the time of the hearing. In his report, the referee apportioned the $200 bankruptcy obligation between Dewitt and his wife and concluded that $100 should be deducted directly from Dewitt's child support obligation.

The referee also determined hypothetical child support for Dewitt's 4-year-old daughter and applied that figure as an allowable deduction from Dewitt's gross earnings to determine the child support payable for Natasha. The referee then allowed a credit of $100 of the payment to the bankruptcy plan against the amount of monthly support in order to arrive at an adjusted child support obligation of $345.58 for Natasha.

Although the petition for modification was filed December 15, 2000, and the referee's report was not filed until November 26, 2001, the referee found that the bankruptcy, the lack of evidence as to savings or other assets, and the proposed increase made it inequitable to make Dewitt solely responsible for the delay by

awarding child support retroactively. The referee therefore recommended that the district court modify the decree of support by increasing Dewitt's child support obligation to $346 per month beginning November 1, 2001, and monthly thereafter until further order of the court.

The State filed an exception to the referee's report on December 3, 2001. On March 13, 2002, the district court overruled the State's exception and adopted the referee's report. The court ordered an increase in Dewitt's child support obligation to $346 per month beginning November 1, 2001, payable until Natasha reached the age of majority, married, died, or became emancipated or self-sufficient, or until further order of the court. The State timely appealed.

ASSIGNMENTS OF ERROR

The State asserts that the district court abused its discretion (1) by giving Dewitt a direct credit against his child support obligation for his bankruptcy plan payment and (2) by ordering the modified child support obligation to be prospective rather than retroactive.

ANALYSIS

The State first argues that the district court erred in adopting the referee's recommendation granting Dewitt a direct credit for payments to his bankruptcy plan in the amount of $100 per month. The State asserts that the referee's reliance on *State on behalf of Elsasser v. Fox*, 7 Neb. App. 667, 584 N.W.2d 832 (1998), is misplaced. The referee concluded that the bankruptcy plan payments are similar to the student loan payments in *State on behalf of Elsasser*.

In *State on behalf of Elsasser*, the district court refused to allow credit for student loan payments in calculating the amount of child support required. The Nebraska Court of Appeals disagreed, noting that deductions were allowed in child support calculations for fixed nonavoidable obligations such as taxes, Social Security, health insurance, mandatory retirement, and child support for other children. The court stated:

> Education loan payments are of the same nature as the deductions that are allowed, that is, they are fixed, legally unavoidable monthly payments, and they have the long-term

> effect of decreasing the former student's real income by the amount of the monthly payment. Unlike ordinary debts, an educational loan cannot, for most former students, be discharged in bankruptcy.

Id. at 674, 584 N.W.2d at 836.

The Court of Appeals reasoned that the student loan would benefit the child because the parent has obtained an education and that, therefore, the student loan should have been taken into account in the child support calculation. The court then deducted the monthly student loan payment from the net monthly income and calculated the child support accordingly.

The State argues that payments to a bankruptcy plan do not benefit a child throughout his or her life in the same manner as student loan payments. It argues that the minor child would be penalized for the noncustodial parent's financial irresponsibility.

We conclude that the district court erred in adopting the referee's report and recommendation concerning the child support payable by Dewitt and therefore abused its discretion in entering the order for increased support in the amount of $346 per month.

[2] In *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000), we held that paragraph C(5) of the guidelines allows a trial court in an appropriate case to deviate from the guidelines to allow a deduction from income based on a parent's student loan payment. Paragraph C of the guidelines provides that the guidelines shall be applied as a rebuttable presumption. However, pursuant to paragraph C(5), deviations from the guidelines are permissible "whenever the application of the guidelines in an individual case would be unjust or inappropriate." The guidelines allow deductions for taxes, Social Security, health insurance, mandatory retirement contributions, and child support for other children. Payments to a bankruptcy plan are not specifically provided for in the guidelines as a deduction or credit. See paragraph C(5).

[3] The Court of Appeals has held that a payment to a bankruptcy plan in and of itself is not sufficient to rebut the presumption that the guidelines should be applied or to require a deviation from the guidelines to avoid an unjust result. See *Lebrato v. Lebrato*, 3 Neb. App. 505, 529 N.W.2d 90 (1995). In *Lebrato*, the father testified that he could pay no more than $700 per month for child support, in part because he was paying $500 per month to a

bankruptcy plan. Although the Court of Appeals did not specifically resolve the question, it noted that the father had been paying far more than was required into a voluntary retirement plan, making his testimony "less than convincing." See *id.* at 518, 529 N.W.2d at 98.

Other courts have considered the effect of bankruptcy plan payments in determining child support. The Montana Supreme Court reversed a modification order, finding that a deduction for bankruptcy payments was in error because it was not provided for under the state's guidelines. See *In re Marriage of Nikolaisen*, 257 Mont. 1, 847 P.2d 287 (1993). The Tennessee Court of Appeals found that the trial court had erred in allowing a monthly deduction for a bankruptcy payment that was not included as an available deduction in the state's guidelines. On remand, the trial court was directed to recalculate the husband's income without considering the bankruptcy deduction. See *Creson v. Creson*, No. 02A01-9801-CH-00002, 1999 WL 65055 (Tenn. App. Feb. 12, 1999).

[4] In the present case, the district court adopted the referee's report, in which the referee concluded that the bankruptcy plan was comparable to a student loan and therefore was a fixed obligation. Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

From our de novo review of the referee's report, we conclude that the referee erred in allowing a $100 credit for the payments to Dewitt's bankruptcy plan. The referee was not justified in crediting $100 of the bankruptcy plan payment directly against the child support that was computed based upon the combined monthly net income of both parents. The district court erroneously adopted the recommendation by the referee concerning the bankruptcy plan payments, and we conclude that the court

abused its discretion. We therefore remand the cause to the district court for a recalculation of child support in accordance with this opinion.

We next address the State's claim that the modified support order should be applied retroactively. The application for modification was filed by the State on December 15, 2000. A responsive pleading was filed on February 20, 2001, and a certificate of readiness for hearing was filed on May 10. The matter was set for trial on November 13. The referee's report was then filed on November 26, which recommended that the increase go into effect on November 1, 2001. A hearing was held before the district court on January 15, 2002, and the court's order was filed on March 13.

The State argues that Dewitt has benefited from delays in the proceedings and that the district court abused its discretion in ordering the child support modification to become effective on November 1, 2001. The court adopted the referee's recommendation concerning the effective date of the modification. The referee found that it was inequitable to make Dewitt wholly responsible for the delay in the support determination by awarding the support retroactively.

[5,6] Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification. See *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system. *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). In *Riggs*, we reiterated that the initial determination as to the retroactive application of the modification is entrusted to the discretion of the trial court. We recognized that in some cases, a noncustodial parent may not be able to pay retroactive support and meet current obligations.

In the present case, the delays do not appear to be the fault of any one individual. We conclude that the district court's determination to make the increase retroactive to the first day of the month of the hearing before the referee, or November 1, 2001, was not an abuse of discretion, and we therefore affirm that portion of the court's judgment.

CONCLUSION

For the reasons set forth herein, we reverse the district court's judgment as to modification of Dewitt's child support obligation, and we remand the cause for a redetermination of such obligation. However, we affirm the remainder of the court's judgment, including that portion establishing November 1, 2001, as the effective date of the modification.

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

BERNARD J. MORELLO, APPELLANT, V. LAND REUTILIZATION COMMISSION OF THE COUNTY OF DOUGLAS, NEBRASKA, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, THIRD-PARTY DEFENDANT, APPELLEE.

659 N.W.2d 310

Filed April 11, 2003. No. S-02-478.

1. **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.
2. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

W. Craig Howell, of Howell & Wilson, P.C., L.L.O., for appellant.

William T. Ginsburg for appellee Land Reutilization Commission.

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

PER CURIAM.

NATURE OF CASE

Bernard J. Morello purchased real estate from the Land Reutilization Commission of the County of Douglas, Nebraska

(LRC). Subsequently, the City of Omaha (City) condemned the property purchased by Morello, and it was ultimately determined that Douglas County (County) owned the property in question, not Morello. Morello commenced this action against the LRC for damages and other relief. The district court granted summary judgment in favor of the LRC, and Morello appeals.

SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Nauenburg v. Lewis, ante* p. 89, 655 N.W.2d 19 (2003).

FACTS

A more detailed statement of the facts surrounding this case is set forth in *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999). We set forth only those facts which are relevant to this appeal.

On June 10, 1988, the County initiated a tax foreclosure action against Father Flanagan's Boys' Home (Boys Home) for delinquent taxes on property owned by the Boys Home. Numerous parcels of real estate, including the tracts in question (24A and 24B), were offered for sale by the Douglas County treasurer, but were not sold and were subject to foreclosure. On October 24, the Boys Home executed and delivered to the County a quitclaim deed regarding tracts 24A and 24B.

On November 10, 1988, the district court for Douglas County entered a decree of foreclosure which included tracts 24A and 24B because the County had failed to remove the tracts from the foreclosure proceeding. The County recorded its quitclaim deed from the Boys Home on April 19, 1989. On June 20, the district court was requested to enter an order for a sheriff's sale of tracts 24A and 24B. The property was then sold to the LRC on July 26. On September 12, 1991, an order confirming the sale was entered, and subsequently, a sheriff's deed was delivered to the LRC. The LRC then sold the property to Morello and delivered to him a special warranty deed on October 30.

On July 23, 1996, the City filed an action seeking to condemn the interests of both the County and Morello. The final report of

the appraisers awarded $56,500 for tract 24A and $3,500 for tract 24B. The City appealed to the district court, alleging that the award was excessive. Morello filed an answer and counterclaim, and the County filed an answer and cross-appeal. On June 11, 1998, the district court entered a partial summary judgment in favor of the County, finding that the County remained the titleholder of the tracts in question. We affirmed. See *id.* We concluded, inter alia, that the property was erroneously sold at the foreclosure sale and that since the property was owned by the County, the transfer to the LRC under the foreclosure sale was void.

On March 10, 2000, Morello commenced this action against the LRC, alleging that he took title to the property in reliance upon the special warranty deed issued by the LRC. He claimed that once he became involved in litigation with the City and the County, the special warranty deed obligated the LRC to defend him. Morello sought recovery of the value of his investment, which he claimed was not less than $225,000. In the alternative, Morello claimed that the LRC was liable for the purchase price of the real estate, interest, and a subsequent increase in value, for a total of $230,000.

The district court granted the LRC's motion for summary judgment. It concluded that under the special warranty deed, the LRC was not obligated to defend Morello in the condemnation proceedings because the defect in title arose under or due to the actions of a prior owner of the property. Morello timely appealed.

ASSIGNMENT OF ERROR

Morello asserts that the district court erred in sustaining the LRC's motion for summary judgment.

ANALYSIS

The LRC was created by the Land Reutilization Act, Neb. Rev. Stat. § 77-3201 et seq. (Reissue 1990). It is a public corporation acting in a governmental capacity and is a political subdivision of the State of Nebraska. It is clothed with the authority necessary for the effective management, sale, transfer, and other disposition of real estate acquired under and by virtue of the foreclosure of a lien for delinquent real estate taxes. See § 77-3201. The LRC is

charged with fostering the public purpose of returning land which is in a non-revenue-generating, non-tax-producing status to effective utilization in order to provide housing, new industry, and jobs for the citizens of the county and new tax revenue for such county. *Id.*

If at a tax foreclosure sale, there is no bid equal to the full amount of the tax bills included in the judgment, interest, penalties, fees, and costs, then the LRC is deemed to have bid the full amount of all the tax bills included. See § 77-3211(1). If there are no other bids received by the sheriff in excess of that amount, then the bid of the LRC is accepted. *Id.*

After the LRC has obtained title to real estate, it has the option of either selling the real estate through a bidding process or transferring it to a governmental agency for public use. It has the authority to convey title to the real estate by either general or special warranty deed. See § 77-3205(2).

Tracts 24A and 24B were acquired by the LRC through a foreclosure sale for a bid of $206.62. After the sale was confirmed, a sheriff's deed to the property was delivered to the LRC pursuant to § 77-3205(2). The LRC then conveyed the property to Morello by special warranty deed. The deed provided in part:

> *LAND REUTILIZATION COMMISSION OF THE COUNTY OF DOUGLAS, NEBRASKA* ("Grantor"), in consideration of the sum of FIVE HUNDRED AND NO/100 . . . DOLLARS, in hand paid by BERNARD J. MORELLO . . . does hereby specially Grant, Bargain, Sell and Convey unto the said Grantee the following described premises . . . .
>
> [S]aid Grantor hereby specially covenants that said premises are free and clear of all liens and encumbrances . . . and it does hereby covenant to SPECIALLY WARRANT AND DEFEND the said premises against the lawful claims and demands of all persons claiming by, through, or under it, and against no other claims or demand.

Morello claims the special warranty deed to tracts 24A and 24B obligated the LRC to defend him in the condemnation proceedings brought by the City. In support of his assignment of error, Morello argues that the district court's ruling misplaced the statutory role of the LRC and the intent of an LRC special

warranty deed. Morello claims that the district court, by doing so, created a de facto quitclaim deed contrary to the statutory authority granted to the LRC.

Morello argues that if the LRC is required to defend only against defects that occur during the time the LRC held the title, such a construction would make the deed a quitclaim deed in substance, even though it might be a special warranty deed in form. He argues that the district court's construction of the deed rendered it a quitclaim deed and that, therefore, the court erred because § 77-3205 does not permit the LRC to convey property by quitclaim deed.

Morello contends that the Legislature intended the special warranty deed to warrant against defects that occur not only during the time that the LRC holds title to property but also during the time that the County holds title. He claims that the law does not allow the LRC to limit its liability to the interest it possesses as the grantor and that in order for a special warranty deed to have meaning, it must go beyond the LRC's interest as a grantor and contemplate defects created by the County. Morello also asserts that the statutory process in which the LRC was created does not involve an arms-length transaction and merely provides a default mechanism whereby the County deeds the land to another governmental entity that serves to dispose of the land.

The LRC and the County are not one. As a political subdivision of the State of Nebraska, the LRC is a separate and distinct entity from the County. Although it is the function of the LRC to dispose of tax-delinquent real estate and part of the purpose for such disposal is to create new tax revenue for the County, the LRC is a separate body. See § 77-3201.

The legal issue is whether a special warranty deed as referred to in § 77-3205(2) warrants the title to real estate against title defects that occur after the County obtains the title or after the LRC obtains the title through a foreclosure sale. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Nauenburg v. Lewis, ante* p. 89, 655 N.W.2d 19 (2003). In our examination of the special warranty deed, we find nothing which suggests that it was intended to be a quitclaim

deed, and Morello has not demonstrated that the deed was intended to warrant against defects occurring before the LRC secured title to the property.

[2] We have not previously considered the definition of a special warranty deed, and it has not been defined by the Legislature. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002). Thus, it is apparent that a special warranty deed, as referred to in § 77-3205, is a different instrument from a general warranty deed. In order to determine the manner in which the two instruments differ, we have consulted the following authorities:

In 11 Thompson on Real Property § 94.07(b)(2)(i) at 390 (David A. Thomas 2d ed. 2002), it is stated in part:

> The covenants in grant deeds are more or less the same as those contained in special warranty deeds. Grantors of special warranty deeds and grant deeds do not promise that they are the true owner of the property or that they will protect the grantees against all claims of superior or paramount title. They only promise that no title defects have arisen or will arise due to the acts or omissions of the grantor. They promise that no one claiming by, through, or under the grantor will be able to assert a title superior to the covenantee's title.

(Emphasis omitted.) "If, in the deed, the grantor assures the grantee that there are no defects in the title whatsoever, no matter how, when, or by whom they may arise, the deed is known as a general or full warranty deed." 14 Richard R. Powell & Michael Allan Wolf, Powell on Real Property § 81A.03[1][b][ii] at 81A-28 (2000). See, also, *Rosenblum v. Eisenhauer*, 29 Conn. Supp. 216, 280 A.2d 537 (1971).

> A deed in which covenants are limited to defects which arise by, through, or under the actions of the grantor is known as a special warranty deed. Under this limited form of warranty, recovery is available only if the defect arises because of the acts of the grantor. In such a case, if the defect is based on events which occurred while the property was in the hands of a prior titleholder, then the grantee will have to look to the covenants, if any, contained in the

deed from a prior titleholder, and cannot recover against the immediate grantor.

14 Powell & Wolf, *supra*, § 81A.03[1][b][iii] at 81A-28.

The Nebraska Real Estate Practice Manual provides in part:

> In a special warranty deed, the grantor agrees that grantor and grantor's heirs will warrant and guarantee the title to the property to the grantee and the grantee's heirs and assigns against all persons claiming by, through, or under the grantor or grantor's heirs. But unlike a general warranty deed, grantor does not warrant against defects in the title that existed before grantor was deeded the property.

Jeffery T. Peetz, Deeds, in Nebraska Real Estate Practice Manual, ch. 13, § 2(c) at 13-2 (Neb. Cont. Legal Educ., 1995). Thus, a special warranty deed is distinguishable from a general warranty deed in that the grantor of a special warranty deed "does not warrant against defects in the title that existed before grantor was deeded the property." See *id.*

It is also clear that a special warranty deed is not a quitclaim deed. In *Gustafson v. Gustafson*, 239 Neb. 448, 451, 476 N.W.2d 819, 821 (1991), we stated: "A quitclaim deed by its nature is an instrument of transfer whereby the grantor transfers only the interest the grantor has in the property at the time of the conveyance." In 14 Powell & Wolf, *supra*, § 81A.03[1][c] at 81A-29, a quitclaim deed is described in the following manner:

> Under a quitclaim deed, the grantor does not purport to "convey" the property to the grantee. Rather the grantor "quitclaims all right, title and interest the grantor may have in the property, if any," to the grantee. It is this language which distinguishes a quitclaim deed from all other deed forms. Under this form of deed, the grantor transfers only what interest he or she may have in the property at the time of conveyance. The grantor makes no assurance to the grantee that he or she actually has good title to, or even any interest at all in, the property and, accordingly, makes no covenants of title. The use of a quitclaim deed can be regarded as notice to the purchaser that there may be outstanding equities against the grantor's title, and can thus cause the purchaser to be denied the benefit of bona fide purchaser status.

Since tracts 24A and 24B were conveyed by a special warranty deed, the LRC did not warrant that it was the true owner of the property. It only warranted that no title defects had arisen or would arise due to the acts or omissions of the LRC. Pursuant to a special warranty deed, recovery is available only if the defects arose because of the acts of the grantor. If a defect is based on events which occurred while the property was in the hands of a prior titleholder, then the grantee cannot recover against the immediate grantor. See 14 Powell & Wolf, *supra*, § 81A.03[1][b][iii].

It is undisputed that the defect in the title to tracts 24A and 24B was not based on events which occurred while the property was in the hands of the LRC. Therefore, the LRC was not required to defend Morello against the defects that occurred prior to the time the LRC obtained title to the property.

CONCLUSION

The LRC conveyed property to Morello by special warranty deed and therefore was not required to defend Morello in litigation with the City and the County because any defects in the title occurred prior to the time the property was conveyed to the LRC. The district court did not err in granting summary judgment in favor of the LRC. We therefore affirm the judgment of the district court.

AFFIRMED.

FLOYDENE WILDER, APPELLEE, V. GRANT COUNTY SCHOOL DISTRICT NO. 0001, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ALSO KNOWN AS HYANNIS ELEMENTARY SCHOOL, APPELLANT.

658 N.W.2d 923

Filed April 11, 2003. No. S-02-579.

1. **Schools and School Districts: Termination of Employment: Teacher Contracts: Evidence: Appeal and Error.** The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.

2. **Statutes: Appeal and Error.** Where the requirements of the statute at issue are a question of law, the appellate court reaches its conclusion independent of the trial court's decision.
3. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
4. ____: ____: ____. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
5. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.

Appeal from the District Court for Grant County: BRIAN SILVERMAN, Judge. Affirmed.

John P. Weis for appellant.

Scott J. Norby, of McGuire and Norby, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Floydene Wilder filed a petition in error in the district court for Grant County to obtain review of the decision of the school board for Grant County School District No. 0001 which terminated Wilder's employment due to a reduction in force. The district court reversed the school board's decision and ordered Wilder reinstated. The school district appeals. We affirm the decision of the district court.

STATEMENT OF FACTS

There is no dispute with regard to the material facts. The appellant, a Class I school district, is a political subdivision providing education to children from kindergarten through the sixth grade. Wilder is a permanent certificated teacher and had been employed by the school district, full time, for 16 years. Prior to her full-time employment, Wilder had worked for the school district, at half-time employment, for 3 years.

During the 2000-2001 school year, the school district served 22 students and employed Wilder and two other full-time teachers.

All three teachers held elementary endorsements. Of the three teachers, Wilder had the fewest years of service, with one teacher having 23 years of service and the other having 18 years of service. Wilder was the only teacher among the three who held an additional endorsement as a "Level 7" library media specialist.

On April 10, 2001, Wilder received a letter indicating that the school district was considering not renewing her teaching contract, due to a reduction in force. The letter stated that termination of Wilder's contract was being considered because Wilder had "the least amount of tenure among the certified staff." In a letter dated April 12, 2001, Wilder requested a hearing before the school board regarding the proposed reduction in force.

A hearing was held on May 15, 2001. At the hearing, the school district's secretary provided information regarding the school district's declining student enrollment. According to the secretary, the school district had 22 students enrolled during the 2000-2001 school year, and it was expected that enrollment would decline to 11 students during the 2001-02 school year. Lou Schoff, who was under contract with the school district to provide administrative services, testified about the reduction of the school district budget for the 2001-02 school year. Schoff stated that he had been asked by the school district to make a recommendation regarding the reduction in force, utilizing only the service records of the three teachers to formulate his recommendation. Schoff testified that he had recommended to the school district to terminate Wilder's employment, based solely on Wilder's having the fewest years of service.

During the hearing before the school board, the school district introduced into the record a copy of the school district's "reduction in force policy." The school district's policy provides as follows:

> 6.8 Reduction in Force
>
> When the Board of Education deems that program changes, budget limitations or other changes in circumstances require a reduction in force, then the board will notify the teacher or teachers that staff reduction procedures are being considered.
>
> In considering staff reduction, normal attrition of personnel through resignation, retirement, termination,

> cancellation, non-renewal, death, etc., shall be taken into consideration by the board.
>
> The procedures used to notify teachers of reduction in force shall be the same as prescribed by statute for all other termination or non-renewal of contract.
>
> Any teacher who is terminated because of reduction in force shall have preferred rights to employment for a period of 24 months commencing at the end of the contract year. The recall of such teacher shall be based on length of service in the district. The teacher shall upon reappointment retain any benefits which have accrued to said teacher prior to termination; however, the leave of absence shall not count as a year of employment unless it meets the statutory definition.

Wilder did not testify or present evidence during the hearing before the school board.

At the conclusion of the hearing, the school board voted unanimously to terminate Wilder's contract due to a "change in circumstances, specifically that there has been a reduction in the enrollment of the elementary school students and also a reduction in the elementary school budget, and that these changes in circumstances necessitates [sic] a reduction in force." The school board indicated that Wilder's contract would be terminated "due to the fact that she ha[d] the least amount of service time among the certified staff of the elementary school."

Wilder appealed the school board's decision to terminate her contract to the district court. Following a hearing, the district court reversed the decision of the school board, concluding that the decision violated Neb. Rev. Stat. § 79-846 (Reissue 1996), because the school district's reduction in force policy contained no "criteria" by which to determine the basis for the reduction in force. Section 79-846 provides as follows:

> Prior to January 1, 1979, every school board, board of education, or governing board of any educational institution in Nebraska covered by the provisions of sections 79-824 to 79-842 shall adopt a reduction-in-force policy covering employees subject to such statutory provisions to carry out the intent of sections 79-846 to 79-849. No such policy shall allow the reduction of a permanent or tenured

> employee while a probationary employee is retained to render a service which such permanent employee is qualified by reason of certification and endorsement to perform or, in cases in which certification is not applicable, by reason of college credits in the teaching area. If employee evaluation is to be included as a criterion to be used for reduction in force, specific criteria such as frequency of evaluation, evaluation forms, and number and length of classroom observations shall be included as part of the reduction-in-force policy.

Due to the absence of any criteria in the school district's reduction in force policy, the district court determined that the school district's termination of Wilder's contract was arbitrary. The district court also determined that contrary to Neb. Rev. Stat. § 79-847 (Reissue 1996), the school district had failed to establish that the change in circumstances necessitating the reduction in force specifically related to Wilder. Section 79-847 provides:

> Before a reduction in force occurs, the school board or board of education and the school district administration shall present competent evidence demonstrating that a change in circumstances has occurred necessitating a reduction in force. Any alleged change in circumstances must be specifically related to the teacher or teachers to be reduced in force, and the board, based upon evidence produced at the hearing required by sections 79-824 to 79-842, shall be required to specifically find that there are no other vacancies on the staff for which the employee to be reduced is qualified by endorsement or professional training to perform.

The district court ordered the school district to reinstate Wilder's contract of employment. The school district appeals.

ASSIGNMENT OF ERROR

On appeal, the school district assigns three errors, which we restate as one. The school district claims, restated, that the district court erred in determining that the school district's termination of Wilder's contract as a result of a reduction in force was arbitrary and not based upon a change in circumstances specifically related to Wilder.

STANDARDS OF REVIEW

[1] The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. *McQuinn v. Douglas Cty. Sch. Dist. No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2000); *Nickel v. Saline Cty. Sch. Dist. No. 163*, 251 Neb. 762, 559 N.W.2d 480 (1997). The evidence is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Id.* Stated another way, the evidence is considered sufficient as a matter of law, or is "'"substantial"'" or constitutes "'"some competent evidence,"'" as those terms have been used in prior articulations of the standard of review in these cases, "'if a judge could not, were the trial to a jury, direct a verdict.'" *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 676, 559 N.W.2d 448, 453 (1997) (quoting *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985)).

ANALYSIS

On appeal, the school district challenges the district court's decision ordering Wilder's reinstatement. The district court reasoned that the termination of Wilder's contract pursuant to the school district's reduction in force policy was arbitrary, because the policy contained no criteria by which a reduction in force decision could be made. Given the statutes and the facts of this case, we affirm the district court's decision.

[2] We have previously observed that, by statute, "the Legislature has attenuated a school [district's] discretion to pare its staff in the face of reduced needs and has imposed specified procedures for achieving a reduction in force." *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 38-39, 424 N.W.2d 881, 882 (1988). One such procedure is that the school district must adopt a reduction in force policy. See § 79-846. At issue in this appeal is whether the policy adopted by the school district is an adequate reduction in force policy under § 79-846. Because our interpretation of the requirements of the statute at issue is a question of law, we reach our conclusion in that respect independent

of the trial court's decision. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002). See, similarly, *Ackerman v. Metropolitan Community College*, 6 Neb. App. 536, 575 N.W.2d 181 (1998) (stating that whether college reduction in force was in compliance with statute is question of law).

[3-5] In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002). It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Id.*; *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002). A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002).

As stated above, pursuant to § 79-846, "every school board, board of education, or governing board of any educational institution in Nebraska covered by the provisions of sections 79-824 to 79-842 shall adopt a reduction-in-force policy covering employees subject to such statutory provisions." Elsewhere, § 79-846 provides that "[i]f employee evaluation is to be included as a criterion to be used for reduction in force," various forms and procedures "shall be included as part of the reduction-in-force policy." The reference in § 79-846 to employee evaluation as one "criterion" indicates that the Legislature intended that a reduction in force policy should contain criteria by which a reduction in force decision would be made. The use of the word "criterion" in § 79-846 is neither superfluous nor meaningless. *Volquardson, supra.* We therefore conclude that a reduction in force policy adopted pursuant to § 79-846 must contain criteria on which the reduction in force decision will be made.

In the instant case, the school district's reduction in force policy that was included as an exhibit in the record does not identify any criteria by which a reduction in force decision would be made. Although we have said that "a school board has broad discretion in determining what factors to include in its reduction in

force policy as well as how to weigh those factors," *Nickel v. Saline Cty. Sch. Dist. No. 163*, 251 Neb. 762, 771, 559 N.W.2d 480, 486 (1997), we have not and do not endorse a policy with no factors. Accordingly, as a matter of law, the school district's policy does not comport with the requirements of § 79-846.

The proceedings in this case show that Wilder's contract with the school district was terminated because she had "the least amount of service time among the certified staff." Although the April 10, 2001, letter from the school district advised Wilder that years of service would be considered when the district made its reduction in force decision, that letter is no substitute for a proper policy under the statute, the adoption of which policy should antedate the changes necessitating the reduction in force. Because the school district's policy contained no criteria on which to base a reduction in force decision, there is no evidence to show that the school board's reduction in force decision was in accordance with that policy. Thus, the evidence does not meet the requirement under § 79-847 that the evidence produced at the hearing establish that, among other things, the change in circumstances necessitating a reduction in force specifically relate to Wilder. See *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988). The district court correctly reversed the decision of the school board.

CONCLUSION

The standard of review of a proceeding in error taken from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. *McQuinn v. Douglas Cty. Sch. Dist. No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2000); *Nickel, supra*. In this case, the reduction in force policy was flawed and the evidence is not sufficient as a matter of law to support the school board's decision to terminate Wilder's contract due to a reduction in force. Accordingly, we affirm the decision of the district court which ordered Wilder reinstated.

AFFIRMED.

MARION BENNETT, APPELLANT, V. JOHN LABENZ ET AL., DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLEES, AND BOARD OF REGENTS, DOING BUSINESS AS UNIVERSITY OF NEBRASKA MEDICAL CENTER, AN AGENCY OF THE STATE, THIRD-PARTY DEFENDANT, APPELLEE.

659 N.W.2d 339

Filed April 18, 2003. No. S-01-1101.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence: Words and Phrases.** Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty.
4. **Negligence.** Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, J. PATRICK MULLEN, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Joseph B. Muller, of Law Offices of Ronald J. Palagi, P.C., for appellant.

Michelle Peters, Assistant Omaha City Attorney, for appellee John Labenz et al.

David L. Welch, of Gaines, Pansing & Hogan, for appellee Board of Regents.

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

MILLER-LERMAN, J.

NATURE OF CASE

Marion Bennett filed a negligence action against John Labenz, Matt Harden, and the City of Omaha (collectively the Defendants)

seeking damages for injuries she sustained while being transported by Labenz and Harden, two Omaha firefighter-paramedics. The Defendants filed a third-party action against the Board of Regents, doing business as the University of Nebraska Medical Center (UNMC). After concluding that the Defendants' alleged negligence did not amount to gross negligence, the district court for Douglas County granted the Defendants' motion for summary judgment and dismissed the petition. Bennett appealed to the Nebraska Court of Appeals, and the Court of Appeals concluded, inter alia, that the district court erred in determining as a matter of law that Labenz and Harden were not grossly negligent. *Bennett v. Labenz*, No. A-01-1101, 2002 WL 31548926 (Neb. App. Nov. 19, 2002) (not designated for permanent publication). The Court of Appeals reversed in part the grant of summary judgment in the Defendants' favor and remanded the cause. The Defendants petitioned this court for further review of certain aspects of the decision of the Court of Appeals. We granted the petition. We affirm in part, and in part reverse and remand with directions.

STATEMENT OF FACTS

On April 28, 1997, Labenz and Harden responded to a 911 emergency dispatch service call at Bennett's home. Bennett had fallen and injured her leg. Labenz and Harden assessed her condition and placed her on a stretcher for transport to UNMC. Labenz and Harden strapped Bennett onto the stretcher. They encountered no problems getting Bennett into the ambulance and transporting her to UNMC.

On April 28, 1997, the main emergency entrance at UNMC was under construction, and UNMC had set up a temporary emergency entrance. The record shows that there had been no reports of dangerous conditions surrounding the temporary emergency entrance. Harden testified that he had not noticed any cracks in the cement that would cause concern. The temporary entrance was on an incline. Labenz and Harden were familiar with the temporary entrance and the incline.

Upon arriving at UNMC, Harden grabbed the end of the stretcher and pushed the release lever, which released the stretcher so he could roll it out of the ambulance to the point where the safety bar catches a hook that is located on the back of

the ambulance, thus preventing the stretcher from rolling out. Harden dropped the legs of the stretcher down and locked them into place. Labenz then lifted the safety bar over the hook. Both Labenz and Harden rolled the stretcher out of the ambulance. While moving the stretcher toward the emergency room entrance, a wheel of the stretcher became caught in a crack in the cement of the hospital driveway, causing the stretcher to tip over and Bennett to fall. Bennett broke her left shoulder as a result of the fall.

David McClard, a "triage tech" at UNMC, witnessed the incident. According to McClard, the stretcher tipped over after it became caught in a crack in the cement. He stated that only one of the firefighter-paramedics was moving the stretcher at the time of the incident.

Bennett filed a negligence action against the Defendants. The Defendants filed a third-party petition against UNMC as a third-party defendant, alleging UNMC was negligent in failing to maintain the driveway at the temporary emergency entrance. In the Defendants' answer to Bennett's petition, they alleged immunity pursuant to Neb. Rev. Stat. § 71-5111 (Reissue 1996). Section 71-5111 provided immunity from civil liability for certain emergency and ambulance workers, but further provided that such immunity should not apply to "any person causing damage or injury by his or her willful, wanton, or grossly negligent act of commission or omission." We note that § 71-5111 has been repealed and replaced by Neb. Rev. Stat. § 71-5194 (Cum. Supp. 2002). However, the operative date of the repeal was July 1, 1998, which was subsequent to the April 28, 1997, incident involved in this case, and, therefore, § 71-5111 is applicable to this case.

Bennett filed a second amended petition on April 9, 2001, in which she alleged that Labenz and Harden were willfully, wantonly, or grossly negligent and that their negligence resulted in her injury. Generally, Bennett alleged that Labenz and Harden were negligent in moving the stretcher without adequate assistance, moving the stretcher while it was in the fully extended position, failing to note the condition of the driveway, and failing to take proper precautions in light of the condition of the driveway. Bennett claimed that the City of Omaha was liable as a result of the acts of Labenz and Harden. Bennett further alleged that the

City of Omaha was negligent for failing to train and instruct Labenz and Harden on the proper operation of the stretcher.

On May 8, 2001, the Defendants filed a motion for summary judgment, asserting that they were immune from civil liability pursuant to § 71-5111. In Bennett's response to the motion for summary judgment, she requested that the court overrule the motion or, in the alternative, continue the motion and grant her additional time to conduct discovery. The motion came on for hearing, and on September 5, the district court entered an order sustaining the motion and dismissing the case with prejudice. The court concluded that the allegations of negligence on the part of Labenz and Harden did not amount to gross negligence and that no reasonable person could conclude that they had acted without slight care. The court further concluded that the immunity provided under § 71-5111 applied to the City of Omaha as the employer of Labenz and Harden, that the City of Omaha could not be held liable for the actions of Labenz and Harden which were not grossly negligent, and that the allegations of direct negligence on the part of the City of Omaha in failing to train and instruct did not amount to gross negligence.

Bennett appealed to the Court of Appeals. On appeal, Bennett asserted, inter alia, that the district court erred in determining that Labenz and Harden were not grossly negligent and in determining that § 71-5111 granted immunity to the City of Omaha for its own direct negligence. The Court of Appeals reviewed the record and noted, inter alia, that there was a conflict in the evidence regarding whether only one or both of the firefighter-paramedics had their hands on the stretcher when it tipped over and whether the use of the stretcher comported with the operating manual for the stretcher. The Court of Appeals concluded that viewing the evidence in the light most favorable to Bennett and giving her the benefit of all reasonable inferences deducible from the evidence, the district court erred in determining as a matter of law that Labenz and Harden were not grossly negligent.

With regard to the alleged direct acts of negligence of the City of Omaha, the Court of Appeals concluded that the district court erred in holding that § 71-5111 provided immunity to the City of Omaha for its own negligence. The Court of Appeals stated that the immunity provided under § 71-5111 extended to the City of

Omaha only so far as it might be liable based on respondeat superior for the acts or omissions of Labenz and Harden, but that the statute did not grant immunity to the City of Omaha for its own alleged negligence in failing to properly train Labenz and Harden.

The Court of Appeals therefore reversed in part the grant of summary judgment in the Defendants' favor and remanded the cause. The Defendants petitioned this court for further review of the Court of Appeals' decision, and we granted their petition.

ASSIGNMENT OF ERROR

The Defendants assert on further review that the Court of Appeals erred in reversing the district court's ruling in which the district court had determined that Labenz and Harden were not grossly negligent and had entered summary judgment in their favor. Further review has not been sought regarding the conclusion of the Court of Appeals that § 71-5111 did not provide immunity for the City of Omaha for its own alleged acts of negligence and that the decision should be reversed in part and the cause remanded as to the City of Omaha's direct negligence.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *In re Estate of Pfeiffer, ante* p. 498, 658 N.W.2d 14 (2003). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Upon review of pleadings and evidence in connection with Defendants' motion for summary judgment, the district court in the present case determined that "[n]o reasonable person could conclude that defendants Labenz and Harden acted without slight care" and that therefore Bennett's allegations of negligence on the part of Labenz and Harden did not amount to gross negligence. On appeal, the Court of Appeals noted evidence indicating that

Labenz and Harden might not have employed certain indicated techniques while moving the stretcher toward the temporary emergency entrance and therefore concluded that the district court erred in determining that Labenz and Harden were not grossly negligent. On further review, the Defendants argue that even if Labenz and Harden failed to follow certain indicated procedures, such failure cannot establish that they acted without even slight care and therefore cannot be viewed as gross negligence. We agree with the Defendants' argument as well as the district court's conclusion that given the undisputed facts, Bennett cannot establish gross negligence on the part of Labenz and Harden.

[3,4] Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty. *Drake v. Drake*, 260 Neb 530, 618 N.W.2d 650 (2000). Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. *Wicker v. City of Ord*, 233 Neb. 705, 447 N.W.2d 628 (1989). The issue of gross negligence is susceptible to resolution in a motion for summary judgment. See *id.* Depending on the facts, we have observed that negligence that is momentary in nature generally does not constitute gross negligence. *Branch v. Wilkinson*, 198 Neb. 649, 256 N.W.2d 307 (1977).

In the present case, Bennett alleged that Labenz and Harden failed to take certain actions which might have prevented the incident. In this regard, Bennett points to the testimony of McClard who, contrary to Harden's recollection, testified that only one of the firefighter-paramedics had his hands on the stretcher at the time it hit the crack and tipped over.

Although Bennett's evidence might support a conclusion that Labenz and Harden were negligent to some degree, in order to establish gross negligence and be recoverable under § 71-5111, Bennett needed to show an absence of even slight care by Labenz and Harden. Further, even taking the inferences from the evidence in favor of Bennett, the pleadings and evidence do not indicate great or excessive negligence. Harden provided undisputed testimony that he and Labenz took certain precautions recited in the facts section above in transporting Bennett, in removing her from the ambulance, and in using the stretcher. In

this connection, Labenz testified that although he was aware of the incline of the entrance, he was not aware of the crack in the pavement. In light of the undisputed testimony that Labenz and Harden took certain precautions, Bennett's allegations that they failed to take other additional precautions does not establish "the absence of even slight care" required to constitute gross negligence. See *Drake v. Drake*, 260 Neb. at 543, 618 N.W.2d at 661. Based on the evidence as to the actions of Labenz and Harden, we agree with the district court's conclusion that no reasonable person could find that Labenz and Harden acted without even slight care. The portion of the decision of the Court of Appeals which reversed the district court's decision on this issue was incorrect and is reversed.

CONCLUSION

We conclude that the district court did not err in determining that no reasonable person could find that Labenz' and Harden's actions constituted gross negligence. We therefore reverse that part of the Court of Appeals' opinion in which it reversed this determination of the district court. We remand this cause to the Court of Appeals with directions to affirm that portion of the district court's order which granted the Defendants' motion for summary judgment in favor of Labenz and Harden and dismissed the case as to Labenz and Harden and, with respect to the City of Omaha, granted the motion in favor of the City of Omaha only to the extent that the City of Omaha's alleged liability was based on respondeat superior.

We note that in addition to its holding regarding the alleged gross negligence of Labenz and Harden and the City of Omaha's alleged liability therefor, the Court of Appeals concluded that § 71-5111 did not provide immunity for the City of Omaha's own alleged negligence in failing to train and instruct Labenz and Harden. The Court of Appeals reversed the district court's dismissal of this claim and remanded the cause on the issue of the City of Omaha's own negligence. Because the Defendants did not assign error to this decision of the Court of Appeals, we do not comment on this portion of the decision of the Court of Appeals, and such ruling is unaffected by our decision. Therefore that portion of the Court of Appeals' decision is affirmed, and the

order remanding the cause to the district court on the issue of the City of Omaha's own negligence remains in effect.

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

STEPHAN, J., not participating.

CHRISTOPHER S. HAMILTON, APPELLANT, V. WAYNE NESTOR, PERSONAL REPRESENTATIVE OF THE ESTATE OF DIANN K. NESTOR, DECEASED, APPELLEE.

659 N.W.2d 321

Filed April 18, 2003. No. S-02-356.

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. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Actions: Mental Distress.** An emotional distress claim is not a cause of action, but, rather, a separate theory of recovery or element of damage.
5. **Mental Distress.** In order to be recoverable, emotional distress must have been so severe that no reasonable person could have been expected to endure it and that the emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically significant.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed.

John M. Lefler for appellant.

James M. Bausch, Tracy A. Oldemeyer, and Pamela K. Epp, of Cline, Williams, Wright, Johnson & Oldfather, P.C., for appellee.

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

STEPHAN, J.

In this action arising from a motor vehicle accident, the district court for Gage County held as a matter of law that Christopher S. Hamilton could not recover on his negligence claim. The court reasoned that Hamilton suffered no physical injury in the accident and therefore could not recover damages for his emotional distress caused by the accident. Hamilton appeals from a denial of his motion for new trial.

FACTS

In Hamilton's operative amended petition filed against Wayne Nestor, the personal representative of the estate of DiAnn K. Nestor (Nestor), Hamilton alleged that on October 21, 1997, he was involved in a motor vehicle collision caused by Nestor's negligence. Both Nestor and her daughter Laura, who was a passenger in her vehicle, sustained fatal injuries. Hamilton alleged that as a proximate result of Nestor's negligence, he suffered "mental and psychological injuries, including posttraumatic stress disorder." He prayed for both general and special damages.

The personal representative moved for summary judgment. At a hearing on the motion, the personal representative offered portions of Hamilton's deposition in which he admitted that he banged his knees on the dashboard during the accident but otherwise suffered no physical injuries. In other portions of the deposition, Hamilton described recurrent nightmares in which he comes upon accident scenes and finds that he or his family members are the victims. These nightmares occur five to six times a week when he is not on medication and one to two times a week when he is medicated. Hamilton also described "flashbacks" that usually occur when he is driving, in which he sees all or part of the accident. Hamilton is generally fearful that he will be involved in another accident and feels guilty that he was unable to prevent the deaths of two people. He testified that he once blacked out while driving near the intersection where the accident occurred. Also received in evidence was the deposition testimony of Dr. Y. Scott Moore. Moore testified that Hamilton suffered posttraumatic stress disorder as a result of the accident.

The district court granted the personal representative's motion for summary judgment on January 10, 2002. In its order, the court

found that Hamilton did not suffer any physical injury in the accident. Relying on *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998), and *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964), *disapproved on other grounds, Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994), the court determined that Nebraska law allows recovery for mental suffering and anxiety only in negligence actions in which a physical injury has been sustained. The court further noted that although Nebraska allows a cause of action for negligent infliction of emotional distress, "[t]his action is not one for negligent infliction of emotional distress, but rather [one that] alleges mental or emotional damages as a result of automobile negligence."

Hamilton filed a motion for new trial in which he alleged that the trial court erred in granting the motion for summary judgment. Alternatively, Hamilton alleged that the trial court erred in failing to allow the case to proceed on the theory of negligent infliction of emotional distress or to grant Hamilton leave to amend his petition to specifically allege that theory. In an order overruling the motion, the district court held that Hamilton could not recover on a negligence cause of action because his mental suffering did not arise out of a physical injury and that he could not proceed on a negligent infliction of emotional distress theory as a matter of law because he had no marital or familial relationship with Nestor. Hamilton filed this timely appeal, and we granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Hamilton assigns, restated and summarized, that the district court erred in (1) sustaining Nestor's motion for summary judgment on the basis that posttraumatic stress disorder is not compensable under a general motor vehicle negligence claim and (2) denying his motion for new trial, thereby precluding him from proceeding on an alternate claim for negligent infliction of emotional distress.

STANDARD 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. *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002); *Bowley v. W.S.A., Inc.*, 264 Neb. 6, 645 N.W.2d 512 (2002).

[2,3] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002); *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002); *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002). 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. *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002); *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002).

ANALYSIS

Characterization of This Action

[4] We disagree with the district court's characterization of this action as "not one for negligent infliction of emotional distress, but rather [one that] alleges mental or emotional damages as a result of automobile negligence." We have stated that an "emotional distress claim is not a cause of action, but, rather, a separate theory of recovery or element of damage." *Fackler v. Genetzky*, 257 Neb. 130, 139, 595 N.W.2d 884, 891 (1999). This is a civil action for damages based upon allegations of negligent operation of a motor vehicle on a public highway. Hamilton makes no claim that the physical structure of his body was injured in the accident, and he therefore seeks no damages for mental pain and suffering related to a physical injury. Nor is this a case involving a claim for parasitic damages, which are damages occasioned by anxiety specifically due to a reasonable fear of future harm attributable to a physical injury caused by the negligence of another. See *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998). Rather, the injury claimed by Hamilton can be fairly described as "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of

another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms." See *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 544, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994). This is the only injury for which Hamilton claims damages in this action. Thus, while it is true that the negligence alleged in this case involved the operation of a motor vehicle, the injury which is claimed to have resulted from such negligence is purely an emotional one. This, then, is an action for negligent infliction of emotional distress.

In *Consolidated Rail Corporation v. Gottshall, supra*, the U.S. Supreme Court was presented with the issue of whether a purely emotional injury was compensable under the Federal Employers' Liability Act, which permits railroad employees to recover for work injuries caused by an employer's negligence. See 45 U.S.C. § 51 (2000). In addressing this issue, the Court acknowledged that while nearly all states have recognized a right to recover for negligent infliction of emotional distress, as defined by the Court in the passage quoted above, the "fundamental differences between emotional and physical injuries" has led to practical limitations upon the common-law right of recovery for reasons of public policy. *Consolidated Rail Corporation v. Gottshall*, 512 U.S. at 545. For example, the Court noted that

> "[b]ecause the etiology of emotional disturbance is usually not as readily apparent as that of a broken bone following an automobile accident, courts have been concerned . . . that recognition of a cause of action for [emotional] injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act."

512 U.S. at 545, quoting *Maloney v. Conroy*, 208 Conn. 392, 545 A.2d 1059 (1988). Other policy considerations noted by the Court as influencing limitations upon the right to recover damages for emotional distress include the absence, in comparison to physical injury, of "necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act," and the difficulty of predicting the incidence and severity of emotional injuries which "depend on psychological

factors that ordinarily are not apparent to potential tortfeasors." *Consolidated Rail Corporation v. Gottshall*, 512 U.S. at 545-46. The Court concluded:

> For all of these reasons, courts have realized that recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants. *Courts therefore have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable.*

(Emphasis supplied.) 512 U.S. at 546.

Negligent Infliction of Emotional Distress in Nebraska

This court addressed the relationship between emotional injury and physical injury in *Hanford v. Omaha & C. B. Street R. Co.*, 113 Neb. 423, 203 N.W. 643 (1925). In that case, a pregnant woman was approaching a streetcar she intended to board when a second streetcar crashed into the first. Although the woman suffered no direct physical injury from this collision, it caused her to jump backward and she suffered a strain, causing her to become ill and suffer a miscarriage. The jury returned an award in her favor. On appeal, the defendant argued that the jury should have been instructed that if the miscarriage was caused by the woman's jumping backward, then the defendant was liable, but if it was caused by fright alone, then the defendant was not liable. After an extensive examination of case law from other jurisdictions, we held that "if defendant's negligence was the proximate cause of fright, and fright, in natural and probable sequence, the proximate cause of physical injury, the chain of causation is complete, and the fright is not an independent cause." *Id.* at 439, 203 N.W. at 649-50. We thus concluded that the woman was entitled to recover whether her injuries resulted from the jump backward or solely from the fright.

We considered analogous circumstances in *Netusil v. Novak*, 120 Neb. 751, 235 N.W. 335 (1931). There, the plaintiff was walking along a street when the defendant's growling dog approached her in a crouched position with teeth bared, causing her to faint. As a result, she suffered "nervous prostration." *Id.* at 755, 235

N.W. at 337. Citing *Hanford*, we noted that there can be liability for physical injuries which are proximately caused by fright and terror. We concluded that the defendant was liable to the plaintiff for her injuries.

Rasmussen v. Benson, 135 Neb. 232, 280 N.W. 890 (1938), involved a dairy farmer who bought a sack of unlabeled "bran" at a farm sale and fed it to his cows and other livestock. The next morning, after he had milked the cows and delivered the milk to his customers, the cows became very sick. Upon discovering this, the farmer notified all of his customers. The "bran" was subsequently found to contain arsenic. Most of the farmer's livestock later died, and he lost the dairy business he had built up over a 10-year period. As a result of the nervous shock caused by the poisoning of his livestock, the loss of his business, and the fear of communicating the poison to his customers, the farmer became fatally ill and died. According to the medical testimony, he died of a "decompensated heart caused by an excessive emotional disturbance." *Id.* at 233, 280 N.W. at 890. In finding that the seller of the poisoned bran was liable for the farmer's death, we cited *Hanford* for the proposition that a physical injury resulting from an emotional upset produced by the negligence of another creates liability for damages. We noted that this proposition does not allow recovery for worry alone, unaccompanied by physical injury. We also clearly stated for the first time that recovery for physical injuries resulting from emotional distress is not limited to situations in which the fright was accompanied by physical impact.

In *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), a young couple with two small children requested a termite inspection of a home they were buying. The defendant's report indicated there was termite activity at one time, but no present damage. Approximately 3 months later, extensive termite damage was discovered, and the wife subsequently sought medical attention because she was constantly crying, could not sleep, and was deeply depressed. She was hospitalized on three occasions and was treated by a psychiatrist for over 3 years. Evidence indicated her mental distress was caused by the discovery of the termite infestation and the resulting damage to her home. This court noted that although we had abrogated

the impact rule, a plaintiff seeking recovery for negligently inflicted emotional distress was still required to show (1) that some type of physical injury resulted from the negligently inflicted suffering and (2) that the plaintiff was within the " 'zone of danger' " or actually feared for his or her own safety. *Id.* at 687, 305 N.W.2d at 607. Finding that the wife had not suffered any physical injury and that she had never been placed in fear of bodily harm to herself or anyone else, we held that her mental distress was not actionable. We distinguished *Rasmussen v. Benson, supra*, on the basis that the farmer suffered actual personal loss and that the seller's act was so wanton and reckless as to approach intentional injury.

A dissent in *Fournell v. Usher Pest Control Co., supra*, argued that the requirement that emotional harm must manifest itself in bodily harm was "outmoded and should be rejected." *Id.* at 690, 305 N.W.2d at 608. The dissent reasoned:

> To suggest that a psychological injury is not as grievous as a physical injury is to ignore reality. And to further suggest that if one can be sufficiently mentally disturbed so as to suffer a coronary occlusion, he or she may recover in tort, but if he or she simply becomes an emotionally distressed person, reduced to sniveling and crying and attempting suicide, he or she may not recover, does not seem to me to be founded upon any rational basis.

Id. at 690-91, 305 N.W.2d at 608. The dissent continued:

> To therefore require that, before one who is mentally injured may recover, he must at least regurgitate once seems to me to be imposing upon the law a requirement that makes little or no sense. As I indicated at the outset, I would join with those jurisdictions which have adopted what I perceive to be the more modern view and would permit a cause of action to exist for mental anguish, absent bodily harm or other compensable damage.

Id. at 697, 305 N.W.2d at 611.

Four years later, this court decided *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). In that case, two young siblings were riding their bicycles when a garbage truck negligently backed through a stop sign, killing the girl as her brother helplessly watched. The brother became physically ill and suffered

emotional distress. An action brought by the parents on behalf of their son was dismissed by the trial court based on a finding that the petition failed to meet the requirements of *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), because it did not allege that the boy was within the " 'zone of danger' " or feared for his own safety. *James v. Lieb*, 221 Neb. at 48, 375 N.W.2d at 111. On appeal, we emphasized that *Fournell* concerned recovery by an alleged " 'direct victim' " of the defendant's negligence, while *James* presented the issue of under what circumstances a bystander could recover for negligent infliction of emotional distress. *James v. Lieb*, 221 Neb. at 49, 375 N.W.2d at 111. We defined " 'bystander[s]' " as "those persons who are not immediately threatened with physical injury nor placed in fear for their own safety by the defendant's negligence." *Id.* In our analysis, we noted that California had abolished the zone-of-danger rule and allowed bystander recovery in *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *James v. Lieb, supra.* After examining the implications of *Dillon*, we concluded that "the *Dillon* approach based upon the reasonable foreseeability of the harm [is] a more logical and just method of determining a defendant's liability than the artificial boundaries of recovery drawn by the 'zone of danger' rule." *James v. Lieb*, 221 Neb. at 54, 375 N.W.2d at 114. After so concluding, we adopted the foreseeability approach of *Dillon*, with certain modifications.

First, we held that the relationship between the plaintiff and the victim was the most valuable in determining foreseeability, and thus required that there be a marital or intimate familial relationship between the plaintiff bystander and the victim. We then noted that the plaintiff was not required to experience actual sensory perception of the injury. Finally, we held that the emotional trauma must result from either death or serious injury to the victim.

Finally, but significantly, we addressed the *Fournell* requirement that a plaintiff must present evidence of a physical injury resulting from the emotional trauma. Agreeing with the rationale of the *Fournell* dissent, we rejected the physical injury requirement, noting that "[w]hile physical manifestation of the psychological injury may be highly persuasive, such proof is

not necessary given the current state of medical science and advances in psychology." *James v. Lieb*, 221 Neb. at 58, 375 N.W.2d at 116.

James v. Lieb, 221 Neb. 47, 375 N.W.2d 109 (1985), clearly adopted a modified version of the *Dillon* test to be applied in bystander cases. Notably, however, *James* specifically overruled *Fournell v. Usher Pest Control Co., supra*, only to the extent that *Fournell* was in conflict with *James*. Because *Fournell* involved a direct victim of the defendant's negligence, while *James* involved a bystander, *James* did not completely abolish the zone-of-danger rule in Nebraska. The zone-of-danger rule is still applicable in direct-victim cases, and the modified *Dillon* rule is applicable in bystander cases. See *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 270, 498 N.W.2d 522, 524 (1993) (recognizing that notwithstanding *James v. Lieb, supra*, an action for negligent infliction of emotional distress may still be maintained "by a 'direct victim' of a defendant's negligence"). Clearly, however, *James* did abolish the requirement that the emotional injury must be manifested in physical symptoms in order to be actionable, regardless of whether the claim is asserted by a bystander or by a direct victim of a negligent act.

Our jurisprudence from *Hanford v. Omaha & C. B. Street R. Co.*, 113 Neb. 423, 203 N.W. 643 (1925), through *James v. Lieb, supra*, expanded the class of plaintiffs who may recover for emotional injuries to include both direct victims and certain bystanders, without regard to whether there was a contemporaneous physical injury. However, as our law has evolved since *James*, we have placed specific limitations on the type of emotional injury which may be compensable in a negligence action. In *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992), the plaintiff claimed that a nurse was negligent in performing medical procedures upon him which were beyond the scope of her licensure. He alleged that as a proximate result of the nurse's negligence, he suffered headaches, sleeplessness, vomiting, and severe emotional distress. In determining whether such damages were recoverable, we adopted the standard used in intentional infliction of emotional distress cases which states that in order for "emotional distress to be compensable, it must be severe." *Id.* at 481, 488 N.W.2d at 576, citing

Hassing v. Wortman, 214 Neb. 154, 333 N.W.2d 765 (1983), and *Pick v. Fordyce Co-op Credit Assn.*, 225 Neb. 714, 408 N.W.2d 248 (1987). Under this standard, we held that the plaintiff's claimed emotional injury "was, as a matter of law, not of sufficient severity to warrant compensation." *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. at 481, 488 N.W.2d at 576.

[5] We refined the test for compensability of negligently inflicted emotional injury in *Schleich v. Archbishop Bergan Mercy Hosp.*, 241 Neb. 765, 491 N.W.2d 307 (1992). The plaintiff in that case was the mother of a patient who died while recovering from surgery at a hospital. Hospital officials notified the coroner that they considered the death suspicious, and as a result, the plaintiff was briefly detained and interviewed by police. She claimed to have suffered emotional distress resulting from the negligence of the hospital in notifying police of the death, and a jury returned a verdict in her favor. Reversing on appeal, we concluded that the evidence did not establish either negligence or compensable injury. With respect to the latter, we wrote that in order to be recoverable, "emotional distress must have been so severe that no reasonable person could have been expected to endure it" and that "the emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically significant." *Id.* at 770-71, 491 N.W.2d at 310-11. Because the plaintiff had presented no medical evidence in support of her claim, we held that she failed as a matter of law to prove that she had suffered severe emotional distress. We have continued to apply this two-pronged test in negligence actions where damages are sought for purely emotional injury. See, e.g., *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993); *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 731, 496 N.W.2d 914 (1993).

Hamilton's Claim for Emotional Distress

Applying these principles to the instant case, we conclude that Hamilton falls within the class of plaintiffs who may seek damages for emotional injury caused by the negligence of another. As the operator of one of the vehicles involved in the collision, Hamilton was clearly within the zone of danger. Because he was thus a direct victim of the alleged negligence of the other driver, and not a bystander, his right to recover is not dependent upon

establishing a "marital or intimate familial relationship" with any other victim. See *James v. Lieb*, 221 Neb. 47, 55, 375 N.W.2d 109, 115 (1985).

The remaining issue is whether the specific emotional injury sustained by Hamilton is actionable under the criteria established by our cases. The record includes the expert opinion of Moore, a psychiatrist, that Hamilton suffers from posttraumatic stress disorder as a result of the 1997 accident. Moore testified that Hamilton exhibits symptoms of this disorder, including dreams and flashbacks, which warrant treatment. Moore referred to these symptoms as "clinically significant distress." This evidence is sufficient to meet the requirement that the emotional anguish or mental harm for which recovery is sought must be medically diagnosable and must be of sufficient severity that it is medically significant. See, *Sell v. Mary Lanning Memorial Hosp., supra*; *Schleich v. Archbishop Bergan Mercy Hosp., supra.*

However, as noted above, actionable emotional distress must also be "'"so severe that no reasonable person could have been expected to endure it."'" *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. at 272, 498 N.W.2d at 525. Accord *Schleich v. Archbishop Bergan Mercy Hosp., supra.* Our case law establishes a high threshold of severity under this standard. For example, in *Sell*, the plaintiff was informed by hospital employees that her 17-year-old son had died in a motorcycle accident. On the following day, the plaintiff was asked by the mortician to view the body, and she discovered that it was not that of her son, but of another 17-year-old male who had died in the accident. The plaintiff then learned that her son was alive and receiving care at the hospital. The plaintiff testified that following this incident, she cried continually, had difficulty eating, and required medication in order to sleep. We concluded that "[w]ithout minimizing plaintiff's apparent and understandable heartache upon being told of her son's death," she had failed as a matter of law to establish emotional distress meeting the standard of "'"so severe that no reasonable person could have been expected to endure it."'" *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. at 272, 498 N.W.2d at 525.

Similarly, in *Andreasen v. Gomes*, 244 Neb. 73, 504 N.W.2d 539 (1993), *disapproved on other grounds, Darrah v. Bryan*

Memorial Hosp., 253 Neb. 710, 571 N.W.2d 783 (1998), parents sought recovery for emotional injuries resulting from the stillbirth of their child allegedly caused by the negligence of two physicians. The parents presented evidence that they suffered from headaches, nightmares, loss of sleep, and nausea, which an expert characterized as "'severe emotional distress.'" *Id.* at 77, 504 N.W.2d at 542. We held that this evidence did not create a genuine issue of material fact with respect to actionable emotional distress. See, also, *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 731, 734, 496 N.W.2d 914, 916 (1993) (holding minor child's reaction to her father's death did not establish that death had "extraordinary effect, either psychological or physical" upon her, and therefore did not constitute "'emotional distress . . . so severe that no reasonable person could have been expected to endure it'").

While the evidence viewed in a light most favorable to Hamilton shows that he did experience diagnosable and clinically significant emotional distress resulting from the accident, it was not of sufficient severity to be actionable under our case law. Moore testified that posttraumatic stress disorder may range in severity from mild to severe. According to Moore, the posttraumatic stress disorder experienced by Hamilton falls within the lower half of the range, "[b]etween mild and moderate." On the basis of information obtained from Hamilton, Moore described him as "pretty well beat up emotionally for a short period of time, but before too long he went on with his life." Viewing this medical testimony, as well as Hamilton's testimony describing his symptoms, in a light most favorable to Hamilton, we conclude that the emotional injury so described cannot, as a matter of law, be considered so severe that no reasonable person could be expected to endure it.

Accordingly, although our reasoning differs significantly from that of the district court, we conclude that the personal representative was entitled to summary judgment and that the district court did not err in denying Hamilton's motion for new trial. We therefore affirm.

AFFIRMED.

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

FARM BUREAU INSURANCE COMPANY OF NEBRASKA, APPELLANT, V. JUSTIN MARTINSEN ET AL., APPELLEES.

659 N.W.2d 823

Filed April 18, 2003. No. S-02-563.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
2. **Insurance: Contracts: Intent.** An insurance policy is a contract. An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
3. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
4. **Insurance: Contracts.** 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 against the preparer of the contract.
5. **Insurance: Contracts: Proof.** Where coverage is denied, the burden of proving coverage under an insurance policy is upon the insured.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed.

Gary J. Nedved, of Keating, O'Gara, Davis & Nedved, P.C., L.L.O., for appellant.

Dale A. Romatzke and Vikki S. Stamm, of Ross, Schroeder & Romatzke, for appellees Diane Brundage and Paul Budzinski.

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

MILLER-LERMAN, J.

NATURE OF CASE

The appellant, Farm Bureau Insurance Company of Nebraska (Farm Bureau), brought this declaratory judgment action in the district court for Hall County to determine the rights and liabilities of the parties under an automobile policy issued by Farm Bureau. The following individuals were named as defendants: Justin J. Martinsen; Andrew Martinsen; Laura Martinsen; Diane Brundage, individually and as personal representative of the estate of Jeffrey D. Budzinski; and Paul Budzinski (collectively the Appellees). At issue is whether Farm Bureau is liable for

certain claims of Paul Budzinski and Diane Brundage (collectively the Budzinskis) for negligent infliction of emotional distress suffered in connection with an automobile accident in which their son, Jeffrey Budzinski (Jeffrey), was killed. The district court concluded that Farm Bureau was liable up to the $500,000 per-occurrence limits of the policy. Farm Bureau appeals. We reverse.

STATEMENT OF FACTS

On September 28, 1997, Justin Martinsen was driving an automobile insured by Farm Bureau when he struck Jeffrey, who was walking along the shoulder of U.S. Highway 281 in Howard County, Nebraska. Jeffrey was injured and later died from his injuries. Jeffrey's parents, the Budzinskis, filed a wrongful death action in the district court for Howard County against Justin Martinsen and against his father, Andrew Martinsen, as the owner of the automobile. The automobile was insured under the Farm Bureau policy at issue. The policy generally provided for bodily injury liability limits of $300,000 per person and $500,000 per occurrence. The Budzinskis' petition included a claim for recovery of medical expenses incurred by Jeffrey as a result of his injuries as well as claims for negligent infliction of emotional distress suffered by each of the Budzinskis.

A settlement was reached providing for $300,000 for the medical expenses incurred by Jeffrey and for $100,000 to each of the Budzinskis in connection with their claims for emotional distress. Justin Martinsen and Andrew Martinsen confessed judgment for the $200,000 total amount for the Budzinskis' claims of emotional distress. The settlement agreement indicates that the Budzinskis agreed that their sole recourse in collecting the $200,000 would be against Farm Bureau and that they would forbear collecting the $200,000 from Justin Martinsen and Andrew Martinsen.

On January 22, 1999, Farm Bureau filed the instant declaratory judgment action to determine the extent of its liability under the terms of its automobile insurance policy issued to Andrew and Laura Martinsen. The issue in this case is whether Farm Bureau, having paid the $300,000 per-person bodily injury limit, is further liable up to the $500,000 per-occurrence limit.

The policy contained the following language:

> The amount shown in the Declarations for Coverage A, **Bodily Injury**, "per person" is the maximum amount *we* will pay for all damages for **bodily injury** sustained by any one person in any one **automobile accident**. Subject to this "per person" limit, the amount shown in the Declarations for Coverage A, **Bodily Injury** "per occurrence" is the maximum amount *we* will pay for all damages for **bodily injury** resulting from any one **automobile accident**.

The policy also provided, "**Bodily Injury** means injury to a person's body and includes sickness, disease or death which results from it."

Farm Bureau argued that there was only one bodily injury due to this "one automobile accident" and that the Budzinskis' claims of emotional distress were entirely dependent upon and derivative of the bodily injury to Jeffrey. Farm Bureau asserted that the extent of its liability in connection with the Budzinskis' case was the $300,000 per-person limit and that such liability had been satisfied because it had paid the $300,000 settlement for Jeffrey's medical expenses. Farm Bureau asserted that because the Budzinskis' claims were entirely dependent upon the bodily injury to Jeffrey, their claims were subject to the single $300,000 per-person limit which had been exhausted.

The Appellees asserted that Farm Bureau was liable up to the $500,000 per-occurrence limit. The Appellees argued that the Budzinskis' claims of emotional distress were direct and separate claims resulting from injuries they personally suffered and that damages for their claims should not be considered derivative of Jeffrey's bodily injury, but should be limited only by the $500,000 per-occurrence policy limit.

The case was tried on a stipulated set of facts. Paragraph 10 of the "Stipulation of Fact" reads as follows:

> The plaintiff alleges that the maximum amount payable under its policy of insurance is the bodily injury limit of $300,000.00 per person which it paid to the Estate of Jeffrey D. Budzinski in exchange for a full and complete release for wrongful death and medical expenses. Paul Budzinski and Diane Brundage claim that the plaintiff is obligated to pay the entire policy limits of $500,000.00 and

> satisfy the judgment for the emotional distress damages as set forth in the second cause of action in the petition filed in the District Court of Howard County and which provides as follows: "As a direct and proximate result of the negligence of the defendant, Justin J. Martinsen, plaintiffs' minor son was seriously injured; plaintiffs had an intimate familial relationship with their minor son and as a result of the serious injuries to their minor son, plaintiffs have suffered severe emotional distress such that no person could be expected to endure it."

On May 3, 2002, the district court entered an order declaring that Farm Bureau was liable up to the " 'per occurrence' " policy limit of $500,000. The district court determined that the Budzinskis had suffered "bodily injury" as that term was defined in the policy and that the Budzinskis' injuries were not derivative of Jeffrey's bodily injury. The court relied on *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). The court reasoned that compensation was available because *James* recognized a tort claim for " 'bystanders' " who suffered negligent infliction of emotional distress upon a showing of marital or intimate familial relationship with a victim who has been killed or seriously injured as a result of the negligence of another, even though such claimant had neither witnessed the incident nor exhibited a physical manifestation associated with emotional distress. The district court concluded that *James* recognized a distinct tort cause of action for separate and actual emotional injury to a claimant and that, therefore, such emotional injury was a " 'sickness' " within the meaning of "bodily injury" under the policy and not derivative of injuries to the victim. Farm Bureau appeals.

ASSIGNMENTS OF ERROR

Farm Bureau asserts generally that the district court erred in determining that Farm Bureau was liable for the Budzinskis' emotional distress damages up to the policy's $500,000 per-occurrence limit and asserts specifically that the district court erred in concluding (1) that the emotional injury suffered by the Budzinskis was "bodily injury" within the meaning of the policy and (2) that the Budzinskis' emotional distress claims were not derivative of Jeffrey's injuries.

STANDARD OF REVIEW

[1] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002).

ANALYSIS

At issue in this case is whether under the stipulated facts and the policy of insurance issued by Farm Bureau, the amount payable under the policy is the bodily injury per-person limit of $300,000 or the entire per-occurrence policy limit of $500,000. The district court declared that Farm Bureau was liable up to the $500,000 per-occurrence limit of the policy. Farm Bureau claims that the district court erred. We agree with Farm Bureau.

[2-4] An insurance policy is a contract. *American Fam. Mut. Ins. Co., supra*; *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *American Fam. Mut. Ins. Co., supra*; *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *American Fam. Mut. Ins. Co., supra*; *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001). 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 against the preparer of the contract. *American Fam. Mut. Ins. Co., supra*; *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001).

With regard to the issues in this case, the policy issued by Farm Bureau to Andrew and Laura Martinsen provides:

> The amount shown in the Declarations for Coverage A, **Bodily Injury**, "per person" is the maximum amount *we* will pay for all damages for **bodily injury** sustained by any one person in any one **automobile accident**. Subject to this

> "per person" limit, the amount shown in the Declarations for Coverage A, **Bodily Injury**, "per occurrence" is the maximum amount *we* will pay for all damages for **bodily injury** resulting from any one **automobile accident**.

The policy defines "bodily injury" as "injury to a person's body and includes sickness, disease or death which results from it." Giving the definition of "bodily injury" its plain and ordinary meaning, we conclude that the definition requires an injury to the body, and we further conclude that under the policy, a "bodily injury" that could give rise to a separate per-person claim must be a physical, as opposed to a purely emotional, injury.

[5] We have held that where coverage is denied, the burden of proving coverage under a policy is upon the insured. *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994); *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984). In this case, Farm Bureau has effectively alleged a denial of coverage because it alleges in this declaratory judgment action that it is not liable for the additional $200,000 related to the Budzinskis' damages for emotional distress. Therefore, the Appellees had the burden to prove coverage under the policy.

According to the stipulated facts, with regard to their claims of negligent infliction of emotional distress, the Budzinskis asserted in their petition filed in the district court for Howard County against Justin Martinsen and Andrew Martinsen that they had "suffered severe emotional distress such that no person could be expected to endure it." The record also shows that Justin Martinsen and Andrew Martinsen confessed judgment for damages of $200,000 for the emotional distress alleged in the Budzinskis' petition. Given the stipulated facts, the record establishes only that the Budzinskis suffered severe emotional distress. Notably, there is no allegation or fact in the record that the effects of the emotional distress included physical injury to their bodies, and none will be implied. See, e.g., *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 826 (Tex. 1997) ("[o]ur conclusion that a claim for physical manifestations of mental anguish is not implicitly raised by a pleading of mental anguish is . . . in accord with several other jurisdictions that have addressed this specific issue"); *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254 (Minn. 1993) (concluding insurer not

required to assume there were physical manifestations when none were alleged).

We recognize that in Nebraska, evidence of concurrent physical injury is not required to prove a claim of negligent infliction of emotional distress. *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). That Nebraska tort law allows for recovery for emotional distress unaccompanied by physical manifestations does not mean that an insurance policy definition of "bodily injury" necessarily encompasses purely emotional injuries, and in this case, it does not. The Budzinskis' assertion of emotional distress and the confession of judgment of Justin Martinsen and Andrew Martinsen thereto fail to establish that the Budzinskis suffered the concurrent physical injury necessary to meet the policy's definition of "bodily injury." Thus, although Justin Martinsen and Andrew Martinsen confessed judgment to the Budzinskis' allegations of negligent infliction of emotional distress, and we, therefore, assume that the Budzinskis' emotional distress was severe enough to recover for their emotional distress, such assumption of severity does not necessarily imply that the Budzinskis received a "bodily injury" as we have interpreted "bodily injury" under the policy. In this regard, we note that our overall analysis is in accord with other jurisdictions, and it has been observed:

> Survivors who were not eyewitnesses to the accident have not been successful in persuading the courts that their actions for mental distress should be viewed as independent and separate bodily injury claims entitling them to be covered under "each person" liability limits provisions separate from the claim for bodily injury applicable to the deceased.

3 Irvin E. Schermer, Automobile Liability Insurance § 44.03[3] at 44-27 (3d ed. 1995).

According to the stipulated facts, Farm Bureau paid $300,000 to the estate of Jeffrey D. Budzinski as a result of Jeffrey's medical expenses arising from his bodily injury sustained in the September 28, 1997, automobile accident. This amount is the per-person limit under the policy. The Budzinskis' claim of emotional distress seeks recovery for the emotional distress they suffered; however, their injuries were the result of Jeffrey's bodily injury in the accident. On the record before us, it is Jeffrey's injury and his resulting death which caused the Budzinskis the

emotional distress for which they sought relief from Justin Martinsen and Andrew Martinsen. That is, the Budzinskis claim damages resulting from the consequences of the accident involving Jeffrey. See *United Pacific Ins. v. Edgecomb*, 41 Wash. App. 741, 706 P.2d 233 (1985).

There is no evidence or suggestion in the record that the Budzinskis developed physical conditions causally related to the emotional distress they suffered as a result of the accident, and we do not consider whether this scenario, if established, could impose separate per-person liability on Farm Bureau whether or not the $300,000 per-person limit had been exhausted. Upon the record before us, we determine that the Budzinskis' emotional distress is a byproduct of and entirely dependent upon the bodily injury to Jeffrey. Contrary to the district court's conclusion, the Appellees have not established that the Budzinskis' injuries are not derivative of Jeffrey's bodily injury and that under a plain reading of the policy, see *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002), and *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001), such claims are properly combined with the damage award for their son's injuries under the $300,000 "per person" limit of the policy, which limit has been satisfied. Because Farm Bureau has paid $300,000 due to Jeffrey's bodily injury, the per-person limit for Jeffrey's bodily injury has been reached, and there is no further payment available to the Budzinskis for damages attributable to his bodily injury. The district court's declaration that the Budzinskis were entitled to further relief up to the $500,000 per-occurrence policy limit was error and must be reversed.

CONCLUSION

The policy's definition of "bodily injury" requires a physical injury to the body, and the Appellees have failed to allege or establish a "bodily injury" to anyone other than Jeffrey. The Appellees failed to establish that the Budzinskis' damages for emotional distress included "bodily injury" to them, and none will be implied on this record. Because the record shows that only Jeffrey sustained bodily injury, Farm Bureau's liability under the policy is limited to the single per-person limit of $300,000 "for all damages for **bodily injury** sustained by any

one person in any one **automobile accident**." The $300,000 for medical expenses attributable to Jeffrey was paid and exhausted this limit. Thus, Farm Bureau had no further liability under the policy. We therefore reverse the district court's decision that Farm Bureau was liable for additional damages up to the $500,000 per-occurrence limit.

REVERSED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DEAN R. MINER, APPELLANT.
659 N.W.2d 331

Filed April 18, 2003. No. S-02-667.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
3. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
4. **Convictions: Juries: Circumstantial Evidence.** In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom.
5. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
6. **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.
7. **Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403.
8. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but,

rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

Appeal from the District Court for Merrick County: MICHAEL OWENS, Judge. Affirmed.

Charles R. Maser, of Truell, Murray & Maser, P.C., for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

STEPHAN, J.

After a jury trial, Dean R. Miner was convicted of one count of branding another's livestock in violation of Neb. Rev. Stat. § 54-1,124 (Cum. Supp. 2002) and sentenced to a term of imprisonment of 3 to 6 years. He perfected this direct appeal.

BACKGROUND

An information filed on June 19, 2001, charged Miner with willfully and knowingly branding or causing to be branded livestock owned by Gary Langenheder, or willfully and knowingly effacing, defacing, or obliterating Langenheder's brand, in Merrick County, Nebraska, "on or about March 22-March 26, 2001." See § 54-1,124. A jury trial was held on April 16 and 17, 2002.

At trial, Langenheder testified that he farms and also raises cattle near St. Libory, Nebraska. In March 2001, Langenheder was feeding 71 yearling heifers in a pen located approximately 1 mile from his home in Howard County. The cattle were branded with Langenheder's registered brand, consisting of a letter "U" over an arrow placed on the right hip of each heifer. At approximately 3:30 p.m. on March 22, Langenheder observed that all the cattle were in the pen.

When Langenheder went to the pen on the following morning, March 23, 2001, he observed that some of the gates had been opened and that some corral panels had been moved. He also noticed vehicle tracks leading to a cattle load-out facility. After

counting only 49 head of cattle, Langenheder concluded that someone had hauled away the other 22 heifers, and he notified law enforcement officials.

Approximately 5 days later, 10 of the missing heifers were located at a sale barn in Beatrice, Nebraska, and another 10 were located at a feedlot in Octavia, Nebraska. Langenheder and Rick Bickford, a criminal investigator and supervisor for the Nebraska Brand Committee, traveled to these locations and identified the heifers. Each of the 20 heifers had new purple ear tags with the name "D.R. Miner" and a number written on the tag.

Langenheder testified that he had branded his cattle approximately 30 days earlier. The cattle located in Beatrice and Octavia had new brands placed over Langenheder's brand on the right hip of each heifer. Each new brand consisted of an "M open 6" pattern and had fresh burn marks. The "M open 6" brand was issued to Miner in October 2000 and expired September 30, 2001. Photographs taken by Bickford depicting the new ear tags and the new brands on the cattle were offered and admitted at trial. Bickford testified that the placement and orientation of the brand on an animal are part of the brand. Miner's "M open 6" brand was to be placed on the left side of the animal. Bickford testified that some of the cattle appeared to have been rebranded more than once in different directions. Upon making inquiry, Bickford learned that the sale barn in Beatrice had issued payment for the cattle to an individual named "Lee Rankin," but that Miner was identified as the owner and seller of the cattle on sale documents dated March 26, 2001.

On March 29, 2001, Bickford and the sheriff of Howard County traveled to Miner's residence near Silver Creek, in Merrick County, Nebraska. When they initially asked Miner about the brands on the cattle, he blamed it on "the damn kids," but did not elaborate. Miner told Bickford that he bought the heifers from an individual in Grand Island, but could not locate the sale documents in his home. He then called the person he had identified as the seller and obtained by fax what Bickford referred to as a "makeshift bill of sale," reflecting a purchase of cows and bulls on November 20, 2000. Bickford doubted these were the cattle in question because the documents made no reference to calves which could have grown to the size of the heifers

located in Beatrice. Upon further questioning, Miner told Bickford that the "M open 6" brand had been placed on the heifers sideways because he had carpal tunnel syndrome. He also stated that the weather had been very cold when he branded the cattle 2 weeks earlier and that the cattle had been jumping around in the chute. Bickford testified that the brands did not appear to be 2 weeks old.

Miner then accompanied Bickford and the sheriff to an outbuilding on Miner's property and showed Bickford his "M open 6" electric branding iron. While on Miner's property, Bickford observed feedlot pens, a cattle working chute, corrals, and a cattle load-out chute. When Bickford suggested DNA testing of the heifers in order to prove that they came from the cows and bulls Miner had purchased, Miner stated he did not know which cows the heifers came from and that he no longer had the herd sires.

On the following morning, Miner met with Bickford and the sheriff at the Howard County courthouse in St. Paul, Nebraska. At that meeting, Miner produced a written statement which differed significantly from the account he had given Bickford and the sheriff on the previous day. The statement provided:

> March 30, 2001
>
> Over a year ago, a good friend, which we will call "Bob" owed me approximately $25,000 for trucking.
>
> After several attempts at trying to collect this money from him and not being able to, around the first of this year I really started pressuring him.
>
> I knew "Bob" was in trouble because he had lost several of his trucks, and he had a family member dying of cancer. I figured "Bob" had to have some pretty high medical bills.
>
> "Bob" finally contacted me on Wednesday March 21 saying that he still had some cattle and a trailer and that if I would settle for this, then he would turn them over to me and that was the best he could do.
>
> I knew that "Bob" had cattle and a gooseneck trailer in the past and I figured this was the only way I would be able to get at least part of my money. I agreed to settle.
>
> He ask [sic] me if I had a pick up that could pull a gooseneck, because he no longer had his pick up. I told "Bob" he could use it, the keys were in it.

> He picked up the truck early Thursday night, March 22, and brought everything back sometime Saturday afternoon. I don't know exactly what time he came back as I was at a basketball tournament with my daughter all day Saturday in St. Paul. We didn't get home till after 9:00 pm and everything was here when we got home. There was a note in my pick up thanking me for letting him use it. When I went out Sunday morning to check the cows, "Bob" had put my brand and ear tags on them. "Bob" had mentioned there was a sale in Beatrice on Monday.
>
> Had I known that the cattle were stolen, I sure wouldn't have accepted them.
>
> Dean Miner

On March 31, 2001, the next afternoon, Bickford and the sheriff executed a search warrant at Miner's residence. One item seized during the search was a document stored on the hard drive of a computer in the home, from which it was printed. This document, identified as exhibit 63, was offered by the State at trial and received over the objection of Miner's counsel.

During his cross-examination, Bickford conceded that Miner never directly said he worked or branded the cattle at his residence. He admitted that his investigation produced no witnesses who had observed the cattle in question on Miner's property. Bickford further admitted that the branding iron was portable and that there was no physical evidence that the cattle had been at the Miner residence.

Testifying in his own defense, Miner stated that while living near Silver Creek, he bred cows and then raised and sold the calves. He testified that he bought 84 cows with calves and 3 bulls from an individual in Grand Island in November 1999. From that transaction, he produced two undated bills of sale, which differed from the bill of sale he originally furnished to Bickford.

Miner further testified that he had a trucking agreement with Gail Hammitt whereby Miner furnished a truck used by Hammitt's driver to pull Hammitt's trailers, for which Miner was to receive 26 cents for each mile driven. According to Miner, Hammitt failed to pay him under this agreement, and in October 2000, Miner agreed to take cattle from Hammitt in

partial payment of the debt. Miner produced a bill of sale for the transaction dated October 15, 2000, which states that Miner was to take possession of 126 pairs of "running aged" cows and 5 bulls after January 1, 2001.

On direct examination, Miner testified that cattle, including those which he subsequently sold in Beatrice, were delivered to his residence on March 23, 2001, while Miner was attending a basketball tournament. Miner claimed that when he returned home, he discovered that the cattle had been branded with his brand and that new ear tags had been affixed. He denied branding the cattle himself. He stated that he did not realize that the cattle may have been stolen until Bickford and the sheriff came to his home. At that time, Miner stated that he gave Bickford a different account of the delivery of the cattle because he wanted an opportunity to talk to Hammitt before accusing Hammitt. Miner subsequently admitted that the person referred to as "Bob" in his written statement dated March 30, 2001, is Hammitt.

On cross-examination, Miner explained that the 700-pound heifers delivered to him in March 2001 resembled the calves he had seen in Hammitt's pasture the previous October 2000. Miner stated that he paid $418 for each cow-calf pair in October, and by March 2001, he had sold the heifers alone for $500 each. Miner attributed this profit to favorable market conditions. Miner explained that Hammitt had started delivering cattle pursuant to the bill of sale on March 12, and delivered 100 head between then and March 23. Miner testified that he sold the cattle immediately because he had injured his back in an automobile accident. Miner claimed that he eventually discovered that all of the cattle he had sold were stolen. He explained that his trial testimony differed from his written statement because his previous attorney had advised him not to discuss his agreement to accept cattle from Hammitt. He denied any knowledge of Hammitt's present whereabouts, stating that he had heard that Hammitt had "left the country."

The case was submitted to the jury, and a verdict of guilty was returned on April 17, 2002. Miner was subsequently sentenced to a term of imprisonment of 3 to 6 years.

ASSIGNMENTS OF ERROR

Miner assigns that (1) there was insufficient evidence to convict him of the crime charged and (2) the district court erred in admitting exhibit 63.

STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002).

[2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002); *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

ANALYSIS

Sufficiency of Evidence

[3,4] Miner argues that there is insufficient evidence to support his conviction because "there simply was no evidence that the cattle in question were ever branded in Merrick County, Nebraska." Brief for appellant at 8-9. While it is true that there is no *direct* evidence of this fact, it is supported by a considerable amount of circumstantial evidence. Circumstantial evidence is not inherently less probative than direct evidence. *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001); *State v. Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001). In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom. *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993).

Viewed in a light most favorable to the State, we determine there is circumstantial evidence in the record from which a jury could reasonably conclude that Miner's brand was placed over Langenheder's brand while the cattle were on Miner's property in Merrick County. The electric branding iron with which the cattle were branded was found at that property. Evidence in the

record indicates that the brand was registered to Miner and that the cattle all had his brand and ear tags when they arrived at the sale locations approximately 4 days after they were reported missing by Langenheder. In the various accounts Miner gave to investigators prior to trial, he did not specifically deny branding the cattle or being involved in the branding. He initially blamed the poor branding on "the damn kids," but subsequently tried to explain the poor branding by stating that he had carpal tunnel syndrome, that the weather was very bad on the day the branding was done, and that the cattle were jumping around. A reasonable inference could be drawn from this evidence that the branding occurred on Miner's property, and there is no dispute that the property was located in Merrick County. This assignment of error is without merit.

EXHIBIT 63

Exhibit 63, the document printed from the hard drive of a computer found at Miner's residence, states:

> Every year hundreds of farmers have suffered the loss from cattle rustlers. It seems that the cattle are put out to pastures that have access roads that are easily reached and if the farmer has a large quantity of cattle, before he realizes they are gone, its [sic] too late to do anything about it.
>
> We have just borrowed your cattle without your knowledge to prove a point. We know this is possible because it happened to us.
>
> What we are suggesting is to let us bring back your cattle, and work with you to have a micro chip built that has a tracking device that can be inserted into the ear tag or directly under the skin of each head of cattle.
>
> If you choose not to work with the tracking device we have started a calving facility that allows you to place your cows in as [sic] highly secured area that has a 24-hour monitoring system.
>
> Call us today . . . . Let us set [sic] down and work out a plan that's best for you.
>
> Dean Miner or Lee Rankin

At the time this exhibit was offered by the State, Miner's counsel interposed the following objection:

> Your Honor, I'm going to object to Exhibit 63 first of all because it was a result of the search which was subject of the Motion to Suppress. Secondly, there's no evidence that this ever was out in the public domain, ever was anywhere other than on the computer. The probative value of that is far outweighed by the prejudicial effect that might have on my client. Absolutely no evidence that this thing was ever published anywhere.

The objection was overruled, and Bickford was allowed to read the contents of the exhibit to the jury. Miner subsequently testified that he had no knowledge of the document until several months into the investigation.

[5,6] Miner argues on appeal that exhibit 63 was irrelevant and therefore inadmissible under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1995), or, alternatively, that any probative value of the exhibit was outweighed by its prejudicial effect, thus making the exhibit inadmissible under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (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. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001); *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000); Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995). 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. *State v. Brouillette, ante* p. 214, 655 N.W.2d 876 (2003); *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002).

The manner in which Langenheder's cattle came into Miner's possession was a fact of consequence to the determination of the action in that the State was required to prove that Miner "willfully and knowingly" either branded livestock owned by another or defaced the owner's brand. § 54-1,124. From exhibit 63, it could reasonably be inferred that Miner and Rankin, whose names both appear on the Beatrice sale documents, were involved in the planning or execution of a scheme whereby cattle were removed from the owner's premises without the owner's knowledge. Thus, assuming without deciding that Miner's trial

objection was sufficiently specific to raise an issue of relevance, the district court did not abuse its discretion in overruling it on that ground.

[7,8] The objection clearly did raise the issue of whether exhibit 63 should have been excluded under § 27-403, which requires exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." The fact that evidence is prejudicial is not enough to require exclusion under this rule, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Although we do not regard exhibit 63 as having a particularly high degree of probative value, neither can we say that its receipt into evidence resulted in unfair prejudice to Miner. While the exhibit supports an inference that Miner was involved in "borrowing" cattle owned by others without their knowledge, it also supports an inference that such actions were not taken with larcenous intent, but, rather, were part of a misguided promotion of bovine security services offered by Miner and Rankin. We therefore cannot say that the district court abused its discretion in not excluding this evidence under § 27-403. Even if we did find error in this regard, we would consider it harmless. Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Duncan, ante* p. 406, 657 N.W.2d 620 (2003); *State v. Brouillette, supra*. Based upon our review of the entire record, including the undisputed evidence that Miner's brand was placed over that of Langenheder's on each of the stolen heifers and Miner's conflicting accounts of the manner in which the cattle came into his possession, we have no difficulty in concluding that the guilty verdict was surely unattributable to the admission of exhibit 63.

CONCLUSION

There is sufficient circumstantial evidence in the record to support a finding that the charged offense was committed by Miner

at his residence in Merrick County, and there was no reversible error in receiving exhibit 63 in evidence over Miner's objection. The judgment of the district court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. SPECIAL COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR,
V. JOHN P. ELLIS, RESPONDENT.
659 N.W.2d 829

Filed April 18, 2003. No. S-03-414.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, John P. Ellis, was admitted to the practice of law in the State of Nebraska on September 8, 1982, and at all times relevant hereto was engaged in the private practice of law in Douglas County, Nebraska. On March 24, 2003, a "Complaint" (hereinafter referred to as the "formal charge") was filed against respondent. The formal charge sets forth a single count which charges the respondent with violating his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997), and the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violation of disciplinary rule); DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice); DR 1-102(A)(6) (engaging in conduct that adversely reflects on fitness to practice law); Canon 6, DR 6-101(A)(3) (neglect); DR 6-102(A) (attempting to exonerate self or limit liability for malpractice); Canon 7, DR 7-101(A)(2) (failure to carry out contract for employment); and DR 7-101(A)(3) (engaging in conduct prejudicial to client).

FACTS

On March 24, 2003, respondent filed with this court a conditional admission of guilt in which respondent admitted the formal charge and effectively waived all proceedings against him in connection therewith. In summary, the formal charge alleges as follows: that respondent neglected a client's case causing the same to be dismissed; that he misled the client with regard to the status of her case; and that he provided false, misleading, and fraudulent information to the Counsel for Discipline's office which was investigating a grievance filed against respondent by the client whose case was dismissed.

ANALYSIS

Neb. Ct. R. of Discipline 13 (rev. 2002) provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly admits the facts outlined in the formal charge and knowingly admits that he violated DR 1-102(A)(1), (4), (5), and (6); DR 6-101(A)(3); DR 6-102(A); and DR 7-101(A)(2) and (3), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Special Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1), (4), (5), and (6); DR 6-101(A)(3); DR 6-102(A); and DR 7-101(A)(2) and (3), as well as his oath of office as an attorney, and that respondent should be suspended for a period of 1 year, effective immediately, after which time respondent may apply for reinstatement. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

GREGORY ALAN DAVIS, APPELLANT, V.
JUANITA ALVAREZ DAVIS, APPELLEE.
660 N.W.2d 162

Filed April 24, 2003. No. S-01-1239.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **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. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Divorce: Modification of Decree: Property Division: Fraud.** A property division in a dissolution of marriage decree from which no appeal is taken is not subject to modification and ordinarily will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity.
4. **Courts: Jurisdiction.** A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.
5. **Modification of Decree: Alimony: Good Cause.** Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 1998), alimony orders may be modified or revoked for good cause shown.

6. **Prejudgment Interest: Claims.** Prejudgment interest is available only when a claim is liquidated, that is, when there is no reasonable controversy either as to the plaintiff's right to recover or as to the amount of such recovery. There must be no dispute either as to the amount or as to the plaintiff's right to recover.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed as modified.

Michael W. Heavey, of Colombo & Heavey, P.C., for appellant.

Eileen Reilly Buzzello, of Holthaus Law Offices, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Gregory Alan Davis appeals from an order of the district court for Sarpy County entering judgment in favor of Gregory's ex-wife, Juanita Alvarez Davis. The issues raised in this case are whether Gregory's application filed in district court was an attempt to modify or enforce the parties' dissolution decree and whether the district court had the authority to provide Gregory with his requested relief.

BACKGROUND

Gregory and Juanita's marriage ended when the district court entered a dissolution decree in 1993. Among other things, the decree ordered Juanita to pay child support to Gregory in the amount of $150 per month commencing August 1, 1993, and continuing until further order of the court. The decree also ordered a division of numerous items of personal property between the parties as well as an equal division of several marital debts. Finally, the decree ordered that upon Gregory's retirement from the U.S. Air Force, Juanita was to be awarded as property settlement 27.5 percent of Gregory's monthly retirement benefits. Juanita appealed the final decree to the Nebraska Court of Appeals. In an unpublished opinion, the Court of Appeals slightly modified the division of the marital debts, but otherwise affirmed the district court's decision. *Davis v. Davis*, No. A-93-756, 1994 WL 135220 (Neb. App. April 19, 1994) (not designated for permanent publication).

On January 19, 2001, Gregory filed an "Amended Application to Determine Amounts Due Pursuant to Decree and to Enforce Decree by Set Off" in the district court. In count I of the application, Gregory alleged that Juanita had failed to pay her share of the marital debts and that Gregory had been required to pay Juanita's share of the debts. In count II of the application, Gregory alleged that Juanita had failed to pay any child support to Gregory. In count III of the application, Gregory alleged that Juanita had failed to give Gregory those items of personal property awarded to him in the final decree and that he had suffered damages as a result. Finally, Gregory alleged that he had received $18,088.48 in retirement benefits to which Juanita was entitled. Gregory prayed for an order:

> 1. Finding and ordering that there is due to [Gregory], from [Juanita], pursuant to the provisions of the Decree and Modification entered herein, the sum of $40,102.04 principal, together with interest thereon in the amount of $33,396.94 through December 31, 2000, together with accruing interest;
>
> 2. Finding and ordering that all future Air Force retirement benefits payable to [Juanita] from Defense Finance and Accounting Service be delivered by Defense Finance and Accounting Service to the Clerk of the District Court of Sarpy County, Nebraska, for application to the satisfaction of the amount found to be due to [Gregory] until such time as said amount is paid, in full, along with all interest, court costs and attorney's fees allowed by the Court;
>
> 3. Awarding [Gregory] his court costs incurred herein, including a reasonable sum for the attorney's fees incurred in the prosecution of this proceeding; and,
>
> 4. Granting such other and further relief as the Court deems just.

In her answer, Juanita denied the material allegations of Gregory's application and affirmatively alleged that the district court was without jurisdiction over counts I and III of Gregory's application.

Each party filed a motion for summary judgment. Juanita's motion was unaccompanied by any supporting evidence, thus, it was treated as a motion for judgment on the pleadings.

In its August 29, 2001, order, the district court concluded that there was no dispute that Juanita had failed to make any child support payments to Gregory and that Gregory was entitled $6,314.54. The district court also concluded that there was no dispute that Juanita was entitled to $18,088.48 in retirement benefits which were paid to Gregory.

As to counts I and III of Gregory's application, the district court found that the application was an attempt to modify the final decree by ordering Juanita to reimburse Gregory for her share of the unpaid marital debts and by ordering Juanita to pay Gregory an amount representing the value of the personal property awarded to Gregory in the decree. The court, citing *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979), found that a property division in a dissolution decree was not subject to modification and that, therefore, the court had no jurisdiction to grant Gregory the relief sought in counts I and III. After offsetting the retirement benefits against the child support debt, the court entered judgment for Juanita in the amount of $11,773.94. Gregory's motion for new trial was overruled, and Gregory appealed.

ASSIGNMENTS OF ERROR

Gregory assigns that the district court erred (1) in determining that it lacked jurisdiction to enforce its decree; (2) in determining that it lacked jurisdiction to determine the amounts due to Gregory under certain property settlement provisions of the decree while simultaneously determining that it possessed jurisdiction to determine amounts due to Juanita under other property settlement provisions of the decree; (3) in refusing to determine the amount due to Gregory for the personal property which had been awarded to him, but which Juanita converted to her own use and benefit; (4) in refusing to determine the amount due to Gregory for payment of Juanita's share of the marital debts of the parties; (5) in failing to award Gregory prejudgment interest on the money which he paid out and on the value of the personal property which was awarded to Gregory and converted by Juanita; (6) in awarding Juanita a judgment against Gregory when the total amount owed to Gregory exceeded the amount of the credit to which Juanita was entitled; and (7) in making an

unauthorized grant of relief extraneous to the issues raised by the pleadings in the form of a judgment in favor of Juanita.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

ANALYSIS

[3,4] The issue in this case is whether the application filed by Gregory is an attempt to enforce or modify the terms of the divorce decree. "We have . . . consistently held that a property division in a dissolution of marriage decree from which no appeal is taken is not subject to modification, and ordinarily will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity." *Bokelman v. Bokelman*, 202 Neb. 17, 21, 272 N.W.2d 916, 919 (1979). Thus, if the district court was correct in characterizing Gregory's application as one attempting to modify the divorce decree, it was also correct in finding that it had no authority to enter judgment in Gregory's favor for the value of the personal property awarded to him or for the marital debts. However, if Gregory's application is instead an attempt to enforce the divorce decree, the district court erred in finding that it had no jurisdiction over counts I and III of the application. A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect. *Laschanzky v. Laschanzky*, 246 Neb. 705, 523 N.W.2d 29 (1994).

We first consider whether Gregory's request to order Juanita to pay him her share of the marital debts is an enforcement or

modification of the decree. In *Dennis v. Dennis*, 6 Neb. App. 461, 574 N.W.2d 189 (1998), a divorce decree ordered the husband to make the payments on a home equity loan. He did not make the payments, and the wife was required to pay off the loan to avoid foreclosure on the home, which had been awarded to her. The wife filed an application to modify the decree in district court, praying that the husband be ordered to pay her the amount she had to pay to satisfy the loan. The Court of Appeals stated that "the relief she sought, a judgment for the amount she paid . . . was actually not in the nature of a *modification*, but, rather, a determination of amounts due under the decree and an award to her of said amounts." (Emphasis in original.) *Id.* at 463, 574 N.W.2d at 191. The court held:

> In sum, we view the action taken by the district court as nothing more and nothing less than enforcing that portion of the decree which obligated [the husband] to hold [the wife] harmless from the debt. As an example, and on a smaller scale, had the decree obligated [the husband] to pay a credit card debt of $2,000 holding [the wife] harmless on the debt and he failed to do so, resulting in a suit against [the wife] who, before judgment (or after for that matter) borrowed funds from a third person to pay the amount owing, there is little doubt that an order for [the husband] to reimburse that amount to [the wife] would be appropriate.

Id. at 465, 574 N.W.2d at 192.

Dennis is on point with one aspect of the case at bar. The final decree entered by the district court in this case ordered that "all marital debts . . . are deemed marital debts and *each party shall pay 50% of those debts*." (Emphasis supplied.) The particular relief sought by Gregory in his application is an attempt to enforce the precise obligation imposed on Juanita by the decree, that is, to pay 50 percent of the marital debts. Whether those payments are directed to Gregory or another is immaterial. As this request by Gregory is an attempt to enforce the decree, the district court erred in finding that it had no jurisdiction over count I of the application.

We next consider whether an order that Juanita pay Gregory the value of the personal property awarded to him in the decree is an enforcement or modification of the decree. Juanita argues that

this issue is controlled by *Sturdevant v. Sturdevant*, 5 Neb. App. 502, 560 N.W.2d 864 (1997). In *Sturdevant*, a divorce decree awarded the husband certain items of personal property and also ordered the husband to pay his wife a lump-sum alimony award. The husband later filed a motion for discharge of lump-sum alimony, alleging that his wife converted the property awarded to him to her own use. He asked the district court to apply the value of the lost property as a credit against the lump-sum alimony award. The district court found that the wife did not convert the property and declined to apply any amount as a credit against the alimony award. On appeal, the Court of Appeals concluded that the husband "was attempting to modify the parties' decree" and that "[t]he district court was without authority to modify the decree in these proceedings under either Neb. Rev. Stat. § 25-2001 (Reissue 1995) or its independent equity jurisdiction." *Sturdevant*, 5 Neb. App. at 506, 560 N.W.2d at 867.

[5] We decline to apply *Sturdevant* to the present case because *Sturdevant* is distinguishable from the present case. The Court of Appeals in *Sturdevant* found that the district court did not err in finding that the wife did not convert any of the husband's personal property. Here, Gregory presented unrefuted evidence that Juanita had converted to her own use the personal property awarded to him in the decree. In addition, *Sturdevant* was a case seeking to modify an award of alimony. It is well known that pursuant to Neb. Rev. Stat. § 42-365 (Reissue 1998), alimony orders may be modified or revoked for good cause shown. *Bowers v. Scherbring*, 259 Neb. 595, 611 N.W.2d 592 (2000). Gregory's request that he be awarded the value of the personal property awarded to him in the decree and converted by Juanita was an enforcement of the divorce decree. As such, the district court erred in finding that it had no jurisdiction over count III of the application.

Finally, we consider Gregory's retirement benefits. The decree ordered that 27.5 percent of Gregory's Air Force retirement benefits be awarded to Juanita. Gregory has received $18,088.48 in retirement benefits to which he admits Juanita is entitled. The district court offset against this amount the child support debt of $6,314.54. Gregory requests that this net amount of $11,773.94 be set off against any amount owed to him and that 100 percent of the retirement benefits be awarded to him in the future until any

amount owed to him by Juanita is satisfied. We determine that Gregory may offset the $11,773.94 owed to Juanita against the amount owed to him for Juanita's share of the marital debt and personal property. We decline to modify the property settlement agreement so as to change the payee from Juanita to the clerk of the district court as requested by Gregory.

[6] Gregory also assigns that the district court erred in failing to award prejudgment interest on "the money which he paid out" and on the value of the personal property. Prejudgment interest is available only when a claim is liquidated, that is, when there is no reasonable controversy either as to the plaintiff's right to recover or as to the amount of such recovery. There must be no dispute either as to the amount or as to the plaintiff's right to recover. *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 529 N.W.2d 16 (1995). We conclude that Gregory's claim is unliquidated. The district court did not err in failing to award prejudgment interest.

CONCLUSION

The district court awarded Gregory $6,314.54, representing past-due child support. The district court further awarded Juanita $18,088.48, representing her share of Gregory's retirement benefits. After offsetting these amounts, the district court entered judgment in favor of Juanita in the amount of $11,773.94. We affirm this award.

For the reasons set forth above, we conclude that the district court erred in finding that it did not have the authority to award Gregory amounts representing (1) the value of the personal property awarded to him in the decree and (2) Juanita's 50-percent share of the marital debts. Gregory offered undisputed evidence that these amounts were $4,806 and $44,378.53, respectively. Thus, we conclude that Juanita should be ordered to pay Gregory the sum of $49,184.53. After offsetting the $11,773.94 owed to Juanita, we enter judgment in favor of Gregory and against Juanita in the amount of $37,410.59.

AFFIRMED AS MODIFIED.

AGRI AFFILIATES, INC., APPELLEE, V. CALVIN R. BONES AND AUDREY J. BONES, TRUSTEES OF THE CALVIN R. AND AUDREY J. BONES FAMILY TRUST, APPELLANTS.

660 N.W.2d 168

Filed May 2, 2003. No. S-01-1074.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Negligence: Case Overruled.** To the extent *Simon v. Wilkinson Agency*, 2 Neb. App. 877, 518 N.W.2d 154 (1994), holds that negligent misrepresentation is a recognizable theory of recovery only in the context of the relationship between an insurer and his or her agent, it is overruled.
4. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
5. **Actions: Fraud: Proof.** To recover on a fraudulent misrepresentation claim, one must show (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 it was made with the intention that it should be relied upon; (5) that the party reasonably did so rely; and (6) that he or she suffered damage as a result.
6. **Actions: Negligence: Proof.** To recover on a negligent misrepresentation claim, one must demonstrate, inter alia, that one who, in the course of his or her business, profession, or employment, or in any other transaction in which he or she 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 or she fails to exercise reasonable care or competence in obtaining or communicating the information.
7. **Fraud: Negligence: Words and Phrases.** The difference between fraudulent misrepresentation and negligent misrepresentation is the duty required in each claim. In fraudulent misrepresentation, one becomes liable for breaching the general duty of good faith or honesty. However, in a claim of negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances.
8. **Real Estate: Sales: Agents.** A real estate seller's agent has a duty (a) to perform the terms of the written agreement made with the client; (b) to exercise reasonable skill and care for the client; (c) to promote the interests of the client with the utmost good faith, loyalty, and fidelity; (d) to account in a timely manner for all money and property received; (e) to comply with all requirements of Neb. Rev. Stat. §§ 76-2401 to 76-2430 (Reissue 1996), the Nebraska Real Estate License Act, and any rules and regulations promulgated pursuant to such sections or act; and (f) to comply with any

applicable federal, state, and local laws, rules, regulations, and ordinances, including fair housing and civil rights statutes and regulations.

9. **Real Estate: Brokers.** When the broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person who hired the broker has received the service for which he or she has contracted, and the broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed.
10. **Affidavits.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein.
11. **Summary Judgment: Evidence: Appeal and Error.** Ordinarily, the erroneous admission of evidence in a summary judgment hearing is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings.

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

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

Terrance O. Waite and Keith A. Harvat, of Waite & McWha, for appellee.

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

HENDRY, C.J.

INTRODUCTION

Agri Affiliates, Inc., sued Calvin R. Bones and Audrey J. Bones, trustees of the Calvin R. and Audrey J. Bones Family Trust, for a commission resulting from the sale of real estate. In their answer, the Boneses pled several defenses and filed a counterclaim for, inter alia, damages resulting from their defense costs in *Keller v. Bones*, 260 Neb. 202, 615 N.W.2d 883 (2000). Both parties filed motions for summary judgment. The Lincoln County District Court overruled the Boneses' motion for summary judgment and dismissed their counterclaim. Agri Affiliates' motion for summary judgment was granted. This appeal followed. We moved this case to our docket pursuant to our authority to regulate the caseloads between this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

The Boneses entered into an exclusive listing agreement with Agri Affiliates on May 24, 1997, to sell ranch land near North Platte, Nebraska, which was owned by the trust. That agreement provided that Agri Affiliates, as broker, was to receive a commission of 6 percent for services provided "upon the Broker finding a purchaser who is ready, willing and able to complete the purchase as proposed by the Owner." The parties agreed that the listing price for the property was to be $490,000, or $245 per acre. At Calvin's request, the listing agreement included language drafted by John Childears, managing partner and a broker at Agri Affiliates, which provided that "Seller reserves current Tenant from this listing for six (6) months from date of Seller's signature. If Tenant is successful buyer within said six months, Broker will close the sale and receive 1% commission."

Both Calvin and Audrey testified that the current tenant of the property, Lydic Brothers, had been notified that the property was for sale, and further that they had inquired of Don Lydic, a representative of Lydic Brothers, whether Lydic Brothers would be interested in purchasing the property. The record shows Lydic Brothers made an offer "somewhere between . . . 190 and $200 an acre" prior to the Boneses' entering into the listing agreement with Agri Affiliates. Lydic's testimony also revealed that he was informed the property had been listed and was aware of the "split sales commission" arrangement.

Loren Johnson, the broker who handled the sale for Agri Affiliates, testified that he would periodically contact Lydic to determine whether Lydic Brothers was interested in the property. Mike Polk, another Agri Affiliates agent, also contacted Lydic sometime between July 10 and 17, 1997, informing him that an offer of $220 per acre on the property had been received. Lydic responded by saying, "I think we are interested in it, but why . . . should [we] bid against ourselves . . . ." Thereafter, on July 17, Johnson telephoned Lydic, notifying him that Agri Affiliates had a buyer who was planning to make a full price offer. According to Lydic, he responded to this July 17 notification by telling Johnson, " 'Loren, that's a lot of money, you know.' " Shortly after this telephone conversation, Johnson met with Dean Keller, who made an offer for the property at the full

list price of $245 per acre. Johnson had no further contact with Lydic after receiving Keller's offer.

The purchase agreement signed by Keller was to expire at 5 p.m. on July 21, 1997, and was sent to the Boneses at their home in Council Bluffs, Iowa. After receipt of the Keller offer, the Boneses and Johnson had a telephone discussion late in the afternoon of July 21 regarding the offer. Before signing the agreement, the Boneses asked if Lydic Brothers had any interest in the property; Johnson replied that it did not.

In their testimonies, both Calvin and Audrey also indicate that in response to their hesitation about signing the purchase agreement, Johnson told them that "it doesn't make any difference to me whether you take the offer or not. They have met the asking price, and therefore you owe us the commission." The purchase agreement was then signed and faxed to Agri Affiliates at 4:53 p.m. on July 21, 1997. At 5:12 p.m., after receiving the faxed purchase agreement, Johnson called Keller and left a message on Keller's answering machine informing him that his offer had been accepted. In *Keller v. Bones*, 260 Neb. 202, 615 N.W.2d 883 (2000), this court held that a valid contract for the purchase of the property in question existed between the Boneses and Keller.

On the morning of July 22, 1997, Lydic called the Boneses to inquire about the property. At that time, he was informed that a purchase agreement for the full listing price had already been signed. Lydic then informed the Boneses that Lydic Brothers would purchase the property at the same price. Calvin called Johnson at Agri Affiliates to inform him that they wished to sell to Lydic Brothers instead of Keller. The Boneses' desire to sell to Lydic Brothers was driven by the fact that under such a circumstance, the Boneses would be required to pay only a 1-percent commission, rather than the 6-percent commission if Keller purchased the property. Johnson testified that after he spoke to Calvin, he discussed the matter with Childears. Thereafter, Johnson left another message on Keller's answering machine, inquiring whether Keller would "let the Boneses out of the contract." Keller refused to do so and further requested Agri Affiliates to fax a copy of the purchase agreement to his attorney, which was done. Agri Affiliates also deposited Keller's earnest money check in its trust account.

Agri Affiliates brought this action in Lincoln County District Court for the payment of the 6-percent commission under the listing agreement. The Boneses' answer alleged several defenses, specifically, negligent misrepresentation, fraudulent misrepresentation, and breach of fiduciary duty. The Boneses also asserted a counterclaim against Agri Affiliates for (1) defense costs from *Keller, supra*; (2) loss of the opportunity to sell to Lydic Brothers; and (3) loss of the use of the net proceeds and interest that would have been earned from a sale to Lydic Brothers.

Both parties filed motions for summary judgment and offered evidence in support of their respective motions. The only objection to any of the evidence offered by either party was that of the Boneses to the affidavit of R.T. Marland, Jr., a real estate broker and appraiser. Both parties also requested the district court take judicial notice of the trial record from *Keller, supra.*

In an order entered August 29, 2001, the district court (1) granted Agri Affiliates' motion for summary judgment and (2) dismissed the Boneses' counterclaim and overruled their motion for summary judgment. In its order, the district court began its analysis of the pending motions by observing that *Keller, supra,* established the existence of a binding contract between Keller and the Boneses and that if the record did not support the Boneses' defenses, Agri Affiliates was entitled to its 6-percent commission. In reviewing the defenses alleged by the Boneses, the court initially considered the defense of negligent misrepresentation. Citing *Simon v. Wilkinson Agency*, 2 Neb. App. 877, 518 N.W.2d 154 (1994), the court concluded that since Nebraska did not recognize a claim for negligent misrepresentation in a real estate context, that defense would not be considered in analyzing the pending motions.

Next, after setting forth the elements of fraudulent misrepresentation, the court determined the evidence showed that Lydic Brothers had never made an offer to purchase the property at the list price. Therefore, the court reasoned, the statement by Johnson that Lydic Brothers was not interested in purchasing the property was not false, but "[i]n fact it was [a] truthful representation." Finally, the court determined the evidence established that Agri Affiliates appropriately marketed the property and used due diligence in finding a buyer, including notifying the tenant, Lydic

Brothers, and that therefore, Agri Affiliates had not breached any fiduciary duty it owed to the Boneses. The court then entered judgment for Agri Affiliates in the sum of $29,400 plus interest, overruled the Boneses' motion for summary judgment, and dismissed their counterclaim.

ASSIGNMENTS OF ERROR

The Boneses assign, rephrased and renumbered, that the district court erred in (1) holding they could not raise the defense of negligent misrepresentation, (2) finding there was no genuine issue of material fact as to their allegations of fraudulent misrepresentation, (3) finding there was no genuine issue of material fact as to their allegations of breach of fiduciary duty, (4) granting Agri Affiliates' motion for summary judgment and entering judgment in favor of Agri Affiliates, (5) overruling their motion for summary judgment and dismissing their counterclaim, and (6) considering Marland's affidavit in granting Agri Affiliates' motion for summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Herrera v. Fleming Cos., ante* p. 118, 655 N.W.2d 378 (2003). 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. *Finch v. Farmers Ins. Exch., ante* p. 277, 656 N.W.2d 262 (2003).

ANALYSIS

Recognition of Negligent Misrepresentation Claim

In their first assignment of error, the Boneses argue that the district court erred in refusing to consider their defense of negligent misrepresentation. The district court's order states:

> One of the defenses asserted by the Defendants is that of negligent misrepresentation. However, the Nebraska Court

> of Appeals has clearly held in the decision of *Simon v. Wilkinson Agency, Inc.*, 2Neb.App. 877, 518 N.W.2d 154 (1994) that the claim of negligent misrepresentation has been recognized in Nebraska only in the context of the relationship between an insured and his or her agent.

[3,4] Neither the district court nor the parties to this action discuss this court's decision in *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994), decided approximately 1 month after *Simon v. Wilkinson Agency*, 2 Neb. App. 877, 518 N.W.2d 154 (1994). *Gibb* involved a purchaser of real estate who sued his real estate agency on, inter alia, a theory of negligent misrepresentation. In reversing the order of the district court sustaining Citicorp Mortgage's demurrer, we recognized Gibb's negligent misrepresentation theory of recovery as a viable basis of liability in the context of a real estate purchase and specifically adopted the definition of negligent misrepresentation found in the Restatement (Second) of Torts § 552 (1977). In the present case, the district court's determination that such "claim of negligent misrepresentation has been recognized in Nebraska only in the context of the relationship between an insured and his or her agent" was error. See, also, *NECO, Inc. v. Larry Price & Assocs.*, 257 Neb. 323, 597 N.W.2d 602 (1999) (reversing summary judgment in favor of vendor, finding that genuine issues of material fact existed as to whether statute of limitations had expired on buyer's claims of fraudulent and negligent misrepresentation with regard to whether building would contain complete sprinkler system). To the extent *Simon, supra*, holds otherwise, it is overruled. Finding such error, however, does not end our inquiry, as error without prejudice provides no ground for appellate relief. See *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001). Whether prejudicial error resulted from the trial court's failure to consider our holding in *Gibb, supra*, will be reviewed in conjunction with our consideration of the Boneses' second assignment of error.

Analysis of Misrepresentation Claims

In their second assignment of error, the Boneses contend the district court erred in failing to find a genuine issue of material

fact with regard to their claim of fraudulent misrepresentation. The Boneses contend Johnson's statement that Lydic Brothers was not interested in purchasing the real estate was known to be false and that therefore Agri Affiliates engaged in fraudulent misrepresentation.

[5] To recover on a fraudulent misrepresentation claim, one must show:

> (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 it was made with the intention that [it] should [be relied] upon . . . ; (5) that the [party] reasonably did so rely; and (6) that he or she suffered damage as a result.

(Emphasis supplied.) *Gibb*, 246 Neb. at 360, 518 N.W.2d at 916.

[6,7] To recover on a negligent misrepresentation claim, one must demonstrate, inter alia, that

> "[o]ne 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."

(Emphasis supplied.) *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 370, 518 N.W.2d 910, 921 (1994). This court has concluded that

> the difference between fraudulent misrepresentation and negligent misrepresentation is the duty required in each claim. In fraudulent misrepresentation, one becomes liable for breaching the general duty of good faith or honesty. However, in a claim of negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances.

Id. at 371, 518 N.W.2d at 921. There is, however, a similarity between the two in that a necessary element of both is a showing that the statement was false. As a result, the initial inquiry into

whether the statement by Johnson was a misrepresentation is the same under either a negligent or a fraudulent misrepresentation framework, and we will consider them together.

Viewing the evidence in a light most favorable to the Boneses, and giving to them the benefit of all reasonable inferences deducible from the evidence, we determine the record contains no evidence that the statement made by Johnson regarding Lydic Brothers' interest in the property was false. In his testimony, Johnson stated that he had two telephone conversations with Lydic in July. Specifically, Johnson testified:

> [The Boneses' counsel:] Do you remember the dates of the two phone conversations with Don Lydic?
>
> A. No, sir. I can't quote them to you.
>
> Q. But they were in late June or — or July of 1997?
>
> A. I believe they were both in July.
>
> . . . .
>
> Q. The first phone conversation you had, what if anything do you remember about that conversation?
>
> A. Just that I told him [Lydic] I knew that he and his brothers were the tenants on there and that we had activity on it and if he wanted to do anything please let us know or let the Boneses know. We needed to know what his intentions were.
>
> Q. What do you recall his response being if any?
>
> A. His response was "At that price we're not interested."
>
> Q. And what price was that?
>
> A. The $490,000.
>
> Q. So you called him later in July then. Do you remember when that conversation was?
>
> A. It was just prior to the Keller offer and I was telling him once again that I was in the process to go visit with a person I thought was going to make a very good offer and was he interested, and that's when he told me I believe that they had already made an offer on the property and they were not interested in making a higher offer at that time. They thought the price was too high.
>
> Q. [Lydic] told you they had already made an offer on the property?
>
> A. $190 an acre.

Q. And who had they made that offer to?
A. The Boneses.
. . . .
Q. Why didn't you call him after you had the $490,000 offer?
A. Because immediately prior to that offer he had completely rejected it. They were not going to make an offer. I had no reason to call him back.

There is no genuine issue of material fact in the record which refutes Johnson's assertion. With respect to the first telephone conversation in which it is claimed Lydic said that "[a]t that price we're not interested," the record is devoid of evidence raising any inference that Lydic did not make such a statement to Johnson. With respect to the second conversation occurring "just prior to the Keller offer," Lydic's version of that same telephone conversation was as follows:

[Lydic:] He told me he was on his way to a guy who said he would sign a, or, he said "I'm on my way to see a guy that says he will give the full price."
Q And you knew from receiving Exhibit 36 and Exhibit 12 that the full price meant at least $245 an acre, is that right?
A It would be the $245 an acre.

The record discloses that Lydic's response to this second telephone conversation was simply, " 'Loren, that's a lot of money, you know.' " While it is true that Lydic testified he "thought" he would have the opportunity to match any offer made on the property, the record shows such "thought" was the result of a letter received from Audrey. The record does not contain evidence, even when viewed in a light most favorable to the Boneses, that anyone at Agri Affiliates made such representation to him. Furthermore, Lydic acknowledged that Lydic Brothers did not have a right of first refusal on the property.

The district court did not err in finding there was no genuine issue of material fact to support the Boneses' allegation that Agri Affiliates made a false representation to them. As there is no evidence in the record to indicate that the statement made by Johnson to the Boneses was false, the district court's error in failing to consider the Boneses' claim of negligent misrepresentation resulted

in no prejudice. There is no merit to the Boneses' second assignment of error.

Breach of Fiduciary Duty

In their third assignment of error, the Boneses argue the district court erred in failing to find a genuine issue of material fact with regard to their allegation that Agri Affiliates had breached its fiduciary obligation. The Boneses contend that Agri Affiliates breached its fiduciary obligation in the following ways: (1) faxing a copy of the signed purchase agreement to Keller's attorney; (2) failing to inform the Boneses they were under no legal obligation to proceed with the sale to Keller, since no written communication of acceptance had been made to Keller; (3) failing to inform the Boneses of the difference in net proceeds due to the varying commissions; (4) failing to actively pursue a sale of the property to Lydic Brothers; and (5) making various misrepresentations to the Boneses.

[8] A real estate seller's agent has a duty:

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

> (e) To comply with all requirements of sections 76-2401 to 76-2430, the Nebraska Real Estate License Act, and any rules and regulations promulgated pursuant to such sections or act; and
>
> (f) To comply with any applicable federal, state, and local laws, rules, regulations, and ordinances, including fair housing and civil rights statutes and regulations.

Neb. Rev. Stat. § 76-2417(1) (Reissue 1996). See, Neb. Rev. Stat. § 76-2429 (Reissue 1996); *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000) (recognizing that § 76-2417(1) supersedes common-law duties and responsibilities of parties to real estate agreement). The question is whether there is a genuine issue of material fact that Agri Affiliates' conduct breached any fiduciary obligation recognized in § 76-2417(1).

This court concluded in *Keller v. Bones*, 260 Neb. 202, 615 N.W.2d 883 (2000), that a binding contract existed between Keller and the Boneses for the sale of this real estate. As a result, the first two claims upon which the Boneses contend Agri Affiliates breached its fiduciary duties are controlled by our holding in *Keller, supra*. First, since we determined in *Keller, supra*, that a binding contract existed between the Boneses and Keller, Keller had a right to a copy of the agreement evidencing such purchase. Therefore, there can be no breach of fiduciary duty in faxing a copy to Keller's attorney. See § 76-2417(1)(e) (requiring compliance with Nebraska Real Estate License Act and Neb. Rev. Stat. § 81-885.24(20) (Reissue 1996) of such act, making failure to deliver copy of purchase agreement to both purchaser and seller unfair trade practice). Second, since our holding in *Keller, supra*, determined that the Boneses had legally accepted Keller's terms, there was a legal obligation on the Boneses' behalf to proceed with the sale to Keller. There is no merit to the Boneses' first two assertions that Agri Affiliates breached a fiduciary duty owed to them.

The remainder of the Boneses' allegations are similarly unsupported by the record. The Boneses' third assertion claims that Agri Affiliates breached its fiduciary duty by failing to inform them of the difference in net proceeds due to the varying commissions in the reservation clause. The reservation clause reads: "Seller reserves current Tenant from this listing for six (6)

months from date of Seller's signature. If Tenant is successful buyer within said six months, Broker will close the sale and receive 1% commission." The record is undisputed that the reservation clause and "split sales commission" was an amendment to Agri Affiliates' usual listing agreement specifically requested by the Boneses. The record further shows that after Agri Affiliates prepared the reservation clause, the Boneses were given an opportunity to have it reviewed by their attorney, and, as Calvin testified: "I think I may have had [an attorney] from Council Bluffs review it. Q. He's your — an attorney? A. He's an attorney. Q. That does work for you? A. Yes." The reservation clause was inserted at the Boneses' request and is not ambiguous. There is no genuine issue of material fact in the record to support the Boneses' claim of a fiduciary breach as set forth in their third assertion.

In their fourth assertion, the Boneses claim Agri Affiliates breached its fiduciary duty by failing to actively pursue a sale of the property to Lydic Brothers. Assuming without deciding that the listing agreement between the parties required such pursuit, we determine the record is similarly devoid of any evidence that Agri Affiliates failed in the manner claimed by the Boneses. After the listing agreement was signed, the record is again undisputed that on at least two occasions, representatives of Agri Affiliates advised Lydic Brothers of offers received on the property. Regarding such occasions, Lydic testified:

> [The Boneses' counsel:] Backing up to the call you got from Mike Polk, at that time when he told you he had an offer for $220 an acre do you remember what your response to him was?
>
> A I told him I think that we were interested in it, but why, you know, should [we] bid against ourselves or, that's what I remember, again, you know.
>
> Q Did he tell you whether or not he would be calling you back about the property?
>
> A No.
>
> Q Did you ask him to call you back if there was any more activity?
>
> A Not that I recollect.
>
> . . . .

[Agri Affiliates' counsel:] All right. And then you got another call, at least one other call, from Loren Johnson on July 17th telling you that he's about to get a signed offer for the full price, didn't you?

A Now, this was like the 12th, or he was the first person that called.

Q I'm sorry?

A Mike Polk would have called first.

Q Okay. Mike Polk called. Then you got a call from Loren where he's out on the place?

. . . .

A Yes.

. . . .

Q Well, let me ask this. At any time when you had a conversation with Loren Johnson did you say, "I'll match any offer you get?" Did you ever say that?

A I didn't know I was supposed to.

Q Just answer the question, sir. Did you say that at any time?

A No.

Contrary to the Boneses' allegation, the record shows that Agri Affiliates did pursue a sale of the property to Lydic Brothers. The Boneses assertion to the contrary is not supported by the evidence in this record or any reasonable inferences deducible therefrom.

Finally, the Boneses assert that Agri Affiliates breached its fiduciary duty by making various misrepresentations to them. Basically the Boneses argue in their brief that Agri Affiliates, through Johnson, (1) misrepresented Lydic Brothers' interest in purchasing the property and (2) further misrepresented that the Boneses would be obligated to pay a full 6-percent commission to Agri Affiliates even if the Boneses chose to not sell to Keller.

Having previously determined there is no evidence from which to conclude that Johnson's statement to the Boneses regarding Lydic Brothers' interest in purchasing the property was false, we now determine the Boneses first assertion is without merit.

[9] With respect to the Boneses' second assertion, this court has previously stated:

> When the broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person

> who hired the broker has received the service for which he or she has contracted, and the broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed.

Marathon Realty Corp. v. Gavin, 224 Neb. 458, 462, 398 N.W.2d 689, 693 (1987) (citing *Wisnieski v. Coufal*, 188 Neb. 200, 195 N.W.2d 750 (1972)). Thus, even if Johnson did make such a representation, it would not be false, as Agri Affiliates, in accordance with the listing agreement, produced a ready, willing, and able buyer at the full listing price.

Viewing the evidence in a light most favorable to the Boneses and giving to them the benefit of all reasonable inferences deductible therefrom, we determine there is no evidence to support their assertion that the conduct of Agri Affiliates breached any fiduciary duty owed to them. See § 76-2417(1). There is no merit to the Boneses' third assignment of error.

District Court's Rulings on Cross-Motions for Summary Judgment

In their fourth and fifth assignments of error, the Boneses contend the district court erred in granting Agri Affiliates' motion for summary judgment and in overruling the Boneses' motion for summary judgment. Having previously determined that the district court did not err in granting Agri Affiliates' motion for summary judgment, we determine the Boneses fourth assignment of error is without merit.

In their fifth assignment of error, the Boneses assert the district court erred in failing to grant their motion for summary judgment on their counterclaim. The theory upon which the Boneses sought summary judgment was, in essence, the same as that espoused in opposing Agri Affiliates' motion. That is, as a result of Agri Affiliates' misrepresentation and breach of fiduciary duties, the Boneses were entitled to damages. Having previously considered the evidence as it relates to the Boneses' opposition to Agri Affiliates' motion, and determining, after viewing the evidence in a light most favorable to the Boneses, that the record does not support their assertions, we likewise determine the district court did not err in overruling the Boneses'

motion for summary judgment and in dismissing their counterclaim. The Boneses' fifth assignment of error is without merit.

AFFIDAVIT OF MARLAND

Finally, in their sixth assignment of error, the Boneses argue the district court erred in admitting and considering the affidavit of Marland. In his affidavit, Marland, who was Agri Affiliates' expert, stated that in his opinion, Agri Affiliates appropriately exposed and marketed the Boneses' property, used due diligence to find a buyer at the full listing price and, in fact, found such a buyer in Keller. Marland further opined that "there was no misrepresentation or breach of fiduciary duty on the part of [Agri Affiliates] in its representation of the [Boneses]."

[10] The Boneses contend that Marland's affidavit violated Neb. Rev. Stat. § 25-1334 (Reissue 1995) in that it was not based upon personal knowledge and included both hearsay and legal conclusions. Section 25-1334 states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein."

In their brief, the Boneses assert the following: "While [Agri Affiliates] may rely on the Marland affidavit to oppose [the Boneses'] Motion for Summary Judgment, the Court inappropriately relied on the affidavit in granting summary judgment in favor of [Agri Affiliates]." Brief for appellants at 32. Thus, this court is concerned only with the district court's reliance on this affidavit with respect to its granting of Agri Affiliates' motion for summary judgment and not with respect to the overruling of the Boneses' motion.

[11] Ordinarily, the erroneous admission of evidence in a summary judgment hearing is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings. *Stiver v. Allsup, Inc.*, 255 Neb. 687, 587 N.W.2d 77 (1998).

Assuming, arguendo, that the district court did improperly admit and rely upon Marland's affidavit in granting Agri Affiliates' motion for summary judgment, such is not prejudicial error requiring reversal. This court has already concluded,

without reliance on Marland's affidavit, that the record is sufficient to sustain the district court's granting of summary judgment in favor of Agri Affiliates. The Boneses' sixth assignment of error is without merit.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

MARGARET DILLION, APPELLANT, V.
CHRISTOPHER MABBUTT, APPELLEE.
660 N.W.2d 477

Filed May 2, 2003. No. S-02-558.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Statutes: Pleadings: Dismissal and Nonsuit: Words and Phrases.** The language of Neb. Rev. Stat. § 25-217 (Reissue 1995) providing for dismissal of unserved petitions is self-executing and mandatory.
4. **Limitations of Actions: Dismissal and Nonsuit: Jurisdiction.** After dismissal of an action by operation of law under Neb. Rev. Stat. § 25-217 (Reissue 1995), there is no longer an action pending and the district court has no jurisdiction to make further order except to formalize the dismissal.
5. **Dismissal and Nonsuit.** If orders are made following a dismissal under Neb. Rev. Stat. § 25-217 (Reissue 1995), they are a nullity, as are subsequent pleadings.

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

Jeffrey F. Putnam, of Inserra & Kelley, for appellant.

Mark Kadi, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellee.

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

CONNOLLY, J.

After more than 6 months had passed since the appellant, Margaret Dillion, had filed her petition, the court determined that Dillion's attempts to serve the appellee, Christopher Mabbutt, had been ineffective. The court sustained Mabbutt's special appearance. Dillion filed a motion for a new trial. The court overruled the motion and dismissed the case without prejudice. More than 30 days after the court had sustained the special appearance, but less than 30 days after the court had overruled the motion for a new trial, Dillion appealed.

We determine that under Neb. Rev. Stat. § 25-217 (Reissue 1995), the case was automatically dismissed as a result of the court's determination that Dillion had failed to serve Mabbutt within 6 months of the date the petition was filed. The dismissal was formalized when the court sustained Mabbutt's appearance, and Dillion's motion for a new trial was a nullity that did not terminate the time for filing her notice of appeal. Because Dillion's notice of appeal was not filed within 30 days of the order sustaining Mabbutt's special appearance, we dismiss for lack of jurisdiction.

BACKGROUND

On August 29, 2001, Dillion filed a petition alleging that on September 3, 1997, she suffered injuries in a car accident that was caused by Mabbutt's negligence. Dillion moved for alternate service by publication, and the district court ordered that service be made by publication once a week for 4 successive weeks in the North Platte Telegraph newspaper.

A legal notice was first published on January 10, 2002, and ran for 4 successive weeks, concluding on January 31. The notice stated that "unless you answer the plaintiff's Petition on or before the 31st day of February [sic], judgment will be rendered against you." (Emphasis in original.)

On March 12, 2002, Mabbutt entered a special appearance challenging the court's jurisdiction over him. He claimed that service had been defective because the publication notice incorrectly identified his answer date. The court sustained the special appearance on April 8.

After the court had sustained the special appearance, Dillion filed what she characterized as a motion for a new trial under

Neb. Rev. Stat. § 25-1142(6) (Cum. Supp. 2002). The court denied Dillion's motion for a new trial and dismissed the case in a journal entry filed on May 13. On May 20, Dillion filed her notice of appeal.

ASSIGNMENTS OF ERROR

Dillion assigns, rephrased and consolidated, that the court erred in (1) finding that the defect in service by publication was not a mere technical error, (2) determining that the petition should be dismissed under § 25-217, and (3) not allowing Mabbutt to answer under Neb. Rev. Stat. § 25-822 (Reissue 1995) (now repealed by 2002 Neb. Laws, L.B. 876 (operative January 1, 2003)).

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Fischer v. Cvitak*, 264 Neb. 667, 652 N.W.2d 274 (2002).

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. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). To determine whether we have jurisdiction, we must examine § 25-217.

At the time the court dismissed the case, § 25-217 provided that an "action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed." In overruling the motion for a new trial, the court noted that more than 6 months had passed since Dillion had filed her petition and questioned whether, given its previous ruling that service had been ineffective, it had jurisdiction.

[3,4] The language of § 25-217 providing for dismissal of unserved petitions is self-executing and mandatory. *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001); *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000). After dismissal of an action by operation of law under § 25-217, there is no longer an action pending and the district court has no jurisdiction to

make further orders except to formalize the dismissal. *Id.* By the time the court had sustained Mabbutt's special appearance, more than 6 months had passed since Dillion had filed her petition. Thus, the court's ruling that Mabbutt had not been served triggered § 25-217, and the order sustaining Mabbutt's special appearance had the effect of formalizing the dismissal of the case.

Because the order sustaining Mabbutt's special appearance formalized the dismissal, it serves as the final order. To appeal the decision, Dillion had to file her notice of appeal within 30 days of the time the order was file stamped on April 8, 2002. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2002). Dillion did not file her notice of appeal until May 20, well after the appeal period had passed.

[5] We note that Dillion filed a motion for a new trial after the April 8, 2002, order and that generally the filing of a motion for a new trial terminates the running of the appeal period. § 25-1912(1). However, if orders are made following a dismissal under § 25-217, they are a nullity, as are subsequent pleadings. *Kovar, supra*; *Vopalka, supra*. Thus, Dillion's motion for a new trial and the court's May 13 journal entry addressing it were nullities, and the motion did not terminate the running of the 30 days within which Dillion had to file her notice of appeal. As a result, Dillion's notice of appeal was untimely and we lack jurisdiction.

CONCLUSION

Because Dillion's notice of appeal was filed more than 30 days after the entry of judgment, we lack jurisdiction. Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 571, APPELLEE, V. CITY OF PLATTSMOUTH, APPELLANT.

660 N.W.2d 480

Filed May 2, 2003. No. S-02-581.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an

appellate court on one or more of the following grounds and no other: if the commission acts without or in excess of its powers, if the order was procured by fraud or is contrary to law, if the facts found by the commission do not support the order, and if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.

2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below.
3. **Statutes: Legislature: Intent.** 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.
4. **Commission of Industrial Relations: Federal Acts: Statutes: Public Policy.** When the Commission of Industrial Relations finds that a party has violated the Industrial Relations Act, Neb. Rev. Stat. §§ 48-819.01 and 48-825(2) (Reissue 1998) grant the commission authority to issue such orders as it may find necessary to provide adequate remedies to the parties to effectuate the public policy enunciated in Neb. Rev. Stat. § 48-802 (Reissue 1998).
5. **Commission of Industrial Relations: Labor and Labor Relations: Administrative Law.** The Commission of Industrial Relations has authority to enter orders preserving the status quo until a dispute is resolved.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

Roger K. Johnson for appellant.

Thomas F. Dowd, of Dowd & Dowd, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The International Union of Operating Engineers Local 571 (IUOE) filed a petition in the Commission of Industrial Relations (CIR) alleging that the City of Plattsmouth (Plattsmouth) had engaged in a prohibited practice in violation of the Industrial Relations Act (IRA) by failing to bargain in good faith over the effects of the elimination of a city department, which included the layoff of a bargaining unit employee. See Neb. Rev. Stat. § 48-824(1) (Reissue 1998). The CIR ordered Plattsmouth to cease and desist from unilaterally implementing changes in terms and conditions of employment which were mandatory subjects of bargaining, and it ordered the parties to commence good faith

negotiations. The CIR also ordered Plattsmouth to make the laid-off employee whole by compensating him with backpay until one of several conditions, including reinstatement, was met. Plattsmouth appeals.

SCOPE OF REVIEW

[1] Any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: if the commission acts without or in excess of its powers, if the order was procured by fraud or is contrary to law, if the facts found by the commission do not support the order, and if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, ante* p. 8, 654 N.W.2d 166 (2002).

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *Keller v. Tavarone, ante* p. 236, 655 N.W.2d 899 (2003).

FACTS

In July 2001, the IUOE requested that Plattsmouth voluntarily recognize it as the bargaining representative for certain Plattsmouth employees working in four departments, including the Parks Department and the Street Department. On August 20, the Plattsmouth City Council voluntarily recognized the IUOE as the employees' collective bargaining representative. At a special meeting held on September 24, Plattsmouth eliminated its Parks Department and transferred the department's function to the newly created Street and Property Maintenance Department. In doing so, Plattsmouth laid off Randy Winters, who had been an employee of the Parks Department. The IUOE was Winters' recognized collective bargaining representative, and the layoff was completed without any bargaining over the effects of the reorganization of the departments.

The IUOE petitioned the CIR, alleging that Plattsmouth had violated § 48-824(1) by refusing to bargain in good faith over the effects of the elimination of the Parks Department. The IUOE sought reinstatement for Winters with backpay and asked that

Plattsmouth be ordered to engage in good faith collective bargaining with the IUOE concerning the layoff of bargaining unit employees. Plattsmouth admitted that it had eliminated the Parks Department and created the Street and Property Management Department. It also admitted that one full-time bargaining unit employee had been laid off. Plattsmouth alleged, however, that the IUOE had waived its right to bargain.

The CIR found that as a result of the reorganization of its departments, Plattsmouth had unilaterally decided to lay off a member of the recently organized bargaining unit. The CIR determined that no bargaining had occurred over the impact of this reorganization upon the membership of the bargaining unit. It also found that the evidence did not support a waiver of the IUOE's right to bargain and that Plattsmouth's failure to bargain over the effects of the reorganization was a prohibited practice as defined by § 48-824(1).

Relying upon various decisions of the National Labor Relations Board (NLRB) for guidance, the CIR ordered Plattsmouth to make Winters whole by compensating him with backpay until one of several conditions, including reinstatement, was met. It further ordered Plattsmouth to cease and desist from unilaterally implementing changes in terms and conditions of employment which were mandatory subjects of bargaining. It also ordered the parties to commence good faith negotiations over the changes. Plattsmouth timely appealed.

ASSIGNMENTS OF ERROR

Plattsmouth assigns, restated, that the CIR erred (1) in ordering it to reinstate Winters and (2) in ordering it to pay Winters backpay in a manner consistent with an award issued by the NLRB pursuant to the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. (2000).

ANALYSIS

The issue presented is whether the CIR acted in excess of its powers when it ordered that Winters be reinstated with backpay in order to remedy the prohibited practice in violation of § 48-824(1). Plattsmouth does not challenge the CIR's determination that it engaged in a prohibited practice.

Our scope of review provides that any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: if the commission acts without or in excess of its powers, if the order was procured by fraud or is contrary to law, if the facts found by the commission do not support the order, and if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, ante* p. 8, 654 N.W.2d 166 (2002). Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *Keller v. Tavarone, ante* p. 236, 655 N.W.2d 899 (2003).

Based upon our scope of review, we must determine whether the CIR acted without or in excess of its powers. See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra.* In order to make such determination, we are required to examine the provisions of the IRA independently of the determination made by the court below. See *Keller v. Tavarone, supra.*

Plattsmouth contends that the CIR's statutory authority cannot be expanded beyond that which is provided by the Legislature. It claims that the CIR's reliance upon various decisions of the NLRB was misplaced because the CIR does not have the same statutory powers as the NLRB.

The IUOE refers this court to various NLRB decisions which have held that where there has been a failure to bargain prior to a layoff, the appropriate remedy under the NLRB is reinstatement of the affected employees with backpay until the employer has fulfilled its bargaining obligation. The IUOE argues that we must look to the decisions of the NLRB for guidance in resolving this issue because the IRA and the NLRA have similar provisions.

We have previously held that decisions of the NLRB provide guidance and are helpful to the CIR in resolving issues where there are similar provisions. See *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999). The CIR obtains its power and authority from state law, whereas the NLRB obtains its power and authority from the NLRA. The IUOE argues that the federal counterpart to § 48-824(1) is 29 U.S.C. § 158(a), which provides:

"It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees . . . ."

Although the NLRA and the IRA contain similar provisions, the NLRA specifically provides that reinstatement with or without backpay is a remedy for an unfair labor practice. See 29 U.S.C. § 160(c). The IRA does not specifically provide for such a remedy. Therefore, the decisions of the NLRB are not helpful to our analysis on this issue.

Plattsmouth also argues that the present action is not an "industrial dispute" because it involves only one employee and that, therefore, the CIR had no authority to enter an order of reinstatement with backpay. Brief for appellant at 28. Plattsmouth relies upon *Nebraska Dept. of Roads Employees Assn. v. Department of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973), in which we held that a uniquely personal termination of employment did not constitute an industrial dispute within the purview of the IRA. However, *Nebraska Dept. of Roads Employees Assn.* does not control our decision.

Neb. Rev. Stat. § 48-810 (Reissue 1998) gives the CIR jurisdiction over "industrial disputes" and "other disputes as the Legislature may provide." An industrial dispute is defined as "any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment." Neb. Rev. Stat. § 48-801(7) (Reissue 1998). In its petition, the IUOE alleged that Plattsmouth had violated § 48-824(1) by failing to negotiate in good faith with respect to a mandatory topic of bargaining. Thus, the matter at issue was an industrial dispute as defined in § 48-801(7). Furthermore, Neb. Rev. Stat. § 48-825 (Reissue 1998) allows a party alleging a violation of § 48-824 to bring a complaint in the CIR and gives the CIR authority to order an appropriate remedy for such violation. We therefore conclude that the CIR had jurisdiction to hear this complaint and to order a proper remedy.

Plattsmouth next argues that the CIR has only those powers specifically set forth in the IRA. It argues that unlike the powers and authority provided to the Nebraska Equal Opportunity

Commission by the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1998), the powers and authority provided to the CIR by Neb. Rev. Stat. § 48-809 (Reissue 1998) do not include the power or authority to enter an order for reinstatement with backpay. Plattsmouth also contends that the CIR has no authority to award damages.

In response, the IUOE refers this court to *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983), in which we recognized a general grant of authority to the CIR to fashion necessary and appropriate remedies. In *IAFF Local 831*, we held that the CIR had authority to award interest on wages when it had ordered a wage rate as part of an industrial dispute over an appropriate wage to be paid to the employees. Although there was no specific language in the IRA granting the CIR authority to order payment of interest, we nevertheless affirmed the award of interest.

The IUOE asserts that the CIR has authority pursuant to § 48-825 and Neb. Rev. Stat. §§ 48-819.01 and 48-823 (Reissue 1998) to fashion an appropriate and necessary remedy to rectify the unfair and prohibited labor practices of Plattsmouth.

[3] 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. *First Data Corp. v. State*, 263 Neb. 344, 639 N.W.2d 898 (2002). Neb. Rev. Stat. § 48-816(1) (Reissue 1998) provides in part:

> In the event of an industrial dispute between an employer and an employee or a labor organization when such employer and employee or labor organization have failed or refused to bargain in good faith concerning the matters in dispute, the commission may order such bargaining to begin or resume, as the case may be, and may make any such order or orders as may be appropriate to govern the situation pending such bargaining.

The IRA also provides that upon a finding by the CIR that a party has committed a prohibited practice in violation of § 48-824, § 48-825(2) authorizes the CIR to order an appropriate remedy. See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, *ante* p. 8, 654 N.W.2d 166 (2002). Section 48-825(2) provides:

> The commission shall file its findings of fact and conclusions of law. If the commission finds that the party accused has committed a prohibited practice, the commission, within thirty days after its decision, shall order an appropriate remedy. Any party may petition the district court for injunctive relief pursuant to the rules of civil procedure.

Section 48-819.01 provides:

> Whenever it is alleged that a party to an industrial dispute has engaged in an act which is in violation of any of the provisions of the Industrial Relations Act, or which interferes with, restrains, or coerces employees in the exercise of the rights provided in such act, the commission shall have the power and authority to make such findings and to enter such temporary or permanent orders as the commission may find necessary to provide adequate remedies to the injured party or parties, to effectuate the public policy enunciated in section 48-802, and to resolve the dispute.

Furthermore, § 48-823 provides:

> The Industrial Relations Act and all grants of power, authority, and jurisdiction made in such act to the commission shall be liberally construed to effectuate the public policy enunciated in section 48-802. All incidental powers necessary to carry into effect the Industrial Relations Act are hereby granted to and conferred upon the commission.

It is apparent from a review of the language of the IRA that the Legislature has provided the CIR with general authority to order an appropriate remedy.

From the above pronouncements of legislative authority, we must determine how much power and authority the Legislature intended to grant the CIR in order to provide an appropriate remedy to an injured party or parties.

Plattsmouth argues that the CIR's order of reinstatement with backpay was not an appropriate remedy and therefore exceeded the authority given to the CIR by law. It contends that §§ 48-819.01 and 48-825 grant the CIR authority to order an appropriate remedy only as it relates to the issue of bargaining but not to the award of damages. Plattsmouth also claims that Winters was not a party to the action and that, therefore, the CIR had no authority to award damages to him.

In *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983), we pointed out that § 48-819.01 was enacted as a result of our decision in *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979) (superseded by statute as stated in *IAFF Local 831 v. City of No. Platte, supra*). In *University Police Officers Union*, we held that the CIR had no authority "to make findings with regard to unfair labor practices or direct a public employer to take any more action than is necessary to preserve and protect the status of the parties' property and public interest involved pending final determination of the issues." 203 Neb. at 17-18, 277 N.W.2d at 537. We recognized the authority granted to the CIR by § 48-819.01 to enter such orders as it may find necessary to provide adequate remedies to effectuate the public policy and to resolve the dispute.

In *Transport Workers v. Transit Auth. of Omaha*, 216 Neb. 455, 344 N.W.2d 459 (1984), the issue was whether the CIR had authority to enter temporary orders concerning wages, hours, and terms and conditions of employment while the CIR was attempting to resolve a labor dispute pending before it. The trial court had concluded that the CIR's authority was limited to restraining the employer from firing the employee. We reversed, and concluded that if the CIR had authority to make temporary orders to protect the status of the parties, it obviously must have had authority to do something more than simply make sure that the employer did not fire the employee. We held that the IRA granted the CIR "discretionary authority, when it appears appropriate, to order that the status quo of the parties be retained until the dispute is resolved." *Id.* at 461, 344 N.W.2d at 463. We stated:

> It may very well be that it is in the public interest to be assured that public employees, who do not have the right to strike or hinder, delay, limit, or suspend the continuity or efficiency of governmental services, should continue to receive their previous salaries or be afforded the same terms and conditions of employment while the employer, the employee, and the CIR attempt to resolve the differences.

Id. at 458-59, 344 N.W.2d at 462.

In *Transport Workers*, we noted that the authority of the CIR is limited to that granted by the Legislature and must be narrowly construed. However, the Legislature has stated in § 48-823 that all

grants of power, authority, and jurisdiction shall be liberally construed to effectuate the public policy.

The rationale in limiting the power and authority granted to the CIR is that the CIR is an administrative body and is not a court. Therefore, the exercise of power is based upon what is necessary to provide adequate remedies to effectuate the public policy and resolve the dispute. It is simply a question of how much authority an administrative body will be permitted to exercise in performing its quasi-judicial functions. The Legislature has left this for the courts to determine on a case-by-case basis.

[4] In *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, ante* p. 8, 30, 654 N.W.2d 166, 183 (2002), we stated that when the CIR finds that a party has violated the IRA, "§§ 48-819.01 and 48-825(2) grant the CIR authority to issue such orders as it may find necessary to provide adequate remedies to the parties to effectuate the public policy enunciated in § 48-802." In *Crete Ed. Assn.*, the remedies fashioned by the CIR fell into two categories: (1) that the appellant cease and desist from certain actions and (2) that the appellant post notices informing employees that it had engaged in prohibited labor practices. We addressed the authority of the CIR under §§ 48-819.01 and 48-825, within the framework of identifying adequate and appropriate remedies. We concluded that the cease and desist orders issued by the CIR were adequate and appropriate but that the order requiring the posting of notices was not a proper remedy and therefore exceeded the CIR's powers.

In the case at bar, the CIR's order to cease and desist unilaterally implementing changes in the terms and conditions of employment is not at issue. We focus only on whether the order of reinstatement with backpay was an adequate and appropriate remedy and therefore within the authority of the CIR.

If the CIR finds that an accused party has committed a prohibited practice, it has the authority to order an appropriate remedy, see § 48-825(2), and such authority is to be liberally construed to effectuate the public policy enunciated in Neb. Rev. Stat. § 48-802 (Reissue 1998), see § 48-823. Since the Legislature has chosen not to specifically define the extent of the remedial authority granted to the CIR, the scope of such authority will be defined by the courts on a case-by-case basis.

Plattsmouth's failure to bargain over a mandatory subject of bargaining was a prohibited practice, and thus, the CIR had the authority to craft an appropriate remedy for the injured party. Although Winters was not named as a party, the IUOE properly represented him as his recognized collective bargaining representative. Therefore, he was an injured party for purposes of the IRA.

[5] We have previously determined that the CIR has authority to enter orders preserving the status quo until a dispute is resolved. See *Transport Workers v. Transit Auth. of Omaha*, 216 Neb. 455, 344 N.W.2d 459 (1984). Giving a liberal interpretation to the authority to effectuate the public policy of § 48-802, we determine that it was appropriate for the CIR to order the parties to return to the status quo following a finding of a prohibited practice under the IRA. Therefore, we conclude that the CIR had authority to order that Winters be reinstated to the position he held prior to Plattsmouth's prohibited actions and that the CIR did not act in excess of its powers when it ordered such reinstatement with backpay.

CONCLUSION

The CIR was correct in returning Winters to the status quo by ordering reinstatement and the payment of his normal wages from the date he was laid off less any net interim earnings. Such was an appropriate remedy under the facts of this case.

For the reasons set forth herein, we affirm the order of the CIR.

AFFIRMED.

RANDALL E. LANGEMEIER, APPELLEE, V.
URWILER OIL & FERTILIZER, INC., AND
CARDINAL MART, INC., APPELLANTS.
660 N.W.2d 487

Filed May 2, 2003. No. S-02-619.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.

2. **Specific Performance.** Specific performance is not generally demandable as a matter of absolute legal right but is addressed to the legal discretion of the court. It will not be granted where enforcement of the contract would be unjust.
3. ____. A party seeking specific performance must show his or her right to the relief sought, including proof that the party is ready, able, and willing to perform his or her obligations under the contract.
4. ____. The right to specific performance may be lost by abandonment of the contract and by conduct inconsistent with the right to relief.
5. **Specific Performance: Contracts: Property: Conveyances.** As a general rule, the vendor in a land contract who, subsequently to its execution, has conveyed a substantial part of the property covered by the contract to a third person who is a bona fide purchaser, cannot enforce specific performance of the contract to sell. Nor does he or she become entitled to specific performance by acquiring options to repurchase the land so conveyed.

Appeal from the District Court for Cedar County: MAURICE REDMOND, Judge. Judgment vacated, and cause remanded with directions to dismiss.

George H. Moyer and Mark A. Keenan, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellants.

Vince Kirby for appellee.

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

STEPHAN, J.

This case is before us for the second time. In *Langemeier v. Urwiler Oil & Fertilizer*, 259 Neb. 876, 613 N.W.2d 435 (2000) (*Langemeier I*), we held that the district court for Cedar County was without jurisdiction to determine whether Randall E. Langemeier (Langemeier) was entitled to specific performance of a real estate purchase agreement because of the absence of an indispensable party, Joan Langemeier (Joan), who was disclosed in the record as having an interest in the subject property. We therefore vacated the order of the district court which had granted Langemeier, as seller, specific performance of the agreement and compelled Urwiler Oil & Fertilizer, Inc. (Urwiler Oil), and Cardinal Mart, Inc. (collectively defendants), as buyers, to comply with its terms, and dismissed the appeal. Subsequently, Joan entered an appearance in the case and additional proceedings were held in the district court, after which the court again

ordered specific performance of the agreement. Defendants perfected this appeal from that order.

FACTS

LANGEMEIER I

The following facts were established by that portion of the record which was before us in *Langemeier I*, 259 Neb. at 877-80, 613 N.W.2d at 436-38, and are therefore reiterated from that opinion:

> On June 27, 1995, Langemeier and Urwiler Oil entered into a purchase agreement for the following described real property: "That part of Outlot One (1) of Second Addition to the City of Randolph, Cedar County, Nebraska, described as follows: Beginning at the Northwest corner of Block 2, Second Addition; Thence North 134 feet to the point of beginning; Thence East at right angles 162 feet; Thence South at right angles 18 feet; Thence East at right angles 150 feet; Thence North at right angles 230 feet to the South line of Federal Highway No. 20; Thence Southwesterly along the South line of Federal Highway No. 20; Thence to a point where the East line of Cedar Street in the City of Randolph, as extended North, intersects the South line of Federal Highway No. 20; Thence South along the East line of Cedar Street to the point of beginning, all in the City of Randolph, Cedar County, Nebraska." Langemeier operated a convenience store on the foregoing described property, sometimes referred to as the "Mini Mart." The purchase agreement included all fixtures on the property together with all personal property "on premises on date of acceptance of [the purchase] agreement—list to be attached." The purchase agreement which appears in the record does not have attached to it a list identifying the personal property. The sale price was $125,000, with a $1,000 downpayment, leaving a purchase price balance of $124,000. The sale was conditioned on Langemeier's having marketable title, in fee simple, and Langemeier's conveyance of title to Urwiler Oil by warranty deed "free and clear of all liens, encumbrances or special taxes levied or assessed."

Pursuant to the purchase agreement, Langemeier agreed to furnish to Urwiler Oil, within 15 days from the date of acceptance of the purchase agreement, either a complete, certified abstract of title or title insurance. Urwiler Oil agreed to deliver, 15 days thereafter, a copy of an attorney's opinion showing any defects in the title. Urwiler Oil further agreed under the purchase agreement to close the sale within 30 days of the delivery of the title abstract or title insurance, unless defects were found, or, in the event defects were found, within 10 days of the curing of such defects.

On June 19, 1995, a title insurance commitment was prepared on the subject property. The commitment listed several matters with regard to the title, summarized as follows:

(1) Langemeier and Vickie Langemeier were divorced on May 24, 1984, and Langemeier claimed to have been awarded the convenience store and the property on which it was situated in the divorce decree. The title insurance company required a quitclaim deed from Vickie Langemeier because the real property awarded to Langemeier in the Langemeiers' divorce decree was identified by only a general description and not by a legal description.

(2) On February 7, 1989, Rodney Zwygart had sued Langemeier, claiming to be Langemeier's business partner with an undivided one-half interest in the partnership's assets. In the lawsuit, Zwygart sought a division of partnership assets, which assets allegedly included the convenience store. The title insurance company refused to issue title insurance against the litigation, which litigation it considered an exception to title insurance because the litigation had not reached a judgment.

Counsel for Urwiler Oil received a copy of the title insurance commitment on or about June 20, 1995. No written attorney's opinion was sent to Langemeier by Urwiler Oil identifying title defects in the property that was the subject of the purchase agreement, although representatives of defendants testified that they had numerous conversations with Langemeier and his attorney about resolving the matters raised in the title insurance commitment, including the pending litigation case, Zwygart v. Langemeier, Cedar

County District Court, docket No. 29, page 45, which matters they believed created clouds on the title.

On August 4, 1995, Zwygart filed a notice of lis pendens. The notice set forth that Zwygart claimed an interest in the real estate described in the notice, which interest was the subject of the pending lawsuit between Zwygart and Langemeier. The notice contained a faulty legal description of the property which was the subject of the purchase agreement.

Cardinal Mart was incorporated as a Nebraska corporation on or about August 15, 1995. Of Cardinal Mart's three shareholders, two are also shareholders in Urwiler Oil. Cardinal Mart took possession of the real estate described in the purchase agreement on August 15 and began operating the convenience store. As of August 15, Langemeier ceased to operate or do business as the Mini Mart.

A closing on the purchase agreement was scheduled for August 18, 1995, but Langemeier did not appear at the closing because he understood it was cancelled due to the existing clouds on the title. Representatives of defendants, however, did appear at the scheduled closing. No closing took place on the purchase agreement on August 18 or subsequent thereto. In August and September, nominal payments were made by Cardinal Mart to Langemeier, which payments Cardinal Mart's representatives described as rent payments. Witnesses testified at trial that the parties continued to discuss the sale and the title matters during August, September, and October.

On October 17, 1995, defendants' counsel notified Langemeier by letter that defendants were rescinding their offer to purchase the property described in the purchase agreement. On November 22, counsel for defendants notified Langemeier that on November 22, defendants had terminated their day-to-day tenancy of the convenience store and had removed or assigned to Cardinal Mart all inventory.

On November 9, 1995, Langemeier filed his petition for specific performance of the purchase agreement against defendants. On December 1, 1998, and continuing on December 2, a bench trial was held on Langemeier's

amended petition filed on March 11, 1996, together with Urwiler Oil's second amended answer to the petition, filed June 22, and Cardinal Mart's fourth amended answer to the petition, filed August 27, 1998.

Langemeier admitted at trial on December 1, 1998, that he no longer owned the property described in the purchase agreement, which is the subject of the instant action, and that the property was owned by his mother, [Joan]. Langemeier testified, however, that he could carry out the terms of the purchase agreement and transfer title to the property the same day or the very next day. The record is unclear when Joan Langemeier acquired title to the property. Joan was not then a party to the case.

With respect to the divorce decree, Langemeier testified that on August 15, 1995, an order nunc pro tunc had been entered by the district court in the divorce action, which order identified the real property awarded to Langemeier under the divorce decree using legal descriptions, including the property on which the convenience store was located. The record suggests that the nunc pro tunc order may have been issued without notice to Vickie Langemeier.

With respect to the Zwygart litigation, Langemeier testified that the litigation was resolved in December 1995. The record does not contain evidence other than Langemeier's testimony that the Zwygart lawsuit has been concluded.

Other witnesses testified that subsequent to the filing of the petition for specific performance, a federal tax lien and a judgment lien had been placed on the real estate that was the subject of the purchase agreement. The record further indicates that a mortgage on the real estate had been foreclosed and that the property had been sold. . . . Langemeier [testified at the first trial that he] had redeemed the property from the foreclosure sale, evidently with funds supplied by his mother, [Joan].

SUBSEQUENT PROCEEDINGS

As noted above, in *Langemeier I*, we vacated the district court's order granting specific performance, based upon our determination that Joan was an indispensable party who had not been joined in the action. We concluded that "[i]n the absence of

an indispensable party, the district court is without jurisdiction to determine the controversy." *Langemeier I*, 259 Neb. at 884, 613 N.W.2d at 440. Following issuance of our mandate, a "Voluntary Appearance and Consent to Judgment" was filed by Joan in which she stated that she is the record owner of the subject property and agreed that the district court "may enter judgment for or against the plaintiffs, and further agrees to be bound thereby as if made a party prior to the trial of this matter."

At a subsequent hearing, the district court took judicial notice of the record made at the previous trial. Both parties submitted additional evidence. Joan testified that she is the mother of Langemeier. She testified that she is the owner of the subject property and that she obtained title to that property "in the court thing." Joan testified that she obtained title by warranty deed. Joan was asked,

> Would you be willing to give a warranty deed to whomsoever that specific performance is granted? Would you be willing and are you able to give a warranty deed, to execute a warranty deed, to that property whereby you would warrant the title to the defendant against all claims presently existing?

Joan answered "[y]es." Defendants then offered evidence that the economic viability of the Mini Mart had significantly decreased since 1995.

On May 13, 2002, the district court entered an order granting Langemeier specific performance of the contract as written. The order stated that "upon payment of the sums due, the plaintiff shall furnish a warranty deed conveying the described property to the defendants or their order, as required by the Purchase Agreement."

ASSIGNMENTS OF ERROR

Defendants assign that the trial court erred by (1) granting specific performance of the purchase agreement, (2) deciding that Langemeier's title was marketable, (3) deciding that Langemeier had tendered performance of the contract for the sale of real estate, and (4) failing to find that it would be inequitable and unfair to compel specific performance nearly 7 years after performance was due from Langemeier.

STANDARD OF REVIEW

[1] An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Langemeier I*; *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996).

ANALYSIS

[2-4] In undertaking our independent review of the legal and factual issues presented in this appeal, we are guided by certain general principles. Specific performance is not generally demandable as a matter of absolute legal right but is addressed to the legal discretion of the court. It will not be granted where enforcement of the contract would be unjust. *James J. Parks Co. v. Lakin*, 206 Neb. 184, 292 N.W.2d 21 (1980); *Tedco Development Corp. v. Overland Hills, Inc.*, 200 Neb. 748, 266 N.W.2d 56 (1978). A party seeking specific performance must show his or her right to the relief sought, including proof that the party is ready, able, and willing to perform his or her obligations under the contract. *Id.* The right to specific performance may be lost by abandonment of the contract and by conduct inconsistent with the right to relief. *James J. Parks Co. v. Lakin, supra*; *Sofio v. Glissmann*, 156 Neb. 610, 57 N.W.2d 176 (1953).

In *Langemeier I*, we held that the absence of Joan as a party to the action was a jurisdictional defect which prevented the district court from reaching the merits of the controversy. Now that Joan has entered an appearance, we are presented with a substantive issue which we did not and could not reach in *Langemeier I*: whether an action for specific performance of a real estate purchase agreement will lie where, subsequent to the execution of the agreement, the seller has conveyed the property to a third party with whom the purchasers have no contractual relationship. In their brief, defendants argue that while Nebraska law is unclear on this point, the law of other jurisdictions resolves the issue in the negative.

Neither the parties' briefs nor our research has disclosed any controlling Nebraska authority on this point, although there is language in *James J. Parks Co. v. Lakin, supra*, which suggests

that conveyance to a third party by the seller may not absolutely preclude the remedy of specific performance against the purchaser under a contract. In that case, the plaintiff had purchased 303 acres of Arizona citrus grove from the defendant, subject to a repurchase agreement. Subsequently, the plaintiff sold an undivided one-half interest in the property to 11 investors, and at the same time, the defendant repurchased a one-eighth interest in the property. Approximately 5 years later, the plaintiff sought specific performance of the original repurchase agreement with respect to all of the property except that which the defendant had already repurchased. The district court denied the relief requested, in part because of a failure to join indispensable parties who were not identified in the record. In affirming, we stated:

> The plaintiff has not acquired the interests of the other owners and the evidence does not show that he can acquire their interests. The rights of the other owners are involved in this action and a final determination could not be made without affecting their rights or leaving the controversy in such condition that the determination would be wholly inconsistent with equity and good conscience.

James J. Parks Co. v. Lakin, 206 Neb. at 189, 292 N.W.2d at 25.

[5] This language is susceptible to an interpretation that specific performance could be awarded if all persons having an interest in the property were made parties and jointly requested relief, or if the seller under the contract could prove that he or she was able to reacquire the portion of the property conveyed to third parties in order to perform on the contract with the purchaser. However, the language is at best dicta and is contrary to what we perceive as the majority rule in other jurisdictions. According to 71 Am. Jur. 2d *Specific Performance* § 147 at 151 (2001):

> Since the vendor in a land contract is not entitled to compel the vendee's specific performance of the contract where the vendor has a defective title, he or she obviously is not entitled to the remedy of specific performance against the vendee where he or she has no title whatever. The vendor in a land contract who, subsequently to its execution, has conveyed a substantial part of the property covered by the contract to a third person who is a bona fide purchaser, cannot enforce specific performance of the contract to sell . . . . Nor

does he or she become entitled to specific performance by acquiring options to repurchase the land so conveyed.

The circumstance in which a seller seeking specific performance asserts the ability to reacquire property conveyed to a third party in order to perform the original contract was addressed in *Suburban Improvement Co. v. Scott Lumber Co.*, 67 F.2d 335 (4th Cir. 1933). In that case, the defendant contracted to buy certain lots from the plaintiff. One of the provisions of the contract provided that the plaintiff could not sell any of the lots to any other person without the consent of the defendant. After the contract was executed, the plaintiff sold some of the lots to third parties. Prior to the time the plaintiff's action for specific performance was heard, the plaintiff obtained options from all persons to whom conveyance had been made and averred its ability to acquire title and make conveyance under the terms of the contract. Notwithstanding this, the court held that the plaintiff was not entitled to specific performance of the contract. The court reasoned that by conveying the lots, the plaintiff both rendered itself unable to perform the contract and violated one of the express provisions of the contract. The court further found that even if no express provision in the contract had been violated, "it has been repeatedly held that a vendor cannot enforce specific performance, where subsequent to the execution of the contract he has conveyed a substantial part of the property therein embraced to a third person." *Id.* at 338. In addressing whether the plaintiff's acquisition of the options to repurchase nevertheless placed it in a position to perform prior to the decree, the court held that any reacquisition of the property could not "wipe out" the breach of the contract that had already occurred. *Id.*

Other courts have held that a purchaser cannot be required to accept title from a third party, even if that title is valid. *Ross v. Kunkel*, 257 Wis. 197, 43 N.W.2d 26 (1950); *Marx v. King*, 193 Iowa 29, 186 N.W. 680 (1922). According to *Marx*, a "rule of general, if not universal, acceptance is that a purchaser cannot be required to accept a conveyance from a third person, even though a good title is thereby conveyed, unless it is so stipulated in the contract." 193 Iowa at 33, 186 N.W. at 682. *Ross* explains that this proposition is applied because " '[t]he personal responsibility of the grantor may or may not become valuable to the grantee

in the event of a breach of the warranties or of the terms and conditions of the deed.' " 257 Wis. at 204, 43 N.W.2d at 30.

In the instant case, it is undisputed that Langemeier conveyed his interest in the subject property to Joan prior to the trial of this action. It is therefore unnecessary to decide the contested factual issue of whether Langemeier was able to perform his obligations under the purchase agreement prior to that conveyance, because he clearly was unable to do so after divesting himself of title. Joan was neither a party nor a third-party beneficiary of the purchase agreement and therefore has no standing to seek enforcement by specific performance. See *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996). Moreover, defendants did not contract to purchase the subject property either directly or indirectly from Joan. We conclude that under these factual circumstances, Langemeier's conveyance of the subject property to Joan was an act inconsistent with the purchase agreement which precludes the remedy of specific performance.

CONCLUSION

Based upon our de novo review of the record, we conclude that Langemeier is not entitled to specific performance of the real estate purchase agreement dated June 27, 1995, for the reasons discussed herein. The judgment of the district court is therefore vacated, and the cause is remanded with directions to dismiss the action.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS TO DISMISS.

GERRARD, J., not participating.

JENNIFER MISEK, APPELLANT, V.
CNG FINANCIAL, APPELLEE.
660 N.W.2d 495

Filed May 2, 2003. No. S-02-876.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record

to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. **Workers' Compensation: Judgments: Appeal and Error.** Where there is no factual dispute, the question of whether the injury arose out of and in the course of employment is clearly one of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts.
3. **Workers' Compensation.** Neb. Rev. Stat. § 48-101 (Reissue 1998) compensates injury caused an employee by an accident arising out of and in the course of his or her employment.
4. **Workers' Compensation: Proof.** The two phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 1998) are conjunctive; thus, both must be established by a preponderance of the evidence.
5. **Workers' Compensation.** The test to determine whether an act or conduct of an employee which is not a direct performance of the employee's work "arises out of" his or her employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard.
6. ____. The "arising out of" employment requirement is primarily concerned with causation of an injury.
7. ____. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.
8. **Workers' Compensation: Words and Phrases.** The "in the course of" requirement of Neb. Rev. Stat. § 48-101 (Reissue 1998) has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.
9. ____: ____. An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.
10. **Workers' Compensation.** If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval, can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment.
11. ____. Whether an injury arose out of and in the course of employment must be determined from the facts of each case.
12. **Workers' Compensation: Judgments: Appeal and Error.** Factual determinations made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Casey J. Quinn for appellant.

Joseph W. Grant, of Gaines, Pansing & Hogan, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The sole issue presented in this appeal is whether an injury sustained by the appellant, Jennifer Misek, arose out of and in the course of her employment. A Nebraska Workers' Compensation Court trial judge determined that Misek's injury arose out of and in the course of her employment and awarded Misek benefits. A review panel of the compensation court reversed the award of the trial judge. We reverse the decision of the review panel and remand the cause with directions.

BACKGROUND

Misek was employed by "Check 'n Go," which was owned by CNG Financial. Her job duties included assisting customers at the front counter, answering telephones, photocopying and faxing documents, and running errands to the post office or bank. With no soft drinks available onsite, Misek would also occasionally leave to get soft drinks for herself and her coworkers, sometimes at her own request and sometimes at the request of her supervisor. Misek was not required to "clock out" in order to run these errands and was paid for her time.

Check 'n Go had no formal break policy in place. Misek testified that any break she took had to be approved by her supervisor and that she had never been told she could not take a break. Misek would not usually tell her supervisor precisely what she would be doing on her break. She also testified that she generally did not leave "the area" during her breaks.

While working at Check 'n Go on August 25, 2000, Misek asked her supervisor if she could go to a nearby convenience store and get a soft drink. Her supervisor said yes. Misek then asked her supervisor and coworker if they would like something from the convenience store as well. Each accepted the offer and gave money to Misek to buy them soft drinks. Misek exited out the back door of Check 'n Go, crossed a driveway, and started

walking down a grassy hill. About halfway down the hill, Misek slipped, fell, and broke her left ankle.

Misek filed a petition in the compensation court seeking compensation for her injury. A trial judge of the court entered an award in which the judge concluded that Misek's injury arose out of and in the course of her employment. The judge found:

> [Misek]'s attempt to obtain soft drinks for herself, her supervisor and co-worker during a work break were matters of personal convenience and comfort not in conflict with her supervisors specific instructions that [Misek] would normally be expected to indulge in under the conditions of [Misek]'s work and that there was sufficient control exercised by [Misek]'s supervisor in acquising [sic] to [Misek]'s request to obtain soft drinks for the supervisor and all employees and as such the act arose out of and was within the course and scope of employment and compensable.

CNG Financial filed an application for review, seeking review of the trial judge's award by a review panel of the compensation court. CNG Financial claimed that the trial judge erred in (1) finding that Misek's injury arose out of and in the course of her employment, (2) determining that CNG Financial exercised no scrutiny of Misek's break activities, and (3) extending the rule of law regarding acts of personal comfort and convenience to activities which occurred off-premises and during a break period.

In a two-to-one decision, the review panel of the compensation court reversed the trial judge's award. The review panel noted that this court has consistently held that injuries which occur off the premises of the employer are generally not compensable, citing *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998), and *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996), while injuries occurring on the employer's premises are generally found to be compensable simply because of the situs of the injury, citing *Thomsen v. Sears Roebuck & Co.*, 192 Neb. 236, 219 N.W.2d 746 (1974). Applying these decisions, the review panel found that no recovery was possible where Misek was injured off CNG Financial's premises and where CNG Financial had no means to exercise control over Misek's actions while she was

gone. The review panel also found that the trial judge's reliance on the doctrine of matters of personal convenience and comfort was misplaced. The review panel concluded that

> the trial court erred in its conclusion that [Misek]'s injury occurred while she was in the "course" of her employment with [CNG Financial]. A finding that an injury "arose out of" risks reasonably necessary or incident to the performance of [Misek]'s work is not sufficient in and of itself to sustain an award.

The dissenting judge on the review panel found that the cases cited by the majority were inapplicable to Misek's case and relied on several factually similar cases from other jurisdictions to arrive at the opposite conclusion. The judge also took exception to the majority's determination that CNG Financial had no opportunity or means to exercise authority over Misek when she was on her break. The judge said, "This is contrary to the finding of fact of the trial judge, who found that [CNG Financial] had sufficient control over [Misek] because [Misek] had to ask to take a break."

ASSIGNMENTS OF ERROR

Misek assigns, rephrased, that the review panel erred in finding that her injury did not arise out of and in the course of her employment.

STANDARD OF REVIEW

[1] 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. *Zavala v. ConAgra Beef Co., ante* p. 188, 655 N.W.2d 692 (2003).

[2] Where there is no factual dispute, the question of whether the injury arose out of and in the course of employment is clearly one of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

ANALYSIS

[3,4] Neb. Rev. Stat. § 48-101 (Reissue 1998) compensates injury caused an employee by an accident arising out of and in the course of his or her employment. *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000). The two phrases "arising out of" and "in the course of" in § 48-101 are conjunctive; thus, both must be established by a preponderance of the evidence. *Skinner v. Ogallala Pub. Sch. Dist. No. 1, supra.*

Arising Out of Employment

[5,6] The test to determine whether an act or conduct of an employee which is not a direct performance of the employee's work "arises out of" his or her employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Cannia v. Douglas Cty.*, 240 Neb. 382, 481 N.W.2d 917 (1992). The "arising out of" employment requirement is primarily concerned with causation of an injury. *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996).

[7] All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment. *Cords v. City of Lincoln, supra.* "[N]o break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities, as by . . . leaving his work . . . to procure drink, refreshments, [or] food." *Appleby v. Great Western Sugar Co., Inc.*, 176 Neb. 102, 107, 125 N.W.2d 103, 107 (1963).

Under the facts of this case, Misek's journey to the convenience store to obtain soft drinks for herself, her supervisor, and her coworker was a matter of personal convenience and comfort an employee may normally be expected to indulge in. We conclude that her injury arose out of her employment.

Arising in Course of Employment

[8,9] The "in the course of" requirement of § 48-101 has been defined as testing the work connection as to time, place, and

activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001). An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto. *Skinner v. Ogallala Pub. Sch. Dist. No. 1, supra.*

The majority of the review panel relied upon *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998), *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996), and *Thomsen v. Sears Roebuck & Co.*, 192 Neb. 236, 219 N.W.2d 746 (1974), in reversing the trial judge's award. The review panel's reliance on these cases was misplaced because the going to or coming from work rule is inapplicable to the present case. Misek was already at work, and was in the process of taking a rest or coffee break when her injury occurred. This finding is in accord with *King Waterproofing Co. v. Slovsky*, 71 Md. App. 247, 524 A.2d 1245 (1987). In *King Waterproofing Co.*, the employee was struck by a car while crossing the street during his coffee break. The Maryland Court of Special Appeals held that the injury sustained arose out of and in the course of his employment.

[10] Professor Larson tells us:

> Now that the coffee break or rest break has become a fixture of many kinds of employment, close questions continue to arise on the compensability of injuries occurring off the premises during rest periods or coffee breaks of various durations and subject to various conditions. It is clear that one cannot announce an all-purpose "coffee break rule," since there are too many variables that could affect the result. . . .
>
> The operative principle which should be used to draw the line here is this: If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee,

> the off-premises injury may be found to be within the course of employment.

1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 13.05[4] at 13-61 to 13-62 (2002).

[11,12] The trial judge of the compensation court found that CNG Financial exercised sufficient control over Misek by acquiescing to her request to go to the convenience store and buy soft drinks for herself and others. Whether an injury arose out of and in the course of employment must be determined from the facts of each case. *Torres v. Aulick Leasing*, 261 Neb. 1016, 628 N.W.2d 212 (2001). Factual determinations made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.*

Misek also testified that she generally stayed in "the area" during her breaks and would prematurely end her break and return to work early if business picked up while she was away. Misek was paid for her time during a break. In addition, Misek had previously traveled off-premises to buy soft drinks for herself and her coworkers, sometimes at the request of her supervisor. These facts are not in dispute. Where there is no factual dispute, the question of whether the injury arose out of and in the course of employment is clearly one of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001). Under these facts, we determine that CNG Financial retained control over Misek during her break. Her injury thus arose in the course of her employment.

CONCLUSION

Misek's injury, sustained off her employer's premises during a break, arose out of her employment. It also arose in the course of her employment because her employer retained authority over her during her break. We reverse the decision of the compensation court review panel and remand the cause with directions to vacate its order reversing the award of the trial judge.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. KIMBERLY SUE FAUST, APPELLANT.

660 N.W.2d 844

Filed May 9, 2003. No. S-01-615.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. ____. Although Neb. Rev. Stat. § 27-404(1)(a) (Reissue 1995) allows the accused to offer evidence of a pertinent trait of his or her character and allows the prosecution to rebut that evidence, Neb. Rev. Stat. § 27-405 (Reissue 1995) limits the manner in which the evidence may be admitted.
3. ____. Neb. Rev. Stat. § 27-403 (Reissue 1995) may serve to limit the use of character evidence.
4. ____. Although the character of an accused often is relevant to the issue of his or her conduct on a particular occasion, character evidence is normally inadmissible for that purpose under Neb. Rev. Stat. § 27-404(1) (Reissue 1995).
5. **Criminal Law: Evidence: Proof.** In criminal cases, the State is prohibited from attempting to prove the guilt of the accused by initiating an attack on his or her character.
6. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1995) specifically prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.
7. ____: ____. Evidence of prior bad acts of an accused might be admissible if it has independent relevance under Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
8. **Rules of Evidence: Other Acts: Proof.** Before the prosecution may offer other crimes evidence under Neb. Rev. Stat. § 27-404(2) (Reissue 1995), it must prove to the trial court, out of the presence of the jury and by clear and convincing evidence, that the accused committed the crime, wrong, or act.
9. **Rules of Evidence: Other Acts: Jury Instructions.** Before the prosecution may offer other crimes evidence under Neb. Rev. Stat. § 27-404(2) (Reissue 1995), it must clearly state the purpose for which the evidence is offered; the court must state the purpose for which it is received; and any limiting instruction must clearly, simply, and correctly instruct the jury about the specific purpose for which it may consider the evidence.
10. **Criminal Law: Evidence: Proof.** The accused in a criminal case may seek to establish his or her good character if proof is confined to particular character traits that are relevant to the conduct involved in the crime with which he or she has been charged.
11. **Rules of Evidence: Prosecuting Attorneys.** Under Neb. Rev. Stat. § 27-404(1)(a) (Reissue 1995), once the accused in a criminal case presents evidence of his or her good character, the prosecution may rebut that evidence.
12. ____: ____. Although Neb. Rev. Stat. § 27-404(1)(a) (Reissue 1995) allows the accused to present character evidence and allows rebuttal by the prosecution, the manner in which either party may present the evidence is limited by Neb. Rev. Stat. § 27-405 (Reissue 1995).

13. **Rules of Evidence: Proof.** Under Neb. Rev. Stat. § 27-405 (Reissue 1995), proof by either party must be made by expressions of reputation or opinion, unless the character trait is an essential element of a charge, claim, or defense.
14. **Trial: Rules of Evidence: Witnesses.** When character is not an element of the crime or a defense, Neb. Rev. Stat. § 27-405 (Reissue 1995) dictates that the only inquiry that can be made into specific instances of conduct is through cross-examination of the defendant's character witnesses.
15. ____: ____: ____. During a cross-examination under Neb. Rev. Stat. § 27-405 (Reissue 1995), the prosecutor is limited to an inquiry whether the witness has heard of a given fact, misdeed, or criminal conviction.
16. **Trial: Rules of Evidence: Witnesses: Proof.** Under Neb. Rev. Stat. § 27-405 (Reissue 1995), cross-examination questions and responses are not allowed as proof that the act occurred and are instead meant to test the witness' knowledge; thus the prosecution must accept the answer given by the witness, and this rule also applies to the direct examination of rebuttal witnesses.
17. ____: ____: ____: ____. Under Neb. Rev. Stat. § 27-405 (Reissue 1995), the prosecution's rebuttal witnesses may testify only to reputation or opinion and the witnesses may not be used to prove that specific instances of conduct occurred.
18. **Trial: Rules of Evidence: Other Acts.** Under Neb. Rev. Stat. § 27-405 (Reissue 1995), even when a defendant improperly offers specific instances of his or her good conduct, the prosecution may not counter by offering evidence of specific instances of bad conduct.
19. **Trial: Other Acts: Proof.** A defendant can "open the door" to proof of specific instances of conduct if he or she testifies and makes specific claims about specific instances of his or her past conduct, and in that circumstance, evidence of specific instances of conduct by rebuttal witnesses may be admissible to directly contradict the specific claims of the accused.
20. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
21. **Effectiveness of Counsel.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.
22. **Effectiveness of Counsel: Records: Appeal and Error.** When a claim of ineffective assistance of counsel is made on direct appeal, the determining factor is whether the record is sufficient to adequately review the question.
23. **Trial: Evidence: Appeal and Error.** If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
24. **Trial: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
25. ____: ____: ____: ____. To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.

26. **Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
27. **Convictions.** When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt.
28. **Effectiveness of Counsel: Presumptions.** When considering whether a counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
29. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** When deciding whether to reverse a judgment for ineffective assistance of counsel without an evidentiary hearing for failure to object to evidence, appellate courts consider the lack of a plausible strategy, the egregious nature of the error, the prejudice incurred, the effect of judicial errors, and the effect of other trial errors.
30. **Criminal Law: Trial: Evidence: Appeal and Error.** An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt.
31. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
32. **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.
33. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid 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.
34. **Self-Defense: Jury Instructions.** A trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense.
35. **Self-Defense.** To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances.
36. ____. Justifications for the use of force in self-defense are statutorily defined.
37. **Self-Defense: Proof.** The defendant bears the initial burden to produce evidence which supports a claim of self-defense.
38. **Self-Defense: Evidence: Jury Instructions.** If the trial evidence does not support a claim of self-defense, the jury should not be instructed on it.
39. **Jury Instructions.** An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given.
40. **Trial: Photographs.** The admission of photographs into evidence rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.

41. **Homicide: Photographs.** In a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
42. **Trial: Photographs.** A photograph which is admitted at trial depicting a victim while he or she was alive is not offered for a proper purpose.
43. **Confessions: Due Process.** Admission of an involuntary confession is precluded by the Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3.
44. **Confessions.** To be admissible, a statement or confession of an accused must have been freely and voluntarily made.
45. ____. A defendant who objects to the voluntariness of a statement is entitled to a hearing in which both the underlying factual issues and the voluntariness of the statement are actually and reliably determined.
46. **Motions to Suppress.** An accused may move for suppression of a statement that he or she claims is involuntary.
47. **Motions to Suppress: Waiver.** An objection to an allegedly involuntary statement is waived if it is not raised by motion before trial, with the exception that a court may entertain motions to suppress after the commencement of trial when the defendant is surprised by the statements introduced by the State.
48. **Motions to Suppress: Appeal and Error.** An appellate court reviews the determination whether to entertain a motion to suppress made after the commencement of trial for an abuse of discretion.
49. **Trial: Confessions.** A hearing pursuant to *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), may be appropriate even when the allegedly involuntary statement is made during rebuttal.
50. ____: ____. A hearing pursuant to *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), is not required for a statement that is being introduced solely for impeachment purposes, but the defendant may be entitled to a determination of voluntariness by the trial court, although not necessarily in the context of a *Jackson v. Denno* hearing.
51. **Confessions: Evidence.** An accused's statement, whether an admission or a confession, made to private citizens, as well as to law enforcement personnel, must be voluntary as determined by a court for admissibility and as a fact ascertained by the jury.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Reversed and remanded for a new trial.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, and Timothy W. Nelsen, Otoe County Public Defender, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

CONNOLLY, J.

A jury convicted the appellant, Kimberly Sue Faust, of two counts of first degree murder and two counts of use of a firearm to commit a felony. The district court sentenced her to consecutive terms of life imprisonment on each count of murder and 20 to 40 years' imprisonment for each count of use of a firearm to commit a felony.

Faust argues that the district court erred by (1) allowing prosecution witnesses to testify about specific instances of conduct when she acted aggressively or violently to rebut her character witnesses' testimony that she is a peaceful person, (2) instructing the jury on self-defense when it was not her theory of the case, (3) admitting into evidence photographs of the victims depicting them before their deaths, and (4) failing to hold a hearing to determine whether a statement that a police officer overheard her make to her father was voluntary. She also argues that she was denied effective assistance of counsel to the extent her trial counsel failed to address the issues now complained of on appeal, that there was prosecutorial misconduct, and that cumulative errors denied her due process.

We determine that under Neb. Rev. Stat. §§ 27-404 and 27-405 (Reissue 1995), the State is prohibited from introducing evidence of specific instances of a defendant's prior bad acts to rebut testimony of the defendant's character witnesses. We also address additional areas of concern about the performance of the attorneys involved at trial. Because the jury was exposed to a significant amount of improper and prejudicial testimony, we conclude that the district court erred in allowing the testimony Faust objected to and that she was denied effective assistance of counsel in the instances when her counsel did not object. We further conclude that because of the overwhelming prejudice to Faust's right to a fair trial, the convictions must be reversed and the cause remanded for a new trial.

BACKGROUND

On April 25, 2000, Shannon Bluhm and Robert Parminter were killed on an Otoe County road. Faust was later charged in the deaths. Faust's theory of defense was that her husband, Bruce Faust, killed Shannon and Robert.

STATE'S EVIDENCE

On the evening of April 25, 2000, Desiree Parminter, Robert's wife, heard screaming and a horn honking outside of her home in Otoe County. She looked out the window and saw the taillights of a car. She told Robert about the incident, and he went to the front porch. At that time, Desiree saw a pickup truck drive by. Robert, thinking nothing had happened, went back to bed, but Desiree then saw a fire in the front driver's side of the car.

Desiree told Robert about the fire, and he went outside. She called the 911 emergency dispatch service and then also went outside. Robert yelled to her that he saw a four-wheel-drive vehicle. Desiree then saw a rectangular vehicle start up the road without its lights on and drive past the car that was on fire. She next saw Robert open the passenger door of the burning car and pull someone out. As Robert carried the person toward the house, Desiree saw the rectangular vehicle coming back with its headlights on. The vehicle stopped between Desiree and Robert, blocking her view. She then heard three or four "popping" sounds, and the vehicle drove off. She did not see any other people at the scene. She went inside and called the 911 number again.

When members of the Palmyra and Eagle rescue squads arrived on the scene around 10 p.m., they found the bodies of Robert and a female who was later identified as Shannon. Shannon's car, a white Geo Prism, was engulfed in flames. The record shows that Shannon had been dating Faust's husband, Bruce. Bruce and Faust were separated, but still married, on April 25, 2000.

The pathologist who performed the autopsies testified that Robert died of at least two gunshot wounds to the head. Shannon had stab wounds to both the left and right areas of the chest, a gunshot wound to the back of the head, and a gunshot wound to the back. The gunshot wound to the back was the fatal wound. A forensic pathologist testified that Shannon had "defensive wounds" that were caused by a weapon such as a knife or a blade.

The State's evidence shows that on April 25, 2000, Faust loaded her bicycle into the back of her vehicle, a Jeep Cherokee, and drove it to a county road near a paved highway. Faust then rode the bicycle into Eagle, Nebraska. According to Faust, her plan was to leave the bicycle in Eagle and obtain a ride back to

her Jeep from her cousin. Faust, however, encountered Shannon in Eagle and accepted Shannon's offer to drive her back to her Jeep. Faust and the State dispute what took place after Shannon and Faust drove back to the Jeep.

The State presented evidence showing that sometime before April 25, 2000, Faust's father, William Borden, gave Faust a loaded revolver because there was criminal activity in the area and he was concerned about her safety. Borden stated that on April 25, Faust called him and asked him to come to her house because she had a problem. When he arrived, Borden found Faust sitting at a picnic table, crying. She said that she had gone for a bicycle ride and that Shannon gave her a ride back to her Jeep. She said that after getting in the car, Shannon started cussing and calling her names. Faust told Borden that Shannon hit her and pulled her hair and that she hit Shannon back. Faust said that she and Shannon then scuffled outside the car, that Shannon had a knife, and that Shannon got "cut or stuck" by the knife. Faust told Borden that she next got into her Jeep and got the gun, that then someone grabbed her, and that the gun went off inside the Jeep. When she got home, she placed the gun in a freezer in her garage. Faust later gave Borden the gun, and he placed it in his truck. Borden also observed a bullet hole in the glove compartment of the Jeep. At about 3 a.m. on April 26, Joel Bergman, a criminal investigator with the Nebraska State Patrol, arrived at Faust's residence and stated that he was investigating a double homicide. Borden gave the gun to Bergman.

While he was at Faust's residence, Bergman overheard a conversation between Borden and Faust. Borden indicated that the situation was his fault because he had discouraged Faust from moving away. Faust replied, "It's not your fault, it's my doing."

Ashley Faust, Bruce and Faust's daughter, testified that Faust was wearing a gray sweatshirt when she left the house on April 25, 2000, and that when she returned at about 10 p.m., Ashley saw Faust go into the bathroom and change clothes. Ashley gave a gray sweatshirt to Bergman. The sweatshirt was later determined to have bloodstains on it, but investigators were unable to obtain a DNA sample from it. According to Ashley, Faust had been upset about a romantic relationship between Shannon and Bruce.

Bergman later arrested Faust and searched her residence. As a result of the search, Bergman found blood on Faust's Jeep and on a notebook on the front passenger seat. An arson investigator found scissors and a serrated knife blade in Shannon's car. A key that fit Faust's Jeep was found at the crime scene.

Blood samples from Faust's Jeep and the notebook were tested. The results showed that blood on the Jeep passenger door, driver's-side door, and driver's-side passenger door came from Robert. Blood from the notebook, the bottom of the driver's-side passenger door, and the driver's-side seat came from Shannon. Blood from the inside driver's-side ledge came from more than one person, with Shannon as a major contributor. Bullet fragments recovered from Robert's body and bullets recovered from Shannon's body were fired by the gun that Faust had in her possession on April 25, 2000.

Various witnesses testified that they saw a vehicle parked on the side of the road on April 25, 2000. One witness, who was driving a Chevrolet pickup, saw a Jeep Cherokee and a white car on the side of the road near the Parminters' home at about 9:35 p.m. The windows of the car were steamed up, and as he drove by, someone partially opened the door.

Faust's Evidence

Faust testified that on April 25, 2000, she parked her car off the highway because she was afraid Bruce would see it and she did not want him to find her. She testified that when Shannon drove her to her Jeep, Bruce pulled up and got in Shannon's car with them. According to Faust, a struggle took place between Bruce and Shannon, and in the process, Faust got hit in the eye. She stated that at one point, Bruce opened the car door and she saw a truck drive by. She testified that she got out of the car and went to her Jeep and that she had blood on her leg. She stated that she had the gun in the glove compartment of the Jeep because she was intending to return it to Borden. She got the gun out, it went off, and then she saw Shannon's car on fire. She went back to where the car was on fire, and Bruce was there. According to Faust, Bruce grabbed her and the gun went off. She testified that Bruce then tried to shoot her, but the gun would not work. She stated that Bruce threatened her not to tell

anyone and that when she went home, she did not think anyone was dead. Faust said that she wore a red sweatshirt on the night of the murders. She also stated that she had her Jeep keys tied to her shoelaces and that Bruce had a key to her Jeep.

The defense presented evidence that a passenger in the Chevrolet pickup which had driven by the white car had previously stated that when he saw the passenger door of the car open, he saw what he assumed to be a man's arm. The defense also presented evidence that the relationship between Bruce and Shannon had "cooled off" by April 2, 2000, and that Bruce had a history of acting violently. Faust also called various character witnesses.

After Faust presented her defense, the State called several rebuttal witnesses. The testimony of Faust's character witnesses, the rebuttal witnesses, and other pertinent facts are described in the analysis section of this opinion.

Instructions and Closing Arguments

Faust was not present at the instruction conference, but no objection was made about her absence. At the instruction conference, Faust's attorney noted that the court had decided to give a self-defense instruction for the charge involving Shannon. Faust's attorney then requested a self-defense instruction for the charge involving Robert. The court denied the instruction because there was no evidence of self-defense in Robert's death.

At closing arguments, the State, during its rebuttal argument, pointed out Faust's character trait for violence and brought out specific incidents of her violent and aggressive conduct that are detailed later in this opinion. The jury convicted Faust on all counts, and Faust was sentenced to consecutive terms of life imprisonment on each count of murder and 20 to 40 years' imprisonment for each count of use of a firearm to commit a felony. Faust appeals.

ASSIGNMENTS OF ERROR

Faust assigns, rephrased, that the district court erred by (1) admitting into evidence proof of specific instances of Faust's conduct and allowing the prosecutor to argue inferences drawn from that conduct, (2) allowing the prosecutor to cross-examine Faust's

daughter, Ashley, about specific instances of Faust's conduct, (3) allowing the prosecutor to inquire into Ashley's reasons for wanting to live with Bruce and impeaching her with a letter she wrote, (4) instructing the jury on self-defense, (5) admitting into evidence photographs of the victims that were taken when they were alive, (6) asking Desiree whether Robert had had the injuries depicted in a postdeath photograph when he left the house on April 25, 2000; (7) admitting into evidence Faust's statement "it's my doing," (8) admitting into evidence testimony concerning Borden's character for peacefulness and allowing the prosecutor to argue inferences based on that testimony, (9) conducting the jury instruction conference in Faust's absence, and (10) allowing cumulative errors that denied Faust due process.

Faust also assigns that to the extent her trial counsel waived any of her assignments of error, she was denied effective assistance of counsel. She also assigns that the record suggests further instances of ineffective assistance of counsel. Finally, she assigns that each issue constituted prosecutorial misconduct.

STANDARD OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Other standards of review are included in our analysis of the issues.

ANALYSIS

Evidence of Faust's Character

Faust contends that the district court erred by allowing the prosecution to present evidence of specific instances of violent conduct to rebut her character witnesses' testimony that she is a peaceful person. She further argues that when her counsel did not object to the evidence, she was denied effective assistance of counsel. The State counters that it was entitled to prove specific instances of conduct that Faust had previously acted in a violent manner because she first presented evidence of her character for peacefulness.

FAUST'S CHARACTER WITNESSES

Donna McCaugherty, a lay minister who had been counseling Faust, testified as a character witness for Faust. She stated that in her opinion, Faust is a very truthful and calm person. On cross-examination, the State asked McCaugherty if she was aware that Faust had previously pointed a gun at Bruce, had rammed her vehicle into a vehicle operated by Bruce, and had thrown tools and a steel milk crate at him. She stated that she was not aware of these incidents.

Bryan Kennedy, a friend of Faust, testified that Faust is a calm and pleasant person. He testified about an incident in which Bruce fired a gun over Faust's shoulder and she reacted in a calm manner. On cross-examination, the State asked Kennedy if he was aware that Faust had pointed a gun at Bruce. He was not aware of the incident. The State then asked if he was aware that Faust had rammed Bruce's vehicle with her vehicle. He stated that he had heard several versions of that story.

Diana Seip, Faust's sister, testified that in March 2000, Bruce physically abused Faust. She then heard Borden state that he would "bury" Bruce if he touched Faust again. Seip stated that she thought Borden would physically harm Bruce if he touched Faust one more time. She also testified that Faust is one of the most calm people she has ever known and that Faust is very truthful. On cross-examination, Seip was asked if she thought Borden was a peaceful person and she answered yes.

Borden stated that Faust is a peaceful person who tells the truth. On cross-examination, the State asked Borden if he is generally a peaceful person but can get frustrated enough to act out in violence. Borden answered yes.

Although Ashley did not testify about Faust's character for peacefulness, she did testify about instances when Bruce behaved in a violent manner. Ashley stated that Bruce once ran into her with his vehicle, that he hit her with a frying pan, and that he pointed a gun at Faust. Ashley also stated that Bruce once told Faust to shoot herself in the head. Ashley testified that on April 25, 2000, Bruce called the house while Faust was gone and she told him that Faust had gone on a bicycle ride.

Without objection, the State asked Ashley on cross-examination about a time when she had wanted to live with

Bruce. The State asked if one of the reasons she wanted to live with Bruce was because Faust "yelled and screamed at [her] all the time." Ashley replied that Faust did not yell but would get upset. The State also asked if another reason was because Faust lied about Bruce. Ashley answered "[n]o" and stated, "My mom does not lie to me." Without objection, the State then asked Ashley to read a letter she had written, which stated in part, referring to Faust: "She's always taking her anger out on me, always yelling and complaining, 24/7, all the time," and "she lies to my [probation officer] and counselor to make my dad look like the bad guy."

In her case in chief, Faust called Bruce as a witness and he admitted that he once became upset at Faust and acted aggressively. He admitted that he slammed a telephone down, causing it to come off of the wall, and that he slammed a door into a refrigerator, causing a dent. He denied ever pointing a gun at Ashley.

Faust testified about an incident when Bruce fired a gun over her shoulder. She also explained the incident in which she allegedly rammed her vehicle into Bruce's vehicle. She stated that he was driving in front of her and slammed on his brakes to cause her to hit him. She also discussed other instances when Bruce acted violently. Faust admitted that there were instances in which she was physically aggressive toward Bruce and that she thought the aggression "went both ways."

State's Rebuttal Evidence

On rebuttal, the State called several witnesses who testified about specific instances of Faust's violent conduct. Jeff Bluhm (Bluhm), Shannon's husband, testified that Faust called him at times when she knew Bruce and Shannon were together. He stated that Faust wanted him to become involved in breaking up Bruce and Shannon's relationship and that she once called him 10 times during the same night. He described the nature of the calls as a "very aggravated, furious type." He stated that he got a caller identification device and started screening calls because Faust called him so often. Faust's attorney stated "[o]bjection" at the beginning of Bluhm's testimony about the calls, but the record shows no discussion with the court about the objection or a ruling by the court.

Bluhm next testified about an incident when he went to pick up his and Shannon's children at Shannon's workplace and Faust abruptly drove up, hitting the curb with her vehicle. He stated that Faust got out of her vehicle as if she was "on a mission," briskly walked up to Shannon, and said, "What the fuck are you doing with my husband, you bitch?" Bluhm testified that the situation was "aggravated" and that he stepped between Shannon and Faust and told Shannon to go inside.

Faust's attorney objected to the testimony based on § 27-404. The State argued that the testimony was being offered under § 27-404(1) to rebut evidence about Faust's character for peacefulness. The court indicated that it did not think § 27-404(2) applied, and the State abandoned an argument that the evidence had independent relevance under § 27-404(2). In particular, the following conversation occurred:

> [Faust's attorney]: Your Honor, I believe [the State] is getting into some [§ 27-]404 materials that pursuant to that rule I think we're entitled to a hearing outside the presence of the jury.
>
> THE COURT: Well, let me figure out where we are. What's the testimony going to be . . . ?
>
> [The State]: That there was a confrontation where Kim Faust called Shannon Bluhm filthy names and started to physically approach her.
>
> THE COURT: Now, just so that I'm clear, are you offering this then under [§ 27-]404(1)A in rebuttal to the evidence put on with regard to her character trait of peacefulness? Is that what you're doing?
>
> [The State]: Yes, Your Honor, and also there was testimony by Kim Faust that there — that she had a couple of conversations and there never was any problems between her and Shannon. And I think it also goes to motive, because she's now testified that someone else did these crimes.
>
> THE COURT: Well, if we get into motive, you're down into [§ 27-]404(2), I think. If you're offering it —
>
> [The State]: Could I look at the specific rule?
>
> THE COURT: If you're offering it to rebut the testimony with regard to her character trait of being peaceful, then I don't think [§ 27-]404(2) and (3) apply, and I can just

> merely give the jury an instruction, an instruction that it's being offered to rebut.
>
> [The State]: Could I look at that specific rule, Judge? Yes, Your Honor, I didn't remember the rule number, but I'm offering this to show that . . . you're allowed to go into specific acts showing the character that's been offered to rebut that character.
>
> THE COURT: Okay. Well, for that limited purpose, I'll permit the questioning.

Neither attorney nor the court discussed § 27-405. The court allowed the testimony and gave the jury a limiting instruction, which stated in part: "This testimony was received only to help you to decide whether you believe the testimony of [Faust]'s witnesses who testified with regard to [Faust]'s character for peacefulness, those witnesses being Donna McCaugherty, Bryan Kennedy, Diana Seip, and William Borden."

The State also called Bruce's friend, Gordon Lukes. Without objection, Lukes stated that in February 2000, he went to the Faust residence to help Bruce get some of his personal belongings. When Lukes pulled into the driveway, he saw Faust "kind of in a total rage, kicking and screaming and hollering and yelling." Lukes stated that Faust then yelled at him and told him to "get the fuck out of there because [he] was trespassing." He testified that Faust was kicking Bruce and using numerous profanities. Lukes stated that Faust also threw things at Bruce, including a steel milk crate, which hit Bruce in the back between the shoulder blades and then bounced up and over a truck. He described Faust's demeanor as an "uncontrolled rage." Lukes testified that Bruce was very calm during the incident. After the testimony, the court gave the jury a limiting instruction that was substantially the same as the instruction given after Bluhm's testimony.

On rebuttal, Bruce testified that Faust had purposely hit his vehicle with her vehicle. Without objection, Bruce also testified that in February 2000, Faust pointed a gun at him twice and that someone had to grab the gun away from her.

Principles of Law

The ability of the State and the accused to present evidence of a character trait and the manner in which that evidence may be

presented is addressed by Neb. Rev. Stat. § 27-403 (Reissue 1995) and §§ 27-404 and 27-405.

Section 27-404 explains when character evidence is admissible and provides in part:

> (1) Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except:
>
> (a) Evidence of a pertinent trait of his or her character offered by an accused, or by the prosecution to rebut the same;
>
> . . . .
>
> (2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> (3) When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

[2] Although § 27-404(1)(a) allows the accused to offer evidence of a pertinent trait of his or her character and allows the prosecution to rebut that evidence, § 27-405 limits the manner in which the evidence may be admitted. Section 27-405 provides:

> (1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

[3] Section 27-403 may also serve to limit the use of character evidence. Under § 27-403: "Although relevant, evidence may be

excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[4-6] It is uniformly recognized that although the character of an accused often is relevant to the issue of his or her conduct on a particular occasion, character evidence is normally inadmissible for that purpose under § 27-404(1). See, *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). See, e.g., *Freeman v. State*, 486 P.2d 967 (Alaska 1971); *Henson v. State*, 239 Ark. 727, 393 S.W.2d 856 (1965); *People v. Baskett*, 237 Cal. App. 2d 712, 47 Cal. Rptr. 274 (1965), *disapproved on other grounds, People v. Kelley*, 66 Cal. 2d 232, 424 P.2d 947, 57 Cal. Rptr. 363 (1967). See, generally, *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948). In criminal cases, the State is prohibited from attempting to prove the guilt of the accused by initiating an attack on his or her character. See, e.g., *Freeman, supra*. Section 27-404(2) specifically prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. *Sanchez, supra*.

[7-9] Evidence of prior bad acts of an accused might still be admissible if it has independent relevance under § 27-404(2). But before the prosecution may offer other crimes evidence under § 27-404(2), it must prove to the trial court, out of the presence of the jury and "by clear and convincing evidence that the accused committed the crime, wrong, or act." § 27-404(3); *Sanchez, supra*. We further require that the prosecution clearly state the purpose for which the evidence is offered and that the court must state the purpose for which it is received. *Sanchez, supra*. Any limiting instruction must " ' "clearly, simply, and correctly" instruct the jury as to the *specific* purpose for which [it] may consider the evidence.' " (Emphasis in original.) *Id.* at 308, 597 N.W.2d at 374. Here, the State did not attempt to prove to the court, outside the presence of the jury, that Faust's acts actually occurred. Instead, the State specifically abandoned any argument that the evidence had independent relevance and has not argued that § 27-404(2) applies to this case. The court did not hold a hearing or consider whether the evidence was admissible under

§ 27-404(2), and the jury was not instructed on § 27-404(2). Accordingly, we do not address whether any of the evidence might have been admissible under § 27-404(2). See, generally, *Sanchez, supra.*

[10,11] The rule prohibiting the use of character evidence to prove conduct is not applied to the accused in criminal cases. It is consistently held that the accused may seek to establish his or her good character if proof is confined to particular character traits that are relevant to the conduct involved in the crime with which he or she has been charged. § 27-404(1)(a). See, e.g., *Freeman, supra.* It is equally established that once the accused presents evidence of his or her good character, the prosecution may rebut that evidence. *Id.*

[12,13] Although § 27-404(1)(a) allows the accused to present character evidence and allows rebuttal by the prosecution, the manner in which either party may present the evidence is limited by § 27-405. Under § 27-405, proof by either party must be made by expressions of reputation or opinion, unless the character trait is an essential element of a charge, claim, or defense. § 27-405. See, e.g., *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied* 441 U.S. 913, 99 S. Ct. 2014, 60 L. Ed. 2d 386 (1979). Here, a character trait for violence is not an element of the crime charged, nor did Faust assert a defense that required a character for peacefulness as an element.

[14,15] When character is not an element of the crime or a defense, § 27-405 dictates that the only inquiry that can be made into specific instances of conduct is through cross-examination of the defendant's character witnesses. § 27-405; *State v. Bourgeois*, 639 A.2d 634 (Me. 1994); 2 Joseph M. McLaughlin, Weinstein's Federal Evidence § 405.03[2][a] (2d ed. 2003). See *State v. Eynon*, 197 Neb. 734, 250 N.W.2d 658 (1977). During cross-examination, the prosecutor is limited to an inquiry whether the witness has heard of a given fact, misdeed, or criminal conviction. See, e.g., *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948); *United States v. Curry*, 512 F.2d 1299 (4th Cir. 1975), *cert. denied* 423 U.S. 832, 96 S. Ct. 55, 46 L. Ed. 2d 50; *United States v. Beno*, 324 F.2d 582 (2d Cir. 1963); *Bourgeois, supra*; *State v. Kelly*, 102 Wash. 2d 188, 685 P.2d 564 (1984) (en banc). The inquiry is not intended to act

as proof that the conduct occurred. Rather, it is intended to test the basis of the witness' opinion or his or her knowledge of the defendant's reputation. See, *State v. Williams*, 111 Ariz. 511, 533 P.2d 1146 (1975); *Bourgeois*, 639 A.2d at 637 n.7, quoting Richard H. Field & Peter L. Murray, Maine Evidence § 405.2 (3d ed. 1992) (" 'objective of cross-examination of a character witness for an accused is to show an inadequate basis for the reputation to which the witness has testified on direct' "). See, also, *Kelly*, 102 Wash. 2d at 194, 685 P.2d at 569 ("primary purpose of [character witnesses'] cross examination must be to impeach the testimony of the character witnesses, not to discredit the person on trial").

[16] Because cross-examination questions and responses are not allowed as proof that the act occurred and are instead meant to test the witness' knowledge, the prosecution must accept the answer given by the witness. Thus, if the witness states that he or she is not aware of the act asked about, the prosecution may not prove that the act occurred through other witnesses or with extraneous evidence. See, e.g., *Bourgeois, supra*; *State v. O'Neal*, 432 A.2d 1278 (Me. 1981). This rule also applies to the direct examination of rebuttal witnesses. See, e.g., *Curry, supra*; *Beno, supra*; *Freeman v. State*, 486 P.2d 967 (Alaska 1971); *Henson v. State*, 239 Ark. 727, 393 S.W.2d 856 (1965); *People v. Baskett*, 237 Cal. App. 2d 712, 47 Cal. Rptr. 274 (1965), *disapproved on other grounds, People v. Kelley*, 66 Cal. 2d 232, 424 P.2d 947, 57 Cal. Rptr. 363 (1967); *Bourgeois, supra* (citing 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 405[02] (1993)); *People v Champion*, 411 Mich. 468, 307 N.W.2d 681 (1981). See, also, *Kelly, supra* (in dicta). See, generally, *Williams, supra*; *O'Neal, supra*. The rule's intent is to counter the concern that extraneous evidence of specific instances of conduct has the potential to be confusing to the jury and overly prejudicial to the defendant.

In *Bourgeois, supra*, a rebuttal witness testified about the defendant's specific past acts of violence to rebut the testimony of character witnesses about his reputation for peacefulness. Because of the improper use of evidence of specific instances of conduct, the Supreme Court of Maine reversed the conviction. The court explained:

> Unless character is an essential element of the offense charged, the only inquiry that can be made into specific instances of conduct is, as [Maine Rules of Evidence] 405(a) provides, through cross-examination of the character witness.
>
> . . . .
>
> "The reason for the rule of exclusion lies in the tendency of triers of fact to give excessive weight against the accused respecting any specific illegal activity. It further tends to confuse the jury concerning the main issue of guilt or innocence of the offense charged and calls upon the accused to account for past wrongdoings for which he is not being tried. The main thrust of such evidence, such as other unrelated wrongful acts of the accused, is to pollute the minds of the jury against the defendant. . . . 'If such testimony should be admitted, the defendant might be overwhelmed by prejudice, instead of being tried upon the evidence affirmatively showing his guilt of the specific offense with which he is charged.'" *City of Topeka v. Harvey*, [188 Kan. 841, 365 P.2d 1109 (1961)].

State v. Bourgeois, 639 A.2d 634, 637 (Me. 1994). See, also, *Freeman, supra* (discussing reasons for rule); *Henson, supra* (admission of specific instances of conduct to prove character raises collateral issues and diverts minds of jurors from matter at hand).

[17] Under § 27-405, the prosecution's rebuttal witnesses may testify only to reputation or opinion. The witnesses may not be used to prove that specific instances of conduct occurred. See, *United States v. Curry*, 512 F.2d 1299 (4th Cir. 1975), *cert. denied* 423 U.S. 832, 96 S. Ct. 55, 46 L. Ed. 2d 50; *United States v. Beno*, 324 F.2d 582 (2d Cir. 1963); *Freeman, supra*; *Henson, supra*; *Baskett, supra*; *Bourgeois, supra*; *Champion, supra*. See, also, *Kelly, supra* (in dicta). See, generally, *State v. Williams*, 111 Ariz. 511, 533 P.2d 1146 (1975); *O'Neal, supra*.

[18] Section 27-405 limits the defendant's evidence of character to evidence of opinion or reputation. But even when a defendant improperly offers specific instances of his or her good conduct, the prosecution may not counter by offering evidence of specific instances of bad conduct. *United States v. Herman*,

589 F.2d 1191 (3d Cir. 1978), *cert. denied* 441 U.S. 913, 99 S. Ct. 2014, 60 L. Ed. 2d 386 (1979); *Beno, supra*; *Henson v. State*, 239 Ark. 727, 393 S.W.2d 856 (1965). See *People v. Baskett*, 237 Cal. App. 2d 712, 719, 47 Cal. Rptr. 274, 279 (1965) (character witness' testimony, "whether properly received or not," did not open door to rebuttal witness' testimony about specific instances of conduct). As one court stated:

> [I]t makes little sense to insist that once incompetent evidence is erroneously admitted, the error must of necessity be compounded by "opening the door" so wide that rebutting collateral, inflammatory and highly prejudicial evidence may enter the minds of the jurors. In short, a small advantage improperly obtained does not compel the exaction of a gross disadvantage in penalty, particularly where a tarnished verdict is the inevitable result.

Beno, 324 F.2d at 588-89. See, also, *Henson*, 239 Ark. at 732, 393 S.W.2d at 859 ("two wrongs do not make a right"). See, generally, *Freeman v. State*, 486 P.2d 967, 976 (Alaska 1971) ("door to rebuttal once opened must not be broadened into a gateway to jury prejudice").

[19] A defendant can "open the door" to proof of specific instances of conduct if he or she testifies and makes specific claims about specific instances of his or her past conduct. In that circumstance, evidence of specific instances of conduct by rebuttal witnesses may be admissible to directly contradict the specific claims of the accused. *Freeman, supra*; *Henson, supra.*

Application to Faust's Case

We now address testimony of specific instances of conduct presented in Faust's case that are raised on appeal. We note at the outset that Faust presented four character witnesses who testified that in their opinion, she was a peaceful person. At least one was allowed to testify about a specific instance of Faust's peaceful behavior.

Jeff Bluhm

The State called Bluhm as a rebuttal witness. Bluhm testified about an incident when Faust drove up, hitting the curb with her vehicle; approached Shannon in a threatening manner as if she was "on a mission"; and called her a "bitch." Faust's attorney

objected to the testimony. The prosecution stated that the evidence was being used solely to rebut Faust's character for peacefulness. The court allowed the testimony for that purpose only and gave a limiting instruction.

The court erred in allowing the testimony. The law is clear that the prosecution cannot prove specific instances of conduct through extrinsic evidence. Instead, the prosecution was limited to cross-examination of Faust's character witnesses about whether they had knowledge of instances in which Faust behaved in a nonpeaceful manner.

The State contends that by presenting evidence of her own good character and by testifying about a specific instance of good character, Faust opened the door to proof of specific instances of conduct on rebuttal. We disagree. Under § 27-405, the State must limit its rebuttal of statements made by character witnesses to cross-examination and must accept the answers provided by the witnesses. Courts have repeatedly stated concerns about the inflammatory and prejudicial nature of testimony about specific acts of bad conduct, and § 27-405 is formulated to address those concerns.

The State also argued to the trial court that Faust stated there was never any problem between her and Shannon and that the testimony was admissible to rebut that statement. But the record does not support the State's argument, and the court did not allow the evidence for that purpose. Further, an inquiry into specific instances of conduct on rebuttal is allowed only to rebut a defendant's denial of a specific occurrence.

Here, the State chose to prove on rebuttal that the incident actually occurred, which is not allowed. Further compounding the error is that none of Faust's character witnesses were asked on cross-examination about the specific instance when Faust got out of her car and approached Shannon in a threatening manner. Yet Bluhm was asked about that incident on rebuttal. The evidence would not be admissible even if Faust's witnesses had denied knowledge of the acts on cross-examination, but that they were never asked makes the State's argument that the evidence was necessary for rebuttal irrelevant.

Bluhm's testimony served to show only that Faust has a bad character trait for violence and acted in conformity with that

character on April 25, 2000, which is inadmissible under § 27-404(1). Evidence of a criminal defendant's prior instances of conduct may not be admitted solely to show propensity. Here, the State presented the evidence solely to rebut Faust's character witnesses, which is not permitted under § 27-405(1). The jury was then instructed that it could consider the evidence for a purpose that is not allowed by § 27-405. Indeed, the instruction, when it informed the jury that the evidence could be used to determine if they believed Faust's character witnesses, allowed the jury to consider improper evidence of propensity to reach that determination. If the jury believed Faust had a propensity for violent behavior, they would likely not believe her character witnesses. This is specifically what §§ 27-404(1) and 27-405 prohibit. See *Sanchez, supra*. Accordingly, the trial court erred when it allowed Bluhm to testify about specific instances of Faust's conduct.

Unobjected-To Rebuttal Testimony

Faust also complains about testimony that was not objected to at trial. We first address instances of unobjected-to rebuttal testimony and then address unobjected-to questions asked during cross-examination. Finally, we address whether Faust's counsel was deficient for failing to object.

During the State's rebuttal, the following testimony was unobjected to or not objected to with sufficient specificity: (1) Bluhm testified about harassing telephone calls he received from Faust that he described as a "very aggravated, furious type"; (2) Lukes testified about an incident when Faust yelled at him and told him to "get the fuck out" because he was trespassing; (3) Lukes also testified that Faust screamed and yelled at Bruce, kicked him, threw a steel milk crate at him, hitting him in the back between the shoulder blades, and was in "an uncontrolled rage"; (4) Bruce testified that Faust pointed a gun at him twice and that someone had to grab the gun away from her; and (5) Bruce testified that Faust had purposely hit his vehicle with her vehicle.

[20] Faust's attorney did not object to the testimony. A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Harms*, 263 Neb. 814, 643

N.W.2d 359 (2002), *modified on other grounds* 264 Neb. 654, 650 N.W.2d 481; *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). Faust may, however, raise a claim of ineffective assistance of counsel because of the failure of her counsel to object. See, generally, *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997). We first address whether the testimony was inadmissible. If the testimony is inadmissible, we then address whether Faust was denied effective assistance of counsel.

Bruce's testimony on rebuttal that Faust purposely hit his vehicle with her vehicle was admissible. Faust previously testified and specifically denied that she purposely hit Bruce's vehicle. Thus, Bruce could testify about the incident to rebut Faust's specific testimony about what happened in that specific instance. The rest of the testimony, however, was inadmissible and should have been objected to.

There were no objections to the testimony about the telephone calls, and this testimony was also inadmissible. The State could not inquire about specific instances of conduct on rebuttal. Further compounding the problem, Faust's character witnesses were not asked if they had knowledge of the telephone calls.

There should also have been objections to Lukes' testimony. Although some character witnesses were asked if they were aware that Faust had thrown tools and a steel milk crate at Bruce, the State was required to accept the witnesses' answers and could not seek on rebuttal to prove that the conduct occurred. Further, Faust admitted during her direct examination that she sometimes behaved aggressively toward Bruce. Thus, even if the State were allowed to rebut through instances of specific conduct—which it was not—it had nothing to rebut. Faust had already admitted to behaving aggressively toward Bruce. The State could not seek to expand on that admission by introducing numerous instances of Faust's violent conduct, which the rules prohibit to avoid jury prejudice and confusion. We note that Lukes testified that Bruce behaved in a calm manner during the incident, but the evidence was not admitted for that purpose, and we do not address whether it would be admissible for that purpose.

Finally, Bruce's testimony that Faust had pointed a gun at him was also inadmissible. As with other instances of rebuttal

testimony, the error was compounded because Faust had admitted that she had behaved aggressively toward Bruce.

The State is prohibited from using specific instances of conduct to prove character when the issue of character is circumstantial to the case. The rebuttal testimony was inadmissible.

Unobjected-To Cross-Examination

Ashley did not provide character evidence for Faust during her direct examination. The State, however, cross-examined Ashley about specific instances of conduct, asking her if Faust "yelled and screamed at [her] all the time" and if Faust lied. When Ashley answered no, the State impeached her with a letter she wrote stating that Faust "yell[ed] and complain[ed] . . . all the time." There was no objection.

The State's cross-examination of Ashley was improper. Had Ashley provided character evidence, the State could have asked her if she was aware of certain instances of conduct to test her knowledge as a witness. The State would then be required to accept her answer. Here, Ashley did not provide any character testimony. Not only was the State barred from using extrinsic evidence to prove that specific instances of conduct occurred, it was barred from engaging in cross-examination about the conduct. The State's cross-examination questions about Faust's character were inadmissible. The impeachment based on Ashley's answers to the questions further compounded the error. Because the State's initial questions were improper, the impeachment should never have occurred. But even if the State had been able to ask cross-examination questions about Faust's character, it would be required to accept the answer given by the witness.

Harmless Error and Ineffective Assistance of Counsel

We next address whether the unobjected-to errors deprived Faust of effective assistance of counsel and whether admission into evidence of the objected-to testimony was harmless error.

[21-23] Faust brings her claim of ineffective assistance of counsel on direct appeal. But such a claim need not be dismissed merely because it is made on direct appeal. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). See *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), *cert. denied* 537 U.S. 918, 123

S. Ct. 303, 154 L. Ed. 2d 203. The determining factor is whether the record is sufficient to adequately review the question. *Cody, supra*. If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

[24] To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. See, *Thomas, supra*; *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001).

[25-27] To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997), *disapproved on other grounds, State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt. *Id.*

The U.S. Supreme Court has explained:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Strickland, 466 U.S. at 695-96. Accord *Boppre, supra*. In particular, the Court has stated that although these principles should

guide the decision, "*the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.*" (Emphasis supplied.) *Strickland*, 466 U.S. at 696. As the Court has noted, "[i]n every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.*

We conclude that by failing to object to a significant amount of improper negative character evidence, Faust's counsel's performance was deficient and prejudiced her defense. This is true even though she also improperly offered a specific instance of conduct to show her character for peacefulness. One court has described the prejudice that arises as follows:

> [A] criminal defendant is entitled to have his guilt or innocence determined on the specific offense charged and not risk the possibility of conviction for a series of prior specific acts which collectively suggested that his career had been reprehensible. The force of this principle, which lies at the heart of our criminal law system and seems a vital part of our definition of due process of law, is in no way blunted merely because a defendant has, in seeking acquittal, introduced evidence of less than questionable relevance. While there are instances in which a defendant may waive rights which the law invokes for his protection . . . the right to be tried for a specific offense, as the very foundation of a criminal trial as we know it, cannot be one of them.

United States v. Beno, 324 F.2d 582, 589 (2d Cir. 1963).

Because Faust's counsel failed to object to the testimony, the State was able to parade before the jury a series of witnesses whose testimony was not only inadmissible but also prejudicial. Although presented as "rebuttal testimony," the effect of the testimony was to demonstrate to the jury, over and over again, that Faust was a violent and aggressive person, and as such, that she had a propensity to commit the crime and should be convicted. Our jurisprudence does not allow this. See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

When a jury is presented with inadmissible evidence that is inflammatory and has a high potential for jury confusion, we

cannot determine whether the defendant was convicted for committing the elements of the crime charged or whether the jury determined guilt because the defendant was a generally aggressive or violent person and, thus, more likely to commit the crime. See *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988) (improper testimony about defendant's character was not harmless error). When improper evidence of a defendant's prior bad acts is involved, the probability that the improper evidence unduly influenced the jury and denied the defendant a fair trial is so great that courts, using terms such as "serious prejudice" and "manifest injustice," overwhelmingly hold that the error is not harmless. See, *United States v. Pantone*, 609 F.2d 675 (3d Cir. 1979); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied* 441 U.S. 913, 99 S. Ct. 2014, 60 L. Ed. 2d 386 (1979); *United States v. Curry*, 512 F.2d 1299 (4th Cir. 1975), *cert. denied* 423 U.S. 832, 96 S. Ct. 55, 46 L. Ed. 2d 50; *Beno, supra*; *Sun B. Lee v. United States*, 245 F.2d 322 (9th Cir. 1957); *State v. Williams*, 111 Ariz. 511, 533 P.2d 1146 (1975); *Henson v. State*, 239 Ark. 727, 393 S.W.2d 856 (1965); *People v. Dee*, 14 Ill. App. 2d 96, 142 N.E.2d 811 (1957); *State v. O'Neal*, 432 A.2d 1278 (Me. 1981); *State v. Putzell*, 40 Wash. 2d 174, 242 P.2d 180 (1952).

Here, the jury should not have heard on rebuttal that Faust made numerous harassing telephone calls to Bluhm, that she had previously approached Shannon in a threatening manner and called her names, that she yelled at Lukes and used profanity, that she threw items at Bruce and called him names, and that she previously pointed a gun at Bruce. The jury heard Faust's telephone calls described as a "very aggravated, furious type." They also heard Faust described as being in an "uncontrolled rage" during one of the incidents. They then heard that she behaved as if she was "on a mission" during another. As we and other courts have recognized, even a small amount of such evidence is highly inflammatory and can serve only to confuse the jury about the issues in the case and affect their deliberations. See, e.g., *Curry*, 512 F.2d at 1304 (evidence that defendant " '[a]bout a year ago . . . was dealing in drugs' " was not harmless error); *Lenz, supra* (evidence of two instances of improper conduct was not harmless error). Further, the jury heard Ashley read a letter in which

she wrote that Faust yelled, complained, and screamed "24/7, all the time," and that Faust lied about Bruce to make him look bad. Thus, the jury was improperly allowed to hear evidence that Faust lied about Bruce. This evidence could influence the jury to believe that if Faust lied about Bruce once, she would have the propensity to lie about him again at trial when she placed the blame on him for the murders.

Here, there were numerous instances of conduct that likely polluted the jury. During the State's rebuttal argument, the prosecutor spoke about Faust's character for peacefulness and argued that she was not peaceful based on the incidents where Faust threw a steel milk crate, called Shannon a "bitch," made telephone calls to Bluhm, and pointed a gun at Bruce. There were no objections, and because the arguments were made on rebuttal, Faust's counsel could not respond to them. The total effect of the errors was that the State was able to spend the last portion of the trial presenting evidence of numerous specific instances of Faust's violent behavior and then use that to argue Faust's guilt to the jury. Thus, the testimony was at the end of the trial where it was fresh in the juror's memories and wafted an unwarranted innuendo into the jury box just before the jury entered deliberations. See *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948). Here, where the jury was wrongly allowed to hear so many specific instances of conduct, Faust was deprived of a fair trial in a most fundamental manner.

The State, however, contends that we are unable to review the issue of ineffective assistance of counsel on direct appeal because the record is incomplete for a review of the question. We disagree. It is clear from the record that the trial court and attorneys involved in this case failed to read and understand § 27-405. As a result, Faust's counsel initially objected to improper character evidence and then failed to continue to object as more prejudicial evidence was piled on. Here, Faust's attorney, along with the prosecutor and the court, made a fundamental mistake of law. The situation was not one where a reasonable trial tactic or strategy was employed, and indeed, no strategy could be reasonable when the result would be a fundamentally unfair trial.

[28] It is correct that we have stated that when considering whether a counsel's performance was deficient, there is a strong

presumption that counsel acted reasonably. See, e.g., *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002). But this presumption can be rebutted, and relief may be warranted without an evidentiary hearing when a decision by counsel cannot be justified as a result of a plausible trial strategy. *Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998).

Although we have not reversed a conviction on direct appeal for ineffective assistance of counsel for failure to object to prejudicial evidence, other jurisdictions have recognized that in some rare circumstances, a reasonable trial tactic or strategy cannot exist. In these cases, courts have reversed for ineffective assistance of counsel on direct appeal. See, e.g., *Com. v. Scullin*, 44 Mass. App. 9, 687 N.E.2d 1258 (1997); *Com. v. Gillette*, 33 Mass. App. 427, 600 N.E.2d 1009 (1992); *State v. Cutcher*, 17 Ohio App. 2d 107, 244 N.E.2d 767 (1969); *Stone v. State*, 17 S.W.3d 348 (Tex. App. 2000). See, also, *State v. Roybal*, 132 N.M. 657, 54 P.3d 61 (2002) (finding no reasonable trial strategy for failure to object, but determining that defendant was not prejudiced). See, generally, *People v. Guizar*, 180 Cal. App. 3d 487, 225 Cal. Rptr. 451 (1986) (applying plain error); *Broussard v. State*, 68 S.W.3d 197 (Tex. App. 2002) (Cohen, J., dissenting). In the federal courts, some circuits, including the Eighth Circuit, will reverse for ineffective assistance of counsel in the absence of an evidentiary hearing when there is no plausible explanation for counsel's actions. *Burns v. Gammon*, 260 F.3d 892 (8th Cir. 2001). See, also, *Leonardo, supra*. In particular, the U.S. Supreme Court recently noted that "[t]here may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*." *Massaro v. United States*, No. 01-1559, 2003 WL 1916677 at *6 (U.S. Apr. 23, 2003).

[29] When reversing a judgment for ineffective assistance of counsel without an evidentiary hearing for failure to object to evidence, appellate courts have considered the lack of a plausible strategy, the egregious nature of the error, the prejudice incurred, the effect of judicial errors, and the effect of other trial errors. See, e.g., *Scullin, supra*; *Gillette, supra*; *Cutcher, supra*. For example,

in *Gillette*, the defendant was charged with indecent assault and battery of his daughter. At trial, evidence was admitted without objection that years earlier, while his wife was pregnant with another child, the defendant told his wife that if she had a daughter, he would take away the child's virginity. The jury heard the statement from three separate witnesses, and it was emphasized in both the prosecutor's opening and closing arguments. On appeal, the court noted that " '[t]rial tactics which, from the vantage point of hindsight, can be seen to have failed do not amount to ineffective assistance unless "manifestly unreasonable" when undertaken.' " *Gillette*, 33 Mass. App. at 429, 600 N.E.2d at 1011. But the court also considered the egregious nature of the error and the prejudice that resulted. The court determined that the evidence was "highly prejudicial" and "unquestionably, any 'ordinary fallible lawyer' would have sought to keep it out of the case." *Id.* at 430, 600 N.E.2d at 1011. The court then concluded as a matter of law that the evidence was more prejudicial than probative. The court stated that no reasonable trial strategy to justify the failure to object had been offered and that it could not imagine any. As a result, the court reversed the conviction.

In *Cutcher, supra*, defense counsel in a sexual assault case initially elicited testimony from his client about previous arrests for incest, assault, and battery. The state stipulated that an exhibit related to the testimony could be entered into evidence. On appeal, the court expressed disappointment with both the defense and prosecuting attorneys, indicating that the state should not have facilitated the reception into evidence of such damaging and prejudicial evidence. The court then noted, however, that the harm to the defendant's right to a fair trial arose from the actions of his attorney, who chose to introduce the evidence "for whatever imagined tactical or strategic trial reason, it is impossible, from the record, to ken." *State v. Cutcher*, 17 Ohio App. 2d 107, 110, 244 N.E.2d 767, 769 (1969). The court considered the prejudicial effect of the evidence and the fact that if the evidence were admissible for another purpose, the jury "was in the dark about it." *Id.* at 111, 244 N.E.2d at 769. The court further noted additional errors that occurred at trial as "other examples of trial counsel's questionable efficiency." *Id.* Finally, the court noted that where the defense is substantially weakened

because of an unawareness of a rule of law basic to the case, the accused is denied effective assistance of counsel. As a result, the court reversed the conviction.

Here, it is clear from a review of the record that everyone was on the wrong page. When discussing the initial objection to Bluhm's testimony, the discussion centered on the meaning of § 27-404(1). It is clear from the record that the court and the attorneys stopped their inquiry after reading that under § 27-404(1), the prosecution could rebut Faust's character evidence. They then made a mistake of law when they failed to consider § 27-405 to determine that the evidence could not be rebutted using specific instances of conduct. We further note that had the law been determined correctly the first time the issue was raised, the problem we face in this case would not exist.

We are also unable to conceive of any reasonable trial strategy when defense counsel would choose to allow a continuing stream of witnesses to testify about numerous bad acts of the defendant when such evidence has such a high potential to prejudice the jury against the defendant. We further note that no plausible strategy has been offered. Perhaps counsel may have been concerned that continuing to object to the evidence would emphasize the evidence to the jury. But such a strategy is not reasonable when the objectionable testimony is so extensive and damaging. Further, counsel could have requested a continuing objection. Regardless, a defendant has a right to be tried for the specific offense charged, and this cannot be waived. *United States v. Beno*, 324 F.2d 582 (2d Cir. 1963). When the inadmissible evidence that is presented has such a high level for jury prejudice and confusion, there is no strategy or reason for a defense attorney to sit back and allow such evidence to be heard without objection. Simply put, when the error was so egregious and resulted in such a high level of prejudice, no tactic or strategy can overcome the effect of the error, which effect was a fundamentally unfair trial. In that rare case, a determination of the issue of ineffective assistance of counsel does not require an evidentiary hearing.

Finally, as discussed later in this opinion, there were other errors at trial. In particular, we note the failure of Faust's counsel to object to a self-defense instruction when self-defense was not

the theory of her case, and we note the failure to object to the use of victim photographs. Faust also raised issues about prosecutorial misconduct and the cumulative effect of trial errors.

We recognize that rarely will a reviewing court be provided the opportunity to make a determination of ineffective assistance of counsel on direct appeal when the issue involves a failure to object to prejudicial evidence. See *Stone v. State*, 17 S.W.3d 348 (Tex. App. 2000). But where no plausible explanation for an attorney's actions exists, to require the defendant to file a postconviction action can be only a waste of judicial time. See *Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998). We conclude that this is one of those rare cases. The performance of Faust's counsel was deficient, and that deficiency prejudiced her defense in a manner that fundamentally denied her a fair trial. Here, no strategy can overcome the effect of the errors that occurred. Hence, an evidentiary hearing would not change the result, would be a waste of judicial resources, and would delay the State's opportunity to retry Faust. We conclude that Faust was denied effective assistance of counsel and that the deficiency prejudiced her case; thus we reverse, and remand for a new trial.

[30] For the same reasons that Faust was prejudiced by her counsel's failure to object, the error admitting Bluhm's testimony that was objected to was not harmless. An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988).

[31] Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). See, *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996) (Gerrard, J., dissenting), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Ryan*,

249 Neb. 218, 543 N.W.2d 128 (1996) (Gerrard, J., dissenting), *overruled on other grounds, State v. Burlison, supra.*

Here, we cannot say that the guilty verdict was unattributable to the error. Although there was strong evidence of guilt, Faust presented evidence to explain her version of what happened. The jury heard prejudicial evidence about specific instances of Faust's conduct, and much of that evidence was presented at the end of the trial. Faust is entitled to have the jury view the evidence as it relates to the crime charged and not tainted by extraneous evidence about specific instances of violent and aggressive behavior. We determine that Faust is entitled to a new trial.

Sufficiency of Evidence

[32,33] 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. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002); *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). In *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), the Court held that the Double Jeopardy Clause does not forbid 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. See, *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), *cert. denied* 532 U.S. 1019, 121 S. Ct. 1957, 149 L. Ed. 2d 753 (2001); *Anderson, supra.* We conclude that Faust can be retried without a violation of double jeopardy because the evidence was sufficient to sustain her conviction.

Other Assignments of Error

Although we have determined that Faust's convictions must be reversed and the cause remanded for a new trial, because some of her remaining assignments of error are likely to recur during retrial, we address those issues. See, e.g., *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991). Generally, Faust's remaining assignments of error involve evidentiary issues that were not objected to. Thus, Faust contends that she was denied effective assistance of counsel. Although we have concerns about the nature of some of these issues, we address these issues solely to prevent errors on retrial and do not decide whether Faust was

actually denied effective assistance of counsel or if any of the errors were harmless. We do not address additional assignments of error that are unlikely to reoccur on retrial.

SELF-DEFENSE INSTRUCTION

Faust contends that the court erred by instructing the jury on self-defense when her theory of the case was that she did not commit the crimes.

[34-39] We have stated that a trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances. *Urbano, supra*; Neb. Rev. Stat. § 28-1409 (Reissue 1995). Justifications for the use of force in self-defense are statutorily defined. See § 28-1409. The defendant bears the initial burden to produce evidence which supports a claim of self-defense. *Urbano, supra*. We have stated that if the trial evidence does not support a claim of self-defense, the jury should not be instructed on it. *Id.* An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given. *Id.*

The Supreme Court of Massachusetts has addressed the question whether a defendant may veto a self-defense instruction when the theory of the case was that the defendant did not commit the crime, but evidence introduced by the state might warrant an instruction. *Commonwealth v. Souza*, 428 Mass. 478, 702 N.E.2d 1167 (1998). In *Souza*, self-defense was not the theory of the defendant's case. The court noted that a trial court must instruct on self-defense when the evidence most favorable to the defendant warrants a reasonable doubt whether the defendant acted in self-defense. The court stated that a defendant's trial strategy should be respected. The court noted that there was also no request from the defendant or the state to give the instruction. The court, however, determined that the defendant was not prejudiced by the instruction. Other courts have also determined that it

is error to instruct on self-defense when it is not the theory of the defendant's case and there is no evidence to support an instruction. See, *People v. Silver*, 16 Cal. 2d 714, 108 P.2d 4 (1940); *People v. Griner*, 30 Mich. App. 612, 186 N.W.2d 800 (1971); *Whisenhunt v. State*, 279 P.2d 366 (Okla. Crim. App. 1954).

Here, Faust did not assert self-defense and did not seek to produce evidence to support a self-defense instruction. Instead, her theory of the case was that she did not commit the crimes and that Bruce was the perpetrator. The initial burden of proof is on the defendant to produce evidence to support a self-defense claim. Faust made no effort to meet her burden of proof to support a self-defense instruction because it was not her theory of the case. Thus, there was no support for a self-defense instruction.

The State presented evidence that Faust had told Borden that she and Shannon scuffled, that Shannon got "cut," and that the gun went off. But this evidence was not presented to either prove or disprove a self-defense claim. Rather, the State presented the evidence to show that Faust had told inconsistent stories about the events of the night of the murders. Without Faust's seeking to assert a theory of self-defense, this evidence does not warrant a self-defense instruction.

We determine that when the defendant makes no effort to meet the initial burden of proof to prove self-defense and when self-defense is not the defendant's theory of the case, a self-defense instruction is not warranted. A theory of self-defense necessarily involves an inference or admission that the defendant harmed the victim, but that the defendant's acts were justified. By giving a self-defense instruction when the defendant's theory of the case is that he or she did not commit the crime, the court risks confusing or misleading the jury. We conclude that the court erred by giving a self-defense instruction and that Faust's attorney should have objected to the instruction. Instead, Faust's attorney asked for an additional self-defense instruction. If the issue whether to give a self-defense instruction arises on retrial, an instruction should not be given if it is not warranted by Faust's evidence.

VICTIM PHOTOGRAPHS

Faust next contends that the court erred in allowing into evidence photographs of the victims taken when they were alive.

During trial, Desiree identified a photograph of Robert that was taken when he was alive. The photograph depicts Robert sitting on a couch with his arm around a dog. She also identified a photograph that was taken of Robert's body after his death. The State asked her if Robert had the injuries depicted in the photograph when he left the house on April 25, 2000. Desiree answered "[n]o."

Shannon's mother also identified a photograph of Shannon that was taken when she was alive. She also identified Shannon in a photograph taken after her death. The photographs were entered into evidence without objection.

[40-42] The admission of photographs into evidence rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999). See § 27-403. In a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent. *Clark, supra.* We have held that a photograph which is admitted at trial depicting a victim while he or she was alive is not offered for a proper purpose. *Id.*

Here, the photographs of the victims depicting them when they were alive were not relevant to show the condition of the body or the extent of the wounds, or to establish malice or intent. The State contends that the photographs were necessary for identification, but this argument ignores that both victims were identified in photographs taken after their deaths. We conclude that the photographs were not offered for a proper purpose. Photographs of the victims taken when they were alive should not be allowed into evidence on retrial.

FAUST'S STATEMENT "IT'S MY DOING"

Faust contends that she was entitled to a hearing under *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), to determine whether her statement "it's my doing" was voluntarily made. The State contends that the issue was waived because Faust failed to move to suppress the statement. In the alternative, the State contends that a hearing was not required

because the statement was not made to law enforcement officers and was properly used on rebuttal to impeach Faust's assertion that she did not commit the crimes.

Before trial, the court held a *Jackson v. Denno* hearing about various statements Faust made to Bergman when he first went to Faust's residence. The court determined that the statements could be used at trial because Faust was not in custody at the time she made the statements and the statements were voluntarily made.

At trial, Bergman testified that while he was at Faust's residence, Faust voluntarily provided information about what she had done on April 25, 2000. She told him that she had taken a bicycle ride and that Shannon had picked her up.

A deputy with the Otoe County Sheriff's Department testified about a statement he overheard Faust make at her home during the early morning hours of April 26, 2000. He testified that he was in the kitchen with Faust and Borden and heard Faust say, "It's not your fault, it's my doing." On cross-examination, he testified that right before Faust's statement, Borden said, "This is my fault, I shouldn't have talked you out of moving." Faust's attorney objected to the testimony, stating that his understanding was that only Bergman was going to testify about statements volunteered by Faust and that the statement the deputy overheard was subject to a *Jackson v. Denno* hearing. The State responded that it told Faust's attorney that the statement might be used in rebuttal and argued that a *Jackson v. Denno* hearing was not needed for rebuttal evidence. The court overruled the objection without explaining its reasoning.

[43-48] Admission of an involuntary confession is precluded by the Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). To be admissible, a statement or confession of an accused must have been freely and voluntarily made. *Id.* A defendant who objects to the voluntariness of a statement is entitled to a hearing in which both the underlying factual issues and the voluntariness of the statement are actually and reliably determined. See, *Jackson, supra*; *Harris, supra*. An accused may move for suppression of a statement that he or she claims is involuntary. *Harris, supra*. An objection to such a statement is waived if it is not raised by motion before trial, with the

exception that a court may entertain motions to suppress after the commencement of trial when the defendant is surprised by the statements introduced by the State. *Id.*; Neb. Rev. Stat. § 29-115 (Cum. Supp. 2002). We review the determination whether to entertain a motion to suppress made after the commencement of trial for an abuse of discretion. *Harris, supra.*

[49,50] A *Jackson v. Denno* hearing may be appropriate even when the allegedly involuntary statement is made during rebuttal. *Loftin v. State*, 180 Ga. App. 613, 349 S.E.2d 777 (1986). A *Jackson v. Denno* hearing is not required for a statement that is being introduced solely for impeachment purposes, but the defendant may be entitled to a determination of voluntariness by the trial court, although not necessarily in the context of a *Jackson v. Denno* hearing. *Id.* Under § 29-115, a court may entertain a motion to suppress after the commencement of trial when the defendant is surprised or was previously unaware of the grounds for the motion. The decision to entertain the motion, however, is at the trial court's discretion. *Harris, supra.*

Here, we are unable to determine from the record whether the court denied Faust's request for a hearing because it erroneously believed that a *Jackson v. Denno* hearing was never required for rebuttal evidence or because it had decided in its discretion to deny the motion despite Faust's contentions of surprise about the testimony. Nor is it clear from the record that the statement was introduced solely for impeachment purposes. Because we are unable to make these determinations, we do not consider the issue to be waived, and we address Faust's arguments.

[51] We have held that an accused's statement, whether an admission or a confession, made to private citizens, as well as to law enforcement personnel, must be voluntary as determined by a court for admissibility and as a fact ascertained by the jury. *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000). That Faust made the statement to Borden does not preclude the need for a hearing.

Had Faust raised the issue before trial in a motion to suppress, she would have been entitled to a hearing. But because she waited to raise the issue, the court could entertain or deny the motion at its discretion. But we are unable to tell from the record whether the trial court properly considered Faust's claim of surprise when it chose to deny the motion. We note that the court would not have

abused its discretion by denying the hearing. Faust does not contend that her statement was involuntary. Instead, she sought a hearing without ever alleging any specific instances of coercion. In addition, other statements made by Faust around the same time and under the same circumstances were found to be voluntary. Further, when taken in the context of the entire conversation between Faust and Borden, it would have been reasonable for the court to question whether the statement was an admission at all. Finally, the trial court could have questioned whether Faust was actually surprised by the testimony about her statement. While Faust claimed to be surprised by the introduction of the statement, the State alleged that it had informed the defense that the statement might be used on rebuttal. Thus, it would have been reasonable for the court to deny the hearing.

We conclude that on retrial, issues regarding the voluntariness of Faust's statement should be addressed before trial. If Faust fails to raise the issue before trial, the court should either hold a hearing if one is later requested or explain its reasons if a hearing is denied.

Evidence of Borden's Character

Faust contends that the court erred in allowing testimony about Borden's character for peacefulness. There was no objection to the testimony. We note that Faust raised the issue first when Seip provided testimony that Bruce physically abused Faust. As a result, Seip testified that she heard Borden state that he would "bury" Bruce if he touched Faust again. The State then explored the issue further on cross-examination of both Seip and Borden. We do not address this issue on appeal, but should the issue arise again on retrial, we caution the attorneys and the court to consider the purpose for which the testimony is offered and whether the testimony is admissible under Neb. Rev. Stat. § 27-608 (Reissue 1995).

CONCLUSION

We conclude that the district court erred in allowing testimony about a specific instance in which Faust acted in a violent and threatening manner. We further conclude that Faust was denied effective assistance of counsel because there were no objections to evidence of numerous additional instances of Faust's conduct.

The admission of the evidence and the ineffective assistance of trial counsel were prejudicial to Faust's defense and resulted in a fundamentally unfair trial. As a result, she is entitled to a new trial. Faust raised additional assignments of error that we do not address, including a charge of prosecutorial misconduct and an argument that the cumulative effect of the errors at trial or instances of ineffective assistance of counsel denied her right to due process. While we do not specifically address those assignments of error, we note that we have addressed a number of issues that may arise on retrial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STEPHAN, J., dissenting.

I respectfully dissent. In my view, the trial record affords an insufficient basis for determining whether trial counsel for Kimberly Sue Faust was constitutionally ineffective, and therefore I would not reach that issue in this direct appeal. Because I perceive no prejudicial error occurring at trial, I would affirm.

The majority concludes that reversal is necessary because the trial court received certain testimony which the majority determines to be inadmissible under the statutory rules of evidence which govern criminal trials in Nebraska. However, those rules provide in part:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> (a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context[.]

Neb. Rev. Stat. § 27-103 (Reissue 1995). From this rule, we derive a basic tenet of appellate review that a prerequisite to an appeal based upon error in the admission of evidence is a timely objection stating the grounds therefor, unless the grounds are apparent from the context. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). The failure to make a timely and proper objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony. *Id.* Put simply, no trial error ordinarily results from receiving evidence to which there is no objection.

With a single exception, there was no objection to the testimony on which the majority predicates reversible error. The majority bridges this gap by accepting Faust's argument that her trial counsel performed in a constitutionally deficient manner by failing to object, thereby enabling the majority to consider whether an objection, if made, would have resulted in exclusion of the evidence. The majority acknowledges the well-established principle that where ineffective assistance of counsel is claimed, there is a strong presumption that counsel acted reasonably. See, *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002); *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). Under this principle, trial counsel is afforded due deference to formulate trial strategy and tactics, and an appellate court will not second-guess reasonable strategic decisions made by counsel. *State v. Al-Zubaidy, supra*; *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). The decision whether to object or not to specific questions posed to a witness is a strategic decision made by trial counsel to which this rule applies. *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000).

Today, for the first time in our jurisprudence, this court determines from a record on direct appeal that defense counsel was constitutionally deficient in not making certain evidentiary objections at trial. The majority concludes that it is "unable to conceive of any reasonable trial strategy" which would have supported a decision not to object to the questions which elicited testimony regarding Faust's actions toward her estranged husband, Bruce Faust, and Shannon Bluhm during the period of their extramarital relationship. This reasoning ignores the reality that trial strategy is often shaped by factors known to trial counsel which do not necessarily appear in the record on direct appeal and are, therefore, unknown to a reviewing court.

Evidence introduced during a criminal trial "will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose facts necessary to decide either prong of the *Strickland* analysis." *Massaro v. United States*, No. 01-1559, 2003 WL 1916677 at *4 (U.S. Apr. 23, 2003). Although the U.S. Supreme Court acknowledged in *Massaro* that there may be cases in which a claim of ineffective assistance of counsel could be resolved on the basis of the appellate record, it also reasoned that

"few such claims will be capable of resolution on direct appeal," 2003 WL 1916677 at *6, and that the "better-reasoned approach" is to permit ineffective assistance claims to be asserted in the first instance in a collateral proceeding under 28 U.S.C. § 2255 (2000), the federal postconviction remedy, 2003 WL 1916677 at *3. The Court reasoned that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance," noting that a collateral postconviction proceeding affords "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Massaro*, 2003 WL 1916677 at *4.

Indeed, while we may consider and resolve claims of ineffective assistance of trial counsel asserted on direct appeal, we frequently decline to do so because the record is insufficient to permit meaningful review. See, e.g., *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002); *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999). In the limited number of cases in which we or the Nebraska Court of Appeals have reached the issue of ineffective assistance of counsel on direct appeal, the record presented questions of law, not questions of trial strategy. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995) (finding because defendant lacked reasonable expectation of privacy with respect to areas searched, counsel not deficient in handling motion to suppress); *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991) (finding evidence sufficient to support charge and thus counsel not deficient in failing to move for directed verdict), *abrogated on other grounds, State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995); *State v. Fletcher*, 8 Neb. App. 498, 596 N.W.2d 717 (1999) (finding enhancement evidence reliable as matter of law and thus counsel not deficient in offering additional evidence on subject). Where claims of ineffective assistance of counsel are dependent upon facts which do not appear in the trial record, Nebraska appellate courts consistently defer resolution to postconviction review. See, *State v. Hert*, 192 Neb. 751, 224 N.W.2d 188 (1974) (declining to reach on direct appeal whether counsel deficient in failing to file motion to discharge); *State v. Kellogg*, 10 Neb. App. 557, 633 N.W.2d 916 (2001)

(declining to reach on direct appeal whether counsel deficient in forgoing presentence investigation).

I see no reason in this case to depart from this sound practice. In my view, the strong presumption that trial counsel acted reasonably cannot be overcome by speculation regarding strategy. Thus, whether a court can or cannot examine the trial record and "conceive" of a reason why defense counsel did not object to certain questions during trial is not the issue. On direct appeal, a reviewing court "may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse." *Massaro*, 2003 WL 1916677 at *4. Without knowing the reasons, and strategic considerations, if any, upon which defense counsel acted or refrained from acting, we are simply not in a position to judge whether counsel's performance was constitutionally deficient. This determination will ordinarily require consideration of facts extrinsic to the trial record. Our statutory postconviction remedy, which is designed to determine whether a conviction should be set aside because it was obtained through a denial or infringement of the constitutional rights of the accused, specifically provides for an evidentiary hearing where a proper allegation of denial of constitutional rights cannot be refuted by the files and records of the original prosecution. Neb. Rev. Stat. § 29-3001 (Reissue 1995). See, also, *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). In a case such as this, where, in my view, the trial record does not clearly establish or refute a claim of deficient performance of counsel, the presumption that counsel acted reasonably is not overcome on direct appeal. A subsequent postconviction proceeding affords a more complete and objective basis for deciding the issue. I would therefore decline to reach the claims of ineffective assistance of trial counsel on this direct appeal.

The only assigned error preserved by a trial objection involved the testimony of Jeff Bluhm (Bluhm) regarding a confrontation between Faust and Shannon in January or February 2000. I agree with the majority that this testimony was not admissible on the narrow issue of Faust's character under Neb. Rev. Stat. § 27-405 (Reissue 1995). While I believe that this evidence may have been

independently relevant on the issue of Faust's motive, and thus admissible under Neb. Rev. Stat. § 27-404(2) (Reissue 1995), it was ultimately not offered for this purpose, and the procedures outlined in *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999), were not followed. Nevertheless, I conclude that the error in admitting Bluhm's testimony was harmless beyond a reasonable doubt.

Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Duncan, ante* p. 406, 657 N.W.2d 620 (2003); *State v. Brouillette, ante* p. 214, 655 N.W.2d 876 (2003). Based upon my review of the record, I am satisfied that the guilty verdict was surely unattributable to the erroneous admission of evidence relating to Faust's confrontation with Shannon several weeks prior to the homicides. I reach this conclusion for two reasons.

First, to the extent that the evidence in question raised an inference that Faust is a person capable of violence, it is cumulative. As the majority acknowledges, Faust admitted that the physical abuse in her marriage sometimes "went both ways" and admitted to incidents in which she was physically aggressive toward Bruce.

More importantly, however, I regard the admission of the character evidence as harmless because the record reflects overwhelming evidence of guilt which is not in any way dependent upon character evidence. Utilizing DNA evidence, the State proved that blood found on the exterior and interior of the driver's side of Faust's vehicle was that of the victims. It is undisputed that the fatal shots were fired from the handgun which was in Faust's possession before and after the crimes were committed. Faust admitted that she was present when the shootings occurred and that the shots were fired from the handgun that she carried in her vehicle.

Faust's defense was that Bruce shot the victims while she helplessly watched. The State was able to substantially impeach this testimony without resort to Bluhm's testimony. On cross-examination, Faust admitted that her trial testimony was inconsistent with two prior accounts she had given regarding the

events at the crime scene. The State was also able to establish inconsistencies between Faust's trial testimony and certain known time sequences. According to Faust's testimony, she and Shannon arrived at the rural location where Faust had left her vehicle sometime after 9:20 p.m. This location was approximately 5 miles from Eagle. Faust testified that as she and Shannon sat and talked in Shannon's vehicle, Bruce arrived and entered the vehicle from the front driver's side. Faust testified that she and Bruce had an argument at that time which led to a physical altercation occurring inside the vehicle between the three of them. Faust testified that she then exited the vehicle, entered her own vehicle, and drove a short distance away. After several minutes, Faust returned to the area where Shannon's vehicle was parked and observed that the vehicle was on fire.

Bruce denied committing the murders. In direct contrast to Faust's testimony, telephone records reveal that Bruce was at his home in Eagle talking to his daughter on the telephone between 9:22 and 9:29 p.m. Witnesses observed the burning vehicle between 9:25 and 9:35 p.m. Desiree Parminter reported the burning vehicle in a 911 emergency dispatch call to the Otoe County sheriff's office that was received at approximately 9:43 p.m. On this evidence, the jury could reasonably have chosen not to believe that Bruce traveled approximately 5 miles from his home to the crime scene, entered Shannon's vehicle, engaged in a physical altercation with Faust and Shannon in the vehicle, and then set fire to Shannon's vehicle, all within what at most would amount to a 14-minute time period. Most importantly, the jury could have arrived at such conclusion without considering the erroneously admitted character evidence in any manner.

For these reasons, I would affirm the judgment of the district court.

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

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. STANFORD L. SIPPLE, RESPONDENT.

660 N.W.2d 502

Filed May 9, 2003. No. S-02-460.

1. **Disciplinary Proceedings: Proof: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence.
3. **Attorneys at Law.** An attorney is expected to use legal means to enforce his or her rights, not violent threats.
4. ____. Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability.
5. **Constitutional Law: Attorneys at Law.** Assertions of an attorney's right to free speech require a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting the right of an attorney to free expression.
6. **Attorney and Client.** There is a distinction between professional employment and professional relationship. A lawyer owes a duty to a client in the context of a professional relationship long after the professional employment has terminated.
7. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
8. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
9. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
10. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

Original action. Judgment of suspension.

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

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

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

PER CURIAM.

I. NATURE OF CASE

This is an action brought by the Counsel for Discipline of the Nebraska Supreme Court seeking the imposition of discipline against respondent, Stanford L. Sipple, a member of the Nebraska State Bar Association. Respondent was formally charged with violating certain disciplinary rules and his oath of office as an attorney in connection with his representation of Brian Husted. A hearing was held, and the referee found that respondent had violated the Code of Professional Responsibility. The referee made no finding as to whether respondent had violated his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended that respondent be suspended from the practice of law for 1 year. Respondent filed exceptions to the referee's report. Following our de novo review of the record, we agree with the referee's findings of fact and conclusions of law. We also conclude respondent violated his oath of office as an attorney. We reject the referee's recommended 1-year suspension and instead suspend respondent from the practice of law for 2 years.

II. STATEMENT OF FACTS

The substance of the referee's findings, with which we agree, may be summarized as follows: On November 14, 1998, respondent entered into a fee agreement to represent Brian in a workers' compensation claim against Duncan Aviation. Brian had allegedly sustained a serious head injury arising out of and in the course of his employment. Respondent filed a workers' compensation lawsuit on behalf of Brian against Duncan Aviation, and the matter was scheduled to go to trial on March 2, 2001. Immediately prior to trial, the parties engaged in settlement discussions. The referee found that during these negotiations, respondent "failed, despite the request of [Brian], to put a settlement demand of $185,000.00 or $165,000.00 to the [employer's] attorney." Apparently, the parties arrived at the figure of $150,000 to resolve the case. Cheryl Husted, Brian's wife, claims, however, that immediately after reaching this figure, she and Brian advised respondent that they did not want to settle the case for $150,000. Cheryl claims respondent advised her that there was nothing that could be done. The referee concluded that

the Husteds "felt that they were pressured to accept the $150,000.00 settlement."

On March 15, 2001, Brian was given a copy of the settlement documents by respondent's office. On March 16, Cheryl advised respondent that Brian needed more time to review the paperwork. In his report, the referee stated that Cheryl's request for more time "incensed [respondent, who] insisted that the settlement documents be executed by the Husteds and returned to his office later [that same day] or he would take steps to nullify the settlement." The referee found that on March 16, respondent left a telephone message for Brian, stating, " 'I'll give you this one last chance. You be in here on Monday [March 19, 2001] before twelve noon and ready to sign these documents or I will go to [Duncan Aviation's attorney.] This is your last chance.' "

Also on March 16, 2001, respondent advised Cheryl that he was driving to the Husteds' house to speak with Brian directly, despite Cheryl's request that respondent not do so because Brian was ill. Later that same day, respondent drove to the Husteds' home and confronted Brian about the settlement documents. The referee's report stated that during their conversation, respondent "became abusive," inquiring whether Brian needed a guardian and challenging Brian to settle the case " 'like a man.' " The referee reported that "[a]ll of this, to say the least, was upsetting to the Husteds."

On March 19, 2001, the Husteds terminated their employment of respondent and hired a new attorney to handle Brian's workers' compensation claim. Thereafter, respondent took several actions which the referee determined could "only be described as a campaign to intimidate the Husteds and force an early payment of his [attorney] fee," even though there was no dispute about respondent's right to collect a fee. Despite the ongoing nature of Brian's workers' compensation claim, respondent scheduled the depositions of the Husteds. He also served them with requests for admissions. Additionally, on May 2, and again on May 17, respondent contacted Duncan Aviation's workers' compensation lawyer. The record reflects that in one conversation, respondent stated to Duncan Aviation's lawyer that "he did not want [Brian] to receive any more than $150,000 in settlement." Respondent also contacted by e-mail the workers' compensation judge assigned to

Brian's case. According to the referee's report, in the e-mail, respondent stated to the judge that he saw " 'little harm that could be done to [Brian's] case by answering [respondent's] discovery [regarding attorney fees], other than his avoiding the truth.' "

In his report, the referee observed that respondent "took offense at a certain Response to [respondent's] Requests For Admissions supplied by [Brian] and his [new] lawyer." As a result of this "offense," respondent threatened to prosecute Brian for perjury. The record reflects that in a facsimile transmitted to the Husteds' new attorney, respondent wrote "I will pursue perjury because it is perjury. . . . Make truthful statements or I will take matter further."

On August 24, 2001, the Husteds' new attorney settled Brian's workers' compensation claim against Duncan Aviation for $200,000. On October 15, this new attorney filed a grievance with the Counsel for Discipline's office against respondent relating to respondent's actions involving the Husteds. On April 30, 2002, a single-count formal charge was filed against respondent alleging that as a result of his actions, respondent had violated the following disciplinary rules:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.
>
> DR 7-101 Representing a Client Zealously.
>
> (A) A lawyer shall not intentionally:
>
> . . . .
>
> (3) Prejudice or damage his or her client during the course of the professional relationship . . . .
>
> DR 7-105 Threatening Criminal Prosecution.
>
> (A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

On June 7, respondent filed an answer to the formal charges, admitting certain of the allegations, but denying that he had

violated either the disciplinary rules or his oath as an attorney. On June 12, this court appointed a referee to serve in the case. A referee hearing was held on October 4, at which hearing evidence was adduced regarding the facts recited above and argument was presented. The record also discloses that respondent had been the subject of two prior reprimands.

On November 8, 2002, the referee filed his report and found by clear and convincing evidence that respondent had violated Canon 1, DR 1-102(A)(1), (5), and (6), and Canon 7, DR 7-101(A)(3) and DR 7-105(A). In his report, the referee also noted that respondent had been the subject of a prior disciplinary proceeding "for behavior of the same type." In one of the two prior disciplinary proceedings, respondent had received a private reprimand after leaving verbally abusive messages on his clients' answering machines when the clients indicated some concern with regard to a settlement respondent had negotiated. With respect to the sanction which ought to be imposed for the violations established by the record, and considering respondent's prior disciplinary history, the referee recommended that respondent be suspended from the practice of law in the State of Nebraska for 1 year. On November 18, respondent filed exceptions to the referee's report.

III. ASSIGNMENTS OF ERROR

In his brief, respondent assigns five errors, which we restate as four. Respondent claims, restated, that (1) the evidence was insufficient as a matter of fact and law to support the conclusion that he violated DR 1-102(A)(5) and (6); (2) the evidence was insufficient as a matter of fact and law to support the conclusion that he violated DR 7-101(A), in part because certain statements respondent made were protected speech, privileged under the First Amendment to the U.S. Constitution and article I, § 5, of the Nebraska Constitution; (3) the evidence was insufficient as a matter of fact and law to support the conclusion that he violated DR 7-105(A); and (4) the punishment was excessive.

IV. STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a

material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Petersen*, 264 Neb. 790, 652 N.W.2d 91 (2002); *State ex rel. Counsel for Dis. v. Brinker*, 264 Neb. 478, 648 N.W.2d 302 (2002).

V. ANALYSIS

1. Violation of Disciplinary Rules and Attorney's Oath

(a) DR 1-102(A)(5) and (6)

For his first assignment of error, respondent challenges the referee's conclusion that respondent violated DR 1-102(A)(5) and (6). In his brief, respondent admits that his "final efforts to consummate the settlement and resolve the fee dispute [were] probably 'out of bounds.'" Brief for respondent at 7. Nonetheless, respondent argues that such conduct does not amount to "conduct that is prejudicial to the administration of justice," see DR 1-102(A)(5), or "conduct that adversely reflects on [respondent's] fitness to practice law," see DR 1-102(A)(6). We disagree.

Initially, we note that respondent's prior disciplinary proceeding involving his leaving abusive messages on his clients' answering machines resulted in respondent's receiving a private reprimand for violating DR 1-102(A)(1), (5), and (6); the same rules respondent claims he did not violate in the instant case. We also note the similarity between respondent's conduct in his prior disciplinary proceeding and certain of the actions in which respondent engaged in the instant case.

Based on our de novo review of the record, it is clear that the record in the instant case contains overwhelming evidence that respondent was abusive to a client in an attempt to coerce the client into accepting a settlement which the client was not prepared to accept and in an attempt to collect an attorney fee. The record reflects that respondent left a threatening message on the Husteds' answering machine. The record also demonstrates that despite Cheryl's request that Brian be given more time to review the settlement documents, respondent stated that he would

"nullify" the settlement if Brian did not execute the documents immediately. The referee found that respondent confronted Brian at his home, notwithstanding Cheryl's specific request that respondent not come to the house because Brian was too ill. During the confrontation which ensued, the record reflects that respondent verbally abused his own client who had sustained a severe head injury, threatened Brian that he needed a guardian, and challenged Brian to settle the case " 'like a man.' "

Respondent continued his abusive behavior, aggressively pursuing his claim to a legal fee that was not in dispute, at a time when Brian's workers' compensation case had not concluded. The referee found respondent's actions to be a "campaign to intimidate the Husteds." During this "campaign," the record reflects that respondent contacted Duncan Aviation's attorney, stating that "he did not want [Brian] to receive any more than $150,000 in settlement." Respondent also contacted the judge assigned to hear Brian's workers' compensation case by e-mail and in that message, challenged Brian's willingness to tell the truth. The referee found that respondent threatened to prosecute Brian for perjury for a matter which respondent admitted had no bearing on his claim for an attorney fee.

[3,4] We have previously stated that an attorney is expected to use legal means to enforce his or her rights, not violent threats. See *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001). In *Lopez Wilson*, the respondent engaged in a course of conduct in which he, inter alia, personally confronted his client at the client's home in a hostile manner, threatened his client that he would alert the court that the client had not been truthful, and contacted an opposing party with information potentially damaging to the client's case, all in an attempt, in part, to collect a legal fee. We concluded that the respondent's conduct had a negative effect on the public's perception of attorneys and the Nebraska State Bar Association in general. We further stated that "[w]ith regard to the protection of the public . . . ' " 'courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions.' " ' " *Id.* at 661, 634 N.W.2d at 474 (quoting *State v. Hawes*, 251 Neb. 305, 556 N.W.2d 634 (1996)). We determined that the respondent's threats undermined the confidential and

fiduciary nature of the attorney-client relationship and lessened the public's confidence in the legal profession. We also stated that hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability. We concluded that an attorney's conduct which includes progressively abusive language and threats "violate[d] disciplinary rules that prohibit engaging in conduct prejudicial to the administration of justice and engaging in conduct that adversely reflects on one's fitness to practice law." *Id.* at 662, 634 N.W.2d at 475.

Based on our de novo review of the record, see *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002), we conclude that the record in the instant case establishes by clear and convincing evidence that respondent engaged in conduct that was prejudicial to the administration of justice and that adversely reflected on respondent's fitness to practice law, in violation of DR 1-102(A)(1), (5), and (6).

(b) DR 7-101(A)(3)

For his second assignment of error, respondent challenges the referee's conclusion that respondent violated DR 7-101(A)(3) by engaging in conduct that was prejudicial or damaging to Brian during the course of the professional relationship. In support of this assignment of error, respondent raises two arguments. First, respondent claims that certain of his actions are protected by his federal and state constitutional rights to free speech, and thus cannot serve as a basis for an attorney disciplinary proceeding. Second, respondent claims that his actions involved a "former client," and thus, did not occur " 'during the course of the professional relationship.' " Brief for respondent at 13. We find no merit to this assignment of error.

[5] Initially, we note that we have previously recognized that assertions of an attorney's right to free speech require "a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting the right of an attorney to free expression." *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. 545, 555, 316 N.W.2d 46, 52 (1982). Nonetheless, we have recognized that "instances can exist where an attorney's criticism or conduct would be impermissible and the subject of professional discipline." *Id.* at 556, 316 N.W.2d at 53. In

Michaelis, we concluded that notwithstanding an attorney's claim that his conduct was protected by his constitutionally guaranteed right to free speech, the record demonstrated that the attorney's statements were unethical and unprofessional and in violation of the Code of Professional Responsibility. In reaching this conclusion, we quoted Justice Stewart of the U.S. Supreme Court, who, in a concurring opinion speaking for five members of the Court, stated:

> "If, as suggested by [Justice] Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."

(Emphasis omitted.) *Id.* at 556-57, 316 N.W.2d at 53 (quoting *In re Sawyer*, 360 U.S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959) (Stewart, J., concurring)).

In the instant case, although we agree that respondent "[did] not surrender his freedom of expression upon becoming an attorney," we conclude that "upon admission to the bar [respondent] incur[red] the obligation to temper his [expression] in the manner allowed by the canons of professional ethics." See *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. at 557, 316 N.W.2d at 53. Accordingly, we conclude there is no merit to respondent's claim that his behavior, if unethical, was protected by his constitutional rights to free speech.

[6] Respondent also claims that he could not have violated DR 7-101(A)(3) because certain of the conduct in which he engaged occurred after Brian had retained new counsel and that thus, the challenged conduct did not occur "during the course of the professional relationship." We disagree. It has been recognized that there is a "distinction between 'professional employment' and 'professional relationship.' A lawyer owes a duty to a

client in the context of a 'professional relationship' long after the 'professional employment' has terminated." See *In re Adams*, 293 Or. 727, 737, 652 P.2d 787, 792 (1982) (concluding attorney violated DR 7-101(A)(3) by filing declaratory judgment suit to set aside former client's workers' compensation award after client had terminated attorney's employment). In this connection, we have held that after the professional employment has terminated, an attorney generally has an ongoing obligation to maintain client confidences. See, generally, *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001). Furthermore, we have observed that notwithstanding the cessation of the attorney-client employment relationship, an attorney must avoid the present representation of a cause against a client that the attorney formerly represented, and which cause involves a subject matter which is the same as or substantially related to that formerly handled by that attorney. *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997). We conclude that respondent's ethical obligation not to engage in conduct that was prejudicial or damaging to Brian during the course of the professional relationship extended beyond the termination of respondent's employment relationship with Brian, and respondent's actions after Brian had secured new counsel can be considered when determining whether respondent violated DR 7-101(A)(3).

Based on our de novo review of the record, see *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002), we conclude that the record in the instant case establishes by clear and convincing evidence that respondent engaged in conduct that was prejudicial and damaging to Brian during the course of the professional relationship, in violation of DR 7-101(A)(3). Among other actions, respondent deliberately contacted counsel for the opposing party in an attempt to minimize the amount of the settlement Brian might receive in his workers' compensation case and contacted the judge scheduled to try Brian's workers' compensation claim and impugned Brian's willingness to tell the truth, all after the attorney-client employment relationship had ceased but while the attorney-client professional relationship was intact. Given this record, we find no merit to respondent's second assignment of error.

(c) DR 7-105(A)

For his third assignment of error, respondent claims that the referee erred in concluding that respondent engaged in conduct violating DR 7-105(A), which provides, inter alia, that a lawyer should not threaten to present criminal charges solely to obtain an advantage in a civil matter. Respondent does not deny that he threatened criminal prosecution against Brian as a result of Brian's response to a request for admissions propounded by respondent. Respondent asserts, however, that "the threat of criminal prosecution in this case was not made *solely* to gain an advantage in a civil proceeding." Brief for respondent at 16.

This argument is without merit. The allegedly perjured statement was made in the course of respondent's attempt to collect the legal fee which he felt was owed to him. Respondent's claim that "his intent was to give [Brian] an opportunity to retract that statement before it was relied upon in the official proceeding" is disingenuous. Brief for respondent at 16. The "official proceeding" referred to by respondent was a proceeding on his claimed attorney fee. In this regard, we note that respondent admitted during the hearing in this case that the purportedly perjured statement, having to do with Brian's assertion that he withdrew respondent's authority to settle the workers' compensation case for $150,000, had no bearing on respondent's entitlement to an attorney fee. Based on our de novo review of the record, see *State ex rel. NSBA v. Gallner, supra*, we conclude that the record in the instant case establishes by clear and convincing evidence that respondent threatened to present criminal charges solely to obtain an advantage in a civil matter, in violation of DR 7-105(A).

(d) Violation of Attorney's Oath

Although the referee made no finding in this regard, we conclude that by virtue of respondent's conduct, we find by clear and convincing evidence that in addition to violating DR 1-102(A)(1), (5), and (6); DR 7-101(A)(3); and DR 7-105(A), respondent has violated the attorney's oath of office. See § 7-104.

2. Imposition of Attorney Discipline

[7-9] 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. Brinker*, 264 Neb. 478, 648 N.W.2d 302 (2002); *State ex rel. Counsel for Dis. v. Rickabaugh*, 264 Neb. 398, 647 N.W.2d 641 (2002). With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case." *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 766, 619 N.W.2d 590, 593 (2000). We have previously set out the factors which we consider in determining whether and to what extent discipline should be imposed:

> To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.

State ex rel. Counsel for Dis. v. Thompson, 264 Neb. 831, 842, 652 N.W.2d 593, 601 (2002).

The evidence in the present case establishes, inter alia, that respondent acted so as to preserve his own interests at the expense of those of Brian. Respondent was verbally abusive to Brian and behaved in a manner which Brian found to be threatening. Respondent contacted opposing counsel and the court in a manner that was likely to be deleterious to his former client's interests. Respondent also threatened criminal prosecution solely for the purpose of gaining an advantage in a civil matter. Respondent's behavior demonstrates a disregard for Brian's interests and for the rules of professional conduct and responsibility.

[10] In assessing the appropriate discipline to be imposed in this case, we note that respondent has been the subject of two prior attorney discipline proceedings. In 1999, respondent was privately reprimanded for sending out advertising brochures to potential clients which contained a false or misleading statement. In 2000, respondent was again privately reprimanded, this time for leaving verbally abusive messages on his clients' answering machines when the clients indicated some concern with regard to a settlement respondent had negotiated; conduct

which we have noted is similar to certain of respondent's actions in the instant case. We have held that cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions. See *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001).

In the instant case, the referee recommended that respondent be suspended from the practice of law for a period of 1 year. Respondent claims on appeal that such a punishment is excessive. We disagree. To the contrary, we are of the opinion that the referee's recommendation of a 1-year suspension is too lenient and, if applied, would depreciate the seriousness of respondent's actions. See *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995). When we balance the need to protect the public, the nature of respondent's offenses, the need for deterring others, the reputation of the bar as a whole, and respondent's prior disciplinary proceedings against respondent's interest in preserving his privilege to practice law, we must conclude that the only appropriate judgment is to suspend respondent from the practice of law for a period of 2 years, effective immediately.

VI. CONCLUSION

It is the judgment of this court that respondent be suspended from the practice of law for a period of 2 years, effective immediately, after which time respondent may apply for reinstatement. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

STEPHAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. JOHNNY SEGURA, JR., APPELLANT.

660 N.W.2d 512

Filed May 9, 2003. No. S-02-948.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
3. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
4. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
5. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

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

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Johnny Segura, Jr., was charged with and convicted of attempted theft and criminal mischief of over $300. He was sentenced to consecutive terms of 2 months' imprisonment for

attempted theft and 1 year's imprisonment for criminal mischief. Segura appeals the judgments of conviction and sentences.

SCOPE OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

[2] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002).

FACTS

On May 16, 2002, Barbara Akin and Lucas Benzeiz were working at a restaurant in a shopping mall in Scottsbluff. Akin and Benzeiz left the restaurant around 9:30 p.m. and walked toward Akin's sport utility vehicle (SUV) in the mall parking lot. As they approached the SUV, they noticed that a door was open and that the dome light was on. Someone was in the front seat looking down at the "control panels" with one leg hanging out of the driver's-side door.

When Akin and Benzeiz were within 10 or 12 feet of the SUV, a man exited the SUV and started walking away. Akin asked, " 'What are you doing with my car[?]' " and the man responded, " 'Nothing.' " She then asked, " 'No, what did you do to my car[?]' " and the man took off running.

Akin observed that the man was about 6 feet tall, had a thin face, and was wearing jeans, a burgundy Nike wind jacket with a white stripe on the sleeve, and a white baseball cap. Benzeiz began chasing the man and told Akin to get into her SUV. Akin immediately called the 911 emergency dispatch service while she

drove toward Benzeiz to pick him up. Benzeiz had run halfway across the parking lot, and he could see that the man was running toward a bank.

Benzeiz saw the man near the bank but then lost sight of him. Akin and Benzeiz drove to the bank parking lot and observed the man running along 20th Street. As they continued their pursuit, Akin and Benzeiz again temporarily lost sight of the man but soon noticed him running across a sidewalk in front of a building called the Loft. They pulled into a nearby parking lot and saw the man run between the Loft and a neighboring Chinese restaurant. The man then ran in the direction of the street as they circled around the buildings.

A police officer arrived, and Akin told the officer that the perpetrator was a Hispanic male wearing a white baseball cap and that he was behind the building. After the officer went around to the back of the building, Akin and Benzeiz saw the man run between the Loft and the restaurant. Two more police officers arrived, and the man, later identified as Segura, was caught and arrested. The entire incident lasted between 5 and 7 minutes.

Akin and Benzeiz testified that Segura was the man they had seen getting out of Akin's SUV and had pursued. They identified him by his clothing and testified that each time they saw him during their pursuit, they knew it was the same man because he was wearing the burgundy jacket and white cap.

The damage to Akin's SUV included a broken triangular window on the rear driver's-side door. A stereo and the console around the stereo were also damaged. It cost Akin $581.56 to have the damage repaired and the stereo replaced.

Segura was charged with attempted theft, a Class III misdemeanor, and criminal mischief of over $300, a Class IV felony. At the close of the State's case, Segura moved for a directed verdict, which motion the district court overruled. Segura did not present any evidence. The jury returned verdicts of guilty on both counts and found the pecuniary loss to be $581.56.

Subsequent to Segura's conviction, but prior to sentencing, criminal mischief causing a pecuniary loss of $581.56 was reclassified by the Legislature from a Class IV felony to a Class I misdemeanor, and Segura received the benefit of the change for purposes of his sentence. The district court sentenced Segura to

consecutive terms of 2 months' imprisonment for attempted theft and 1 year's imprisonment for criminal mischief. Segura appeals.

ASSIGNMENTS OF ERROR

Segura assigns, restated, that the evidence presented by the State was insufficient to support the convictions and that the district court erred (1) in refusing to sustain his motion for directed verdict and (2) by imposing excessive sentences.

ANALYSIS

Sufficiency of Evidence and Directed Verdict

Segura argues that the evidence presented by the State was insufficient to support his convictions. He asserts that the district court erred in refusing to sustain his motion for directed verdict.

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

[3,4] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id.*

Segura argues that the evidence presented by the State lacked sufficient probative value to sustain a finding of guilt and was insufficient as a matter of law. He contends that an identification based solely on the clothing he was wearing was insufficient to

establish that he was the perpetrator. He asserts that his convictions should be reversed.

Segura was charged with attempted theft and criminal mischief of over $300. A person is guilty of theft if he or she "takes, or exercises control over, movable property of another with the intent to deprive him or her thereof," Neb. Rev. Stat. § 28-511(1) (Reissue 1995), and a person is guilty of criminal attempt if he or she "[i]ntentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime," Neb. Rev. Stat. § 28-201(1)(b) (Cum. Supp. 2002). A person is guilty of criminal mischief if he or she "(a) Damages property of another intentionally or recklessly; or (b) Intentionally tampers with property of another so as to endanger person or property . . . ." Neb. Rev. Stat. § 28-519(1) (Cum. Supp. 2002).

Akin and Benzeiz first saw the perpetrator in Akin's SUV while the dome light was on. They saw him in the front seat of the vehicle and looking down at the "control panels" with his leg hanging out the open driver's-side door. When the perpetrator got out of the SUV, Akin and Benzeiz were within 10 to 12 feet of him in an illuminated parking lot. Akin testified that when the perpetrator got out of the SUV, she saw that he was about 6 feet tall and had a thin face, and she noticed he was wearing jeans, a burgundy Nike wind jacket with a white stripe on the sleeve, and a white baseball cap.

Benzeiz pursued the man on foot across the parking lot and observed him close to a nearby bank. Although Benzeiz temporarily lost sight of the man while getting into Akin's SUV, he and Akin spotted the man again when they reached the bank parking lot. Akin testified that from the bank parking lot, she saw the same man running along 20th Street. She testified it was obvious that it was the same man because she could see him running under a street light and he was wearing the same outfit she had seen earlier.

After turning onto 20th Street, Akin and Benzeiz saw the same man running near the front of the Loft building. Akin and Benzeiz circled a neighboring building and saw the same man wearing identical clothing at least two more times before he was finally

arrested by police officers. Segura was the man arrested, and he was wearing clothes matching the descriptions of Akin and Benzeiz. The pursuit and arrest took a total of 5 to 7 minutes. Both Akin and Benzeiz testified that they were certain Segura was the man they saw in the SUV and pursued until his arrest.

Akin testified that after Segura fled, she noticed that the stereo in her SUV was damaged. She also noticed that the console around the stereo had been partially cut away and damaged. Shortly after Segura's arrest, Akin and Benzeiz discovered that the triangular window of the back driver's-side door was broken. The State produced evidence demonstrating the damage totaled $581.56.

The evidence in the case before us is not so doubtful in character or lacking in probative value that a finding of guilt upon such evidence cannot be sustained. There was sufficient evidence for a jury to find beyond a reasonable doubt that Segura was the perpetrator of the crimes of which he was convicted. Therefore, Segura's assignment of error is without merit.

Excessive Sentences

Segura argues that his sentences, although within statutory limits, were nevertheless excessive and constituted an abuse of discretion by the district court.

Attempted theft is a Class III misdemeanor, which is punishable by a penalty of 0 to 3 months' imprisonment, a $500 fine, or both. Neb. Rev. Stat. § 28-106 (Cum. Supp. 2002). Segura was sentenced to a term of 2 months' imprisonment for his attempted theft conviction.

At the time Segura committed the offense, criminal mischief causing pecuniary loss in excess of $300 was a Class IV felony, which is punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002). Prior to his sentencing, the Legislature reclassified criminal mischief causing pecuniary loss between $500 and $1,500 as a Class I misdemeanor, and Segura was given the benefit of the change for purposes of his sentence. See § 28-519. A Class I misdemeanor is punishable by a penalty of 0 to 1 year's imprisonment, a $1,000 fine, or both. § 28-106. Segura was sentenced to a term of 1 year's imprisonment for his criminal mischief conviction.

[5] Segura's sentences for attempted theft and criminal mischief were both within the statutory limits. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

The district court reviewed the presentence investigation report and considered the statutory criteria for determining whether probation or incarceration would be more appropriate. The court also considered a handwritten statement by Segura, which it believed to be untruthful and disingenuous. The court stated that the letter was "counterproductive to any type of sentence of probation and would render a sentence of probation somewhat meaningless," considering the weight of the evidence in the case and the short time it took the jury to reach a unanimous decision.

The district court stated that it considered Segura's prior record in determining his sentence. The court noted two 1998 convictions in which Segura was given concurrent 90-day sentences. It explained that Segura was granted leniency in 1998 for similar crimes and that he did not take advantage of that leniency. It noted that part of the purpose of the 1998 sentences was to give Segura a warning and an opportunity to show that he could change his ways, but Segura had failed to do so.

Segura's sentences do not demonstrate that the district court abused its discretion. Therefore, Segura's assignment of error that the court abused its discretion by imposing excessive sentences has no merit.

CONCLUSION

Finding no merit to Segura's assignments of error, we affirm the judgments of conviction and sentences of the district court.

AFFIRMED.

STEPHAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. PAUL E. MARCUS, APPELLANT.

660 N.W.2d 837

Filed May 9, 2003. No. S-02-997.

1. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** When the underlying circumstances are detailed in the affidavit, reason for crediting the source of the information is given, and when a magistrate has found probable cause, the duty of a court reviewing the issuance of a warrant is to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
2. **Criminal Law: Identification Procedures: Probable Cause.** The identifying physical characteristics statutes, Neb. Rev. Stat. §§ 29-3301 to 29-3307 (Reissue 1995), require a showing of probable cause to believe the person seized has engaged in an articulable criminal offense before the judicial officer can issue an order to produce identifying physical characteristics.
3. **Identification Procedures: Probable Cause: Appeal and Error.** When determining whether an order to produce identifying physical characteristics was based on a showing of probable cause, an appellate court considers the totality of the circumstances.
4. **Search Warrants: Probable Cause.** Under the totality of the circumstances standard, the magistrate who is evaluating the probable cause question must make a practical, commonsense decision.
5. **Search Warrants: Affidavits: Appeal and Error.** An appellate court's after-the-fact scrutiny of the sufficiency of an affidavit should not take the form of a de novo review.
6. **Search Warrants: Probable Cause: Appeal and Error.** A magistrate's determination of probable cause should be paid great deference by reviewing courts.
7. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity, and the affiant must establish the informant's credibility or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
8. ____: ____. The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
9. ____: ____. The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth circumstances from which the informant's status as a citizen informant can reasonably be inferred.
10. **Criminal Law: Eyewitnesses: Words and Phrases.** A citizen informant is a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement.
11. **Eyewitnesses.** Once an individual is considered to be a citizen informant, reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known.

12. **Criminal Law: Eyewitnesses.** An informant's detailed eyewitness report of a crime may be self-corroborating because it supplies its own indicia of reliability.
13. **Criminal Law: Eyewitnesses: Presumptions.** An untested citizen informant who has personally observed the commission of a crime is presumptively reliable.
14. **Eyewitnesses: Police Officers and Sheriffs.** When a citizen informant's information is based on another person's statements, law enforcement officers are required to make further inquiry about the underlying facts and circumstances on which the report is based.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE J. YARDLEY and GALE POKORNY, Judges. Judgment of District Court affirmed.

Franklin Elliott Miner for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

CONNOLLY, J.

Paul E. Marcus appeals the overruling of a motion to suppress photographs that were authorized by an order to produce identifying physical characteristics. He contends that the affidavit for the order lacked probable cause because law enforcement officers failed to show that an informant's information was based on personal knowledge. He also argues that the order does not comply with Neb. Rev. Stat. § 29-3305 (Reissue 1995). We determine that the informant was a citizen informant whose information was sufficiently corroborated and that the order complied with § 29-3305. Accordingly, we affirm.

BACKGROUND

On August 27, 2001, Jodie Carlton, a salesclerk for Goodwill, observed a man entering the store. The man was described as a darker skinned male, possibly East Indian, 35 to 40 years of age, 5 feet 8 inches tall, medium build, wearing a black T-shirt with white lettering and dark blue gym shorts. He walked to the counter and asked where the gym shorts were. He later returned

wearing a pair of yellow shorts and asked Carlton if the shorts were too tight. Carlton observed that he was fondling his genitals outside of the shorts. He then walked around the counter to the entry area and asked Carlton to check the size of the shorts. While standing in front of Carlton, he asked Carlton to see if there was a tag inside the shorts, pulled the back and front of the shorts down, and exposed his penis. He then returned to the dressing room and left after changing clothes. Carlton told the police that she believed she could identify the man from a photographic lineup.

Two days later, Dina Hopper, an employee of the Nebraska Game and Parks Commission, called Sgt. Joseph Wright of the Lincoln Police Department after reading an article about the offense in the Lincoln Journal Star newspaper. Hopper told Wright that Marcus matched the suspect description. She stated that Marcus was a problem at area lakes because he would often contact young women, ask if his shorts or swimsuit was too small, and then expose himself.

The police did not have a photograph of Marcus in their imaging system. Wright contacted Marcus and, according to his police report, asked Marcus if he was in the area of the Goodwill store on "Monday, 08-28." This appears to be a typographical error because the incident occurred on Monday, August 27, 2001. Marcus stated that he may have been in the area of the Goodwill store at the time of the incident, but that he did not go inside the store. He refused to have his photograph taken.

Wright prepared an affidavit repeating the information obtained from Carlton, Hopper, and Marcus. The affidavit also contains the same reference to "Monday, August 28, 2001," as in the police report. Wright stated in the affidavit that the procurement of photographs of Marcus was necessary to determine whether he was the individual responsible for the crime.

The county court entered an order to produce physical identifying characteristics. One provision of the order authorized the Lincoln Police Department to obtain the evidence at the police department or "where ever deemed most practical by officers of the Lincoln Police Department." Another provision stated that Marcus "shall appear at the Lincoln Police Department . . . at such date and time as is designated by Sergeant Joseph Wright

for the purpose of obtaining the above-mentioned physical characteristic evidence."

Marcus was later contacted at his residence, and photographs were obtained. Carlton identified Marcus in a photographic lineup, and he was arrested. Marcus' motion to suppress the photographs was overruled. The county court concluded that the affidavit established probable cause because Hopper identified Marcus as meeting the description of the perpetrator, Marcus was identified as using the same language in making contact with other victims, and Marcus had placed himself in the area of the crime at the time it was committed. Marcus was convicted of indecent exposure and was fined $500. The district court affirmed, concluding that there was probable cause and that the order met the requirements of § 29-3305. Marcus appeals.

ASSIGNMENTS OF ERROR

Marcus assigns that the county court erred in overruling his motion to suppress and finding him guilty and that the district court erred in affirming the county court's decision.

STANDARD OF REVIEW

[1] When the underlying circumstances are detailed in the affidavit, reason for crediting the source of the information is given, and when a magistrate has found probable cause, the duty of a court reviewing the issuance of a warrant is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. See *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987).

ANALYSIS

Marcus contends that the affidavit was insufficient to show probable cause because it does not establish Hopper's credibility or the accuracy of her statements.

[2-6] The identifying physical characteristics statutes, Neb. Rev. Stat. §§ 29-3301 to 29-3307 (Reissue 1995), require a showing of probable cause to believe the person seized has engaged in an articulable criminal offense before the judicial officer can issue an order to produce identifying physical characteristics. *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983). When determining whether an order to produce identifying physical characteristics

was based on a showing of probable cause, we consider the totality of the circumstances. *Id.* See *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Under this standard, the magistrate who is evaluating the probable cause question must make a practical, commonsense decision. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). An appellate court's after-the-fact scrutiny of the sufficiency of an affidavit should not take the form of a de novo review. *Id.* A magistrate's determination of probable cause should be paid great deference by reviewing courts. *Id.*

[7,8] In the context of a search warrant, we have said that when the warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity. *State v. Faber, supra.* Further, the affiant must establish the informant's credibility or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *Id.* The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *Id.*

Here, nothing in the affidavit indicates that Hopper gave reliable information to the police in the past or made a statement against penal interest. Therefore, the first question is whether Hopper is a citizen informant.

[9,10] The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth circumstances from which the informant's status as a citizen informant can reasonably be inferred. *State v. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001). When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster—who acts for money, leniency, or some other selfish purpose—from the citizen informer, whose only motive is to help law officers in the suppression of crime. *State v. Lytle*, 255 Neb. 738, 587 N.W.2d 665 (1998), *disapproved in part on other grounds, State v. Johnson,*

256 Neb. 133, 589 N.W.2d 108 (1999). Unlike the professional informant, the citizen informant is without motive to exaggerate, falsify, or distort the facts to serve his or her own ends. *Id.* A citizen informant is a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement. *Id.*

Here, Hopper was a citizen informant. She acted openly to assist law enforcement, and nothing in the record suggests that she had a motive to exaggerate, falsify, or distort the facts to serve her own ends. Instead, it is reasonable to infer that she was motivated by good citizenship.

Although Hopper was a citizen informant, the affidavit did not present her as a direct witness to the incidents that she reported to the police. As a result, the affidavit failed to show that Hopper's information was based on personal knowledge. We conclude that this factor does not change Hopper's status as a citizen informant. Instead, the question is the extent to which law enforcement must independently investigate the information provided by Hopper in the absence of evidence that Hopper had personal knowledge of the reported events.

[11-14] Once an individual is considered to be a citizen informant, reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known. *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987). Thus, we have said that an informant's detailed eyewitness report of a crime may be self-corroborating because it supplies its own indicia of reliability. *Id.* We have also said that an untested citizen informant who has personally observed the commission of a crime is presumptively reliable. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996); *State v. Duff, supra*. But when a citizen informant's information is based on another person's statements, courts have concluded that law enforcement officers are required to make further inquiry about the underlying facts and circumstances on which the report is based. This reduces the possibility of mistake and satisfies the minimum standards for establishing probable cause. See, e.g., *State v. Williamson*, 290 Mont. 321, 965 P.2d 231 (1998).

Here, when the affidavit does not establish that Hopper's information was based on personal knowledge, her information is not

entitled to the presumption of reliability. But law enforcement officers also corroborated some of the information provided by Hopper and Carlton. Law enforcement officers visited with Marcus and observed that he met the physical description of the suspect. This corroborated Hopper's statement that Marcus fit the description that she read about in the newspaper. Law enforcement officers were also able to observe that Marcus met the description given by Carlton. Marcus was then asked if he had been in the area of the Goodwill store on the date of the offense, and he answered affirmatively.

We consider whether, under the totality of the circumstances, the issuing magistrate had a substantial basis on which to find probable cause. We conclude that the ability of law enforcement officers to confirm that Marcus met the description of the suspect as given by Carlton, along with Marcus' statement that he had been in the area of the Goodwill store on the date of the crime, established a substantial basis on which the magistrate could find probable cause to issue the order. Thus, we determine that the court was correct when it determined that the affidavit was valid and denied the motion to suppress.

Marcus next contends that the order does not comply with § 29-3305, because the order was vague or overbroad concerning where and when the photographs could be taken.

Section 29-3305 provides:

> Any order issued under sections 29-3301 to 29-3307 shall specify (1) the character of the alleged criminal offense which is the subject of the application; (2) the specific type or types of identifying physical characteristic evidence which are sought; (3) the identity or description of the individual who may be detained for obtaining such evidence; (4) the name and official status of the peace officer or officers authorized to obtain such evidence and to effectuate any detention which may be necessary to obtain the evidence; (5) the place at which the obtaining of such evidence may be carried out; (6) that the person will be under no legal obligation to submit to any interrogation or to make any statement during the period of his appearance except that required for voice identification; (7) that the individual shall forthwith accompany the officer serving the order for the

> purpose of carrying out its objectives, or, in the alternative, fixing a time at which the individual shall appear for the purpose of carrying out the objectives of the order . . . .

The order authorized the Lincoln Police Department to obtain the evidence at the police department or "where ever deemed most practical by officers of the Lincoln Police Department." Although lacking in specific detail, we conclude this statement meets § 29-3305(5), which requires the order to state the place at which the obtaining of physical evidence may be carried out.

The order also stated that Marcus "shall appear at the Lincoln Police Department . . . at such date and time as is designated by Sergeant Joseph Wright for the purpose of obtaining the above-mentioned physical characteristic evidence." Marcus argues that this statement is inconsistent with the provision of the order allowing the evidence to be obtained wherever was deemed most practical. But this statement is also specifically required by § 29-3305(7), which requires the order to state that the individual shall accompany the officer serving the order or shall fix a date and time at which the individual shall appear for purposes of carrying out the order.

Marcus also argues that the ability of law enforcement officers to take his photograph in front of his home created an embarrassing situation. The record indicates that law enforcement officers took the photograph at Marcus' residence to save him the trouble of coming to the station. Further, our concern on appeal is whether the order complied with § 29-3305. We conclude that the order contained the information required by § 29-3305 and that the court correctly overruled the motion to suppress.

AFFIRMED.

COLIN M. GOURLEY, A MINOR, BY AND THROUGH MICHAEL J. GOURLEY, HIS FATHER, AND LISA A. GOURLEY, HIS MOTHER, AS NEXT FRIENDS AND NATURAL GUARDIANS, ET AL., APPELLEES, V. NEBRASKA METHODIST HEALTH SYSTEM, INC., A CORPORATION, APPELLEE, AND MICHELLE S. KNOLLA, M.D., AND OBSTETRICIANS-GYNECOLOGISTS, P.C., DOING BUSINESS AS THE OB/GYN GROUP, APPELLANTS.

663 N.W.2d 43

Filed May 16, 2003. No. S-00-679.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
5. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Juries.** The "any majority" rule applies to Neb. Rev. Stat. § 25-1125 (Reissue 1995); a juror is free to deliberate and vote on each issue presented to the jury, even if the juror has dissented from the majority on a previous issue.
7. **Expert Witnesses.** An expert's opinion need not be expressed with reasonable certainty within the expert's field of expertise, but may be expressed with reasonable probability.
8. ____. An expert's opinion must be sufficiently definite and relevant to provide a basis for the fact finder's determination of an issue or question.
9. ____. Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
10. ____. When an expert's opinion is mere speculation or conjecture, it is irrelevant.
11. **Trial: Expert Witnesses.** Whether an expert's opinion is too speculative to be admitted is a question for the trial court's discretion.
12. **New Trial: Appeal and Error.** Only an error which is prejudicial to the rights of the unsuccessful party justifies a new trial.

13. **Verdicts: Appeal and Error.** In the absence of prejudicial error, the successful party, having sustained the burden and expense of trial, may keep the benefit of the verdict.
14. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence which unfairly prejudices a substantial right of the complaining litigant constitutes reversible error.
15. **Jury Trials: Evidence: Appeal and Error.** When it appears from the record that evidence wrongfully admitted in a jury trial did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception is not prejudicial error.
16. **Trial: Evidence: Appeal and Error.** One may not on appeal assert a different ground for excluding evidence than was urged in the objection made to the trial court.
17. **Trial: Appeal and Error.** If a defendant does not offer an objection and does not expressly adopt a codefendant's objection, the matter is not preserved for him or her on appeal.
18. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
19. ____: ____: ____. Out-of-court statements, if not offered for the purpose of proving the truth of the facts asserted, are not hearsay.
20. **Constitutional Law: Courts: Statutes.** When specific constitutional questions are presented, courts will not search for constitutional authority that was not raised and argued by the parties to overthrow a legislative enactment.
21. **Constitutional Law: Statutes: Special Legislation.** The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class.
22. ____: ____: ____. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
23. **Constitutional Law: Special Legislation: Public Policy.** A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified.
24. **Special Legislation.** Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.
25. **Constitutional Law: Special Legislation.** Classification for the purpose of legislation is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation.
26. **Constitutional Law: Statutes: Presumptions.** Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.
27. **Constitutional Law: Legislature: Presumptions.** The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality.
28. **Statutes: Courts: Legislature: Intent.** Courts will not reexamine independently the factual basis on which the Legislature justified a statute, nor will a court independently review the wisdom of the statute.

29. **Statutes: Courts: Appeal and Error.** An appellate court does not sit as a superlegislature to review the wisdom of legislative acts.
30. **Constitutional Law: Statutes: Legislature: Intent.** All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature.
31. **Special Legislation: Legislature: Public Policy.** If the Legislature had any evidence to justify its reasons for passing an act, then it is not special legislation if the class is based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation concerning the objects to be classified.
32. **Special Legislation: Legislature: Intent.** The determination whether an act of the Legislature is special legislation is reached by considering what the Legislature could have found at the time the act was passed.
33. **Statutes: Legislature: Courts.** It is up to the Legislature and not a court to decide whether its legislation continues to meet the purposes for which it was originally enacted.
34. **Special Legislation: Statutes.** The cap on damages in Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) does not violate principles prohibiting special legislation.
35. **Equal Protection: Statutes: Proof.** The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause.
36. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
37. ____. In any equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive.
38. **Constitutional Law: Statutes.** If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny.
39. **Constitutional Law: Statutes: Legislature: Intent.** Under the strict scrutiny test, strict accordance must exist between the classification and the statute's purpose. The result the Legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists.
40. ____: ____: ____: ____. If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. Upon a showing that such a rational relationship exists, courts will uphold the legislation.
41. **Constitutional Law: Statutes: Appeal and Error.** Some legislative classifications, such as those based on gender, are reviewed under an intermediate level of scrutiny.
42. **Constitutional Law: Damages.** The rational basis test is applied to review the damages cap in Neb. Rev. Stat. § 44-2825(1) (Reissue 1998).
43. **Equal Protection.** Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

44. ____. The rational relationship standard is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause.
45. **Constitutional Law: Statutes.** When determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results.
46. **Equal Protection: Statutes.** In economics and social welfare, a statute does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.
47. **Constitutional Law: Statutes.** The fact that other legislative classification schemes could have been selected does not mean that the scheme chosen is constitutionally infirm.
48. **Constitutional Law: Courts: Legislature: Statutes.** As long as the classification scheme chosen by the Legislature rationally advances a reasonable and identifiable governmental objective, a court must disregard the existence of other methods that other individuals might have preferred.
49. **Equal Protection: Courts: Legislature: Intent.** Social and economic measures run afoul of the Equal Protection Clause only when the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the Legislature's actions were irrational.
50. **Equal Protection: Statutes: Damages.** The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) satisfies principles of equal protection.
51. **Legislature.** The Legislature is free to create and abolish rights so long as no vested right is disturbed.
52. **Constitutional Law.** No one has a vested interest in any rule of the common law or a vested right in any particular remedy.
53. ____. If a common-law right is taken away, nothing need be given in return.
54. **Constitutional Law: Statutes: Damages.** The cap on damages in Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) does not violate Neb. Const. art. I, § 13.
55. **Constitutional Law: Jury Trials.** The purpose of Neb. Const. art. I, § 6, is to preserve the right to a jury trial as it existed at common law and under the statutes in force when the constitution was adopted.
56. **Actions: Juries.** The remedy available in an action is a question of law, not fact, and is not a matter to be decided by the jury.
57. **Constitutional Law: Statutes: Damages: Jury Trials.** The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) does not violate the right to a jury trial.
58. **Constitutional Law: Statutes: Damages: Property.** The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) does not violate Neb. Const. art. I, § 21.
59. **Constitutional Law: Statutes: Damages: Remittitur.** The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) does not act as a legislative remittitur or otherwise violate principles of separation of powers.
60. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated under Neb. Ct. R. of Prac. 9D(4) (rev. 2000) if affirmative relief is to be obtained.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed in part, and in part reversed.

William M. Lamson, Jr., Raymond E. Walden, and William R. Settles, of Lamson, Dugan & Murray, L.L.P., and John R. Klein for appellants.

Daniel B. Cullan and Paul W. Madgett, of Cullan & Cullan, and John Vail for appellees Colin M. Gourley et al.

James A. Snowden and Andrew B. Koszewski, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellee Andrew Robertson, M.D.

Thomas J. Shomaker and Mary M. Schott, of Sodoro, Daly & Sodoro, for appellee Nebraska Methodist Health System, Inc.

Charles M. Pallesen, Jr., of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for amici curiae Nebraska Medical Association and Greater Nebraska Medical Coalition.

William F. Austin, of Erickson & Sederstrom, P.C., for amici curiae Nebraska Association of Hospitals and Health Systems and Cherry County Hospital.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ., and HANNON and CARLSON, Judges.

PER CURIAM.

Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) of the Nebraska Hospital-Medical Liability Act limits recoverable damages in medical malpractice actions to $1,250,000. The district court determined that the damages limitation was unconstitutional because it denied the appellees Colin M. Gourley and his parents, Michael J. Gourley and Lisa A. Gourley, equal protection of the law and a right to a jury trial. The appellants, Michelle S. Knolla, M.D., and Obstetricians-Gynecologists, P.C., doing business as the OB/GYN Group, contend that (1) the district court erred in determining that § 44-2825(1) was unconstitutional, (2) the jury verdict was invalid, and (3) the court erred in admitting hearsay and irrelevant evidence.

I. NATURE OF CASE

The Gourleys brought this medical malpractice action against Nebraska Methodist Health System, Inc., and Nebraska Methodist

Hospital (collectively Methodist Hospital); Knolla; Marvin L. Dietrich, M.D.; Andrew Robertson, M.D.; Pauline R. Sleder, M.D.; OB/GYN Group; and Perinatal Associates, P.C. The Gourleys sought damages for injuries sustained by Colin because of the alleged negligent care Lisa received during her pregnancy. A jury awarded the Gourleys $5,625,000, and the district court entered judgment for the Gourleys in that amount and against Knolla and the OB/GYN Group.

II. BACKGROUND

During her pregnancy, Lisa received prenatal care from Knolla, an obstetrician and gynecologist employed with the OB/GYN Group. On November 15, 1993, in the 36th week of her pregnancy, Lisa informed Knolla that she noticed less movement from the twin fetuses she was carrying. Knolla assured Lisa that this was common and that everything appeared to be normal. Two days later, Lisa called the OB/GYN Group to again report a lack of fetal movement and was told to come to the office to meet with Dietrich. Dietrich's examination revealed that one of the fetuses suffered from bradycardia, a decrease in the fetus' heart rate, and a lack of amniotic fluid. Dietrich instructed Lisa to proceed to Methodist Hospital for examination by Robertson, who was employed by Perinatal Associates.

During his examination, Robertson determined that an immediate cesarean section should be performed. Shortly thereafter, Colin and his twin brother, Connor, were delivered. Colin was born with brain damage and currently suffers from cerebral palsy and significant physical, cognitive, and behavioral difficulties.

The Gourleys filed suit alleging that Knolla and the OB/GYN Group failed to monitor Lisa and Colin while they were under their care. At the close of the Gourleys' case in chief, Methodist Hospital moved for a directed verdict. The court granted the motion and dismissed Methodist Hospital.

The jury found Knolla and the OB/GYN Group to be 60 percent and 40 percent negligent, respectively. The jury awarded the Gourleys $5,625,000. The Gourleys moved for a new trial, arguing that the court erred in granting a directed verdict to Methodist Hospital. The jury found for Dietrich, Robertson,

Sleder, and Perinatal Associates, and the court later dismissed them from the case.

The district court reduced the jury's award and entered judgment for the Gourleys and against Knolla and the OB/GYN Group, jointly and severally, in the amount of $1,250,000. The court found that § 44-2825(1) was constitutional.

The Gourleys filed a second motion for new trial, contending that the cap on damages imposed by § 44-2825 is unconstitutional because it violates their rights to (1) equal protection; (2) a jury trial; (3) an open court and full remedy; (4) substantive due process; and (5) life, liberty, and the pursuit of happiness. The Gourleys also alleged that the Legislature exceeded its power when imposing the cap and that the cap was unconstitutional special legislation.

Knolla and the OB/GYN Group also moved for a new trial because of 16 alleged errors, among which were that the verdict was not agreed to by five-sixths of the jury as required by Neb. Rev. Stat. § 25-1125 (Reissue 1995) and that the court erred in receiving certain exhibits and testimony into evidence.

The court (1) overruled the Gourleys' motion for new trial on Methodist Hospital's directed verdict and (2) overruled Knolla and the OB/GYN Group's motion for new trial, specifically rejecting their argument that the jury verdict was invalid. Knolla and the OB/GYN Group's other grounds for new trial were also overruled without explanation.

The court reversed its decision and concluded that the cap on damages in § 44-2825(1) violated equal protection under Neb. Const. art. I, § 3. The court also concluded that § 44-2825(1) violated the Gourleys' right to a jury trial under Neb. Const. art. I, § 6. The court found that § 44-2825(1) was severable from the rest of the act. The court vacated its previous order and entered judgment for the Gourleys and against Knolla and the OB/GYN Group, jointly and severally, in the full amount of $5,625,000. Knolla and the OB/GYN Group appeal.

III. ASSIGNMENTS OF ERROR

Knolla and the OB/GYN Group assign that the district court erred in (1) denying their motion for new trial when the jury returned an invalid verdict; (2) admitting unsupported and hearsay

evidence in the form of a "Life Care Plan for Colin Gourley" by Terry Winkler, M.D.; (3) admitting a book, "What To Expect When You're Expecting," into evidence which contained hearsay, was itself hearsay, and was likely to confuse the jury; (4) overruling their motion for new trial; (5) declaring unconstitutional the damages cap of the Nebraska Hospital-Medical Liability Act, § 44-2825, and in reversing its order reducing the amount of the judgment to the statutory maximum of $1,250,000; and (6) applying its ruling on the constitutionality of the act retrospectively.

The Gourleys purported to file a cross-appeal, assigning that the court erred in granting Methodist Hospital's motion for directed verdict.

IV. STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Green Tree Fin. Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

[3] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002).

[4] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Hass v. Neth, ante* p. 321, 657 N.W.2d 11 (2003).

V. ANALYSIS

1. JURY VERDICT

Knolla and the OB/GYN Group argue that they are entitled to a new trial because the verdict was not agreed to by five-sixths of the jury as required by § 25-1125.

Section 25-1125 provides that "[i]n all trials in civil actions in any court in this state, a verdict shall be rendered if five-sixths or more of the members of the jury concur therein, and such verdict shall have the same force and effect as though agreed to by all members of the jury . . . ." Here, the jury signed and returned two verdict forms. We construe verdict form No. 2 as requiring the jury to determine which defendants were liable and verdict form No. 1 as requiring the jury to decide the amount of damages and how to apportion the defendants' negligence. Although 10 jurors signed both verdict forms, the forms were not signed by the same 10 jurors. This means that a juror who disagreed with the determination of who was liable provided the 10th vote necessary to decide the amount of damages and how to apportion the defendants' negligence. Thus, we must decide if a verdict is valid under § 25-1125 if the same five-sixths of the jury fails to agree on each essential issue embodied in that verdict.

[5] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Newman v. Thomas, supra.* Nothing in the plain language of § 25-1125 indicates whether the same five-sixths of a jury must agree on each essential issue embodied in its verdict. Several jurisdictions, however, have addressed the issue within the context of similar statutory and constitutional provisions, and we turn to these cases for guidance in construing § 25-1125.

Other jurisdictions have answered the question in one of two ways. See David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 Jurimetrics J. 275 (1996). One group has adopted the "same juror" rule. See, e.g., *Stacy v. Truman Medical Center*, 836 S.W.2d 911 (Mo. 1992); *O'Connell v. Chesapeake & Ohio RR.*, 58 Ohio St. 3d 226, 569 N.E.2d 889 (1991); *Klanseck v Anderson Sales*, 136 Mich. App. 75, 356 N.W.2d 275 (1984); *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 239 N.W.2d 190 (1976); *Clark v. Strain et al*, 212 Or. 357, 319 P.2d 940 (1958); *Fleischhacker v. State Farm Mut. Automobile Ins. Co.*, 274 Wis. 215, 79 N.W.2d 817 (1956). Under this rule, the same fractional group of jurors must concur on each issue necessary to support the ultimate verdict. See H. William

Walker, Jr., Comment, *Vote Distribution in Non-Unanimous Jury Verdicts*, 27 Wash. & Lee L. Rev. 360 (1970). If we adopt the same juror rule, the verdict would be invalid because the 10 jurors who determined which defendants were liable were not the same 10 jurors who apportioned the defendants' negligence and determined the amount of damages.

Other courts have rejected the "same juror" rule in favor of the "any majority" rule. See, e.g., *Hendrix v. Docusort, Inc.*, 18 Kan. App. 2d 806, 860 P.2d 62 (1993); *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503 (Ky. 1989); *Williams v. James*, 113 N.J. 619, 552 A.2d 153 (1989); *Schabe v Hampton Bays*, 103 A.D.2d 418, 480 N.Y.S.2d 328 (1984); *Jaurez v. Superior Court of Los Angeles Cty.*, 31 Cal. 3d 759, 647 P.2d 128, 183 Cal. Rptr. 852 (1982); *Tillman v. Thomas*, 99 Idaho 569, 585 P.2d 1280 (1978); *McChristian v. Hooten*, 245 Ark. 1045, 436 S.W.2d 844 (1969); *Ward v. Weekes*, 107 N.J. Super. 351, 258 A.2d 379 (1969). Under this rule, all jurors are free to deliberate and vote on every issue "regardless of their votes on other issues. . . . Plaintiff prevails if the specified number of jurors find in her favor on each element." Lombardero, *supra*, at 298. If we adopt the any majority rule, the verdict would be valid, because at least 10 jurors found for the Gourleys on each element necessary to support a verdict in their favor.

Although there are persuasive arguments for both rules, we conclude that the "any majority" rule better serves the purposes underlying § 25-1125. See *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 352, 647 N.W.2d 599, 611 (2002) ("[w]hen construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it").

The movement to abolish the unanimous verdict requirement was meant to improve judicial efficiency while preserving fundamental fairness in the jury system. As one court has explained: "Nonunanimous verdicts decrease the number of mistrials and retrials and thus reduce court congestion, delay and the cost of maintaining the judicial system. They also reduce the number of unjust verdicts deriving from juror obstinacy or dishonesty and discourage compromise verdicts." *Schabe v Hampton Bays*,

103 A.D.2d at 423, 480 N.Y.S.2d at 333. See, also, *Ward v. Weekes, supra.*

Courts have recognized that the "mechanistic" same juror rule does less to improve judicial efficiency than the any majority rule. *Tillman v. Thomas, supra.* Under the same juror rule, the same fractional group of jurors must agree on each issue necessary to support the ultimate verdict. For example, in a typical personal injury case, only the jurors in the five-sixths majority that agreed that a defendant was negligent could vote on the question of damages. The votes of any jurors who dissented on the negligence question could not be used to reach a five-sixths majority on the damages question. As a result, if the 10 jurors who agreed on the negligence question could not agree on the question of damages, the result would be a hung jury.

But under the any majority rule, a juror who dissents on one issue is allowed to vote on subsequent issues. A juror who disagreed on the question of negligence would still be eligible to provide the vote needed to reach a five-sixths majority on the question of damages. This flexibility reduces the risk of hung juries, as well as all of the associated costs and delays, thus advancing the policy of judicial efficiency underlying § 25-1125 better than the same juror rule. See, *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503 (Ky. 1989); *Williams v. James*, 113 N.J. 619, 552 A.2d 153 (1989); *Schabe v Hampton Bays*, 103 A.D.2d 418, 480 N.Y.S.2d 328 (1984); *Jaurez v. Superior Court of Los Angeles Cty.*, 31 Cal. 3d 759, 647 P.2d 128, 183 Cal. Rptr. 852 (1982).

Those courts that have adopted the same juror rule have generally conceded that it will lead to less judicial efficiency than the any majority rule. They have argued, however, that two other principles are more important than judicial efficiency, unanimity of the statutorily required minimum number of jurors and consistency in individual juror voting. David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 Jurimetrics J. 275 (1996). We are not persuaded by either argument.

Those courts that have relied upon unanimity in adopting the same juror rule see the verdict as a "non-fragmentable totality," representing "one ultimate finding on the basis of several issues." H. William Walker, Jr., Comment, *Vote Distribution in*

Non-Unanimous Jury Verdicts, 27 Wash. & Lee L. Rev. 360, 363-64 (1970). Thus, the verdict cannot be "'the product of mixed thoughts.'" *Clark v. Strain et al*, 212 Or. 357, 364, 319 P.2d 940, 943 (1958) (quoting *The State v. Bybee*, 17 Kan. 462 (1877)). Instead, it must represent the unified thinking of the statutorily required minimum number of jurors.

This reasoning is misplaced. "The requirement of the same jurors agreeing, which is a necessary characteristic of a unanimous verdict, needs [sic] not remain when there has been a change permitting less than unanimity to be the jury's verdict." *Naumburg v. Wagner*, 81 N.M. 242, 245, 465 P.2d 521, 524 (N.M. App. 1970). We see no reason to "maintain the semblance of unanimity after the requirement of unanimity ceases to exist." *Id.* See, also, *Williams v. James, supra.*

More recent decisions adopting the same juror rule have relied primarily upon the principle of consistency. See, *O'Connell v. Chesapeake & Ohio RR.*, 58 Ohio St. 3d 226, 569 N.E.2d 889 (1991); *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 239 N.W.2d 190 (1976). These courts contend that inconsistent votes on related issues "indicate that the jurors disagree or do not comprehend." Lombardero, *supra*, at 301. They also question the ability of jurors in the dissenting minority on one issue "to cast aside their opinions and vote on subsequent issues as if they agreed with the majority." *Id.* Courts have been particularly concerned about the ability of a juror who dissented on the question of who was negligent to fairly participate on the question of how to apportion negligence. See, e.g., *O'Connell v. Chesapeake & Ohio RR.*, 58 Ohio St. 3d at 235, 569 N.E.2d at 897 ("where a juror finds that a plaintiff has not acted in a causally negligent manner, it is incomprehensible to then suggest that this juror may apportion some degree of fault to the plaintiff and thereby diminish or destroy the injured party's recovery").

We are not persuaded that the concerns over consistency are enough to reject the benefits of the any majority rule. We have more faith in the mental capabilities and ethical integrity of jurors than the courts that have adopted this line of reasoning. We refuse to presume that a juror who dissents on one issue will violate his or her oath and attempt to subvert the deliberations on a subsequent issue, even if the issues are integrally related.

See *Ward v. Weekes*, 107 N.J. Super. 351, 258 A.2d 379 (1969). In our view, it is more likely that a juror who is outvoted on one issue can " 'accept the outcome and continue to deliberate with other jurors honestly and conscientiously to decide the remaining issues.' " *Jaurez v. Superior Court of Los Angeles Cty.*, 31 Cal. 3d 759, 768, 647 P.2d 128, 133, 183 Cal. Rptr. 852, 857 (1982) (quoting *Ward v. Weekes, supra*).

Moreover, the same juror rule sacrifices a principle of the jury system that is more fundamental than either unanimity or consistency. That principle is that "all members of a jury . . . partake meaningfully in [the] disposition of the case." *Schabe v Hampton Bays*, 103 A.D.2d 418, 424, 480 N.Y.S.2d 328, 333 (1984). The same juror rule reduces the ability of a juror who dissents on one issue to meaningfully participate in the discussion of the remaining issues. The dissenter remains free to express his or her opinions on the remaining issues, but with the power to persuade divorced from the power to vote, the dissenter's influence is reduced to "a state of practical impotence." *Schabe v Hampton Bays*, 103 A.D.2d at 424, 480 N.Y.S.2d at 333.

By contrast, the any majority rule preserves the principle of full participation in the deliberative process. A juror who dissents on one issue retains the ability to vote on subsequent issues. Thus, the power to vote remains united with the power to debate and the dissenter can deliberate fully and effectively on each issue presented to the jury.

[6] Accordingly, because we believe that it furthers judicial efficiency while protecting fundamental fairness better than the same juror rule, we adopt the any majority rule. A juror is free to deliberate and vote on each issue presented to the jury, even if the juror has dissented from the majority on a previous issue. Even though a juror, who disagreed on the question of who was liable, provided the 10th vote necessary on the damages and apportionment questions, the verdict was valid.

2. Life Care Plan

At trial, the Gourleys called Winkler, a specialist in physical medicine and rehabilitation, to testify about the life care plan that he had developed for Colin. A life care plan is a comprehensive document which includes the items of service, medications,

doctor's visits, and equipment a disabled person will need over the course of his or her life, as well as the costs associated with each of these items. During the direct examination of Winkler, each page of the life care plan was displayed to the jury and received into evidence.

As we understand their brief, Knolla and the OB/GYN Group make two complaints about Winkler's testimony and the life care plan. First, they claim that the life care plan and some of Winkler's testimony contained opinions that were too uncertain to be relevant. Second, they argue that the life care plan was inadmissible hearsay.

(a) Relevance

During direct examination, Winkler admitted that for several of the items that he included in Colin's life care plan, he could not state to a reasonable degree of medical certainty that Colin would require that item in the future. He explained that he included these items in the life care plan "to provide information to everybody involved just to help make decisions."

Knolla and the OB/GYN Group argue that the court erred in allowing Winkler to testify about those items for which he was not reasonably certain Colin would need in the future. Similarly, they argue that the life care plan should not have been admitted into evidence because it contained information about these items. We agree, but conclude that the error was harmless.

[7-11] An expert's opinion need not be expressed with reasonable certainty within the expert's field of expertise, but may be expressed with reasonable probability. The expert's opinion must be sufficiently definite and relevant to provide a basis for the fact finder's determination of an issue or question. *Renne v. Moser*, 241 Neb. 623, 490 N.W.2d 193 (1992). Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. *Franksen v. Crossroads Joint Venture*, 257 Neb. 597, 599 N.W.2d 603 (1999). When an expert's opinion is mere speculation or conjecture, it is irrelevant. See *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). Whether an expert's opinion is too speculative to be admitted is a question for the trial

court's discretion. See, *id.*; *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998).

Winkler admitted that he included information in the life care plan about items for which he was not reasonably certain Colin would need in the future. The context of his testimony makes clear that he was guessing that Colin might possibly need these items. An expert opinion which is merely speculation or conjecture is inadmissible. Here, the court erred by allowing Winkler to testify about the items for which he admitted that he was not reasonably certain Colin would need in the future. Similarly, information about these items should have been redacted from the life care plan before it was accepted into evidence.

[12-15] That does not, however, end the inquiry. Not every error justifies a new trial; only an error which is prejudicial to the rights of the unsuccessful party does so. *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996). In the absence of such an error, the successful party, having sustained the burden and expense of trial, may keep the benefit of the verdict. *Id.* In a civil case, the admission or exclusion of evidence which unfairly prejudices a substantial right of the complaining litigant constitutes reversible error. *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001). When it appears from the record that evidence wrongfully admitted in a jury trial did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception is not prejudicial error. See *Westgate Rec. Assn. v. Papio-Missouri River NRD, supra.*

Here, the record shows that although information about items which Colin was not reasonably certain to need in the future was wrongfully admitted into evidence, the receipt did not affect the result of the trial. Instead, the record shows that the jury knew which items Winkler was not reasonably certain Colin would need; that the court instructed the jury to consider only items Colin was reasonably certain to need; and that consistent with the instruction, the jury excluded those items in making its award.

Winkler treated items differently in the life care plan if he was not reasonably certain Colin would need them, and he explained these differences to the jury.

The first part of the life care plan is a 28-page spreadsheet. It provided information about each item that Winkler believed Colin

would need or might need because of his disability. The items are listed in horizontal rows. Spaces appear in each row that allowed Winkler to provide eight types of information about each item as follows: (1) when Colin would need the item, (2) how many years Colin would need it, (3) how often Colin would need it, (4) the purpose of the item, (5) the likely vendor of the item, (6) a range of per-unit prices for the item, (7) a range of per-year prices for the item, (8) and any additional comments that Winkler believed necessary to explain the item. Winkler testified that if he was reasonably certain that Colin would need an item in the future, he provided an estimate in the space for the range of per-year prices, but that if he was not reasonably certain that Colin would need the item, he left that space blank.

The second portion of the life care plan was designed to demonstrate how much an item would cost over the course of Colin's life. Every item listed in the first portion of the life care plan was also listed in the second. But, as he explained to the jury, Winkler included only an estimate as to how much an item would cost over the course of Colin's life if he was reasonably certain Colin would need the item in the future. If he was not reasonably certain Colin would need the item, he put zero for the cost of the item. At the end of the second section of the life care plan, Winkler provided a total sum of $12,461,500.22 for all of the items in the life care plan which he was reasonably certain Colin would need.

The jury was aware of exactly which items in the life care plan Winkler was not reasonably certain Colin would need in the future. Moreover, at the end of the trial, the jury was told that it could not consider such information. The court instructed the jury that it could award the "reasonable value of medical, hospital, nursing, therapy, rehabilitation, medical equipment and similar care and supplies reasonably needed by and actually provided to the Plaintiffs and *reasonably certain to be provided in the future*." (Emphasis supplied.)

It is clear that the jury followed the instruction and excluded from its final award those items which Winkler was not reasonably certain Colin would need. As noted, Winkler estimated the total cost to be $12,461,500.22 over the course of Colin's life for items which he was reasonably certain Colin would need. Later

in the trial, an economist testified that the present value of that amount, depending on which discount factor was used, was a minimum of $5,943,111. But the jury awarded only $5 million in damages. Thus, the jury did not even award damages for each of the items Winkler had testified that he was reasonably certain Colin would need, let alone the items for which Winkler was not reasonably certain Colin would need. We conclude that although the court erroneously admitted irrelevant information about items which Winkler was not reasonably certain Colin would require, the error was harmless because it did not unfavorably affect the result of the trial.

(b) Hearsay

At trial, the Gourleys displayed each page of the life care plan to the jury during Winkler's testimony. When his testimony was over, the court received the life care plan into evidence. As we understand their brief, Knolla and the OB/GYN Group argue that the life care plan was hearsay. They claim that as a result, the Gourleys should not have been allowed to show the life care plan to the jury during Winkler's testimony and that the court should not have received the life care plan into evidence. See *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001) (holding expert's written appraisal inadmissible as hearsay which would unfairly emphasize his trial testimony).

[16] Knolla and the OB/GYN Group, however, failed to preserve a hearsay objection to the life care plan. One may not on appeal assert a different ground for excluding evidence than was urged in the objection made to the trial court. *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997). The only grounds upon which Knolla and the OB/GYN Group objected to the life care plan were foundation, relevancy, speculation, and conjecture; they did not object to the life care plan because it was hearsay.

[17] We note that one of their codefendants objected because the life care plan was a "narrative memorialization of testimony in a written form of the type that is normally not received." While this might be construed as a hearsay objection, Knolla and the OB/GYN Group did not join the objection. If a defendant does not offer an objection and does not expressly adopt a codefendant's objection, the matter is not preserved for him or her on

appeal. See, *Seaside Resorts v. Club Car*, 308 S.C. 47, 416 S.E.2d 655 (S.C. App. 1992); *Cook Associates, Inc. v. Warnick*, 664 P.2d 1161 (Utah 1983); *Thomas v. Bank of Springfield*, 631 S.W.2d 346 (Mo. App. 1982); *Wolfe v. East Texas Seed Co.*, 583 S.W.2d 481 (Tex. Civ. App. 1979). We will not consider the argument that the life care plan was hearsay.

3. "WHAT TO EXPECT WHEN YOU'RE EXPECTING"

Knolla and the OB/GYN Group assert that the district court erred in receiving into evidence the book entitled "What to Expect When You're Expecting" (hereinafter the book). During the cross-examination of Knolla, the Gourleys marked the book as an exhibit and asked Knolla several questions about it. The Gourleys then offered the book into evidence. Knolla objected on the grounds that the book was hearsay and that it was irrelevant. In response, the Gourleys' counsel stated that the book was being offered only to show what information the OB/GYN Group would have provided to its patients in 1993. The court overruled the objections and received the book into evidence.

[18,19] Initially, Knolla and the OB/GYN Group claim that the book contained inadmissible hearsay statements. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 1995). Out-of-court statements, if not offered for the purpose of proving the truth of the facts asserted, are not hearsay. *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, 247 Neb. 547, 529 N.W.2d 33 (1995). Here, the book was not offered for the truth of its contents, but instead was offered for the limited purpose of showing what information the OB/GYN Group would have provided to its patients in 1993. The book was not hearsay.

Knolla and the OB/GYN Group also argue that the court should have excluded the book under Neb. Rev. Stat. § 27-403 (Reissue 1995) because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. But, "one may not on appeal assert a different ground for excluding evidence than was urged in the objection made to the trial court." *Benzel v. Keller Indus., Inc.*, 253 Neb. 20, 26, 567 N.W.2d 552, 557 (1997). The only

objections Knolla and the OB/GYN Group made at trial about the book were hearsay and relevance, the first of which is without merit for the reasons set out above and the second of which has not been raised on appeal. We will not consider the § 27-403 argument.

4. Constitutional Issues

Knolla and the OB/GYN Group argue that the cap in § 44-2825(1) is constitutional. The Gourleys argue that the cap violates principles of (1) special legislation, (2) equal protection, (3) open courts and right to a remedy, (4) right to a jury trial, (5) taking of property, and (6) separation of powers. The Gourleys rely solely on provisions of the state Constitution.

The Gourleys do not argue that the cap violates substantive due process or deprives them of life, liberty, and the pursuit of happiness as listed in their motion for new trial. Other than arguing equal protection, the Gourleys do not argue that Neb. Const. art. I, § 3, applies to their case. The Gourleys also did not argue to the trial court that the cap is unconstitutional as applied, nor do they make that argument on appeal.

[20] When specific constitutional questions are presented, courts will not search for constitutional authority that was not raised and argued by the parties to overthrow a legislative enactment. See, e.g., *United States v. Spector*, 343 U.S. 169, 72 S. Ct. 591, 96 L. Ed. 863 (1952) (alternate constitutional ground for overturning statute not considered when appellee did not brief and argue issue); *Rice v. Rigsby and Davis v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963) (addressing only constitutional issues raised in appellee's brief). Thus, we will consider only the specific constitutional arguments that the Gourleys raise and argue. See *Rice v. Rigsby and Davis v. Rigsby, supra.* Because we are asked to review numerous alternate grounds for finding the cap unconstitutional, we generally address the constitutional issues concerning the Gourleys' contentions.

(a) Statutory Provisions and Background

The Nebraska Hospital-Medical Liability Act was created to address a perceived medical liability crisis. The act created a medical review panel, capped the amount of damages that could

be recovered, and created the Excess Liability Fund. Neb. Rev. Stat. §§ 44-2801 et seq. (Reissue 1998). Under the act, health care providers that do not opt out of the act's coverage must file proof of financial responsibility with the Director of Insurance and pay surcharges for the excess liability fund. §§ 44-2821 and 44-2824. The act allows patients to opt out of the act's coverage. § 44-2821(3). Section 44-2825 provides:

> (1) The total amount recoverable under the Nebraska Hospital-Medical Liability Act from any and all health care providers and the Excess Liability Fund for any occurrence resulting in any injury or death of a patient may not exceed . . . (c) one million two hundred fifty thousand dollars for any occurrence after December 31, 1992.
>
> (2) A health care provider qualified under the act shall not be liable to any patient or his or her representative who is covered by the act for an amount in excess of two hundred thousand dollars for all claims or causes of action arising from any occurrence during the period that the act is effective with reference to such patient.
>
> (3) Subject to the overall limits from all sources as provided in subsection (1) of this section, any amount due from a judgment or settlement which is in excess of the total liability of all liable health care providers shall be paid from the Excess Liability Fund pursuant to sections 44-2831 to 44-2833.

(b) Special Legislation

The Gourleys contend that § 44-2825(1) is unconstitutional special legislation because it provides a special privilege to health care professionals while placing a burden on the most severely injured plaintiffs.

Neb. Const. art. III, § 18, provides:

> The Legislature shall not pass local or special laws in any of the following cases, that is to say:
>
> . . . .
>
> Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

[21] We described the purpose of the constitutional safeguard against special legislation in *Haman v. Marsh*, 237 Neb. 699, 709, 467 N.W.2d 836, 844-45 (1991), as follows:

> By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary. . . . General laws embrace the whole of a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. . . . It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted.

Thus, the focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class.

[22] A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). This case does not involve a permanently closed class.

[23-25] We have consistently stated that the test for determining the constitutionality of classifications is as follows:

> "A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. . . ." "Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes

> of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act."

State ex rel. Douglas v. Marsh, 207 Neb. 598, 609, 300 N.W.2d 181, 187 (1980). See, e.g., *Bergan Mercy Health Sys. v. Haven, supra*; *Big Johns Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000); *Haman v. Marsh, supra*.

We note that a special legislation analysis is similar to an equal protection analysis, and often the two are discussed together because, at times, both issues can be decided on the same facts. See, generally, *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000) (addressing equal protection and special legislation separately, but deciding issues for same reasons). As a result, language normally applied to an equal protection analysis is sometimes used to help explain the reasoning employed under a special legislation analysis. *Id.* But the focus of each test is different. The analysis under a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation. This is different from an equal protection analysis under which the state interest in legislation is compared to the statutory means selected by the Legislature to accomplish that purpose. Under an equal protection analysis, differing levels of scrutiny are applied depending on if the legislation involves a suspect class. See, e.g., *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995) (discussing special legislation and equal protection separately and applying differing tests); *Lerma v. Keck*, 186 Ariz. 228, 921 P.2d 28 (Ariz. App. 1996) (illustrating difference between equal protection and special legislation); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989) (upholding damages cap and discussing special legislation and equal protection separately).

This court has upheld the constitutionality of the Nebraska Hospital-Medical Liability Act. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). Discussing equal protection, we first held there was a reasonable basis for the classification. Then, in response to the argument that the medical review panel constituted

a special privilege for the health care provider and imposed an undue burden on the seriously injured patient, we stated:

> In this respect it must be remembered the Nebraska procedure is an elective one. Under the election, the act guarantees the claimant an assured fund . . . for the payment of any malpractice claim he [or she] may have. Under the common law remedy [the claimant] had no such guarantee and, as in the case of the plaintiff Prendergast, who has been unable to acquire any malpractice insurance, the likelihood of collecting a substantial judgment could be quite remote.
>
> Additionally, the claimant is assured of a procedure which will provide him access to an impartial medical review panel to determine whether the health care provider met the applicable standard of care. In return, claimant by his election agrees to the [cap]. . . . [T]he classification rests on reasons of public policy and a substantial difference between medical care providers and other tort-feasors. Suffice it to say that the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.
>
> . . . Nothing in the act suggests, as defendant infers, that the legislation involved was enacted for the relief of the medical care provider. The enactment was, and so appears to us to be, in the public interest. This is paramount.

Id. at 115, 256 N.W.2d at 669.

The Gourleys argue that *Prendergast* is not precedent because it did not have a four-judge majority. But, under Neb. Const. art. V, § 2, only three judges are necessary to determine that an act is constitutional. Further, even before *Prendergast* was decided, this court recognized the Legislature's concern over the rising cost of malpractice insurance and the substantial difference between medical practitioners and other tort-feasors. When holding that the statute of limitations for malpractice actions did not constitute special legislation, we stated:

> There are substantial reasons for legislative discrimination in regard to this field. We have seen in recent years the growth of malpractice litigation to the point where numerous insurance companies have withdrawn from this field. Insurance rates are practically prohibitive so that many

> professional people must either remain unprotected or pass the insurance charges along to their patients and clientele in the form of exorbitant fees and charges. This unduly burdens the public which requires professional services.

Taylor v. Karrer, 196 Neb. 581, 586, 244 N.W.2d 201, 204 (1976), *disapproved on other grounds, Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998).

After *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977), was decided, we relied on it when determining that a different cap on damages was constitutional. In *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989), we upheld the constitutionality of a limit of recovery of damages under the parental liability statute, Neb. Rev. Stat. § 43-801 (Reissue 1998). In determining that § 43-801 did not violate principles of equal protection or the prohibition against special legislation, we cited *Prendergast* for the proposition that "certain limitations on recovery and differentiation among types of tort-feasors are permissible." *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. at 852, 443 N.W.2d at 572. We again cited *Prendergast* with favor in 1991. *Haman v. Marsh*, 237 Neb. 699, 713, 467 N.W.2d 836, 847 (1991) ("there are substantial reasons for legislative discrimination in regard to malpractice actions"). Further, in 2000, this court quoted and relied on language from *Prendergast,* stating that in *Prendergast*, we were "dealing with the fundamental right to adequate medical care" and affirming " 'the right of the Legislature to exercise the police power to promote the general health and welfare of the citizens of this state.' " *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 857, 620 N.W.2d 339, 348 (2000). We also quoted *Prendergast* as follows:

> "Defendant . . . assumes the legislation was enacted to relieve doctors or insurance companies of some of their burden. We do not accept defendant's premise. Doctors and insurance companies are able to protect themselves against financial burdens by passing the cost on to their patients. Because they were doing so, [they] created part of the problem. The Legislature deemed it necessary to exercise its police power to make available qualified medical services at reasonable prices for the Nebraska public. We find no constitutional violation of this effort."

Bergan Mercy Health Sys. v. Haven, 260 Neb. at 857, 620 N.W.2d at 348. Thus, we have recognized on repeated occasions that the classification in the Nebraska Hospital-Medical Liability Act is based upon a reason of public policy. Further, we have recognized the existence of a substantial difference of situation or circumstances that justified diverse legislation for the classification.

The Gourleys argue, however, that § 44-2825(1) was not justified. The Gourleys point out that there was disagreement in the Legislature at the time § 44-2825(1) was enacted and conflicting testimony at the hearing on the motion for new trial. Thus, they argue that there never was an insurance crisis and that lifting the cap would have little effect on the cost of medical services. The Gourleys essentially ask that we independently review the wisdom of enacting the cap. We decline to do so.

[26,27] Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *Bergan Mercy Health Sys. v. Haven, supra*. The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

[28,29] It is commonly held that courts will not reexamine independently the factual basis on which a legislature justified a statute, nor will a court independently review the wisdom of the statute. See, e.g., *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). Instead, courts have inquired into "whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based." *Robinson v. Charleston Area Med. Center*, 186 W. Va. at 730, 414 S.E.2d at 887. See *Prendergast v. Nelson, supra*. See, also, *Phillips v. Mirac, Inc., supra* (considering whether any set of facts either known or which could be reasonably assumed supports legislature's judgment). As one author has stated:

> The legislature has the ability to hear from everybody—plaintiff's lawyers, health care professionals, defense

> lawyers, consumer groups, unions, and large and small business. . . . And, ultimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voter's disfavor. These are but a few reasons why, over the years, legislators have received some due deference from courts.

Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688 (2001). This court does not sit as a super-legislature to review the wisdom of legislative acts. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001).

[30-32] Also, all reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. *State v. Hunt, supra*. If the Legislature had any evidence to justify its reasons for passing the act, then it is not special legislation if the class is based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation concerning the objects to be classified. See *Prendergast v. Nelson, supra*. We reach this determination by considering what the Legislature could have found at the time the act was passed. See, generally, *Ralston v. County of Dawson*, 200 Neb. 678, 264 N.W.2d 868 (1978).

[33] It is not this court's place to second-guess the Legislature's reasoning behind passing the act. Likewise, "it is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted." *Verba v. Ghaphery*, 210 W. Va. at 36, 552 S.E.2d at 412 (upholding constitutionality of damages cap). Because we give deference to legislative factfinding and presume statutes to be constitutional, any argument that the record contains evidence that the act was not wise or necessary when it was enacted does not change the analysis.

Section 44-2825 was adopted under 1976 Neb. Laws, L.B. 434, but the legislative history is found under 1976 Neb. Laws, L.B. 703. At the committee hearing, the Legislature heard from

both proponents and opponents of the act. There was testimony from witnesses indicating that there was a problem recruiting physicians in the state and that increases in medical malpractice insurance were raising the cost of medical care. Public Health and Welfare Committee Hearing, L.B. 703, 84th Leg., 2d Sess. (Jan. 27, 1976). There was also testimony that a cap would not affect the cost of medical care, and some expressed the belief that the act was nothing more than a boon for insurance companies. *Id.* Generally, the proponents of the act expressed concern that an insurance crisis existed, but admitted that it was likely impossible to know if a cap on damages would solve the problem. Based on the information before it, the Legislature generally believed that a damages cap would solve the problem, especially when combined with the medical review panel and the Excess Liability Fund. *Id.* Thus, the Legislature set out a specific statement of findings and intent in the Nebraska Hospital-Medical Liability Act. In § 44-2801, the Legislature stated:

> (1) The Legislature finds and declares that it is in the public interest that competent medical and hospital services be available to the public in the State of Nebraska at reasonable costs, and that prompt and efficient methods be provided for eliminating the expense as well as the useless expenditure of time of physicians and courts in nonmeritorious malpractice claims and for efficiently resolving meritorious claims. It is essential in this state to assure continuing availability of medical care and to encourage physicians to enter into the practice of medicine in Nebraska and to remain in such practice as long as such physicians retain their qualifications.
>
> (2) The Legislature further finds that at the present time under the system in effect too large a percentage of the cost of malpractice insurance is received by individuals other than the injured party. The intent of sections 44-2801 to 44-2855 is to serve the public interest by providing an alternative method for determining malpractice claims in order to improve the availability of medical care, to improve its quality and to reduce the cost thereof, and to [e]nsure the availability of malpractice insurance coverage at reasonable rates.

Here, the Legislature had evidence to justify their reasons for passing the act. The class is based upon reasons of public policy and substantial differences of situation or circumstances that suggested the justice or expediency of diverse legislation.

Other states have also expressed agreement that a cap on damages for medical malpractice does not constitute special legislation. See *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989). See, also, *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000). There is recognition by both this court and others that there is evidence to justify the Legislature's actions.

[34] To the extent that other courts have found damages caps to constitute special legislation, those cases do not conform to our legal precedent and are unpersuasive. See, e.g., *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 228 Ill. Dec. 636 (1997) (Miller, J., concurring in part, and in part dissenting) (explaining reasons for disagreement with special legislation analysis as applied in *Best*). See, also, Matthew W. Light, Note, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 Wash. & Lee L. Rev. 315 (2001) (criticizing cases holding that damages caps are unconstitutional). We conclude that the cap does not violate principles prohibiting special legislation.

(c) Equal Protection

The Gourleys next contend that the cap violates the equal protection clause of the Nebraska Constitution. They first argue that the cap affects fundamental rights and ask that this court apply a "searching" or rigorous review. Brief for appellees the Gourleys at 56.

[35] Neb. Const. art. I, § 3, states: "No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause. See *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995).

[36-41] The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.

Pfizer v. Lancaster Cty. Bd. of Equal., 260 Neb. 265, 616 N.W.2d 326 (2000). In any equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive. If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. Under this test, strict accordance must exist between the classification and the statute's purpose. The result the Legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists. On the other hand, if a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. Upon a showing that such a rational relationship exists, courts will uphold the legislation. *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, 593 N.W.2d 295 (1999); *State v. Garber*, 249 Neb. 648, 545 N.W.2d 75 (1996). Some legislative classifications, such as those based on gender, are reviewed under an intermediate level of scrutiny. See, e.g., *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

A majority of jurisdictions apply a rational basis or other similar test and determine that a statutory cap on damages does not violate equal protection. See, e.g., *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (en banc); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992); *Peters v. Saft*, 597 A.2d 50 (Me. 1991); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds, Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). See, also, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) (reaching this conclusion but stating that it

was not binding precedent); *Trujillo v. City of Albuquerque*, 125 N.M. 721, 965 P.2d 305 (1998) (overruling use of heightened standard, but remanding for determination of constitutionality under rational basis standard); *Morris v. Savoy*, 61 Ohio. St. 3d 684, 576 N.E.2d 765 (1991) (finding no violation of equal protection, but finding damages cap unconstitutional on other grounds). A few jurisdictions have applied a heightened standard under their state constitution. See, *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

The Gourleys contend that a heightened level of scrutiny should be applied to this case because the cap affects fundamental rights such as the right to a jury trial, full remedy, property, and medical care. They also argue that the cap affects a suspect class because plaintiffs with damages awards over the cap are "'saddled with disabilities.'" Brief for appellees the Gourleys at 51. They also appear to argue that heightened scrutiny should apply because the Nebraska Unicameral system is more susceptible to influences from special interests. We disagree that a heightened level of scrutiny should be applied.

[42] The right of access to the courts is important, but that right is impaired only by state action that limits or blocks access to the courts. See, generally, *Evans ex rel. Kutch v. State, supra.* The damages cap at issue does not limit access to the courts. Instead, it limits a plaintiff's recovery in court. *Id.* Further, access to the courts to pursue redress for injuries is not the type of fundamental right which requires heightened scrutiny. *Guzman v. St. Francis Hospital, Inc., supra.* In addition, the classification created by § 44-2825 is not based on suspect criteria. Instead, the Gourleys' interest in unlimited damages is economic. See *Guzman v. St. Francis Hospital, Inc., supra.* See, generally, *Evans ex rel. Kutch v. State, supra.* We find no merit in the argument that plaintiffs with damages awards over the cap are a suspect class or that heightened scrutiny should be applied because Nebraska has a unicameral legislative system. Because the interests at issue are economic, we apply the rational basis test.

[43-45] Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the

classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). The rational relationship standard is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). Thus, when determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results. *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989).

[46-49] As with their arguments about special legislation, the Gourleys contend that the act was unwise and unnecessary. But as we already discussed, we will not second guess the conclusions of the Legislature. Further, in economics and social welfare, a statute does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. *Pfizer v. Lancaster Cty. Bd. of Equal., supra*; *State v. Garber*, 249 Neb. 648, 545 N.W.2d 75 (1996). The fact that other schemes could have been selected does not mean that the scheme chosen is constitutionally infirm. *Id.* See *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). As long as the classification scheme chosen by the Legislature rationally advances a reasonable and identifiable governmental objective, a court must disregard the existence of other methods that other individuals might have preferred. See *Pfizer v. Lancaster Cty. Bd. of Equal., supra.* Social and economic measures run afoul of the Equal Protection Clause only when the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the Legislature's actions were irrational. *State v. Atkins, supra.*

The district court concluded that § 44-2825 was unconstitutional partially because it is a cap on all damages instead of a cap on only noneconomic damages. This does not change the analysis. A statute will not offend equal protection if a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that

end. We note that other courts have upheld statutes that cap all damages. See, *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds, Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

Here, the Legislature was concerned about a perceived insurance crisis that could affect the ability of the state to recruit and retain physicians and increase the costs of medical care. Reducing health care costs and encouraging the provision of medical services are legitimate goals which can reasonably be thought to be furthered by lowering the amount of medical malpractice judgments. See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002).

We have previously recognized these goals as legitimate legislative concerns. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976), *disapproved on other grounds, Jorgensen v. State Nat. Bank & Trust Co.*, 255 Neb. 241, 583 N.W.2d 331 (1998). Also, a rational relationship exists between the concern and the statutory means selected by the Legislature to accomplish its goal. We note that § 44-2825 was generally based on an Indiana act. Public Health and Welfare Committee Hearing, L.B. 703, 84th Leg., 2d Sess. 17 (Jan. 27, 1976). In *Johnson v. St. Vincent's Hospital, supra*, the Indiana Supreme Court upheld the damages cap in the Indiana act, and it noted that the act established a form of government-sponsored insurance, set limitations upon liability, and placed the burden upon persons injured by the industry. The court then stated:

> An insurance operation cannot be sound if the funds collected are insufficient to meet the obligations incurred. It must, however, be accepted that the badly injured plaintiff who may require constant care will not recover full damages, yet at the same time we are impressed with the large amount which is recoverable and its probable ability to fully compensate a large proportion of injured patients. In the same vein, badly injured patients would have little or no chance of recovering large sums of money if the evil the act was intended to prevent were to come about, i.e., that an

> environment would develop in the State in which private or public malpractice insurance were unavailable or unused. Of some relevance here is also the fact that after suit and recovery against a health care provider is completed, there continues a total life-time dependency upon other health care providers for vital treatment of the residuum of illness from the prior negligence and of new and unrelated illnesses. Thus to the extent that the limitation upon recovery is successful in preserving the availability of health care services, it does so to the benefit of the entire community including the badly injured plaintiff.

Johnson v. St. Vincent's Hospital, 273 Ind. at 396, 404 N.E.2d at 599. Although one may disagree with this reasoning, the Nebraska Legislature heard similar comments when it was considering enacting § 44-2825. Public Health and Welfare Committee Hearing, L.B. 703, 84th Leg., 2d Sess. (Jan. 27, 1976).

[50] Finally, we note that some jurisdictions have held that a cap on damages violates equal protection. In some cases, the jurisdiction applied a heightened level of scrutiny, which we reject. See, *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978). Another is unclear about the level of scrutiny. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991). Several fail to give deference to the Legislature and engage in judicial factfinding, which we also reject. See, *Moore v. Mobile Infirmary Ass'n, supra*; *Arneson v. Olson, supra*. Another requires the provision of a replacement remedy, quid pro quo, to limit recovery of damages, which we reject and which will be discussed when dealing with the open courts provision of the Nebraska Constitution. See, e.g., *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). We find these cases unpersuasive. Thus, we conclude that the cap on damages in § 44-2825 satisfies principles of equal protection.

(d) Open Courts and Right to Remedy

The Gourleys contend that § 44-2825 violates the open courts provision of the Nebraska Constitution and denies them their right to a remedy. They argue that common-law rights and remedies that were in place at the time the constitution was adopted are protected from legislative change.

Neb. Const. art. I, § 13, provides: "All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay . . . ."

A majority of jurisdictions have held that a cap on damages does not violate the open courts and right to remedy provisions of their state constitution. *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds, Collins v. Day*, 644 N.E.2d 72 (Ind. 1994); *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Trujillo v. City of Albuquerque*, 125 N.M. 721, 965 P.2d 305 (1998). A minority of courts have held that a cap on damages violates a state constitution's open courts or right to remedy provision. *Matter of Certif. of Questions of Law*, 544 N.W.2d 183 (S.D. 1996); *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988).

[51,52] It has long been the law of Nebraska, however, that the Legislature is free to create and abolish rights so long as no vested right is disturbed. *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989). When upholding the constitutionality of the review panel provision of the act, we stated in *Prendergast v. Nelson*, 199 Neb. 97, 104, 256 N.W.2d 657, 663-64 (1977):

> Basically the contention is that the Legislature is powerless to alter a common law right. The law itself as a rule of conduct may be changed at the will or even at the whim of the Legislature unless prevented by constitutional limitations. . . . The Constitution does not forbid the creation of new rights, nor the abolition of old ones recognized by the common law, to attain a permissible legislative object.

Thus, we have held that no one has a vested interest in any rule of the common law or a vested right in any particular remedy. *Peterson v. Cisper, supra.*

The Gourleys contend that rights that were in place when the constitution was adopted are an exception to these rules. In the

alternative, they contend that the Legislature cannot change a remedy without providing an adequate replacement, or quid pro quo. We disagree.

Rejecting an argument that the common law in place at the time the constitution was adopted could not be changed, the Idaho Supreme Court stated: "To adopt that argument would be to hold that the common law as of 1890 governs the health, welfare and safety of the citizens of this state and is unalterable without constitutional amendment." *Jones v. State Board of Medicine*, 97 Idaho at 864, 555 P.2d at 404. Relying on a Colorado case, the court further noted that the open courts provision did not discuss the common law. Instead, the common law was adopted through another constitutional provision and through statute in Idaho. *Jones v. State Board of Medicine, supra*, citing *Vogts v. Guerrette*, 142 Colo. 527, 351 P.2d 851 (1960).

In Nebraska, the common law of England was adopted by statute. Neb. Rev. Stat. § 49-101 (Reissue 1998). Thus it exists here by legislative enactment and may be repealed. See *Vogts v. Guerrette, supra*. Section 44-2825(1) also does not bar access to the courts or deny a remedy. Instead it redefines the substantive law by limiting the amount of damages a plaintiff can recover. Although plaintiffs have a right to pursue recognized causes of action in court, they are not assured that a cause of action will remain immune from legislative or judicial limitation or elimination. *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc).

[53,54] We have also held that if a common-law right is taken away, nothing need be given in return. *Prendergast v. Nelson, supra*. Because the Legislature can eliminate a common-law cause of action entirely, it can also alter the remedy for a cause of action without providing a replacement remedy, or quid pro quo. We conclude that § 44-2825(1) does not violate Neb. Const. art. I, § 13.

(e) Jury Trial

The Gourleys contend that the cap violates their right to a trial by jury. Knolla and the OB/GYN Group counter that the Legislature can abolish a common-law cause of action and that

therefore, it follows that it can limit the amount of damages that can be recovered.

Neb. Const. art. I, § 6, provides:

> The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury.

Courts are split on whether a cap on damages violates the right to a jury trial. The majority of courts hold that a cap does not violate the right to trial by jury. *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000); *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (en banc); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Adams v. Children's Mercy Hosp., supra*; *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). In two of these cases, the constitutional provision at issue is generally the same as the provision in the Nebraska Constitution. *Kirkland v. Blaine County Medical Center, supra*; *Adams v. Children's Mercy Hosp., supra*. Other courts have applied language that is generally the same as the Nebraska Constitution and have concluded that a cap on damages does violate a plaintiff's right to a jury trial. *Lakin v. Senco Products, Inc.*, 329 Or. 62, 987 P.2d 463 (1999); *Matter of Certif. of Questions of Law*, 544 N.W.2d 183 (S.D. 1996); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991); *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989), *amended* 780 P.2d 260. We disagree with the reasoning of those courts.

[55,56] The purpose of article I, § 6, is to preserve the right to a jury trial as it existed at common law and under the statutes in force when the constitution was adopted. *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999); *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986). The primary function of a jury has always been factfinding, which includes a determination of a plaintiff's damages. See

Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992) (en banc). The court, however, applies the law to the facts. *Id.* Section 44-2825 provides the remedy in a medical malpractice action. The remedy is a question of law, not fact, and is not a matter to be decided by the jury. See, e.g., *Adams v. Children's Mercy Hosp., supra*; *Murphy v. Edmonds, supra*; *Etheridge v. Medical Center Hospitals, supra.* See, generally, *Evans ex rel. Kutch v. State, supra.* Instead, the trial court applies the remedy's limitation only after the jury has fulfilled its factfinding function. See, e.g., *Murphy v. Edmonds, supra*; *Etheridge v. Medical Center Hospitals, supra.* See, generally, *Evans ex rel. Kutch v. State, supra.*

[57] Further, as we have discussed, the Legislature has the right to completely abolish a common-law cause of action. *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989). If the Legislature has the constitutional power to abolish a cause of action, it also has the power to limit recovery in a cause of action. See, e.g., *Adams v. Children's Mercy Hosp., supra.* We conclude that § 44-2825 does not violate the right to a jury trial.

(f) Taking of Property

The Gourleys next contend that the cap acts to take property in violation of Neb. Const. art. I, § 21. They argue that a cause of action and a jury's determination of damages are property.

Article I, § 21, states: "The property of no person shall be taken or damaged for public use without just compensation therefor." Article I, § 21, applies to vested property rights. See *Tracy v. City of Deshler*, 253 Neb. 170, 568 N.W.2d 903 (1997).

[58] As previously discussed, we have held that a person has no property and no vested interest in any rule of the common law or a vested right in any particular remedy. *Peterson v. Cisper, supra.* Further, courts have rejected the argument that a cause of action and determination of damages are property. *Pulliam v. Coastal Emergency Services*, 257 Va. 1, 509 S.E.2d 307 (1999). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). The cap on damages in § 44-2825 does not violate Neb. Const. art. I, § 21. We conclude that the Gourleys' argument is without merit.

(g) Separation of Powers

The Gourleys contend that § 44-2825 violates the separation of powers provision of Neb. Const. art. II, § 1. They argue that the cap legislatively transfers their property to another, acts as a legislative remittitur, and acts as a legislative judgment on damages.

We have already stated that a person has no property and no vested interest in any rule of the common law or a vested right in any particular remedy. *Peterson v. Cisper, supra.* The Gourleys' argument about the legislative transfer of property is without merit. We also find no merit in the argument that the cap acts as a legislative judgment of damages. As we have discussed, the Legislature may abolish a common-law right or remedy. *Id.* For the same reasons the cap does not violate the right to a jury trial, it also does not act as a legislative determination of the amount of damages in any specific case.

We note that one court has held that a cap on damages improperly delegates to the Legislature the power to remit verdicts and judgments. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 228 Ill. Dec. 636 (1997). See, also, *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989), *amended* 780 P.2d 260 (indicating in dicta that cap might violate separation of powers). In *Best*, the court concluded that the determination whether a verdict was excessive was a discretionary function of the trial court and that a cap on damages improperly delegated that function to the Legislature.

Other courts, however, have determined that a cap on damages does not violate principles of separation of powers. See, e.g., *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001); *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000); *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). Most of these courts have specifically disagreed with the reasoning that a cap acts as a legislative remittitur. *Verba v. Ghaphery, supra*; *Kirkland v. Blaine County Medical Center, supra*; *Guzman v. St. Francis Hospital, Inc., supra.* See, generally, *Evans ex rel. Kutch v. State, supra.*

In *Kirkland*, the Idaho Supreme Court noted that nothing about the damages cap purported to limit the exercise of the judiciary's constitutional powers or jurisdiction. The court stated:

> Rather, if anything, the statute is a limitation on the rights of plaintiffs, not the judiciary. Because it is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine.

Kirkland v. Blaine County Medical Center, 134 Idaho at 471, 4 P.3d at 1122.

[59] We agree that the damages cap does not act as a legislative remittitur or otherwise violate principles of separation of powers. The cap does not ask the Legislature to review a specific dispute and determine the amount of damages. Instead—without regard to the facts of a particular case—the cap imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy. We have stated repeatedly that the Legislature may change or abolish a cause of action. Thus, the ability to cap damages in a cause of action is a proper legislative function. See, *Verba v. Ghaphery, supra*; *Kirkland v. Blaine County Medical Center, supra*; *Etheridge v. Medical Center Hospitals, supra*. See, generally, *Evans ex rel. Kutch v. State, supra*. "Indeed, were a court to ignore the legislatively-determined remedy and enter an award in excess of the permitted amount, the court would invade the province of the legislature." *Etheridge v. Medical Center Hospitals*, 237 Va. at 101, 376 S.E.2d at 532. We determine that the cap on damages does not violate art. II, § 1.

5. Cross-Appeal

The Gourleys purported to file a cross-appeal assigning that the district court erred when it overruled the motion for new trial regarding the directed verdict for Nebraska Methodist. Nebraska Methodist filed a motion to dismiss, contending that this court lacks jurisdiction over the appeal because it was not filed within 10 days of the overruling of the motion for new trial. The motion

was denied. Nebraska Methodist then filed a brief arguing that this court lacks jurisdiction over the cross-appeal and that the cross-appeal was not properly filed.

The Gourleys' brief states on the cover that it is the brief of appellees and cross-appellants. An assignment of error appears on page 2 of the brief. Statements about jurisdiction, scope of review, and propositions of law are covered together for both the brief and any cross-appeal. The brief does not set out a separately designated section of the brief as the brief on cross-appeal. Instead, portions of the purported cross-appeal are scattered throughout the brief.

Neb. Ct. R. of Prac. 9D(4) (rev. 2000) 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.

[60] The appellate courts of this state have repeatedly held that a cross-appeal must be properly designated under rule 9D(4) if affirmative relief is to be obtained. *Michael B. v. Donna M.*, 11 Neb. App. 346, 652 N.W.2d 618 (2002). See *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999).

The Gourleys admit that they "did not comply with most of the procedural requirements of [rule] 9D(4)." Reply brief for appellees the Gourleys at 8. They ask that this court exercise discretion and consider the cross-appeal although rule 9D(4) was not followed. We decline to do so.

VI. CONCLUSION

We reverse that portion of the district court's judgment finding that § 44-2825(1) is unconstitutional and affirm the judgment in all other respects. The district court shall enter judgment for the Gourleys in the amount of $1,250,000.

AFFIRMED IN PART, AND IN PART REVERSED.

STEPHAN and MILLER-LERMAN, JJ., not participating.

CONNOLLY, J., concurring.

I agree with and join the majority opinion but write separately to address several issues raised by Justice McCormack's dissent.

After foraging for facts outside the record, Justice McCormack concludes in his dissent that the reason for the damages cap—availability of malpractice insurance at reasonable rates—no longer exists. The dissenting opinion states that "[n]ow, 27 years after enactment of the cap, the information available indicates otherwise." Citing from the Trends in 2002 Rates for Physicians' Medical Professional Liability Insurance (Med. Liab. Monitor 2002), the dissent concludes that the Nebraska Hospital-Medical Liability Act has not served to reduce the cost of medical malpractice insurance. But the dissent fails to provide all the data from the report. It also fails to note that while the cost of insurance has generally risen in all or most states, the overall cost of insurance in Nebraska is significantly less than it is in many states that do not have caps on damages. Thus, the data that the dissent uses can also support the argument that the cap has been effective in keeping the overall rate of insurance lower in Nebraska than in many other states.

Justice McCormack's dissent next refers to physicians' incomes, apparently for the proposition that because physicians earn substantial incomes, they can afford insurance. This misses the point. The Legislature was concerned when enacting the cap that physicians were leaving the medical practice or moving to states with a better malpractice climate because of the costs of insurance. A second concern was that as insurance prices rose, physicians would pass those costs on to their patients, resulting in more expensive health care. A physician's income is irrelevant to these problems. Physicians, like those in any other profession, seek to maximize income and thus will seek to practice in states where they have less overhead expenses and will pass any increase in overhead expenses on to their patients.

Although I find Justice McCormack's conclusions based on his statistical sources suspect, what is more inappropriate is that they are used at all. As the majority opinion stated, it is not the place of a court to second guess the wisdom of legislative acts, nor is it appropriate for a court to decide whether legislation continues to meet the purposes for which it was originally enacted. See *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001). See, also, *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282,

399 N.W.2d 706 (1986); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). Of further concern is that the sources used in the dissent were not before the Legislature and are not in the record. Instead, if the evidence from the record were considered, the Gourleys presented little credible evidence that the cap was unwise or no longer necessary, while Knolla and the OB/GYN Group presented much more evidence supporting the cap.

Because the record and the dissent's use of statistics can be used to indicate differing points of view, one is left questioning which view is correct. What is clear is that a decision about the necessity of a damages cap cannot be decided based on a few incomplete sources. Instead, many differing sources must be considered. See, e.g., H.R. Rep. No. 108-32(I) (House Report from Committee on the Judiciary recommending enactment of damages cap and citing to numerous sources of information both in support of and in opposition to bill). The consideration of statistical sources to determine the wisdom of an act is the concern of the Legislature, not an appellate court. Were this court to start second guessing legislative enactments, principles of fairness and due process would require us to consider many sources of statistical information and hear from experts in the field. This court does not have the time or resources to engage in such a process, nor should we. That is not a judicial function. It is a legislative function that was carried out by the Legislature when it enacted Neb. Rev. Stat. § 44-2825 (Reissue 1998). The determination whether it is wise to continue the cap is also a legislative function.

This court's function is to neutrally review the constitutionality of legislation. It should not act as a second legislative chamber that can overturn legislation that it disagrees with. Although I am not entirely in agreement with the provisions of § 44-2825, this court is limited to reviewing the constitutionality of the act without engaging in a form of judicial legislation. Despite any personal concerns I have about the act, I conclude that it is constitutional.

Justice McCormack's dissent also suggests that this court's decision in *Prendergast, supra*, is not binding or persuasive authority. In *Prendergast*, three justices determined that portions of the Nebraska Hospital-Medical Liability Act were constitutional. Neb. Const. art. V, § 2, provides:

> The Supreme Court shall consist of seven judges . . . . A majority of the judges shall be necessary to constitute a quorum. A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges.

Thus, three is the constitutionally appropriate number of judges necessary to agree that a legislative act is constitutional. Because three justices in *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977), held that portions of the act are constitutional, *Prendergast* is binding precedent. Also, as the majority opinion notes, we have consistently relied on *Prendergast* for the position that substantial reasons exist for legislative discrimination concerning malpractice actions. See *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

Moreover, a reading of the majority opinion makes clear that although the majority cited *Prendergast*, it also decided the issue after a thorough analysis regardless of *Prendergast*. Based on the authority cited by the majority, I would determine that the cap on damages in § 44-2825 is constitutional even if *Prendergast* had never been decided.

Next, relying largely on equal protection cases, the dissent would apply to a special legislation analysis a level of scrutiny comparable to the intermediate scrutiny test employed in an equal protection analysis. This is incorrect because, as the majority opinion states, the special legislation test is not a heightened test. Instead, it is simply a different test from that of equal protection. The rule advocated by the dissent introduces principles of equal protection into a special legislation analysis. Under the dissent's rule, legislation that was subject to a rational basis review under equal protection would always receive heightened scrutiny under a special legislation analysis. The effect would be a back door way of using an equal protection analysis to find legislation that passes muster under equal protection to be unconstitutional. A special legislation analysis has a different focus from an equal protection analysis and should not be used as a second equal protection clause under which everyone gets heightened scrutiny.

GERRARD, J., concurring.

In 1976, a precipitous process in the final stage of legislation led to the enactment of the Nebraska Hospital-Medical Liability Act. The act in significant instances unfairly deprives the Gourleys of the full measure of *economic damages* that is the most fundamental element of a meaningful recovery for negligently injured people. In a number of cases, people injured through no fault of their own will be unable to even collect their proven medical expenses. While I reluctantly concur with the per curiam opinion's conclusion that the act does not violate any of the provisions of the Nebraska Constitution that have been raised, briefed, and argued in this case, it would be injudicious to sit idly by and silently concur in a matter of such importance to so many parties. I, therefore, write separately to express my serious concerns about the public policy upon which the act is purportedly based and whether the act adequately protects the substantive due process rights of injured persons.

ECONOMIC AND NONECONOMIC DAMAGES

The Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801 et seq. (Reissue 1998), limits an injured person to a total recovery of $1,250,000 for any single occurrence of medical professional malpractice. See § 44-2825(1). This limitation on total recovery ignores the distinctions to be made between different measures of damages and, as in the present case, can result in the inability of injured persons to recover even the expenses for their medical care. This unwarranted restriction on economic damages is, in my view, a fundamental flaw.

There are two separate types of compensatory damages, economic and noneconomic. Economic damages include the cost of medical care, past and future, and related benefits, i.e., lost wages, loss of earning capacity, and other such losses. Noneconomic losses include claims for pain and suffering, mental anguish, injury and disfigurement not affecting earning capacity, and losses which cannot be easily expressed in dollars and cents. See *McKissick v. Frye*, 255 Kan. 566, 876 P.2d 1371 (1994). See, also, *Gallion v. O'Connor*, 242 Neb. 259, 494 N.W.2d 532 (1993); Neb. Rev. Stat. § 25-21,185.08 (Reissue 1995). While both economic and noneconomic damages are intended to compensate plaintiffs

for their injuries, they do so in fundamentally different ways. Money damages are, at best, an imperfect means of compensating plaintiffs for intangible injuries. The effects of economic losses, on the other hand, can be fully ameliorated by the payment of money damages.

In other words, while the legal system cannot undo pain and suffering, it can and should provide that medical expenses be fully paid.

> "When liability has been demonstrated, the first priority of the tort system is to compensate the injured party for the economic loss he has suffered. . . . [I]t is unconscionable to preclude a plaintiff, by an arbitrary ceiling on recovery, from recovering all his economic damages, even though some lowering of medical malpractice premiums may result from the enactment of such a ceiling."

Fein v. Permanente Medical Group, 38 Cal. 3d 137, 160 n.17, 695 P.2d 665, 681 n.17, 211 Cal. Rptr. 368, 384 n.17 (1985) (quoting "Rep. of Com. on Medical Professional Liability (1977) 102 ABA Ann.Rep. 786, 849").

Noneconomic damages are generally the largest portion of a medical liability settlement. Grace Vandecruze, *Has the Tide Begun to Turn for Medical Malpractice?*, 15 No. 2 Health Law. 15 (2002). More significantly, unbridled noneconomic damages have been said to present the primary threat to maintaining reasonable malpractice premiums, because such awards are based on highly subjective perceptions and resist actuarial prediction. See *Matter of Certif. of Questions of Law*, 544 N.W.2d 183 (S.D. 1996). See, also, *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Fein, supra*. See, generally, Mark C. Kendall, *Expectations, Imperfect Markets, and Medical Malpractice Insurance*, in The Economics of Medical Malpractice 167 (Simon Rottenberg ed., 1978); Judith K. Mann, *Factors Affecting the Supply Price of Malpractice Insurance*, in The Economics of Medical Malpractice 155 (Simon Rottenberg ed., 1978).

Recognizing these basic principles, the substantial majority of states that have enacted limitations on medical malpractice damages have limited noneconomic damages, but allowed complete recovery for economic losses. See, generally, 2 David W. Louisell

and Harold Williams, Medical Malpractice ¶ 18.26 (2002); Miles J. Zaremski and Frank D. Heckman, Reengineering Healthcare Liability Litigation, ch. 11 (1997 & Cum. Supp. 1999) (compiling state statutory provisions). Similarly, several courts upholding the constitutional validity of such limitations have, in so doing, noted the distinction between economic and noneconomic damages. See, *Franklin, supra*; *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Fein, supra*; *Edmonds v. Murphy*, 83 Md. App. 133, 573 A.2d 853 (1990), *affirmed* 325 Md. 342, 601 A.2d 102 (1992) (upholding statutes that permitted complete recovery of economic damages). Compare *Matter of Certif. of Questions of Law, supra* (striking down cap because of limitation on recovery for economic damages).

LEGISLATIVE PROCESS

The legislative history of the Nebraska Hospital-Medical Liability Act reflects awareness of the need to protect recovery for economic losses, but also reflects a legislative process that short circuited attempts to address that need. The parameters of what would become the act were first set forth in L.B. 703, 84th Legislature, 2d Session. As originally drafted, L.B. 703 would have capped total recovery, much like the present act, at $500,000. Testimony was heard by the Public Health and Welfare Committee reflecting the policy concerns set forth above, and it was decided to amend L.B. 703 to address those concerns. As amended by the committee, L.B. 703 would have capped general damages at $500,000, but placed no limitation on special damages. See Legislative Journal, 84th Leg., 2d Sess. 796 (Feb. 26, 1976).

However, L.B. 703, as amended, was held up on the floor of the Legislature. Instead, the general provisions of the original version of L.B. 703, prior to the committee amendment, were amended into a bill that had originally dealt with meat retailers. See Legislative Journal, L.B. 434, 84th Leg., 2d Sess. 1240 (Mar. 19, 1976). L.B. 434 was enacted by the Legislature. See 1976 Neb. Laws, L.B. 434. Because of the circuitous process by which the act became law, there is little evidence that the specific decision to cap both economic and noneconomic damages was fully considered by the Legislature. The members of the

Public Health and Welfare Committee were the only senators with the opportunity to hear and examine the witnesses who testified regarding the act. But the committee's determination to at least allow complete recovery for special damages, based on that testimony, was undone on the floor of the Legislature by parliamentary maneuvering.

EXCESS LIABILITY FUND

Moreover, there is little suggestion that the Legislature fully considered how the different aspects of the act would interact. The primary concern of the Legislature seems to have been the problem of increasing malpractice insurance premiums, and it is evident that the cap on total damages was intended to reduce those premiums. However, an examination of the statutory scheme demonstrates that there is no significant relationship between the cap on total recovery and malpractice insurance premiums, because of the intervening effect of the Excess Liability Fund.

Under the act, a qualified health care provider shall not be liable to any patient for an amount in excess of $200,000 arising from any occurrence. See § 44-2825(2). Instead, subject to the overall limit established by § 44-2825(1), any amount due from a judgment in excess of the total liability of all liable health care providers shall be paid from the Excess Liability Fund. See § 44-2825(3). Health care providers are required to maintain professional liability insurance in the amount of $200,000 per occurrence. See § 44-2827. See, generally, *Brewington v. Rickard*, 235 Neb. 843, 457 N.W.2d 814 (1990).

To compensate for judgments above $200,000 per qualified health care provider, but below the cap on total recovery, the act creates the Excess Liability Fund (hereinafter the Fund), which is supported by a surcharge levied on all qualified health care providers. See § 44-2829. The amount of the surcharge is established by the Director of Insurance and is intended to maintain a reserve in the Fund "sufficient to pay all anticipated claims for the next year and to maintain an adequate reserve for future claims." See § 44-2830. However, the surcharge is not to exceed 50 percent of the annual premium paid by health care providers for their required malpractice insurance, except that a special surcharge may be levied if the amount in the Fund is inadequate

to pay all claims for a calendar year. See §§ 44-2829(2)(a) and 44-2831(1). The director may also obtain reinsurance for the Fund. See § 44-2831(2).

The effect of this scheme is to attenuate, if not almost completely sever, the relationship between the cap on total recovery and malpractice insurance premiums. Malpractice insurance premiums are established based on actuarial principles which generally evaluate, inter alia, the risk of liability and the predicted value of successful claims. See, generally, Judith K. Mann, *Factors Affecting the Supply Price of Malpractice Insurance*, in The Economics of Medical Malpractice 155 (Simon Rottenberg ed., 1978). Because of the Fund, however, the exposure of malpractice insurance carriers is limited to $200,000 arising out of any single occurrence for any single care provider. It is that figure, and not the cap on total liability, which must provide the primary basis for actuarial determinations of malpractice insurance premiums.

The cap on total recovery, then, has some, but minimal, bearing on the market cost of medical malpractice insurance. The cap on total recovery does not serve to limit the liability of malpractice insurers; instead, it limits the liability of the Fund. Unfortunately, the Legislature, in enacting the act, does not seem to have reflected on whether each of the specific provisions of the act were necessary or warranted in light of the remaining provisions. When considering the public policy rationale for the cap on total liability—and, more particularly, the cap on economic damages—the question is, To what extent can a limitation on recovery for proven economic losses be justified by a need to limit the potential liability of the Fund?

SUBSTANTIVE DUE PROCESS

In my view, this question, when placed in its proper constitutional framework, implicates the constitutional right to substantive due process of law. There is a substantial overlap between the tests applied under due process and equal protection analysis. See, generally, *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989). The distinction is that equal protection and special legislation analyses are focused on the classes created by a statute and whether there is justification for making such classifications and treating those classes differently. See, e.g, *Bergan*

Mercy Health Sys. v. Haven, 260 Neb. 846, 620 N.W.2d 339 (2000). Due process, on the other hand, questions the justification for abrogating a particular legal right, and the appropriate scrutiny is determined by the importance of the right that is at issue. See, generally, *Condemarin, supra*. Thus, while the act does not create suspect classifications, and there may be some rational basis for treating health care tort-feasors differently from other tort-feasors, whether economic damages may be taken from negligently injured persons is a separate issue and calls for a different constitutional analysis. Because my concerns regard the nature of the basic right that has been taken—the right to recover for proven economic damages—those concerns are properly addressed by a due process analysis.

However, as the per curiam opinion correctly determines, the issue of substantive due process has not been brought before this court, and we are precluded from deciding, on the record and briefing before us, whether the act comports with that constitutional mandate. Nonetheless, my judicial responsibilities compel me to express my serious reservations regarding the act's satisfaction of constitutional due process, for the benefit of other litigants, the members of the Legislature, and their constituents, the public.

The Nebraska Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law . . . ." Neb. Const. art. I, § 3. The concept of due process embodies the notion of fundamental fairness and defies precise definition. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). The primary purpose of that constitutional guaranty is security of the individual from the arbitrary exercise of the powers of government. *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947). The Legislature may not, under the guise of regulation, set forth conditions which are unreasonable, arbitrary, discriminatory, or confiscatory. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994).

Generally, classifications appearing in social or economic legislation require only a rational relationship between the state's legitimate interest and the means selected to accomplish that end. The ends-means fit need not be perfect; it need only be rational. *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997).

Accord *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). But measures adopted by the Legislature to protect the public health and secure the public safety and welfare must still have some reasonable relation to those proposed ends. See, *Jeffrey, supra*; *Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm.*, 217 Neb. 487, 351 N.W.2d 701 (1984). See, also, *Rein, supra.* There must be some clear and real connection between the assumed purpose of the law and its actual provisions. *Finocchiaro, Inc., supra.*

When a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest. *Champoux, supra.* However, this begs the question whether the right to recover for economic losses is important enough to merit heightened scrutiny under the Nebraska Constitution. Although this court, because of the limitation on the issues presented, has no occasion in this case to determine the appropriate level of scrutiny to be applied in a due process analysis of a cap on economic damages, it is worth noting that several courts have concluded the right to recover damages for personal injury is essential, and caps on damages are subject to heightened judicial scrutiny in making constitutional determinations. See, e.g., *Matter of Certif. of Questions of Law*, 544 N.W.2d 183 (S.D. 1996); *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976). As explained by the Supreme Court of South Dakota:

> Medical bills, lost wages, and prescription costs are tangible damages, whereas pain and suffering and like damages are largely intangible. Unbridled noneconomic damage awards present a real threat to maintaining reasonable malpractice insurance premiums, because such awards are unpredictable and based on highly subjective perceptions. . . . In truth, however, the . . . flat cap on total damages potentially cuts not only fat, but muscle, bone and marrow. If a malpractice patient's hospital bill, for example, exceeds the cap, then the patient can recover nothing for the remaining medical bills, future bills, past and future income lost, prescriptions, etc.

Matter of Certif. of Questions of Law, 544 N.W.2d at 200. The right to such recovery " 'is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life.' " *Condemarin*, 775 P.2d at 360, quoting *Hunter v. North Mason School Dist.*, 85 Wash. 2d 810, 539 P.2d 845 (1975).

The facts of the instant case demonstrate the callous effect of denying recovery for economic damages. The record shows that Colin suffered severe brain damage and will, for the rest of his life, be afflicted by cerebral palsy and extensive physical, cognitive, and behavioral deficiencies. The economic evidence presented by the Gourleys sets forth the expenses likely to be incurred over the course of Colin's life because of his disabilities, including medications, care, and medical treatment and equipment. The Gourleys' expert testified, without contradiction, that the expenses for Colin's care will total $12,461,500.22 over the course of his life. This figure has a present value of $5,943,111, of which the jury awarded $5 million. In short, it is undisputed that the Gourleys will recover, because of § 44-2825(1), less than one-fourth of Colin's medical expenses alone.

This effect on the quality of life of an injured child, incurred because of a statutory limitation on the right to collect economic damages, must be balanced against the act's only direct effect: the maintenance of the Fund. The evidence in this case does not indicate that the Fund requires financial protection. In fact, the evidence is far to the contrary. In 1998, the surcharge for qualified health care providers was 5 percent. The balance in the Fund at the end of 1998 was $62,625,074, and the estimated liabilities of (i.e., potential claims against) the Fund at that time were $24,014,000. Between 1990 and 1998, the amount of total claims paid in any given year ranged from a low of $1,795,069 in 1990 to a high of $4,197,308 in 1991. In 1998, the Fund *earned* over three times more than it paid out in claims, even disregarding the additional funds obtained through the surcharge (which, it should be noted, was only one-tenth of the surcharge permitted under the act).

Given the stark comparison between the assets of the Fund and the potential poverty that can result from forcing negligently injured persons to find their own means of paying for catastrophic

medical expenses, it may ultimately be determined that the act, in capping recovery for economic damages, is unconstitutional as applied to plaintiffs whose proven economic damages exceed the cap. This would not render the act completely inoperative, but would prelude application of the cap where it would prevent a complete recovery of economic damages. See, generally, *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091 (D. Neb. 1998), *affirmed* 192 F.3d 1176 (8th Cir. 1999); *Texas Workers' Compensation Com'n v. Garcia*, 893 S.W.2d 504 (Tex. 1995); *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994) (distinguishing between facial challenge to statute, which asserts statute unconstitutional under all circumstances, and as-applied challenge, which asserts statute operates unconstitutionally because of party's unique circumstances).

I recognize the general principle that the wisdom and utility of legislation is a matter for the Legislature, and not the courts, and that judges should not substitute their social and economic beliefs for the judgment of legislative bodies. See, *City of Grand Island v. County of Hall*, 196 Neb. 282, 242 N.W.2d 858 (1976); *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972). See, also, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); *Okl. Ed. Ass'n v. Alcoholic Bev. Laws Enf. Com'n*, 889 F.2d 929 (10th Cir. 1989). However, the discretion of the Legislature is circumscribed, as always, by the Nebraska Constitution, particularly where the abrogation of fundamental rights is concerned. The effect of the act on a substantial right—recovery of economic damages—is especially troubling, and potentially unreasonable, when balanced against the negligible effect that such recovery would have on the Fund.

The parties in this case have not presented the question whether the act, as applied, violates substantive due process, and I agree with the per curiam opinion's determination that we should not overthrow a legislative enactment on the basis of authority not raised and argued by the parties. The per curiam opinion expressly reserves ruling on such issues, which means that some of the most important questions about the act remain, for the time being, unanswered. This does not, however, prevent the Legislature from considering whether the act, in its current form, is fair, wise, or necessary, nor should it preclude legislative

changes to protect both the constitutional validity of the act and the well-being of the citizens of Nebraska.

CONCLUSION

As previously stated, I concur, albeit grudgingly, in the per curiam opinion's conclusions regarding the constitutional challenges to the act. I join in the opinion of the court regarding the other issues presented. I remain deeply troubled by the public policy choices reflected in the act, particularly the denial of economic recovery to negligently injured persons. It is pointedly unfair, and may well prove unconstitutional, for the law of this state to safeguard a surplus of tens of millions of dollars in the Excess Liability Fund by denying negligently injured persons money for needed medical care and potentially condemning them to undue poverty. But, because this case does not afford us the opportunity to decide that constitutional question, I reluctantly concur in the judgment of the court.

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

HENDRY, C.J., concurring in part, and in part dissenting.

I concur with Justice Gerrard insofar as he suggests that the cap on damages imposed by Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) may violate substantive due process rights of injured persons. I write separately, however, to state that for reasons similar to those expressed in my dissent in *Bergan Mercy Health Sys. v. Haven,* 260 Neb. 846, 620 N.W.2d 339 (2000) (Hendry, C.J., dissenting), I believe the Gourleys lack standing to challenge the Nebraska Hospital-Medical Liability Act as unconstitutional special legislation in violation of Neb. Const. art. III, § 18.

In assessing a special legislation claim, we must first determine the privilege created by the statute and the particular class which is singled out to receive the privilege. *Haven, supra.* See, also, *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996); *Stanton v. Mattson*, 175 Neb. 767, 123 N.W.2d 844 (1963). In my view, the privilege created by § 44-2825(1) is the cap on the total amount recoverable "from any and all health care providers . . . for any occurrence resulting in injury or death of a patient." The particular class singled out by the Legislature to receive the privilege is composed of "health care providers," which class is

limited to physicians, nurse anesthetists, qualifying professional entities, and hospitals. Neb. Rev. Stat. § 44-2803 (Reissue 1998).

Next, we must determine the persons within the general class which is made the subject of the legislation who stand in the same relation to the privilege as the particular class that receives the privilege. *Haven, supra.* See, also, *Swanson, supra*; *Stanton, supra.* Further, we must then determine whether the statute violates Neb. Const. art. III, § 18, either because the particular class which receives the privilege is a permanently closed class, or because the particular class has no reasonable distinction or substantial difference from the general class. *Haven, supra.* See, also, *Swanson, supra*; *Stanton, supra.*

I believe that the general class of persons standing in the same relation to the privilege would be all other health care professionals who are not "health care providers" as defined by the act, but who nonetheless may be liable "for bodily injury or death on account of alleged malpractice, professional negligence, failure to provide care, breach of contract, or other claim based upon failure to obtain informed consent for an operation or treatment." Neb. Rev. Stat. § 44-2822 (Reissue 1998). Such individuals could include, for example, optometrists (see Neb. Rev. Stat. § 71-1,135.06 (Cum. Supp. 2002)); dentists (see, generally, *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996), *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990), *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989), and *Pfeifer v. Konat*, 181 Neb. 30, 146 N.W.2d 743 (1966)); and chiropractors (see, generally, *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987)).

I therefore conclude that the only persons who would have standing to assert that § 44-2825(1) is unconstitutional special legislation are such members of the general class who do not benefit from the privilege of the cap on damages pursuant to § 44-2825(1). *Haven, supra.* See, also, *Swanson, supra*; *Stanton, supra.* Because in my view the Gourleys lack standing, I reserve judgment as to whether § 44-2825(1) violates Neb. Const. art. III, § 18, until the proper party, together with an adequate and proper record, is before the court.

Recognizing that courts are concerned only with the power of the legislative branch to enact statutes, and not a legislature's

wisdom, with the exception of its analysis regarding special legislation, I concur with the per curiam opinion. See, *U.S.D. No. 229 v. State*, 256 Kan. 232, 238, 885 P.2d 1170, 1175 (1994) (stating that " 'the function of the court is merely to ascertain and declare whether legislation was enacted in accordance with or in contravention of the constitution—and not to approve or condemn the underlying policy,' " quoting *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 789 P.2d 541 (1990)); *Fagas v. Scott*, 251 N.J. Super. 169, 211, 597 A.2d 571, 593 (1991) (stating that " 'judicial branch of the government does not and cannot concern itself with the wisdom or policy of a statute [and that s]uch matters are the exclusive concern of the legislative branch, and the doctrine is firmly settled that its enactment may not be stricken because a court thinks it unwise,' " quoting *N. J. Sports & Exposition Authority v. Mc Crane*, 61 N.J. 1, 292 A.2d 545 (1972)).

McCormack, J., concurring in part, and in part dissenting.

I agree with those portions of this court's per curiam opinion discussing the jury verdict, the life care plan, "What to Expect When You're Expecting," and the Gourleys' attempted cross-appeal. However, I respectfully dissent from the per curiam opinion's analysis of the constitutionality of Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) (the cap). I would find that the cap is special legislation in violation of Neb. Const. art. III, § 18.

PRENDERGAST V. NELSON

As recognized by the per curiam opinion, this court previously addressed the constitutionality of various provisions of the Nebraska Hospital-Medical Liability Act in *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). I respectfully suggest that *Prendergast* is persuasive authority for next to nothing.

In *Prendergast*, a declaratory judgment action was brought by three health care providers against the director of the Nebraska Department of Insurance after the director refused to implement the provisions of the act. A three-judge plurality of this court upheld the constitutionality of numerous provisions of the act. Specifically, the plurality found that the cap was not an unconstitutional special privilege. *Prendergast v. Nelson, supra.* The plurality found it important that while a claimant who has not elected

out of the act's provisions may be limited in the amount of recovery, the claimant is guaranteed the existence of a fund from which to recover and is also guaranteed a procedure to provide an assessment of his or her claim. *Prendergast v. Nelson, supra.* The ability to elect out of the act's provisions and the tradeoff of the amount of recovery for the assessment and certainty of recovery persuaded the plurality that the cap did not offend any constitutional prohibition on the passage of special legislation.

The plurality opinion authored by Justice Spencer is one of six opinions filed in the case and is the *only* opinion in which any member of the court found that the cap is constitutional. A review of several of the remaining opinions discloses the dubious procedural posture upon which the plurality made its findings.

Justice Clinton concurred with the plurality with respect to "[t]he only justiciable issue before the court," i.e., whether the act granted the credit of the state in aid of an individual, association, or corporation under Neb. Const. art. XIII, § 3. *Prendergast v. Nelson*, 199 Neb. at 125, 256 N.W.2d at 674 (Clinton, J., concurring in part, and in part dissenting). As to the remaining issues, Justice Clinton admonished:

> Today this court, to the best of my knowledge, for the first time in its history renders what is, for the most part, an advisory opinion. In this respect it lamentably disregards its constitutional functions as a court. This course, if followed in the future, has ominous implications for the future political welfare of this state.

Id. at 122, 256 N.W.2d at 672.

In addition to the suspect procedural posture of the case, *Prendergast* also resulted in a severely fractured court. While Justice Clinton declined to reach any constitutional issues not properly raised, Justice White found that the cap was unconstitutional special legislation. *Id.* (White, J., dissenting in part). Justice McCown concurred with Justice White's opinion that the cap was unconstitutional special legislation. *Id.* (McCown, J., dissenting in part). Finally, Justice Boslaugh found that the election provision of the act—the saving grace of the cap according to the plurality—was "unrealistic and illusory." *Prendergast v. Nelson*, 199 Neb. 97, 133, 256 N.W.2d 657, 677 (1977) (Boslaugh, J., dissenting in part).

The fractures and procedural defects in *Prendergast* noted above have not gone unnoticed by other states. The North Dakota Supreme Court has noted that *Prendergast*

> is made less persuasive by the fact that the majority opinion is joined by only three of seven judges, with three others dissenting as to the constitutionality of a $500,000 limitation on recovery, and one judge declining to reach constitutional questions, since he questions the standing of some of the parties and concludes that the opinion is only advisory.

Arneson v. Olson, 270 N.W.2d 125, 131 (N.D. 1978). See, also, *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (Bird, C.J., dissenting).

A court has the power neither to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before it. *Preiser v. Newkirk*, 422 U.S. 395, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975). The director of the Department of Insurance admittedly represented no person in *Prendergast* who was limited in the amount he or she could recover against a health care provider or whose constitutional rights were otherwise affected by the provisions of the act. *Prendergast v. Nelson, supra* (Clinton, J., concurring in part, and in part dissenting). Despite the lack of a concrete adversarial claim, a plurality of the court ventured forth to address whether the cap, evidently as applied to some hypothetical claimant, was constitutional. The present case suffers from no such defect. For the first time, the constitutionality of the cap has been presented to this court by parties with their own rights at stake. The Gourleys were awarded damages against Knolla and the OB/GYN Group in an amount exceeding the cap and now seek a determination that the cap is unconstitutional so that they may recover the full amount of their damages. The rights of the Gourleys and of Knolla and the OB/GYN Group are squarely at issue in this case.

The doctrine of stare decisis would typically require us to abide by the *Prendergast* decision and uphold the constitutionality of the cap, see *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996), "'"'*unless* the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so,'"'"

(emphasis in original) *State v. Reeves*, 258 Neb. 511, 527-28, 604 N.W.2d 151, 163 (2000). The U.S. Supreme Court describes stare decisis as a principle of policy rather than an inexorable command. *Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998). Where a fractured decision of this court rests upon tenuous procedural grounds, and where the current case presents clear adversaries serving to sharply focus the constitutional issues, I believe it would be a disservice to the parties to pronounce a decision based upon a case as ill-advised as *Prendergast*. Thus, I visit the issue anew.

SPECIAL LEGISLATION

Neb. Const. art. III, § 18, provides:

> The Legislature shall not pass local or special laws in any of the following cases, that is to say:
>
> . . . .
>
> Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). A legislative act that applies only to particular individuals or things of a class is special legislation. *Id.* General laws embrace the whole of a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. *Id.* It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted. *Id.*

A legislative act constitutes special legislation, violative of Neb. Const. art. III, § 18, if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently

closed class. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). My focus is solely on whether the cap creates an arbitrary and unreasonable method of classification.

A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Id.* Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. *Id.* When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution. *Id.*

In *Haman v. Marsh*, 237 Neb. at 713, 467 N.W.2d at 846-47, we had the opportunity to describe this test in greater detail:

> The narrower special legislation prohibition supplements the equal protection theory. . . . The test of validity under the special legislation prohibition is more stringent than the traditional rational basis test. Classifications must be based on some *substantial* difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

(Citation omitted.) (Emphasis in original.)

The above-quoted portion of *Haman* was necessary to resolve some confusion about the exact nature of the test and its relationship to the test applied in an equal protection case. The tests applied in an equal protection case are well known. If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, 593 N.W.2d 295 (1999). The party challenging a statute's constitutionality has the burden to show that the statute has no rational basis. See *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000). Upon a showing that such a rational relationship

exists, courts will uphold the legislation. *Schindler v. Department of Motor Vehicles, supra.* The intermediate scrutiny test requires that a party seeking to uphold a statute that classifies individuals must show that the classification serves important governmental objectives and that the discriminatory means employed are *substantially* related to achievement of those objectives. See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982). See, also, *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996). Finally, if a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. Under this test, strict congruence must exist between the classification and the statute's purpose. The end the Legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists. *Schindler v. Department of Motor Vehicles, supra.*

In *Haman v. Marsh*, 237 Neb. 699, 713, 467 N.W.2d 836, 846 (1991), we described special legislation as being a "narrower" test than equal protection. We further explained that "[t]he test of validity under the special legislation prohibition is *more stringent* than the traditional rational basis test." (Emphasis supplied.) *Id.* at 713, 467 N.W.2d at 846-47. See, also, *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995). The level of scrutiny required by the above-mentioned test is "more stringent" because of the requirement that classifications be based upon some "*substantial*" difference of situation or circumstances. (Emphasis in original.) *Haman v. Marsh*, 237 Neb. at 713, 467 N.W.2d at 847. See, also, *City of Ralston v. Balka, supra*; *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991) (emphasizing that classifications must be based upon some *substantial* difference of situation or circumstances); *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 300 N.W.2d 181 (1980).

Because the test of validity under the special legislation prohibition is more stringent than the traditional rational basis test, I would apply a level of scrutiny comparable to the intermediate scrutiny test. It is well known that the degree of judicial scrutiny to which the statute is to be subjected may be dispositive. See *Schindler v. Department of Motor Vehicles, supra.*

That has proved to be the case in other states that have analyzed caps. Those states that have subjected caps to the minimal rational basis test have, as one might expect, found their caps to be constitutional. See, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (en banc); *Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds, Collins v. Day*, 644 N.E.2d 72 (Ind. 1994); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Morris v. Savoy*, 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991); *Matter of Certif. of Questions of Law*, 544 N.W.2d 183 (S.D. 1996); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991); *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000). However, caps have generally been unable to survive a more stringent level of scrutiny. See, *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989). But see *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976).

In analyzing a special legislation claim, we must determine (1) the privilege created by the statute, (2) the particular class which is singled out to receive the privilege, (3) the persons within the general class that is made the subject of the legislation who stand in the same relation to the privilege as the particular class, and (4) whether a substantial difference exists between the particular class and the general class. See *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000) (Hendry, C.J., dissenting).

The cap grants a privilege to all health care providers whose negligence causes catastrophic damages, i.e., damages in excess of $1,250,000, because they are liable for less than 100 percent

of the damages they cause. The general class standing in the same relation to these health care providers is all other professional service providers who commit malpractice and cause catastrophic damages and who are liable for 100 percent of the damages they cause. Is there a substantial difference between these two classes? I do not believe that there is. Each class provides services to the public. Each class is subject to actions brought by the public for malpractice committed in the course of providing those services to the public. Each class is financially burdened by those actions which prove to be successful. Each class may impose the costs of those successful actions on the public at large. Yet the Legislature has chosen to provide a benefit to one subset of the general class by exempting those health care providers whose negligence causes damages in excess of $1,250,000 from full liability for their negligent actions. Thus, I conclude that the cap is unconstitutional special legislation in violation of Neb. Const. art. III, § 18.

As Justice Gerrard discusses in greater detail, I am equally concerned by the fact that the cap applies to *all* damages, whether economic or noneconomic. Several states have struck down statutes that impose a cap on all damages. *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); *Arneson v. Olson, supra*; *State ex rel. OATL v. Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999); *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988). The majority of states with caps in effect today limit only the noneconomic damages a person may recover and do not limit recovery for economic damages. See Mark D. Clore, *Medical Malpractice Death Actions: Understanding Caps, Stowers, and Credits*, 41 S. Tex. L. Rev. 467, appendix A (2000). As the per curiam opinion notes, evidence offered at trial indicates that the Gourleys' economic damages, reduced to present value, is a minimum of $5,943,111. The jury failed to award even this amount, instead awarding $5 million in economic damages and $625,000 in noneconomic damages. However, by applying the cap and slashing the Gourleys' award to $1,250,000, the Gourleys receive an award which will cover only a fraction of their expenses over the course of Colin's lifetime and, in effect, receive nothing for their pain and suffering. See *Arneson v. Olson*, 270 N.W.2d 125 (N.D.

1978). If Nebraska followed the majority of states with caps that limited only noneconomic damages, the Gourleys would have been able to recover a large percentage of the expenses they will be burdened with for the rest of Colin's life. Had a valid challenge to the cap been preserved on substantive due process grounds, I would find that the cap violates that constitutional mandate as well for the reasons expressed by Justice Gerrard in his concurring opinion.

One of the stated purposes of the Nebraska Hospital-Medical Liability Act is to "[e]nsure the availability of malpractice insurance coverage at reasonable rates." Neb. Rev. Stat. § 44-2801(2) (Reissue 1998). As the per curiam opinion states, "the proponents of the act expressed concern that an insurance crisis existed, but admitted that it was likely impossible to know if a cap on damages would solve the problem. Based on the information before it, the Legislature generally believed that a damages cap would solve the problem . . . ." Now, 27 years after enactment of the cap, the information available indicates otherwise.

The following is a comparison of the base rates for physicians' liability insurance available in several states from various insurance companies for three different specialties: internal medicine, general surgery, and obstetrics-gynecology (OB/GYN). The data was obtained from Trends in 2002 Rates for Physicians' Medical Professional Liability Insurance (Med. Liab. Monitor 2002) (see, generally, http://www.medicalliabilitymonitor.com).

STATE	2001 RATE	2002 RATE	% INCREASE SINCE 7/01
NEBRASKA			
Midwest Medical Insurance Co.:			
Internal Medicine	$ 3,183	$ 3,469	9.0%
General Surgery	11,301	12,318	9.0
OB/GYN	17,297	18,854	9.0
PIC Wisconsin:			
Internal Medicine	$ 2,256	$ 2,786	23.4%
General Surgery	7,114	9,474	33.1
OB/GYN	12,288	16,718	36.0
CALIFORNIA			
Cooperative of American Physicians:			
Internal Medicine	$ 7,710 (So. Calif.)	$ 9,070	17.6%

Internal Medicine	7,340 (San Diego)	8,630	17.6
Internal Medicine	6,590 (No. Calif.)	7,750	17.6
General Surgery	24,740 (So. Calif.)	25,330	2.4
General Surgery	23,520 (San Diego)	24,080	2.4
General Surgery	21,070 (No. Calif.)	21,570	2.4
OB/GYN	42,330 (So. Calif.)	43,350	2.4
OB/GYN	40,230 (San Diego)	41,200	2.4
OB/GYN	36,020 (No. Calif.)	36,890	2.4
Northwest Physicians Mutual Insurance Co.:			
Internal Medicine	$ 9,204 (Los Angeles)	$ 9,810	6.6%
Internal Medicine	7,592 (San Diego)	8,092	6.6
Internal Medicine	6,240 (No. Calif. & rest of state)	6,650	6.6
General Surgery	25,080 (Los Angeles)	30,704	22.4
General Surgery	20,879 (San Diego)	24,073	15.3
General Surgery	17,783 (No. Calif. & rest of state)	20,448	15.0
OB/GYN	46,938 (Los Angeles)	56,406	20.1
OB/GYN	38,721 (San Diego)	43,776	13.1
OB/GYN	33,226 (No. Calif. & rest of state)	37,238	12.1
COLORADO			
COPIC Insurance Co.:			
Internal Medicine	$ 9,324	$ 9,845	5.6%
General Surgery	32,804	34,644	5.6
OB/GYN	29,265	30,905	5.6
Doctors' Co.:			
Internal Medicine	$ 8,482	$ 8,876	14.8%
General Surgery	29,906	32,657	14.8
OB/GYN	38,578	39,494	14.8

FLORIDA			
First Professionals Insurance Co.:			
Internal Medicine	$ 38,378 (Dade Cty.)	$ 56,153	46.3%
Internal Medicine	19,681 (rest of state)	28,796	46.3
General Surgery	124,046 (Dade Cty.)	174,268	40.5
General Surgery	63,614 (rest of state)	89,368	40.5
OB/GYN	166,368 (Dade Cty.)	201,376	21.0
OB/GYN	85,317 (rest of state)	103,270	21.0
Medical Assurance Co.:			
Internal Medicine	$ 17,611 (Dade, Broward Ctys.)	$ 26,794	52.1%
Internal Medicine	10,232 (rest of state)	15,460	51.1
General Surgery	63,189 (Dade, Broward Ctys.)	95,474	51.1
General Surgery	36,277 (rest of state)	54,677	50.7
OB/GYN	108,043 (Dade, Broward Ctys.)	136,231	26.1
OB/GYN	61,908 (rest of state)	77,949	25.9
American Physicians Assurance Corp.:			
Internal Medicine	$ 30,272 (Dade Cty.)	$ 49,494	63.5%
Internal Medicine	15,136 (rest of state)	23,757	57.0
General Surgery	75,164 (Dade Cty.)	117,201	55.9
General Surgery	37,582 (rest of state)	56,256	49.7
OB/GYN	159,166 (Dade Cty.)	210,576	32.3
OB/GYN	79,583 (rest of state)	101,076	27.0
IDAHO			
Doctors' Co.:			
Internal Medicine	—	$ 7,389	17.9%
General Surgery	—	27,546	17.9
OB/GYN	—	32,262	17.9

Medical Insurance Exchange of California:			
Internal Medicine	$ 4,320	$ 4,320	0.0%
General Surgery	15,544	15,544	0.0
OB/GYN	25,904	25,904	0.0
IOWA			
American Physicians Assurance Corp.:			
Internal Medicine	$ 4,374	$ 4,374	0.0%
General Surgery	14,386	14,386	0.0
OB/GYN	27,839	27,839	0.0
Doctors' Co.:			
Internal Medicine	—	$ 9,169	29.1%
General Surgery	—	30,441	29.1
OB/GYN	—	39,852	29.1
Midwest Medical Insurance Co.:			
Internal Medicine	$ 5,412	$ 6,168	14.0%
General Surgery	16,325	18,607	14.0
OB/GYN	33,237	37,883	14.0
KANSAS			
Kansas Medical Mutual Insurance Co.:			
Internal Medicine	$ 5,234	$ 6,082	16.2%
General Surgery	21,343	24,801	16.2
OB/GYN	33,082	38,441	16.2
Medical Assurance Co.:			
Internal Medicine	$ 3,522	$ 3,522	0.0%
General Surgery	14,090	14,090	0.0
OB/GYN	21,839	21,839	0.0
NORTH DAKOTA			
Doctors' Co.:			
Internal Medicine	—	$ 6,712	0.8%
General Surgery	—	18,006	0.8
OB/GYN	—	25,071	0.8
Midwest Medical Insurance Co.:			
Internal Medicine	$ 4,719	$ 5,427	15.0%
General Surgery	12,583	14,470	15.0
OB/GYN	21,628	24,872	15.0
SOUTH DAKOTA			
Doctors' Co.:			
Internal Medicine	—	$ 5,395	19.7%
General Surgery	—	19,958	19.7
OB/GYN	—	23,950	19.7
Midwest Medical Insurance Co.:			
Internal Medicine	$ 2,527	$ 2,906	15.0%
General Surgery	6,737	7,748	15.0
OB/GYN	11,580	13,317	15.0

The statistics cited above indicate a general upward trend in malpractice rates in Iowa and North Dakota—states that do not cap damages in medical malpractice actions. Belying the story line advanced by cap proponents, however, the same general upward trend is exhibited in states *with* caps, such as Nebraska, California, Colorado, Florida, Idaho, Kansas, and South Dakota. It appears that at least one of the intended goals of caps, to ensure reasonable malpractice rates, remains unmet—unfortunate news to the catastrophically injured such as Colin and his family, who can recover only approximately 20 percent of their medical costs so that some medical providers can enjoy what they consider to be reasonable rates. And while the absolute amount for malpractice insurance may, in some states, be burdensome, the data available suggests that insurance rates are not so "practically prohibitive," as we stated in *Taylor v. Karrer*, 196 Neb. 581, 586, 244 N.W.2d 201, 204 (1976), *disapproved on other grounds, Jorgensen v. State Nat. Bank & Trust Co.*, 255 Neb. 241, 583 N.W.2d 331 (1998), relative to physicians' incomes, as seen from the following data compiled by the American Medical Association:

GENERAL PRACTICE:

	MEAN	MEDIAN
Gross Revenue	$457,800	$369,000
Professional Expenses	263,000	184,000
Professional Liability	10,900	7,000
Income After All Expenses Including Malpractice Premiums	142,500	130,000

GENERAL INTERNAL MEDICINE:

	MEAN	MEDIAN
Gross Revenue	$419,400	$357,000
Professional Expenses	225,900	160,000
Professional Liability	10,800	6,000
Income After All Expenses Including Malpractice Premiums	157,900	140,000

INTERNAL MEDICINE-CARDIOLOGY:

	MEAN	MEDIAN
Gross Revenue	$689,200	$676,000
Professional Expenses	381,700	313,000

Professional Liability	27,100	12,000
Income After All Expenses Including Malpractice Premiums	294,600	230,000

SURGERY-GENERAL:

	MEAN	MEDIAN
Gross Revenue	$454,100	$359,000
Professional Expenses	201,700	131,000
Professional Liability	24,900	23,000
Income After All Expenses Including Malpractice Premiums	246,800	215,000

SURGERY-ORTHOPEDIC:

	MEAN	MEDIAN
Gross Revenue	$748,500	$668,000
Professional Expenses	417,100	324,000
Professional Liability	34,200	28,000
Income After All Expenses Including Malpractice Premiums	312,500	280,000

OB/GYN:

	MEAN	MEDIAN
Gross Revenue	$627,000	$515,000
Professional Expenses	375,900	272,000
Professional Liability	35,800	33,000
Income After All Expenses Including Malpractice Premiums	214,400	200,000

Physician Socioeconomic Statistics 2000-2002 (John D. Wassenaar and Sara L. Thran, eds., Am. Med. Assn. 2001). While the income figures cited above are based on a nationwide sample of physicians, the study noted that "[g]eographic differences in income are less pronounced than for other" categories tabulated. James W. Moser, *Physician Income Trends*, in Physician Socioeconomic Statistics 2000-2002, *supra*.

I respectfully dissent from the per curiam opinion's conclusion that the cap is constitutional.

CARLSON, Judge, concurring in part, and in part dissenting.

I join in Justice McCormack's concurrence and dissent. I also agree with Justice Gerrard's concurrence in regard to his substantive due process analysis.

DAN FOX, APPELLANT, V. BRADLEY E. NICK, SPECIAL ADMINISTRATOR OF THE ESTATE OF EDWARD I. RADIL, APPELLEE.

660 N.W.2d 881

Filed May 16, 2003. No. S-01-920.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
4. **Actions: Pleadings: Time.** Pursuant to Neb. Rev. Stat. § 25-217 (Reissue 1995), an action is commenced on the date a petition is filed.
5. **Actions: Service of Process: Time: Dismissal and Nonsuit.** If proper service is not obtained within 6 months of the commencement of an action, the action is dismissed by operation of law.
6. **Actions: Dismissal and Nonsuit.** After an action is dismissed by operation of law, all proceedings conducted by the court subsequent to that date, with the exception of any order finalizing the dismissal, are nullities.
7. **Actions: Abatement, Survival, and Revival.** A pending action which survives a defendant's death must be revived in the manner provided by statute.
8. ____: ____. If a pending action is not revived in the manner provided by statute, such pending action has no force and effect as to any entity in whose name revivor was required.

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

Timothy M. Schulz, of Yost, Schafersman, Lamme, Hillis, Mitchell & Schulz, P.C., L.L.O., for appellant.

Thomas A. Grennan and Thomas E. Morrow, Jr., of Gross & Welch, P.C., for appellee.

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

HENDRY, C.J.

INTRODUCTION

Appellant, Dan Fox, filed a petition against Edward I. Radil in the district court for Dodge County 8 days before the expiration of the applicable statute of limitations. However, Fox was unable to serve Radil with summons before Radil's death approximately 2 months later. After Radil's death, Fox served

appellee, Bradley Nick, special administrator of Radil's estate, with notice of the lawsuit against Radil. Nick was served prior to the expiration of the 6-month period for service of process permitted by Neb. Rev. Stat. § 25-217 (Reissue 1995). The district court granted summary judgment against Fox on the ground that Fox failed to commence his action within the applicable statute of limitations. Fox appealed. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

On October 23, 1995, Fox and Radil were involved in an automobile accident. On October 15, 1999, 8 days before the expiration of the statute of limitations, Fox filed a petition against Radil in the district court for Dodge County alleging that Radil's negligence had caused the accident and that Fox had suffered injuries as a result.

Fox's attempts to serve Radil with notice of the suit were unsuccessful. A summons sent by certified mail to Radil's last known address was returned unclaimed on November 5, 1999. A November 8 alias summons issued for personal service on Radil was also returned unsatisfied. Radil died on December 18. It is undisputed that Radil was not served with notice of the suit before his death.

On March 29, 2000, Fox filed a "Petition for Appointment of Special Administrator in Formal Proceedings" in the county court for Douglas County. By order issued that same day, the county court appointed Nick as special administrator of Radil's estate in order "to accept service of process in the case of Dan Fox v. Edward I. Radil, District Court of Dodge County, Nebraska." Also on March 29, "Letters of Special Administrator" were issued by the county court "as evidence of such appointment" of Nick as special administrator.

Nick was personally served with summons and petition on April 4, 2000, 11 days before the expiration of the 6-month period for service of process permitted by § 25-217. The summons and petition with which Nick was served, however, named Radil as defendant, rather than Nick in his capacity as special administrator.

On May 4, 2000, Nick filed a special appearance, claiming no suit had been filed against him in his capacity as special administrator. Nick further claimed that he had not been named a party to any pending suit in his capacity as special administrator. For these reasons, Nick asserted the court lacked personal jurisdiction.

On January 5, 2001, Fox filed a "Motion to Amend Petition" in the Dodge County District Court. On February 12, Fox filed an amended petition in the district court, for the first time naming Nick as defendant in his capacity as special administrator of Radil's estate. The record discloses, however, that no order reviving the action in the name of Nick as special administrator has ever been entered by the district court.

On February 23, 2001, Nick filed an answer to Fox's amended petition, in which he preserved his special appearance. On June 28, Nick moved for summary judgment. The district court granted summary judgment, determining Fox's claim was time barred because it was not commenced within the applicable statute of limitations. Fox appeals.

ASSIGNMENTS OF ERROR

Fox assigns, rephrased, that the district court erred in (1) determining no genuine issue of material fact existed, (2) determining Fox's suit was time barred, (3) failing to determine Nick was served "with the lawsuit" in a timely manner, (4) failing to determine that the relation-back doctrine rendered Fox's suit timely, and (5) failing to determine that the liability insurance exception under Neb. Rev. Stat. § 30-2485(c)(2) (Reissue 1995) allowed Fox to proceed with his lawsuit.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Maxwell v. Montey, ante* p. 335, 656 N.W.2d 617 (2003); *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Maxwell, supra*; *Alegent Health v. American Family Ins., ante* p. 312, 656 N.W.2d 906 (2003).

[3] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of

the trial court. *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

ANALYSIS

[4-6] In granting Nick's motion for summary judgment, the district court determined Fox's action had not been commenced within the applicable statute of limitations. The issue, however, is whether the district court had jurisdiction when it ruled on Nick's motion. That issue is dependent upon the question of whether Fox obtained proper service within 6 months of commencing his action. Fox's action was commenced on October 15, 1999, the date he filed his petition. See § 25-217 (amended by 2002 Neb. Laws, L.B. 876, substituting "complaint" for "petition"; operative January 1, 2003); *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999); *Licht v. Association Servs., Inc.*, 236 Neb. 616, 463 N.W.2d 566 (1990). See, also, Neb. Rev. Stat. § 25-501 (Reissue 1995). If proper service was not obtained on or before April 15, 2000, 6 months after Fox's action was commenced, Fox's action was dismissed by operation of law and any proceeding conducted by the court subsequent to that date, with the exception of any order formalizing the dismissal, was a nullity. See, § 25-217; *Kovar, supra*; *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000). Therefore, since it is undisputed that Fox failed to serve Radil before Radil died, we turn to the question of whether Fox obtained proper service within 6 months from the date his action was commenced.

In *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 324, 314 N.W.2d 19, 21-22 (1982), we observed:

> Both at common law and in this jurisdiction prior to 1867, a cause of action for injuries to the person did not survive on the death of either the person injured or the wrongdoer, and a pending action for such an injury abated on the death of either the plaintiff or the defendant. See, 1 C.J.S. *Abatement and Revival* § 144 (1936); *Wilson v. Bumstead*, 12 Neb. 1, 10 N.W. 411 (1881); *Warren v. Englehart*, 13 Neb. 283, 13 N.W. 401 (1882); *Swift v. Sarpy County*, 102 Neb. 378, 167 N.W. 458 (1918); *Gengo v. Mardis*, 103 Neb. 164, 170 N.W. 841 (1919); *Hindmarsh v. Sulpho Saline*

> *Bath Co.*, 108 Neb. 168, 187 N.W. 806 (1922); *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977).
>
> It was only by reason of the enactment of the survivorship statutes, Neb. Rev. Stat. §§ 25-1401 and 25-1402 (Reissue 1979), in 1867 . . . that the common-law rule was, in any manner, changed, and *then only to the limited extent provided by statute.*

(Emphasis supplied.) See, also, *Babbitt v. Hronik*, 261 Neb. 513, 623 N.W.2d 700 (2001). Specifically, Neb. Rev. Stat. § 25-1402 (Reissue 1995) provides that "[n]o action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant." Fox's action was "pending" in the Dodge County District Court, even though efforts to serve Radil prior to his death were unsuccessful.

We recognize that in *Willis v. Rose*, 223 Neb. 49, 388 N.W.2d 101 (1986), this court concluded that an action is "pending" for purposes of § 25-1402 if, prior to the defendant's death, both a petition is filed and the defendant is properly served. However, at the time *Willis* was decided, § 25-217 provided in relevant part that an action "shall be deemed commenced" on the date the petition is filed with the court "*if* proper service is obtained within six months of such filing." (Emphasis supplied.) § 25-217 (Reissue 1985).

Since our decision in *Willis*, § 25-217 has been amended. At all times relevant to this case, § 25-217 read: "An action is commenced on the date the petition 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 petition was filed." See 1986 Neb. Laws, L.B. 529. The amendment to § 25-217 no longer requires that service be "obtained" before an action "shall be deemed commenced." In addition, the plain language of § 25-217 requires such determination, for as to any defendant not served within 6 months of filing, the action stands dismissed without prejudice. Clearly, if an action is not commenced upon filing, there would be no need to dismiss the action as to "any defendant not served within six months." Since Fox's action had commenced prior to the date

of Radil's death, we determine Fox's action was pending in accordance with § 25-1402. See *Kovar v. Habrock*, 261 Neb. 337, 342, 622 N.W.2d 688, 692 (2001) (providing that when action is dismissed by operation of law due to failure to effect proper service within 6 months, "there is no longer an action pending"). Accordingly, pursuant to § 25-1402, Fox's pending action for damages based on the alleged negligence of Radil did not abate as a result of Radil's death. See *Levin v. Muser*, 107 Neb. 230, 185 N.W. 431 (1921).

[7] Although the enactment of § 25-1402 changed the common law pertaining to the abatement of pending actions, as we observed in *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 324, 314 N.W.2d 19, 22 (1982), such changes are "only to the limited extent provided by statute." To that effect, a pending action which survives the defendant's death must be revived in the manner provided by statute. *Workman v. Workman*, 167 Neb. 857, 872, 95 N.W.2d 186, 195 (1959) (stating that "[p]rocedure for revivor is provided by statute upon the death of a litigant in a cause pending in his lifetime if the cause of action did not abate upon his death"); *Murray v. Omaha Transfer Co.*, 95 Neb. 175, 179, 145 N.W. 360, 362 (1914) (stating that "[t]he action not having abated, the statutes make provision for revivor"). See, also, *Vogt v. Daily*, 70 Neb. 812, 813, 98 N.W. 31, 32 (1904) (stating "[m]anifestly, if before judgment a party plaintiff die, the action can no longer proceed in his name, but must be revived in the name of his representative or successor"); *A.J. Armstrong Company v. Hufstedler*, 75 N.M. 408, 410, 405 P.2d 411, 412 (1965) (stating that "[i]t is fundamental that a pending action cannot be prosecuted after the death of a party defendant thereto, so as to affect the decedent's estate, until it is revived against his personal representative or successor in interest").

As observed in 1 C.J.S. *Abatement and Revival* § 155 at 211-12 (1985):

> The substitution of a new party to proceed with the prosecution or defense of a claim is the revivor of an action. The death of a party to a legal proceeding, where the cause of action survives, suspends the action as to decedent until someone is substituted for decedent as a party.

> The right to revive or continue a pending action at law after the death of a party is purely statutory; there may be a revival or continuance when and only when the case is within a statute permitting it, and strict compliance with the statutory requirements is shown.

[8] If a pending action is not revived in the manner provided by statute, "such pending action has no force and effect" as to any entity in whose name revivor was required. *Smith v. Ralph*, 18 Ohio App. 2d 235, 238, 248 N.E.2d 208, 210 (1969); *A.J. Armstrong Company v. Hufstedler*, 75 N.M. at 410, 405 P.2d 412 (noting that "[s]ince the revival of actions at law is purely statutory, they may be revived only as prescribed by [a New Mexico statute]" nearly identical to Neb. Rev. Stat. § 25-1411 (Reissue 1995)). See, also, Neb. Rev. Stat. § 30-2404 (Reissue 1995) ("no proceeding to enforce a claim against the estate of a decedent . . . may be revived . . . before the appointment of a personal representative").

Nebraska's statutory procedure for revivor is provided by Neb. Rev. Stat. §§ 25-1403 to 25-1420 (Reissue 1995) and Neb. Rev. Stat. § 25-322 (Reissue 1995). Specifically, § 25-1411 provides:

> Upon the death of a defendant in an action, wherein the right, or any part thereof, survives against his personal representative, the revivor shall be against him; and it may also be against the heirs or devisees of the defendant, or both, when the right of action, or any part thereof, survives against them.

Although the record shows that Nick was appointed "special administrator" by the county court for Douglas County on March 29, 2000, the record is devoid of any evidence showing that after such appointment, the pending action was revived in the name of Nick as special administrator. See Neb. Rev. Stat. § 30-2209(33) and (43) (Cum. Supp. 2002) ("[p]ersonal representative includes . . . special administrator" and "[s]pecial administrator means a personal representative as described in sections 30-2457 to 30-2461").

There is no motion "suggesting" the death of Radil per § 25-1407, no conditional order of revivor per § 25-1406, and nothing to suggest any revivor based upon the consent of the parties per § 25-1408. Finally, although we have construed § 25-322

to permit revivor if, with leave of the court, " 'supplemental pleadings [are] filed and summons served as in the commencement of an action,' " *Hayden v. Huff*, 62 Neb. 375, 379, 87 N.W. 184, 186 (1901), Fox did not file an amended petition naming Nick as defendant in his capacity as special administrator until February 12, 2001. This was nearly 10 months after April 15, 2000, the date upon which the 6-month deadline for service of process under § 25-217 expired.

After Radil's death, it became necessary to revive the pending action against Radil's "personal representative" and obtain service on that individual. Although Nick was appointed "special administrator" by the Douglas County Court on March 29, 2000, both the summons and petition served upon Nick on April 4 identified Radil as defendant in the pending action. In essence, Nick was served with summons in a pending lawsuit that had not been revived to include him as a named defendant. Such service was a nullity.

The record shows that no service was obtained upon any proper party defendant within 6 months from the date the action was filed. As such, the action stood dismissed without prejudice as a matter of law on April 15, 2000. See, § 25-217; *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001); *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000). As a result, any action taken by the district court subsequent to April 15 and any pleading filed thereafter was a nullity, as the district court lacked jurisdiction. *Id.*

Given our determination that this action was dismissed without prejudice on April 15, 2000, we need not address Fox's remaining assignments of error.

CONCLUSION

We remand the cause to the district court with directions to vacate the order of summary judgment in favor of Nick and to enter an order that Fox's petition stands dismissed pursuant to § 25-217.

REMANDED WITH DIRECTIONS.

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