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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM P. JONES, RESPONDENT.

704 N.W.2d 216

Filed October 7, 2005. Nos. S-04-619, S-04-963, S-04-1461.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **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.
3. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** An attorney against whom formal charges have been filed is subject to a judgment on the pleadings if he or she fails to answer those charges.
5. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
6. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
7. ____. Misappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts, and typically warrants disbarment.
8. **Disciplinary Proceedings: Words and Phrases.** In the context of attorney discipline proceedings, misappropriation is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.
9. **Disciplinary Proceedings.** The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any aggravating or mitigating factors.
10. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect, therefore justifying more serious sanctions.
11. ____. Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline indicate disrespect for the Nebraska Supreme Court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.
12. **Disciplinary Proceedings: Rules of the Supreme Court.** Failure to comply with Neb. Ct. R. of Discipline 16 (rev. 2004) places one in contempt of court and constitutes an aggravating circumstance in attorney discipline cases.
13. **Disciplinary Proceedings.** Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment.

Original actions. Judgment of disbarment.

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

William P. Jones, pro se.

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

PER CURIAM.

I. INTRODUCTION

The office of the Counsel for Discipline of the Nebraska Supreme Court, relator, filed formal charges against respondent, William P. Jones. Respondent failed to answer, and on June 16, 2004, this court suspended respondent from the practice of law. We now consider relator's motion for judgment on the pleadings and the appropriate discipline to be imposed upon respondent.

II. FACTS

1. BACKGROUND

Respondent was admitted to the practice of law in the State of Nebraska on September 18, 1989. In previous disciplinary proceedings, respondent received a private reprimand on November 22, 1999, for neglecting a client's case and a second private reprimand on June 24, 2003, for aiding the unauthorized practice of law.

2. NO. S-04-619: TEMPORARY SUSPENSION

On January 14, 2004, a bank notified relator that respondent's trust account was overdrawn by $168.31. Relator sent a letter of inquiry, but respondent failed to provide a written explanation for the overdrawn trust account. When respondent did not answer a second request, relator filed a grievance. Respondent received notice of the grievance on March 12 instructing him to respond, but he did not do so.

On January 14, 2004, relator also received a grievance letter from Rickey Bringus alleging that respondent failed to timely file a brief in Bringus' case before the Nebraska Court of Appeals. Relator sent respondent a copy of the grievance letter and instructed respondent to file a written response. A second letter was sent, but respondent still did not reply. Relator filed another

grievance and sent notice to respondent, directing him to file a written response within 15 days. Respondent did not answer.

Relator arranged to take a deposition of respondent on April 27, 2004, and served a subpoena duces tecum on him. Respondent said he would send the requested trust account documents prior to the deposition. Respondent also stated that he was under a psychiatrist's care for depression and attention deficit and that he would send a letter from his doctor. Respondent sent neither the trust account documents nor the doctor's letter. Respondent failed to attend the scheduled deposition, allegedly because his truck would not make it from Omaha to Lincoln. Relator told respondent to send the requested documents by courier, but respondent failed to do so.

On May 19, 2004, the chairperson of the Committee on Inquiry of the Second Disciplinary District filed an application asking this court to temporarily suspend respondent from the practice of law. We issued an order on May 26, instructing respondent to show cause within 7 days why this court should not temporarily suspend his license to practice law in Nebraska. Respondent did not answer the order to show cause, and on June 16, we suspended his license and ordered him to comply with Neb. Ct. R. of Discipline 16 (rev. 2004) (suspended or disbarred attorney must notify clients, refund client funds and close trust accounts, and return membership card to Nebraska State Bar Association).

Because respondent failed to notify his clients of his suspension, this court appointed a trustee on September 15, 2004, to take inventory of respondent's files, to sequester client funds, and to take other actions necessary to protect the interests of respondent's clients. The trustee fielded requests from respondent's clients in search of their files, and the trustee notified respondent of these requests. It is unclear from the record whether respondent failed to reply to all his clients' inquiries, but the trustee reported that in one case, after he sent respondent a letter to inform respondent that a former client sought her file, that client again called the trustee and indicated that respondent had not contacted her at all.

The trustee reported that respondent's files were in "hapless shape," which made it difficult for the trustee to "tell whether

they were open, closed, or whatever." The trustee provided an inventory of respondent's cases to this court "to the extent they exist[ed]." Respondent kept the files in various boxes "with no visibly coherent organization."

During the existence of the trusteeship, the trustee noted that respondent would promise to take action (e.g., deliver file materials to the trustee) but then fail to follow through. In the trustee's final report, the trustee noted that respondent had assured the trustee he had no trust account funds in hand and that "[f]inally, he appears to be cooperative." On the other hand, the trustee also noted tasks respondent still had not completed.

3. No. S-04-963: Formal Charges

(a) Count I: Representation of Rickey Bringus

Respondent represented Bringus at a postconviction hearing in Lancaster County District Court in December 2002. Following the hearing, the court gave respondent 7 days to submit a written argument. After respondent failed to do so, Bringus' motion for postconviction relief was denied. Respondent continued to represent Bringus on appeal to the Court of Appeals. After the court had granted an extended brief date, respondent failed to file a brief on behalf of Bringus. Thus, Bringus was forced to file a brief pro se in February 2004 to preserve his appeal.

In Bringus' case before the Court of Appeals, respondent checked out the bill of exceptions and transcript but failed to timely return them despite repeated requests from the Attorney General's office and the office of the Clerk of the Supreme Court and Court of Appeals. A court order was served on respondent before he finally returned the documents to the clerk.

Respondent also represented Bringus in a Social Security matter in the U.S. District Court for the District of Nebraska. On August 1, 2003, the district court sent respondent notice that the case would be dismissed in 10 days for failure to prosecute unless respondent showed cause why the case should not be dismissed. Respondent failed to reply to the court's order, so Bringus' Social Security case was dismissed.

As to count I, relator alleges that respondent violated 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)(5) (conduct prejudicial to administration of justice), and DR 1-102(A)(6) (conduct adversely reflecting on attorney's fitness to practice law), and Canon 6, DR 6-101(A)(3) (neglect of legal matter).

(b) Count II: Overdrawn Trust Account

Respondent's trust account was overdrawn on January 6, 2004, by $40.31 and on January 8 by $168.31. Respondent failed to answer relator's initial inquiry. Relator filed a grievance, and respondent again failed to provide explanation for the overdrawn trust account.

As to count II, relator alleges that respondent violated his oath of office as an attorney; DR 1-102(A)(1); and Canon 9, DR 9-102(A) (proper maintenance of trust account).

(c) Count III: Failure to Cooperate With Disciplinary Proceedings

Respondent failed to reply to any of relator's inquiries or the grievances regarding his representation of Bringus and the overdrawn trust account. Despite being served with a subpoena duces tecum, respondent failed to attend a deposition and did not send relator the documents which had been requested.

As to count III, relator charges respondent with violating his oath of office as an attorney; the disciplinary rules; and DR 1-102(A)(1), (5), and (6).

4. No. S-04-1461: Formal Charges

(a) Count I: Representation of Raymond Baker

On August 24, 2004, Raymond Baker filed a grievance with relator. Baker claimed that respondent held funds belonging to him, that respondent had failed to respond to Baker's repeated attempts to contact respondent, that respondent did not return Baker's files and records, and that respondent failed to notify Baker that respondent's law license had been suspended in June 2004. Relator mailed a copy of Baker's grievance letter to respondent, but respondent failed to provide a written response.

As to count I, relator charges respondent with violating his oath of office as an attorney; Neb. Ct. R. of Discipline 9(E) (rev. 2001) (attorney must respond to grievance within 15 working

days); disciplinary rule 16; DR 1-102(A)(1), (5), and (6); DR 6-101(A)(3); and DR 9-102(A) and (B) (prompt notification of receipt of client funds, safekeeping of client property, maintenance of complete records of client property in attorney's possession, prompt delivery of funds or other property to client upon request).

(b) Count II: Representation of Debbie Sue Hecker

Debbie Sue Hecker filed a grievance against respondent on September 1, 2004. Hecker alleged that respondent neglected her case, failed to respond to repeated attempts by Hecker to talk to respondent, failed to return her files and records, and failed to notify her that his law license had been suspended in June 2004. Relator mailed a copy of Hecker's grievance letter to respondent with instructions for respondent to reply. Respondent did not do so.

As to count II, relator charges that respondent violated his oath of office as an attorney; disciplinary rules 9(E) and 16; DR 1-102(A)(1), (5), and (6); DR 6-101(A)(3); and DR 9-102(B)(4) (prompt delivery of funds or other property to client upon request).

(c) Count III: Representation of Charles Evans

Respondent represented Charles Evans in a suit in federal court. After losing the case in the district court, respondent filed a notice of appeal to the U.S. Court of Appeals for the Eighth Circuit, but he did not pay the necessary docket fee. Consequently, the Eighth Circuit sent to respondent an order to show cause why the appeal should not be dismissed for failure to prosecute. Respondent did not reply, and the appeal was dismissed on July 23, 2003. Even after the appeal had been dismissed, respondent told Evans that the appeal had been perfected and that he had filed a brief.

Evans filed a grievance with relator on August 18, 2004, alleging that respondent had neglected his case, lied to him about the status of the case, and failed to deliver to him his files and records. Relator mailed a copy of Evans' grievance letter to respondent and instructed respondent to provide a written response. Respondent made no reply.

As to count III, relator charges that respondent violated his oath of office as an attorney; disciplinary rules 9(E) and 16; DR 1-102(A)(1), (5), and (6); DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 6-101(A)(3); and DR 9-102(B)(4).

(d) Count IV: Representation of Candace Kohler

Respondent represented Candace Kohler in a case against her landlord. Kohler filed a grievance with relator on November 8, 2004, alleging that respondent had neglected her case. Respondent also failed to notify Kohler that his license was suspended and failed to return her file materials to her. Relator mailed a copy of Kohler's grievance letter to respondent and instructed him to provide a written response. Respondent made no reply.

As to count IV, relator charges that respondent violated his oath of office as an attorney; disciplinary rules 9(E) and 16; DR 1-102(A)(1), (5), and (6); DR 6-101(A)(3); and DR 9-102(B)(4).

(e) Count V: Representation of Richard Hendren

Respondent represented Richard Hendren in a case against an airline. Hendren filed a grievance with relator on November 29, 2004, alleging that respondent had neglected his case. Respondent also failed to notify Hendren that his license was suspended and failed to return Hendren's file materials to him. Relator mailed a copy of Hendren's grievance letter to respondent and instructed him to provide a written response. Respondent did not reply.

With regard to count V, relator charges that respondent violated his oath of office as an attorney; disciplinary rules 9(E) and 16; DR 1-102(A)(1), (5), and (6); DR 6-101(A)(3); and DR 9-102(B)(4).

III. STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Chapin, ante* p. 56, 699 N.W.2d 359 (2005).

IV. ANALYSIS

[2,3] 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. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Chapin, supra.*

1. Motion for Judgment on Pleadings

[4] An attorney against whom formal charges have been filed is subject to a judgment on the pleadings if he or she fails to answer those charges. See *State ex rel. Counsel for Dis. v. Lechner*, 266 Neb. 948, 670 N.W.2d 457 (2003). The disciplinary rules provide that if no answer is filed, "the matter may be disposed of by the Court on its own motion or on a motion for judgment on the pleadings" so long as an opportunity for oral argument is given before disbarment is ordered. Neb. Ct. R. of Discipline 10(I) (rev. 2005).

In this proceeding, respondent did not answer the charges filed against him or file any pleadings or briefs and relator has moved this court for a judgment on the pleadings. We determine that the requirements of rule 10(I) have been satisfied. Having reviewed the record de novo, we conclude that the allegations contained in the formal charges have been established by clear and convincing evidence and that the motion of relator for judgment on the pleadings should be and is hereby granted.

2. Determination of Appropriate Sanction

[5] Under Neb. Ct. R. of Discipline 4 (rev. 2004), this court may impose one or more of the following sanctions: (1) disbarment, (2) suspension, (3) probation in lieu of or subsequent to suspension, (4) censure and reprimand, or (5) temporary suspension. See *Chapin, supra.* 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 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. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005).

[6] Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *Id.* However, we also consider "the sanctions imposed by this court in prior cases presenting similar circumstances" in order to determine what the appropriate sanction is in this case. *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 199, 673 N.W.2d 214, 226 (2004).

In many instances, lawyers facing similar allegations have been disbarred. In *State ex rel. Counsel for Dis. v. Rasmussen*, 266 Neb. 100, 662 N.W.2d 556 (2003), Scott Rasmussen neglected several clients and cases, mishandled client funds, and failed to cooperate with the Counsel for Discipline by not responding timely to inquiries and not appearing at a scheduled deposition. We concluded that Rasmussen violated his oath of office, DR 1-102(A)(1) and (5), DR 6-101(A)(3), and DR 9-102(A) and (B)(3) and (4).

We noted that some of Rasmussen's ethical violations, including paying himself a retainer before earning it, were of a type for which lawyers typically receive the most severe sanctions. "[M]isappropriation of a client's funds is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession." *Rasmussen*, 266 Neb. at 112, 662 N.W.2d at 565. If no mitigating circumstances are shown, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment. See *id.* Because no mitigating circumstances were present, this court ordered Rasmussen disbarred.

In *State ex rel. NSBA v. Gregory*, 251 Neb. 41, 554 N.W.2d 422 (1996), two complaints were filed by former clients who alleged that J. David Gregory continually neglected legal matters, failed to carry out a contract of employment for professional services, engaged in conduct involving dishonesty and misrepresentation, and misused client funds. Gregory lied to his clients by telling them that he had completed certain tasks when in fact he had not. Despite his clients' repeated requests, Gregory failed to return documents to them. Gregory neither responded to the complaints nor attended a hearing of the Committee on Inquiry.

We declared that we would not tolerate "such neglectful and uncooperative practices," *id.* at 44, 554 N.W.2d at 424, and noted that misappropriation of client funds typically warrants disbarment. Consequently, we disbarred Gregory. See, also, *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000) (disbarment ordered where lawyer failed to maintain sufficient funds in trust account and did not provide any explanation to Counsel for Discipline upon request, and where court found no evidence of mitigating circumstances).

[7,8] We take the alleged trust account violations very seriously because "[a]n attorney bears the responsibility to accurately account for his client's funds." See *State ex rel. Counsel for Dis. v. Gilroy, ante* p. 339, 344, 701 N.W.2d 837, 841 (2005). Misappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts, and typically warrants disbarment. *Gregory, supra*; *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991). In the context of attorney discipline proceedings, misappropriation is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom. *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004).

This court has on occasion imposed lengthy suspensions instead of disbarment. In *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000), we suspended W. Mark Jensen indefinitely with no possibility of reinstatement for 2 years, at which time he would be required to submit to a 2-year probationary period and to comply with several reinstatement conditions. Jensen neglected clients and cases, failed to deposit client funds into his trust account, and failed to deliver promptly to his clients their funds or other property in his possession.

In determining the appropriate disciplinary measure, we considered how Jensen acted both in the underlying events of the case and in the disciplinary proceedings. He admitted his misconduct and took responsibility for his actions. He made "sincere and productive efforts to confront" an alcohol problem, satisfactorily completed an alcohol treatment program, and remained sober thereafter. *Id.* at 814, 619 N.W.2d at 848. He also

had no prior history of disciplinary violations. We ordered a sanction less than disbarment because these mitigating circumstances were present.

In *State ex rel. NSBA v. Pullen*, 260 Neb. 125, 615 N.W.2d 474 (2000), we ordered an indefinite suspension (for at least 18 months) with a conditional reinstatement where Daniel Pullen's misconduct constituted many of the same violations as those alleged against respondent. Pullen neglected legal matters entrusted to him, lied to a client about a motion he had not filed, agreed to a child custody modification without his client's consent, failed to return file materials to a client despite the client's repeated requests, and mishandled his trust account. In determining the appropriate sanction, we considered the following mitigating circumstances: Pullen "readily admitted his misconduct[,] acknowledged responsibility for his actions [and] acknowledged that his violations ha[d] harmed the public." *Id.* at 132, 615 N.W.2d at 479. Those acknowledgments reflected positively upon his attitude and character. *Id.* Pullen also admitted he was addicted to alcohol and satisfactorily completed an alcohol treatment program. Furthermore, Pullen's violations occurred during a 1-year period, and he had no prior history of disciplinary violations.

[9] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any aggravating or mitigating factors. *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005). In the present case, respondent's misconduct does not arise from an isolated event, but from a longstanding pattern of ethical violations. The record reflects several aggravating factors, but no mitigating factors.

(a) Aggravating Factors

[10] To analyze the aggravating factors in this case, we begin by noting both the quantity and the nature of respondent's alleged violations. The formal charges in these cases, which have been consolidated for argument and disposition, contain eight counts against respondent. Cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect, therefore justifying more serious sanctions. *State ex rel. NSBA v. Freese*, 259

Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000). Respondent has exhibited a pattern of neglecting his clients and their cases. This neglect has harmed his clients.

[11] Next, respondent's lack of cooperation during these disciplinary proceedings is an aggravating circumstance that must be considered. For purposes of determining the proper discipline, this court considers respondent's acts both underlying the events of this case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Gilroy, ante* p. 339, 701 N.W.2d 837 (2005). Respondent failed to provide relator with an explanation concerning any of the grievances lodged against him. We have repeatedly emphasized how important it is for an attorney to respond to inquiries and requests for information from the Counsel for Discipline. Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information indicate disrespect for this court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice. See, *id.*; *Sutton, supra.*

Although respondent met with the appointed trustee to inventory his cases and returned some file materials to clients after he was temporarily suspended, he made no effort to cooperate during these disciplinary proceedings. Respondent failed to answer the formal charges, and he did not file a brief in this court.

[12] Upon being temporarily suspended by this court in June 2004, respondent did not properly notify his clients of the suspension or return their file materials to them as required of suspended attorneys by disciplinary rule 16. As a result, this court appointed a trustee to inventory respondent's cases. Failure to comply with rule 16 places one in contempt of court and constitutes an aggravating circumstance. *State ex rel. NSBA v. Mahlin*, 252 Neb. 985, 568 N.W.2d 214 (1997); *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997).

Finally, this is not the first time that respondent has been disciplined. Respondent received a private reprimand on November 22, 1999, for neglecting a client's case, and he received a second private reprimand on June 24, 2003, for aiding the unauthorized practice of law. Thus, we have not been presented with merely a

single instance of unprofessional, unethical, and neglectful conduct, but several. This court cannot "overlook that lesser punishment in the form of private reprimands" has not changed respondent's behavior or that "his failure to have complied with Neb. Ct. R. of Discipline 16 . . . on this occasion makes him currently in contempt of this court." See *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 473, 558 N.W.2d 53, 57 (1997) (holding that attorney's misconduct involving failure to make filings, attend hearing, and communicate with client, and failure to make timely responses to inquiries by Counsel for Discipline warranted disbarment).

(b) Mitigating Factors

[13] Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment. *State ex rel. Counsel for Dis. v. Gilroy, ante* p. 339, 701 N.W.2d 837 (2005). In *Gilroy*, the attorney violated several disciplinary rules, trust account rules, and his oath of office. He failed to respond to inquiries by the Counsel for Discipline, answer the formal charges, or file any other pleadings, and this court disbarred him. We noted that because the attorney failed to reply to the Counsel for Discipline or file any pleadings, we had no basis for considering any factors that mitigated in his favor.

In the case at bar, respondent failed to provide any explanation to relator for his actions or to answer the charges levied against him. Therefore, we cannot point to any circumstances which this court might consider to be mitigating.

V. CONCLUSION

Clear and convincing evidence establishes that respondent neglected many of his clients' cases, deceived a client, mishandled and overdrew his trust account, failed to return requested materials to clients, and failed to comply with the disciplinary rules by not responding to inquiries by relator and not informing his clients that he was temporarily suspended in June 2004. Respondent violated DR 1-102(A)(1), (4), (5), and (6); DR 6-101(A)(3); DR 9-102(A) and (B); disciplinary rules 9(E) and 16; and his oath of office as an attorney. For the reasons set forth, we conclude that disbarment is the appropriate sanction.

It is therefore the judgment of this court that respondent be disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent is directed to comply with disciplinary rule 16, and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), disciplinary rule 10(P), and Neb. Ct. R. of Discipline 23 (rev. 2001) within 60 days after an order imposing costs and expenses has been entered by this court.

JUDGMENT OF DISBARMENT.

McCORMACK, J., not participating.

NEBCO, INC., A NEBRASKA CORPORATION, APPELLEE, V. RANDY ADAMS, A CITIZEN OF NEBRASKA, APPELLANT.

704 N.W.2d 777

Filed October 7, 2005. No. S-04-652.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** A guaranty is a contract by which the guarantor promises to make payment if the principal debtor defaults.
4. **Contracts: Guaranty: Intent.** Because a guaranty is a contract, it must be understood in light of the parties' intentions and the circumstances under which the guaranty was given.
5. **Corporations: Guaranty: Liability.** Whether incorporation materially alters the nature of the performance required of the guarantor so as to justify releasing the guarantor from his or her guaranty obligations is important to the determination of liability, and an alteration in risk is particularly pertinent to materiality.
6. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

John M. Boehm, of Butler, Galter & Boehm, for appellant.

Shannon L. Doering for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

NEBCO, Inc., on behalf of its division Ready Mixed Concrete Company (Ready Mixed), filed an action in the district court for Lancaster County against appellant, Randy Adams, seeking payment pursuant to a personal guaranty contract which Adams had executed to guarantee the cost of purchases of concrete by Adams' business from Ready Mixed. Adams' business was identified in the guaranty as "Adams Concrete Construction." At the time Adams signed the guaranty, Adams Concrete Construction was a sole proprietorship. Adams' business was subsequently incorporated as "Adams Concrete Construction Inc." As he argued in district court, Adams claims on appeal that the guaranty is limited to the debts of the sole proprietorship and does not extend to the debts of the corporation. Adams therefore contends that he is not liable for the debts incurred by his corporation, which debts NEBCO sought to recover in this action. The district court determined that Adams was liable on the guaranty and granted NEBCO's motion for partial summary judgment on the issue of liability. The parties stipulated to damages without prejudice to the issue of liability, and the court entered judgment in favor of NEBCO. Adams appeals. Because we conclude that Adams is liable under the guaranty for the debts at issue, we affirm.

STATEMENT OF FACTS

On April 13, 1992, Adams completed a credit application naming "Adams Concrete Construction" as the applicant for purchases made on account from Ready Mixed, a division of NEBCO. The credit application included a guaranty provision which stated:

> In consideration of any extension of credit by Ready Mixed Concrete Co. hereinafter called "Seller", either now or in the future to the above named credit applicant, on the above terms, or any other terms agreed to by said credit applicant and Seller, the undersigned, unconditionally, personally, jointly and severally guarantee the payment of any and all sums due or which may become due as a result of any such extension of credit . . . .

Adams signed the guaranty and was the only individual to do so. Adams testified at his deposition that at the time the application was completed, his business was a sole proprietorship. NEBCO does not dispute this characterization.

On May 30, 1997, Adams incorporated his business as "Adams Concrete Construction Inc." About this time, an individual gave money to Adams and became a 20-percent shareholder. Adams was the majority shareholder of Adams Concrete Construction Inc., and the record is undisputed that Adams controlled the business which continued to purchase concrete from Ready Mixed as Adams Concrete Construction under the original account number. According to the evidence, this same account number was listed on the credit application in 1992. Adams did not sign a new guaranty after the incorporation, nor did he take steps to terminate the existing guaranty.

Adams stated in his deposition that at some point, he had conversations with NEBCO personnel regarding the incorporation. Adams also stated that payments on the account were made with checks showing his business was incorporated. No such checks were offered as evidence. In contrast to Adams' testimony, NEBCO's credit manager stated in his deposition that NEBCO was not informed Adams Concrete Construction was a corporation and that Adams never requested any alteration of the information listed in connection with the account or a termination of his personal guaranty.

Adams' business fell behind on payments to Ready Mixed. On June 6, 2000, Adams signed a promissory note to Ready Mixed in the amount of $165,786.07. The note was payable in 10 monthly payments beginning July 15, 2000. The note reflected amounts that were due and owing on the account of "Adams Concrete Construction." The record thus shows that 3 years after

the incorporation, Adams signed the note as "Randy Adams, doing business as Adams Concrete Construction" without reference to the corporate status of the business. Adams' business continued to make purchases from Ready Mixed in 2001 and 2002, and the business again fell behind on the account.

On June 13, 2003, NEBCO filed the complaint in district court which gives rise to this appeal. Adams was sued personally, and Adams was named as the only defendant. The complaint asserted two causes of action. The first cause of action was for breach of the guaranty contract. NEBCO alleged that Adams Concrete Construction incurred charges of not less than $228,333.79 on its account between November 2001 and July 2002. NEBCO alleged that when Adams Concrete Construction refused to pay the amounts due and owing on its account, NEBCO sought payment from Adams pursuant to his personal guaranty and that Adams had refused to pay. NEBCO alleged that Adams' refusal to pay was a breach of the guaranty contract and sought judgment from Adams in the amount of sums due on the account plus interest and costs. In its second cause of action, NEBCO alleged that Adams had defaulted on the promissory note and sought judgment in the amount of $40,898.73 plus interest and costs. At some point, Adams confessed judgment on the second cause of action for default on the promissory note, and this cause of action is not at issue on appeal.

On February 5, 2004, NEBCO moved for partial summary judgment on the issue of liability as to the cause of action for breach of the guaranty contract. Adams opposed the summary judgment, claiming that the guaranty pertained only to Adams Concrete Construction as a sole proprietorship and did not extend to debts incurred by the corporation.

Following an evidentiary hearing, the district court concluded that Adams was liable to NEBCO on the guaranty, and on March 3, 2004, the court granted partial summary judgment in favor of NEBCO. The parties subsequently stipulated to the amount of damages without prejudice to liability as to the cause of action for breach of the guaranty contract. On April 23, the court entered judgment in favor of NEBCO in the amount of $228,333.79 on the first cause of action and $40,898.73 on the

second cause of action, plus interest and costs on both causes of action. Adams appeals.

ASSIGNMENTS OF ERROR

Adams assigns numerous errors and generally asserts that the district court erred in concluding that he was liable on the guaranty and in granting NEBCO's motion for partial summary judgment. Adams specifically asserts, inter alia, that the court erred in failing to conclude as a matter of law that the personal guaranty executed when Adams' business was a sole proprietorship did not extend to debts incurred by the corporation.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Fraternal Order of Police v. County of Douglas, ante* p. 118, 699 N.W.2d 820 (2005).

[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. *Plowman v. Pratt*, 268 Neb. 466, 684 N.W.2d 28 (2004).

ANALYSIS

As Adams argued in district court, he claims on appeal that the guaranty he signed when his business was a sole proprietorship does not extend to the debts of his business after incorporation. He contends that the trial court's conclusion to the contrary was error. Adams urges us to reverse the district court's grant of summary judgment in favor of NEBCO. In contrast, NEBCO claims that because Adams' guaranty was continuing and the nature of Adams' business after incorporation was substantially the same as when the guaranty was signed, Adams should not be released from his obligations under the guaranty. NEBCO contends that the district court did not err in concluding that Adams was liable under the guaranty and entering judgment accordingly. We agree with NEBCO and, therefore, affirm.

[3,4] We have stated that a guaranty is a contract by which the guarantor promises to make payment if the principal debtor defaults. *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003). We rely on general principles of contract and guaranty law to determine the obligations of the guarantor. *Id.* Because a guaranty is a contract, it must be understood in light of the parties' intentions and the circumstances under which the guaranty was given. See *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000) (in contract case appellate court gives effect to parties' intentions at time writing was made).

The guaranty at issue provides, inter alia, that Adams guaranteed the "sums due or which may become due as a result of any such extension of credit" as a result of the sale of concrete to Adams' business. By its terms, the guaranty did not specify a definite duration and was therefore a continuing obligation. See 38 Am. Jur. 2d *Guaranty* § 58 (1999).

Notwithstanding the continuing nature of Adams' guaranty, Adams refers us to numerous cases, not repeated here, which he asserts stand for the proposition that where a sole proprietorship later incorporates, the obligations encompassed by the guaranty executed by the sole proprietor prior to incorporation of the business are extinguished as a matter of law. In this regard, Adams relies on *Teledyne Mid-America Corporation v. HOH Corporation*, 486 F.2d 987 (9th Cir. 1973), in which a married couple guaranteed the debts of a sole proprietorship run by the husband, a business that was later incorporated. The court, in ruling on pretrial motions, refused to hold the guarantors liable for the debts of the corporate entity. Contrary to Adams' reading of the *Teledyne Mid-America Corporation* case, the opinion did not state that guarantors of a sole proprietorship which later incorporates are relieved of their obligations as a matter of law. Instead, *Teledyne Mid-America Corporation* was decided on the facts of the case which showed that after incorporation, the magnitude of the risk associated with the guaranty had changed significantly, justifying release of the guarantors.

In *Teledyne Mid-America Corporation*, the evidence showed that after incorporation, the husband was no longer the holder of the majority of the shares and that the essential nature of the business enterprise of the principal debtor was altered. Given

evidence of fundamental changes to the entity whose debts were guaranteed, the court in *Teledyne Mid-America Corporation* determined that the essential nature of the guarantors' risk had been altered and thus refused to hold the guarantors liable for the debts of the corporate entity.

The court in *Teledyne Mid-America Corporation* did not hold that the guarantors were released simply because of incorporation. Similarly, we decline to hold that a guarantor of the debt of a sole proprietorship is released solely because the business of the principal debtor is later incorporated. Further, although not articulated in these terms, the rationale of the court in *Teledyne Mid-America Corporation* is consistent with principles of contract law, which we have noted above apply to guaranties. In this regard, we recognize that as a matter of contract law, an appellate court will give effect to the parties' intentions at the time the writing was made. *Baye v. Airlite Plastics Co., supra.* Determination of the guarantor's obligation under the guaranty contract after incorporation must be evaluated by reference to the terms of the guaranty and decided on a case-by-case basis.

[5] It has been observed that whether incorporation materially alters the nature of the performance required of the guarantor so as to justify releasing the guarantor from his or her guaranty obligations is important to the determination of liability and that "an alteration in risk is particularly pertinent to materiality." *Bernardi Bros., Inc. v. Great Lakes Distributing*, 712 F.2d 1205, 1207 (7th Cir. 1983). We agree that liability under a guaranty contract should be consistent with the risk the guarantor could have anticipated when assuming the risk under the guaranty.

Our recognition of a risk analysis to determine whether a guaranty for the debts of a sole proprietorship will extend to the debts of the business after incorporation is consistent with the approach adopted by other courts. See *Loving & Associates, Inc. v. Carothers*, 619 N.W.2d 782 (Minn. App. 2000) (cases collected). Summarizing the risk analysis approach used by various courts, the court in *Fehr Bros. v Scheinman*, 121 A.D.2d 13, 19, 509 N.Y.S.2d 304, 308 (1986), stated:

> The test which has evolved is to determine whether the changes in the entity, the debts of which . . . are guaranteed[,] significantly alter the business dealings between the

debtor and the creditor and the nature of the guarantor's undertaking, in particular the degree of risk the guarantor is being obligated to assume.

Both parties refer us to *Loving & Associates, Inc. v. Carothers, supra*, which employed a risk analysis. The court in *Loving & Associates, Inc.* discussed the relevance of changes in the nature of the business of the principal debtor, albeit in various forms of business, and the impact of such changes on the obligations of the guarantor. The *Loving & Associates, Inc.* court stated as follows:

> Whether changes in the principal [debtor] are of sufficient magnitude to justify releasing a guarantor is a determination courts must make on a case-by-case basis. *Fehr Bros., Inc. v. Scheinman*, 121 A.D.2d 13, 509 N.Y.S.2d 304, 307-08 (1986). Courts agree that minimal changes do not affect a guarantor's obligation. *See* Annotation, *Change in Name, Location, Composition, or Structure of Obligor Commercial Enterprise Subsequent to Execution of Guaranty or Surety Agreement as Affecting Liability of Guarantor or Surety to the Obligee*, 69 A.L.R.3d 567, 572 (1976). The reincorporation and name-change of a principal, for example, have been held to be insufficient to discharge a guarantor's obligations absent a corresponding change in operating procedures or business structure. *See, e.g., Folk v. Continental Can Co.*, 97 F.2d 322, 324 (4th Cir.1938) (upholding guaranty after change in principal's business structure on finding that "[t]he business of the old company was conducted as usual by the [new company] with substantially the same officers and with the same assets which the new company had absorbed"). This is particularly true when the guarantor himself participates in the change or the change could reasonably have been anticipated. *See, e.g., New York Am., Inc. v. Hub Advertising Agency*, 136 Misc. 596, 240 N.Y.S. 367, 368 (N.Y.City Ct.1930) (holding guarantor was "estopped from using the cloak of a corporate entity to which he himself was a party to relieve him of any liability under [guaranty issued before incorporation to secure partnership's debts]") . . . .

> Whether more substantial changes in the principal [debtor] affect a guarantor's obligation depends primarily on (a) whether the changes result in a new principal in terms of management, control, operating procedures, and business dealings; and (b) whether the changes materially alter the nature of the performance required of the guarantor. Thus, changes that allow the principal [debtor] to survive as an independent entity and do not affect the guarantor's original undertaking do not discharge a guaranty. *See, e.g., Alton Banking & Trust Co. v. Sweeney*, 135 Ill.App.3d 96, 89 Ill.Dec. 926, 481 N.E.2d 769, 773-74 (1985) (change in principal's business from used-car lot to new-car dealership did not constitute material change warranting guarantor's release from obligations under continuing guaranty, where guarantor owned both businesses and assented to the change, and amount of dealership's indebtedness did not exceed amount specified in guaranty); *New York Am.*, 240 N.Y.S. at 368 (partnership's decision to incorporate did not release partner-guarantor from liability for new corporation's debts because new corporation continued to conduct same business, at same address, under same name, with same directors and stockholders; business relation between creditor and principal [debtor] continued unaffected; and partner-guarantor participated in decision to incorporate and became stockholder and director of newly formed corporation); *Caldor, Inc. v. Mattel, Inc.*, 817 F.Supp. 408 (S.D.N.Y.1993) (finding that merger and subsequent spinoff of subsidiary, with resulting loss of control by parent-guarantor, did not fundamentally alter parent-guarantor's risk under guaranty because subsidiary continued to operate same business under substantially same conditions as before merger and spinoff).

Loving & Associates, Inc. v. Carothers, 619 N.W.2d 782, 787-88 (Minn. App. 2000).

[6] The instant case was before the court on NEBCO's motion for partial summary judgment. A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Richards*

v. Meeske, 268 Neb. 901, 689 N.W.2d 337 (2004). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.*

The evidence presented by NEBCO showed that Adams signed the guaranty for Adams Concrete Construction; that Adams' business purchased concrete from Ready Mixed on the same account at Adams' direction, both before and after incorporation; that Adams' business owed Ready Mixed money on account; and that after demand, Adams' business failed to pay NEBCO. Demand was thereafter made on Adams as guarantor, and upon his failure to pay, NEBCO filed suit against Adams personally.

We further note that NEBCO's evidence showed that Adams participated in the incorporation of his business. See, *D. N. & E. Walter & Co. v. Zuckerman*, 214 Cal. 418, 6 P.2d 251 (1931); *N. Y. American, Inc. v. Hub Advertising Agency, Inc.*, 136 Misc. 596, 240 N.Y.S. 367 (1930). The incorporation did not change the relationship between Ready Mixed and Adams' business. Referring to the record, there was no evidence that Adams' business underwent a change which altered Adams' relationship to his business. To the contrary, based on the evidence presented by NEBCO, Adams continued to control his business after incorporation with no resulting change in the risk he had undertaken as guarantor of the business account.

NEBCO presented evidence showing it was entitled to judgment on the guaranty contract if the evidence was uncontroverted at trial. The burden shifted to Adams, and Adams did not present evidence which showed the existence of a material issue of fact that prevented judgment. We believe it is important that even taking the inferences in favor of Adams, there was no evidence to indicate that the risk Adams guaranteed changed after his business incorporated. Further, although Adams claims on appeal that certain facts, such as whether Ready Mixed knew of the incorporation, were in dispute, in this case, such facts are not material to the resolution of the case and do not preclude entry of partial summary judgment in favor of NEBCO. See *Continental Cas. Co. v. Calinger*, 265 Neb. 557, 657 N.W.2d

925 (2003) (stating that disputed fact must be material to prevent entry of summary judgment). We reject Adams' assignments of error and conclude that the district court did not err in entering judgment in favor of NEBCO.

CONCLUSION

We conclude that Adams is liable on the guaranty and that NEBCO is entitled to partial summary judgment. Accordingly, we affirm the judgment.

AFFIRMED.

HENDRY, C.J., not participating.

IN RE APPLICATION OF METROPOLITAN UTILITIES DISTRICT OF OMAHA. METROPOLITAN UTILITIES DISTRICT OF OMAHA, A POLITICAL SUBDIVISION AND A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLANT AND CROSS-APPELLEE, CORNERSTONE ENERGY, INC., A NEBRASKA CORPORATION, AND AQUILA, INC., A DELAWARE CORPORATION DOING BUSINESS AS AQUILA NETWORKS, APPELLEES AND CROSS-APPELLANTS, AND NORTHWESTERN ENERGY, A DIVISION OF NORTHWESTERN CORPORATION, A DELAWARE CORPORATION, APPELLEE.

704 N.W.2d 237

Filed October 7, 2005. No. S-04-662.

1. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
3. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
4. **Actions: Parties: Standing.** A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy.

5. ____: ____: ____. A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.
6. **Parties: Words and Phrases.** The "party aggrieved" concept must be given a practical rather than hypertechnical meaning.
7. **Administrative Law: Words and Phrases.** An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.
8. **Administrative Law: Parties.** When an administrative agency acts as the primary civil enforcement agency, it is more than a neutral fact finder—it is a required party.
9. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, so that effect is given to every provision.
10. ____. To the extent that a conflict exists between two statutes on the same subject, the specific statute controls over the general statute.
11. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for further proceedings.

Jon Bruning, Attorney General, and L. Jay Bartel for appellant.

John M. Lingelbach, Max J. Burbach, and Stacia L. Palser, of Koley Jessen, P.C., for appellee Cornerstone Energy, Inc.

Douglas J. Law and L. Steven Grasz, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellee Aquila, Inc.

Susan E. Prazan for appellee Metropolitan Utilities District of Omaha.

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

CONNOLLY, J.

The Nebraska Public Service Commission (Commission) dismissed the application of the Metropolitan Utilities District of Omaha (MUD) for certification as a competitive natural gas provider (CNGP). The district court "affirmed," finding that the Commission lacked jurisdiction. The Commission appeals, contending that it has jurisdiction over MUD under Neb. Rev. Stat. §§ 66-1848 and 66-1849 (Reissue 2003). MUD argues, however, that the Commission lacks jurisdiction because of Neb. Rev. Stat. § 57-1306 (Reissue 2004). We determine that the newer and more

specific statutes, §§ 66-1848 and 66-1849, apply and give the Commission jurisdiction over MUD's application. Accordingly, we reverse, and remand for further proceedings.

BACKGROUND

MUD is a political subdivision and a municipal corporation. In 2003, it filed an application with the Commission seeking to be certified as a CNGP outside of its service area under §§ 66-1848 and 66-1849. In the application, MUD stated that it wanted to distribute natural gas to customers located on nonowned distribution facilities. Cornerstone Energy, Inc.; Aquila, Inc.; and NorthWestern Corporation intervened, protesting the application and moving for dismissal. The Commission denied MUD's application.

MUD sought review in the district court under Neb. Rev. Stat. § 84-917 (Reissue 1999) of the Administrative Procedure Act. The district court "affirmed because the Commission lacked jurisdiction." Thus, the court did not reach the merits of the application and should have dismissed the action instead of affirming it because its decision was based on a lack of jurisdiction. The Commission argues that the court erred when it "affirmed" the dismissal for lack of jurisdiction, but asks that we affirm its denial of MUD's application. Cornerstone Energy and Aquila cross-appeal. They also argue that the Commission has jurisdiction and request that we affirm.

ASSIGNMENTS OF ERROR

The Commission assigns that the district court erred by (1) finding that it lacked jurisdiction over the application and (2) failing to determine that the Commission properly denied the application.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is a matter of law. *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005).

[2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which

requires an appellate court to reach an independent conclusion. *Waste Connections of Neb. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005).

[3] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *In re Estate of Bauer, ante* p. 91, 700 N.W.2d 572 (2005).

ANALYSIS

MUD raises two procedural issues: The Commission lacks standing to appeal, and the Commission is not a proper party to the action.

STANDING

MUD argues that the Commission is not an aggrieved party and therefore lacks standing to appeal. It argues that the Commission was the prevailing party because the court "affirmed" the denial of the application. As a result, MUD contends that the court's order did not adversely affect the Commission. The Commission, however, argues that it has an interest because the court's order affects its authority to regulate CNGP's.

Neb. Rev. Stat. § 84-918(1) (Reissue 1999) provides that "[a]n aggrieved party may secure a review of any judgment rendered or final order made by the district court under the Administrative Procedure Act by appeal to the Court of Appeals." The act does not define the term "aggrieved party." We have, however, addressed the "aggrieved party" in terms of standing. See *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998).

[4-6] A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy. See *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004). A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding. See *Stevens v. Downing, Alexander*, 269 Neb. 347, 693 N.W.2d 532 (2005). The "party aggrieved" concept must be given

a practical rather than hypertechnical meaning. See *Custer v. Sweeney*, 89 F.3d 1156 (4th Cir. 1996).

Here, although the court "affirmed" the Commission's order denying the application, the Commission still has a legal interest in the controversy. The district court's determination that the Commission lacked jurisdiction effectively halted its authority to regulate certain activities. As the regulatory agency over CNGP's, it has a direct interest in challenging a finding that it lacks jurisdiction over metropolitan utilities districts. Therefore, we determine that the court's order affects the Commission's ability to regulate CNGP's and that it has standing to appeal.

Commission as Proper Party to Action

MUD next argues that because the Commission is a neutral factfinding body, it cannot appeal under § 84-917(2)(a). Section 84-917(2)(a) provides in part:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record.

[7,8] An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party. See *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984). But when an administrative agency acts as the primary civil enforcement agency, it is more than a neutral fact finder—it is a required party. See *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

Neb. Rev. Stat. § 66-1804(1) (Reissue 2003) sets out the Commission's powers concerning natural gas utilities:

> The commission shall have full power, authority, and jurisdiction to regulate natural gas public utilities and may do all things necessary and convenient for the exercise of such power, authority, and jurisdiction. Except as provided in the Nebraska Natural Gas Pipeline Safety Act of 1969, and

> notwithstanding any other provision of law, such power, authority, and jurisdiction shall extend to, but not be limited to, all matters encompassed within the State Natural Gas Regulation Act and sections 57-1301 to 57-1307.

Under the statutory authority given to the Commission, it acts as more than a neutral factfinding body. The Commission has the authority to set conditions on certifications, resolve disputes, investigate complaints, issue orders, and enforce orders. Neb. Rev. Stat. §§ 68-1811 (Reissue 2003) and 66-1849. We determine that the Commission is a required party in the action and could appeal the court's order.

JURISDICTION

The Commission argues that it had jurisdiction over MUD's application under the plain language of §§ 66-1848 and 66-1849, both enacted in 2003. MUD, however, argues that a previously enacted statute, § 57-1306, applies and deprives the Commission of jurisdiction.

Section 66-1849 provides: "(1) The commission shall certify all competitive natural gas providers and aggregators providing natural gas services. . . . (2) The commission may resolve disputes involving the provision of natural gas services by a competitive natural gas provider or aggregator." Section 66-1848 defines a CNGP as follows:

> For purposes of this section and section 66-1849:
>
> . . . .
>
> (2)(a) Competitive natural gas provider means a person who takes title to natural gas and sells it for consumption by a retail end user. Competitive natural gas provider includes an affiliate of a natural gas public utility.
>
> (b) Competitive natural gas provider does not include the following:
>
> (i) A jurisdictional utility;
>
> (ii) A city-owned or operated natural gas utility or metropolitan utilities district in areas in which it provides natural gas service through pipes it owns; or
>
> (iii) A natural gas public utility that is not subject to the act as provided in section 66-1803 in areas in which it is

> providing natural gas service in accordance with section 66-1803.

In addition, § 66-1804(2) provides: "The State Natural Gas Regulation Act and all grants of power, authority, and jurisdiction in the act made to the commission shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of the act are expressly granted to and conferred upon the commission."

MUD, however, argues that § 57-1306 controls. It provides in pertinent part:

> If the investor-owned natural gas utility or the metropolitan utilities district disagrees with a determination by an investor-owned natural gas utility or a metropolitan utilities district that a proposed extension or enlargement is in the public interest, the matter may be submitted to the Public Service Commission for hearing . . . . *The commission shall have no jurisdiction over a metropolitan utilities district or natural gas utility beyond the determination of disputes brought before it under sections 57-1301 to 57-1307.*

(Emphasis supplied.)

[9,10] Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, so that effect is given to every provision. See *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005). To the extent that a conflict exists between two statutes on the same subject, the specific statute controls over the general statute. *Id.*

MUD is correct that § 57-1306 states that the Commission does not have jurisdiction over a metropolitan utilities district except for disputes brought under §§ 57-1301 to 57-1307. But the statutes specifically pertaining to CNGP's were passed later and provide the Commission with jurisdiction over all CNGP's. In particular, § 66-1848 defines a CNGP as a person who sells gas for consumption by a retail end user. It then excludes metropolitan utilities districts only in areas in which it provides natural gas service through pipes it owns—which is not the case here. This more specific provision of § 66-1848 trumps the general provisions of § 57-1306, particularly when considering the stated legislative desire that the Commission's powers "shall be liberally construed." See § 66-1804(2).

In its application, MUD stated it intended to sell natural gas to distribution facilities not owned by MUD. Thus, MUD falls under the certification provisions and the Commission's jurisdiction. Therefore, the Commission had jurisdiction over MUD's application for certification and the district court erred when it affirmed because of a lack of jurisdiction.

REMAND

The Commission next asks that we affirm its decision denying MUD's application. The district court, however, did not address the application's merits.

[11] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Hauser v. Nebraska Police Stds. Adv. Council*, 269 Neb. 541, 694 N.W.2d 171 (2005). Accordingly, we do not address whether MUD has authority to act as a CNGP and remand the cause to the district court for that determination.

CONCLUSION

We determine that the Commission had jurisdiction over MUD's application. We do not address the application's merits. Therefore, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MICHELE KANT, NOW KNOWN AS MICHELE STROM, APPELLANT, V. SABAR ALTAYAR, M.D., APPELLEE.

704 N.W.2d 537

Filed October 7, 2005. No. S-04-864.

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. **Motions for New Trial.** The discretion of a trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case; a new trial may be granted only where legal cause exists.
3. **Torts: Battery.** In Nebraska, severe emotional distress is not an element of the tort of battery.

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

Daniel J. Welch, of Welch Law Firm, P.C., for appellant.

Joseph S. Daly and Michael G. Monday, of Sodoro, Daly & Sodoro, for appellee.

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

STEPHAN, J.

Michele Kant, now known as Michele Strom, brought this civil action against Sabah Altayar, M.D., in the district court for Douglas County, alleging that he committed a battery upon her. Following a jury trial and verdict in Kant's favor, judgment was entered for Kant in the amount of $37,500. The district court subsequently granted Altayar's motion for new trial, based upon its determination that the jury instructions "failed to properly instruct on actionable emotional distress and the standard that must be met." We conclude that the district court erred in granting the motion for new trial and that the judgment in Kant's favor should be reinstated.

BACKGROUND

At all relevant times, Kant was a pharmaceutical sales representative who called on physicians, including Altayar, that were located in her assigned territory. Kant first met Altayar in 2000 and made several calls to his office between October 2000 and March 2001 for the purpose of leaving samples and promoting pharmaceutical products.

During the afternoon of March 23, 2001, Kant experienced symptoms of a migraine headache. She made an appointment to see her chiropractor, but before the appointment, she made a sales call to Altayar's office. During her conversation with Altayar, Kant complained of her headache. Altayar offered to treat the condition with two injections, one for nausea and the other for pain. Kant consented to the injections, which Altayar administered. He then instructed Kant to lie down in a darkened patient room. After Altayar left the room, Kant began to feel extremely groggy and sleepy. Altayar returned in approximately 20 minutes

to check on her and told Kant that she should remain there for another 5 to 10 minutes.

The ensuing events were the subject of sharply conflicting trial testimony. Kant testified that when Altayar returned to the room, he began to rub her back and neck and asked if he could kiss her. Kant testified that she pushed away and told him "no" and that he then left the room. Kant testified that when she later left the patient room and walked to the nurses' station, she experienced nausea and thought she might pass out. She testified that Altayar approached her and accompanied her to his personal office, where she sat down near a container which Altayar gave her in case she became ill. According to Kant, Altayar then asked her to stand, he put his hands on her shoulders, then put his arms around her and began to kiss her. Kant testified that she again pushed him back and said "no." At that point, Kant left the building and, after keeping the appointment with her chiropractor, returned home and slept without waking for 15 to 16 hours. The next day, Kant told her fiance and her chiropractor about Altayar's actions and of the fear she had experienced during the incident.

Altayar testified that he did not enter the patient room on either of the two occasions that he checked on Kant following the injections, but, rather, that he spoke to her from an adjacent hallway. Altayar testified that at the time of his second inquiry, Kant stated that she was feeling much better, so he told her that she could go home. He stated that several minutes later, he went to his personal office and found Kant seated there. He testified that he asked her why she was in his office and that she replied that she went in to sit down because she had felt light-headed as she was passing by. Altayar testified that he brought her some water and denied her request to prescribe a pain medication. He testified that he then returned to the nurses' station and that moments later, Kant walked by. According to Altayar, Kant thanked him for his kindness and his time, gave him a hug and a kiss on the cheek, and then left the building, stating that she was going to an appointment with her chiropractor. Altayar denied that he rubbed Kant's neck and back or that he attempted to kiss her.

In her operative amended petition, Kant alleged that as a result of Altayar's actions, she "became ill for two days" and "suffered and continues to suffer from emotional distress." Kant

testified at trial that she suffered emotionally as a result of the incident, although she did not seek medical treatment or counseling. She testified that for about 1½ years after the incident, she had trouble being alone with her male customers in their offices or in their sample rooms because she feared the incident could happen again. She described flashbacks of the incident and her "constant fear" of encountering Altayar or his associate following the incident.

The jury was instructed that before Kant could recover from Altayar on her battery claim, she was required to prove by the greater weight of the evidence that she was battered by Altayar, that the battery proximately resulted in damage to her, and the nature and extent of the damage. With respect to the amount of damages, the jury was instructed that it could consider the "nature and extent of the injury" and the "emotional distress the Plaintiff may have suffered."

In its order granting the motion for new trial, the district court cited our decision in *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993), and stated that even if it agreed with Kant's argument that she was not required to present medical testimony to establish damages, she nevertheless "failed to meet the second prong, that the emotional distress was so severe that no reasonable person could have been expected to endure it." After the district court denied Kant's motion to reconsider its order granting Altayar's motion for new trial, Kant perfected this timely appeal. We moved the appeal to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Kant assigns, consolidated and restated, that the district court erred in granting Altayar's motion for new trial.

STANDARD OF REVIEW

[1,2] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999). The discretion of a trial court in ruling on a motion for new trial is only the power to apply the

statutes and legal principles to all facts of the case; a new trial may be granted only where legal cause exists. *Id.*; *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993).

ANALYSIS

It is apparent from the verdict that the jury believed Kant's account of the events of March 23, 2001, and we therefore assume those facts for purposes of our analysis. Kant sought recovery under a theory of battery, an intentional tort which includes physical contact with another without consent or justification. See, *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Bergman v. Anderson*, 226 Neb. 333, 411 N.W.2d 336 (1987); Black's Law Dictionary 162 (8th ed. 2004). The victim of a battery may recover compensatory damages, including pain and suffering, determined by the nature of the injury. *Nelson-Holst v. Iverson*, 239 Neb. 911, 479 N.W.2d 759 (1992); *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984). The same wrongful conduct may support a civil action based on a theory of battery as well as an action based upon the independent tort of intentional infliction of emotional distress. Thus, in *Mindt v. Shavers*, 214 Neb. 786, 337 N.W.2d 97 (1983), we held that where an action for sexual battery was barred under a 1-year statute of limitations, the plaintiff could nevertheless maintain an action for intentional infliction of emotional distress arising from the same facts within the applicable 4-year limitations period.

The elements of the tort of intentional infliction of emotional distress, sometimes referred to as the tort of outrage, are (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985). Under this theory of recovery, "outrageous" conduct is actionable "only where the emotional distress has in fact resulted, and where it is severe." Restatement (Second) of Torts § 46, comment *j.* at 77 (1965). According to the Restatement,

> [e]motional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises.

Id. See, also, *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981) (White, J., concurring). Severe emotional distress is also an element of the tort of negligent infliction of emotional distress. *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003); *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993). The issue presented by this appeal is whether a person suing on a theory of battery must prove similarly severe emotional distress in order to recover compensatory damages for such an injury. We conclude that the law does not require such proof.

Although we have not previously addressed the issue, other courts and legal authorities recognize a distinction between proof requirements in an action for negligent or intentional infliction of emotional distress and damages for emotional distress sought "where other interests have been invaded, and tort liability has arisen apart from the emotional distress." Restatement, *supra*, comment *b.* at 72.

In rejecting a contention that emotional distress was not shown to be sufficiently severe to be recoverable as damages for breach of a fiduciary duty, the Supreme Court of Vermont noted that the claimant "was only claiming damages in the form of emotional distress. She did not bring a tort claim against anyone for intentional or negligent infliction of emotional distress." *Cooper v. Cooper*, 173 Vt. 1, 14, 783 A.2d 430, 441 (2001). In *A.R.B. v. Elkin*, 98 S.W.3d 99 (Mo. App. 2003), the Missouri Court of Appeals held that while "severe emotional distress" was a required element of proof in a claim for intentional infliction of emotional distress, the requirement did not apply to a claim for assault and battery in which emotional injury was claimed. The court held that a plaintiff was "at least entitled to nominal damages upon a finding that an assault and battery occurred," and could also recover "compensatory damages for bodily pain, humiliation, mental anguish and other injuries that occur as a

necessary and natural consequence of the tortious conduct." *Id.* at 104. In upholding a judgment for emotional distress damages in an assault and battery case, notwithstanding the fact that the plaintiff did not undergo medical or psychological treatment, the Supreme Court of Nevada recognized that "the standard of proof for emotional distress damages arising from assault and battery is not as stringent as the standard of proof requirement for bare claims of intentional or negligent infliction of emotional distress." *Olivero v. Lowe*, 116 Nev. 395, 400, 995 P.2d 1023, 1026 (2000). Similarly, in *Johnson v. Ramsey County*, 424 N.W.2d 800, 804 (Minn. App. 1988), the Minnesota Court of Appeals rejected a contention that damages for emotional distress were recoverable in a battery case only where the emotional injury met the "strict standard for the tort of intentional infliction of emotional distress," noting "[t]he tort of battery is a separate and distinct cause of action from the tort of intentional infliction of emotional distress, and the elements of proof necessary to sustain each claim are entirely different."

[3] In Nebraska, "severe emotional distress" is not an element of the tort of battery, in which "the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of h[er] person and not in any physical harm done to h[er] body." Restatement (Second) Torts § 18, comment *c.* at 31 (1965). Nebraska appellate courts have upheld recovery of damages for emotional distress resulting from intentional torts other than intentional infliction of emotional distress without limitation based upon the degree of severity. See *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984) (affirming jury award for compensatory damages established in part by plaintiff's own testimony that she suffered embarrassment and humiliation caused by assault); *Bishop v. Bockoven, Inc.*, 199 Neb. 613, 260 N.W.2d 488 (1977) (affirming award where plaintiff's testimony provided only evidence of embarrassment and mental anguish in case of false imprisonment); *Crouter v. Rogers*, 193 Neb. 497, 227 N.W.2d 845 (1975) (determining that once assault is proved, plaintiff's testimony of mental anguish, humiliation, and mental distress experienced as result of assault is sufficient to submit issue to jury); *Sabrina W. v. Willman*, 4 Neb. App. 149, 540

N.W.2d 364 (1995) (finding emotional distress need not be severe to be compensable under claim for invasion of privacy).

Contrary to the reasoning upon which the district court granted Altayar's motion for new trial, Kant was not required to prove *severe* emotional distress in order to recover compensatory damages caused by the battery. Her testimony regarding the emotional impact of the battery, as summarized above, was sufficient to submit this issue to the jury. The instructions given to the jury, when read together and taken as a whole, correctly stated the law, were not misleading, and adequately covered the issues supported by the pleadings and evidence. See *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003). Accordingly, the verdict should not have been disturbed.

CONCLUSION

For the foregoing reasons, the district court abused its discretion in granting a new trial. We therefore reverse the judgment of the district court and remand the cause with the direction that the district court enter judgment in accordance with the verdict.

REVERSED AND REMANDED WITH DIRECTION.

IN RE APPLICATION OF ROBERT TODD ROSEBERRY FOR ADMISSION TO THE NEBRASKA STATE BAR ON EXAMINATION.

704 N.W.2d 229

Filed October 7, 2005. No. S-34-040001.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** Under Neb. Ct. R. for Adm. of Attys. 15 (rev. 2000), the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. **Rules of the Supreme Court: Attorneys at Law: Proof.** The rules for admission of attorneys place on the applicant the burden of proving good character by producing documentation, reports, and witnesses in support of the application.
4. **Attorneys at Law.** A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant for admission to the Nebraska State Bar may constitute a basis for denial.

5. ____. False, misleading, or evasive answers to Nebraska State Bar application questions may be grounds for a finding of lack of requisite character and fitness.
6. ____. Abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for denial of admission to the bar.

Original action. Application denied.

D.C. Bradford and Justin D. Eichmann, of Bradford & Coenen, for applicant.

Jon Bruning, Attorney General, Jennifer Tomka, and Heidi Karr Sleper and Chris Seifert, Senior Certified Law Students, for Nebraska State Bar Commission.

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

PER CURIAM.

Robert Todd Roseberry appeals the denial of his application to take the Nebraska bar examination. The Nebraska State Bar Commission (Commission) determined that Roseberry had deficiencies in the character and fitness requirements for admission. We sustain the Commission's recommendation that Roseberry not be allowed to sit for the Nebraska bar examination.

BACKGROUND

This appeal involves Roseberry's second application to take the Nebraska bar examination. The Commission notified him that his first application, filed in November 2000, would be denied because he did not meet the character and fitness requirements. He then withdrew the application instead of seeking a hearing to provide evidence and make a record for appeal. After the second denial in 2004, the Commission held a hearing and denied Roseberry's application because of character and fitness requirements.

FAILURE TO REPORT LITIGATION

Roseberry admitted that he did not report several instances of litigation in his first application, including *Roseberry v. Wright*, 2 Neb. App. 248, 508 N.W.2d 867 (1993), and Ferretti v. Roseberry, Multnomah County Circuit Court, State of Oregon, No. A8201-00560. He did, however, report them on his second application.

The complaint in the Ferretti action alleges that Roseberry wrote unauthorized checks from Esmond F. Ferretti's account. Roseberry, however, filed an answer alleging that the funds were gifts. According to Roseberry, Ferretti was a family friend for whom Roseberry did odd jobs when he was between the ages of 12 and his early twenties. Ferretti gave him money for college but then wanted the money back when Roseberry chose to go to college out of town. Ferretti obtained a $20,000 judgment for conversion and breach of fiduciary duty. Roseberry testified that he paid about $10,000 of the judgment, but remained friends with Ferretti and never paid the rest. He stated that he forgot to include the litigation on his application because it had occurred 20 years ago and he was, at that time, affected by the stress of his divorce, a house fire, a business failure, and family medical issues.

In *Roseberry v. Wright, supra*, Roseberry took and passed the Nebraska veterinary examination, but the then Nebraska Department of Health refused to issue a license pending investigation into a complaint that he had practiced veterinary medicine without a license. Roseberry sought to enjoin the Department of Health from refusing to issue him a license. The court refused to issue an injunction, and the Nebraska Court of Appeals affirmed.

According to Roseberry, he obtained a temporary license in Nebraska and practiced under the supervision of a licensed veterinarian. A complaint arose when he began working at a racetrack without a veterinarian directly supervising him. Roseberry brought an injunction action. He stated that the Department of Health then gave him a permanent license, so he assumed the injunction action was successful. He stated he was unaware of the appeal because he believes his employer paid the attorney fees and costs in the action. The record also contains documentation of additional litigation involving Roseberry.

Iowa Denial of Bar Application

In 2003, the Iowa Board of Law Examiners denied Roseberry's application for admission. The board noted that in his application, Roseberry failed to timely disclose that he had been denied admission in 2001 to the Nebraska bar because of

concerns about his character and fitness. It noted that although he had been allowed to withdraw his Nebraska application, he should have disclosed the initial denial. The application shows that Roseberry answered "[n]o" to the question whether he had ever been denied a position, certificate, or license that required proof of good character. Roseberry, however, testified that he believed he had provided the required information because he did note that he had applied for the Nebraska bar and had later withdrawn the application.

Veterinary License Probation and Other License Sanctions

Roseberry holds veterinary licenses in Nebraska, Iowa, and other states. The Iowa Board of Veterinary Medicine placed him on probation from February 1991 to January 1992 and assessed a $250 civil penalty against him. The board alleged that he purchased 10 milligrams of Ritalin, a federally controlled substance, from a pharmacy by falsely representing that the drug was for a horse he owned.

Roseberry testified that Ritalan is often used with racehorses. According to Roseberry, the commonly accepted way to obtain a prescription is to write it for office use. However, when he went to the local drug store seeking seven Ritalan pills, he was told that he could not write a prescription for office use and that the pharmacy required a patient's name. Roseberry gave the name of the horse the Ritalan would be used for. According to Roseberry, he was told that although he could purchase Ritalin under a proper federal Drug Enforcement Agency license, by putting the horse's name down, he implied that he owned the horse. He entered into an informal settlement with the board for the fine and probation. No action was taken by the Drug Enforcement Agency.

Racing Commission Sanctions and Revocation of License

The record contains multiple rulings against Roseberry affecting his occupational licenses issued by the Iowa, Nebraska, and Kansas racing commissions. Racetracks regulate themselves through the use of the licenses and stewards, who

oversee activities at the racetracks. The stewards have the ability to investigate, conduct hearings, and issue sanctions.

The record contains an exhibit of the following violations, which we set out with minor revisions: (1) medical report violation; (2) Lasix administered to wrong horse; (3) unlabeled bottle; (4) medical report; (5) conduct detrimental to racing; (6) fighting; (7) failure to submit log; (8) medicated entry in error necessitating late scratch; (9) conduct detrimental to the best interest of racing—altercation in barn area; (10) failure to turn in medication report in timely manner; (11) administered Lasix to a horse that was "not a Lasix horse"; (12) medication in vehicle improperly labeled; and (13) conduct detrimental to best interest of racing—failed to remove tampon from nostril of horse before a race. The final violation led to a $1,000 fine. It also resulted in a 5-year suspension of Roseberry's Kansas license, which was lifted on appeal.

According to Roseberry, fines and other sanctions are common at racetracks and "happen to everybody every day." He stated that in many cases, he was fined for things he voluntarily disclosed and gave the example of providing Lasix to a horse that had been taken off the Lasix list when asked by the trainer to give the drug. Roseberry stated that although he reported the action, he was still fined. He said that often, items are listed as conduct detrimental to the best interest of racing but that no explanation is given. In other cases, he testified that there were no clear rules and provided the example of being cited for unlabeled medicine when no rule prohibited it. He also testified that he did not appeal most of the sanctions because sanctions are normally small and are accepted as the cost of doing business.

At the hearing, he addressed the Kansas Racing and Gaming Commission suspension. He stated that he had used a tampon to treat a cut in a horse's nose when he could not use medication and stitches because the horse was racing in a few days. He then reported it to the state veterinarian. According to Roseberry, the tampon should have fallen out before race day and if not, when the horse went to race, a paddock judge would see it as part of a tattoo check of the horse's lip. He also stated that the state veterinarian would come by the day of the race and should notice

it. According to Roseberry, the tampon was not in the horse's nose after the race. He was asked if he removed the tampon or had observed another do it, and he said no. At the hearing, he stated that he appealed the $1,000 fine and 5-year license suspension and that on review, the Kansas Racing and Gaming Commission determined that he did not act unethically or deceptively and that the commission dropped the suspension when he agreed to pay the fine. The ruling on that appeal, however, is not in the record.

Revocation of Racing Commission License

In August 2001, the Iowa Racing and Gaming Commission revoked Roseberry's probationary vocational license. A notice granting the initial license stated that it was probationary because of a history of "various and serious rule violations at different racetracks from 1989 through 1994." It also noted that he had submitted a license application that failed to disclose a 1993 Nebraska suspension.

When the license was revoked, the Iowa board of stewards investigated treatment reports submitted by Roseberry that listed medication different from that detailed in his billing statements. The board found that during the investigation, Roseberry told stewards that the reports were different because sometimes he would perform procedures that the trainers did not want the owners to know about. The board found that he later failed to comply with a request to produce a log book. The board further found that he violated commission rules and that his conduct was "unethical, deceptive, objectionable, dishonest, [and] dangerous to the welfare of the public, racing participants, and the horses under [Roseberry's] care, and detrimental to the integrity of racing in the state of Iowa." The board also found other violations and noted actions on his license in Nebraska and that the Idaho Board of Veterinary Medicine had denied him a temporary permit application.

A stipulation to dismiss the appeal required that Roseberry not apply for a 2002 license and left open the resolution of issues raised in the revocation proceeding if he applied again. Although Roseberry disclosed the revocation and appeal in his

Nebraska bar application, he failed to disclose the finding that he had engaged in unethical conduct.

According to Roseberry, the license was probationary largely because he had been away from veterinary practice while attending law school. He stated that the notation about failing to report a suspension was an error by the Iowa Racing and Gaming Commission. His application for the Iowa license shows a Nebraska suspension in 1992. According to Roseberry, someone made a false representation about his recording and documenting prescription drugs at the racetrack. He testified that his license was initially removed without a hearing.

According to Roseberry, when a hearing was held, the board of stewards would not allow him to call witnesses and was told to "save it for the appeal." According to Roseberry, the drugs provided and the drugs billed were the same, but he may have written the common name on one document and the trade name or generic name on another because he used the common name with owners. Roseberry denies that he made any statements to the board of stewards about drugs being given and hidden from the owners and stated that he turned in his medication log books everyday.

Several people testified for Roseberry. A racehorse owner stated that sanctions at racetracks were common. He also stated that in his opinion, Roseberry was honest and ethical. A former classmate of Roseberry also testified that Roseberry had good moral character.

A veterinary assistant for Roseberry at the time of his license suspension testified that she had witnessed him refuse to do things that were unethical or against the racing rules, such as administer medication at the urging of a trainer on a race day. The assistant compared racetrack sanctions, especially at the track where Roseberry's license was suspended, to being like a "meter lady would give out parking tickets." She also supported his assertions that he turned in his medication log books and listed the same drug on the logs and in billing, but often with the common name used for the bill.

The Commission voted to deny Roseberry's application. Roseberry appeals.

ASSIGNMENT OF ERROR

Roseberry assigns that the Commission erred by not allowing him the opportunity to take the Nebraska bar examination.

STANDARD OF REVIEW

[1] Under Neb. Ct. R. for Adm. of Attys. 15 (rev. 2000), the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission. *In re Application of Silva*, 266 Neb. 419, 665 N.W.2d 592 (2003).

ANALYSIS

[2] This court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. *In re Application of Silva, supra.* Nebraska statutory law further provides: "No person shall be admitted . . . unless it is shown to the satisfaction of the Supreme Court that such person is of good moral character." Neb. Rev. Stat. § 7-102(1) (Cum. Supp. 2004).

Neb. Ct. R. for Adm. of Attys. 3 (rev. 2005) governing the admission of attorneys describes the applicable standards for character and fitness of attorneys as follows:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission.

In addition to the admission requirements otherwise established by these rules, the essential eligibility requirements for admission to the practice of law in Nebraska as recited in rule 3 are as follows:

> (a) The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;
>
> (b) The ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, and others;

> (c) The ability to conduct oneself with respect for and in accordance with the law and the Nebraska Rules of Professional Conduct;
>
> . . . .
>
> (f) The ability to exercise good judgment in conducting one's professional business;
>
> (g) The ability to avoid acts that exhibit disregard for the health, safety, and welfare of others;
>
> (h) The ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others;
>
> . . . .
>
> (j) The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

Appendix A to the rules for the admission of attorneys further clarifies the character and fitness standards:

> The primary purposes of character and fitness screening before admission to the bar of Nebraska are to assure the protection of the public and to safeguard the justice system. . . . The public is adequately protected only by a system that evaluates character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their attorneys.

[3,4] The rules place on the applicant " 'the burden of proving good character by producing documentation, reports, and witnesses in support of the application.' " *In re Application of Silva*, 266 Neb. 419, 426, 665 N.W.2d 592, 597 (2003). " 'A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission.' " *Id.* The character and fitness standards of appendix A of the rules list the following as relevant conduct that should be treated as cause for further inquiry before the Commission decides whether an applicant possesses the character and fitness to practice law:

> 1. misconduct in employment;
>
> 2. acts involving dishonesty, fraud, deceit, or misrepresentation;

3. abuse of legal process, including the filing of vexatious lawsuits;

4. neglect of financial responsibilities;

5. neglect of professional obligations;

6. violation of an order of a court, including child support orders;

. . . .

9. denial of admission to the bar in another jurisdiction on character and fitness grounds;

10. disciplinary action by an attorney disciplinary agency or other professional disciplinary agency of any jurisdiction.

When evidence shows that an applicant has engaged in conduct requiring further inquiry, the Commission must determine whether "the present character and fitness of an applicant qualify the applicant for admission" based on the consideration of the following factors:

1. the applicant's age at the time of the conduct;

2. the recency of the conduct;

3. the reliability of the information concerning the conduct;

4. the seriousness of the conduct;

5. the factors underlying the conduct;

6. the cumulative effect of the conduct or information;

7. the evidence of rehabilitation;

8. the applicant's positive social contributions since the conduct;

9. the applicant's candor in the admissions process;

10. the materiality of any omissions or misrepresentations.

Id.

Lack of Candor on Bar Applications

[5] In his applications to the Nebraska and Iowa bars, Roseberry showed a disturbing pattern of conduct—a lack of candor. False, misleading, or evasive answers to bar application questions may be grounds for a finding of lack of requisite character and fitness. *In re Application of Silva, supra*; *In re Application of Majorek*, 244 Neb. 595, 508 N.W.2d 275 (1993). The concern becomes heightened when the omitted items

involve character and fitness issues. Here, Roseberry initially omitted on his Nebraska application instances of litigation that (1) specifically included a judgment for conversion and breach of fiduciary duty and (2) involved a complaint about his veterinary license. In addition, on his Iowa application, he failed to inform the Iowa Board of Law Examiners that he had been notified that his Nebraska application would not be accepted because of issues concerning his character and fitness. Finally, he failed to disclose that when the Iowa Racing and Gaming Commission revoked his probationary veterinary license, it found that he had engaged in unethical conduct.

We find Roseberry's parade of excuses unpersuasive. His explanation that he "forgot" a $20,000 judgment because it was old and he was under stress lacks credibility. See *In re Application of Majorek, supra.* Likewise, his claim that he believed he had provided the required information to the Iowa Board of Law Examiners withers when exposed by the record. The record shows that Roseberry knew that the Commission in Nebraska denied his application on character and fitness grounds and that after he was denied, he was allowed to withdraw the application. Yet, he still answered "no" to the question asking whether he had ever been denied a position, certificate, or license that required proof of good character. Roseberry appears to have no explanation for his omission of the Iowa Racing and Gaming Commission's finding. We find that Roseberry either failed to accurately complete his applications or deliberately tried to conceal the issues. As we have noted, "[n]either is comforting." See *In re Application of Majorek*, 244 Neb. at 604, 508 N.W.2d at 281.

Sanctions Imposed by Professional Boards and Litigation

Roseberry's numerous sanctions against his professional licenses and a court finding that he breached a fiduciary duty trigger alarm bells.

[6] Some offenses were never adequately explained. For example, in two instances, Roseberry was sanctioned for "fighting" and for an "altercation in barn area." We have held that " 'abusive, disruptive, hostile, intemperate, intimidating, irresponsible,

threatening, or turbulent behavior is a proper basis for the denial of admission to the bar.' " *In re Application of Silva*, 266 Neb. 419, 427, 665 N.W.2d 592, 598 (2003). Yet, other than a brief mention on his bar application, Roseberry fails to adequately explain these incidents.

In one instance, the Iowa Racing and Gaming Commission noted Roseberry's history of "various and serious rule violations at different racetracks from 1989 through 1994." The commission also noted the board of stewards' finding that his conduct was "unethical, deceptive, objectionable, dishonest, [and] dangerous to the welfare of the public . . . and detrimental to the integrity of racing in the state of Iowa." Although Roseberry attempts to explain the incidents and contends that racetrack sanctions are akin to the "normal cost of doing business," the sheer number of offenses undermines his credibility. Roseberry's lack of candor and numerous sanctions are impossible to ignore and speak strongly against his fitness and character to practice law.

Finally, we find a lack of rehabilitation. Although Roseberry had witnesses testify about his good character, the record shows a long history of questionable conduct. We find no persuasive evidence that Roseberry's character has changed or that he has been rehabilitated.

Because of the numerous instances of professional sanctions, litigation, and failure to reveal required information, we determine that the Commission did not err when it denied Roseberry's application. The record shows a consistent pattern of misconduct and a lack of candor, and we find his excuses unpersuasive. The recommendation of the Commission to deny Roseberry's application is affirmed.

APPLICATION DENIED.

WILLIAM A. WASHINGTON, APPELLANT, V. QWEST COMMUNICATIONS CORPORATION ET AL., APPELLEES.

704 N.W.2d 542

Filed October 14, 2005. No. S-04-677.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Negligence: Liability.** In cases involving liability for injuries arising from conditions on property, the existence of a duty generally depends upon occupancy, ownership, control, or a special use of the premises by the defendant.
3. **Negligence: Easements.** The pivotal question in determining whether the owner of an easement owes a duty of care to third persons is whether the easement holder may fairly be said to occupy, own, or control the relevant property.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
5. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
6. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
7. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
8. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. If there is no legal duty, there is no actionable negligence.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Dale A. Romatzke and Vikki S. Stamm, of Ganz, Romatzke & Stamm, P.C., L.L.O., for appellant.

Mark J. Peterson and Nora M. Kane, of Koley Jessen, P.C., L.L.O., for appellee Qwest Communications Corporation.

Cathleen H. Allen, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellee Addison Construction Co.

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

WRIGHT, J.

NATURE OF CASE

William A. Washington, while an employee of ConAgra, Inc., was injured when he tripped over a wire lying on the ground between a telephone terminal box and a utility pole located on a utility easement. Qwest Communications Corporation (Qwest) had installed the wire several days earlier in order to provide telephone service to a construction trailer owned by Addison Construction Co. (Addison). The district court granted Addison's motion for directed verdict, and a jury entered a verdict in favor of Qwest. Washington appeals. (ConAgra was joined as a party for the purpose of workers' compensation subrogation. See Neb. Rev. Stat. § 48-118 (Reissue 2004).)

SCOPE OF REVIEW

[1] Whether a jury instruction given by a trial court is correct is 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. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

FACTS

Washington was employed as a maintenance worker at ConAgra's packing plant in Grand Island, Nebraska. On October 13, 1998, his duties included collecting trash along a strip of land between ConAgra's north boundary fence and Swift Road, a public street that ran east and west. As Washington chased a plastic bag that was floating in the wind, he tripped on a wire which was lying on the ground between a telephone terminal box and a utility pole on the south side of Swift Road. The wire was allegedly hidden by tall grass. Washington was injured as a result of the fall, and he sought medical treatment. He was terminated from his employment in July 1999.

Prior to Washington's injury, Addison had begun a construction project on the north side of Swift Road (across the street from ConAgra) and had requested that Qwest provide telephone service for a trailer that was to be placed on the site. A telephone

terminal box was located on the utility easement on the south side of Swift Road. A Qwest employee placed a wire which ran from the terminal box to a utility pole about 10 feet away. The wire was laid on the ground between the terminal box and the utility pole and then was strung up the utility pole to hang in the air across Swift Road to the north side of the road. There, the wire was attached to another utility pole, strung down that pole, and laid on the ground.

Washington sued Qwest and Addison. He alleged that Qwest was in actual or constructive possession, control, and use of the premises, where it owned and maintained a telephone terminal box pursuant to a utility easement. He also alleged that Qwest was negligent in leaving a wire lying on top of the ground when Qwest knew or should have known that foot traffic would cross between the utility pole and the terminal box and that the wire would not be seen due to tall grass in the area. Washington alleged that Addison was negligent (1) in failing to properly instruct Qwest as to the installation of the telephone wire, (2) in failing to discover the improper installation of the telephone wire by Qwest, and (3) in failing to bury the telephone wire.

Addison and Qwest alleged that Washington was contributorily negligent and had assumed the risk. Qwest also alleged that Washington was barred from recovery because of the "accepted work doctrine."

At trial, the evidence established that in October 1998, Addison was in the process of building an electrical substation and had requested telephone service from Qwest for a temporary construction trailer to be located on the north side of Swift Road. Qwest's manager of installation maintenance testified that he went to the construction site and explained to one of Addison's employees the various options for installing a telephone wire on a temporary basis. The Addison employee indicated that the company wanted the wire above ground and wanted slack left in the wire because it was not sure of the exact location of the construction trailer on the property. At that time, Qwest had no written policies or procedures regarding "drops on the ground."

The Qwest employee who installed the wire testified that he had been taught to assess situations and make decisions with regard to safety concerns that were observed at installation sites.

He admitted that laying a wire on top of the ground can be dangerous and that no warnings were placed between the terminal box and the utility pole.

At the end of Washington's case, Addison and Qwest each moved for a directed verdict. Addison's motion was granted, and the matter proceeded against Qwest. The jury returned a verdict in favor of Qwest, and Washington timely appealed.

ASSIGNMENTS OF ERROR

Washington assigns the following errors: The district court erred (1) in failing to sustain his objections to certain jury instructions, (2) in granting Addison's motion for directed verdict, and (3) in failing to give Washington's proposed jury instructions. He also assigns as error that the jury erred in finding for Qwest.

ANALYSIS

ACCEPTED WORK DOCTRINE

Washington argues that the accepted work doctrine does not apply to the facts of this case and that the trial court erred in instructing the jury as to the doctrine. In *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 254 Neb. 754, 757, 579 N.W.2d 526, 528 (1998), we stated:

> The general rule is that a construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner. *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993); *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984); *Stover v. Ed Miller & Sons, Inc.*, 194 Neb. 422, 231 N.W.2d 700 (1975). This principle has been referred to as the "accepted work doctrine." See *Pickens v. Tulsa Metropolitan Ministry*, 951 P.2d 1079 (Okla. 1997).

Exceptions to the accepted work doctrine have been recognized in situations where the parties dealt with inherently dangerous elements or the defect was latent and could not have been discovered by the owner or employer. *Parker, supra*. The phrase "inherently dangerous" has been described in terms of a special

or peculiar risk and has been defined as " 'one that "differ[s] from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community. . . ." ' " *Id.* at 757, 579 N.W.2d at 528, quoting *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997).

In the case at bar, Washington objected to a jury instruction concerning the use of the accepted work doctrine as a defense. The instruction stated: "In defense to plaintiff's claim defendant Qwest alleges that it did complete the work requested by defendant Addison and Addison accepted that work and that the wire on which plaintiff tripped and fell was not a latent condition." The trial court explained that the burden of proof in connection with that defense was on Qwest to prove by a greater weight of the evidence that it had completed the work ordered by Addison, that Addison accepted the completed work, and that the completed work did not result in a condition that was latent. Washington asserts that the instruction was in error.

The accepted work doctrine had its roots in *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842), in which a negligent contractor was shielded from liability for a third party's injuries because the contractor and third party were not in privity of contract. See *Suneson v. Holloway Const. Co.*, 337 Ark. 571, 992 S.W.2d 79 (1999). The *Suneson* court cited three reasons supporting the doctrine: (1) the *Winterbottom* decision, (2) the owner alone was in control of the entity where the injury occurred, and (3) the presumption that the owner had carefully inspected the work and knew of its defect before accepting the work. *Suneson, supra*, citing *Howard v. Redden*, 93 Conn. 604, 107 A. 509 (1919).

Whether the jury should have been instructed on the accepted work doctrine depends upon whether Qwest was in control of the premises where Washington was injured at the time of the accident. This court has addressed the question of control of premises in *Wilson v. North Central Gas Co.*, 163 Neb. 664, 80 N.W.2d 685 (1957), and *Muckey v. Dittoe*, 235 Neb. 250, 454 N.W.2d 682 (1990).

In *Wilson*, we stated: "It was indispensable to any recovery in this case that appellant show by evidence that appellee was at the time of the accident *in control of the premises* upon which

appellant was injured." (Emphasis supplied.) 163 Neb. at 667, 80 N.W.2d at 687. There, the plaintiff sustained a leg fracture when she fell over a mound of dirt that remained after the gas company installed an underground pipe and covered it with dirt. The trial court dismissed the case, and we affirmed because there was no proof that the gas company was in the occupancy or control of the premises or that it had any relationship, duty, or right at the time of the accident.

In *Muckey*, we held that a person who was not the owner of or in control of the premises could not be held liable for injuries to a third party that occur on the premises. A delivery person was injured when he delivered a refrigerator to a home that was owned by the purchaser's fiance. We held that the purchaser was not a possessor of the land and did not "in any manner [exhibit] a degree of control or possession of the subject premises which would justify" holding her liable for the delivery person's injuries. *Id.* at 253-54, 454 N.W.2d at 685.

We have not previously considered the control issue as it relates to easements. Thus, we take guidance from other jurisdictions. In *Sutera v. Go Jokir, Inc.*, 86 F.3d 298 (2d Cir. 1996), the plaintiff was injured in a slip-and-fall accident at a shopping mall and the defendant was the owner of an easement in the parking lot where the fall occurred. The court noted that "the imposition of a duty on an owner depends on whether—in light of the rights granted under the easement, as well as the activities undertaken pursuant to those rights—the dominant owner has sufficient control to warrant treatment as a landowner for tort purposes." *Id.* at 305. The court found that the easement owner had sufficient control of the relevant portion of the mall to warrant the imposition of a duty of care toward third parties.

[2,3] The court stated: "In cases involving liability for injuries arising from conditions on property, the existence of a duty generally depends upon 'occupancy, ownership, control or a special use of [the] premises' by the defendant." *Id.* at 302, quoting *Balsam v Delma Eng'g Corp.*, 139 A.D.2d 292, 532 N.Y.S.2d 105 (1988). The pivotal question in determining whether the owner of an easement owes a duty of care to third persons is "whether the easement holder may fairly be said to occupy, own, or control the relevant property." *Sutera*, 86 F.3d at 302.

In *Kibbons v. Union Elec. Co.*, 823 S.W.2d 485 (Mo. 1992), an electric company had an easement to construct, operate, and maintain utility poles and lines over certain property. The plaintiff's decedent was electrocuted when he came into contact with a utility line. The court stated that the landowner had no duty to maintain or repair or to warn of dangerous conditions on the easement that were in the sole control of the holder of the easement. "This is because the landowner is only liable for those injuries caused by devices placed on the premises by the holder of the easement that are under the landowner's possession and control." *Id.* at 488. The landowner was said to hold "only a servient estate and thus had no duty to warn or barricade against conditions controlled by the owner of the easement or dominant estate." *Id.* at 489.

In *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), a 5-year-old child was injured when she touched a ground-level transformer owned and maintained by a power company but located on land owned by a housing authority. The transformer was the property of the power company and was placed on the premises pursuant to an easement. Noting that the owner of the easement is the party charged with its maintenance, the court held that the power company had the sole duty to keep the transformer safe. "We are of the opinion that the knowledge of third party defendants is irrelevant to the question of their liability where, as here, the third party defendants had no control over the transformer." *Id.* at 611-12, 290 S.E.2d at 598. The court cited *Levy v. Kimball*, 50 Haw. 497, 443 P.2d 142 (1968), for the proposition that it is the control and not the ownership which determines liability.

Washington alleged that Qwest had control of the premises where the accident occurred because it maintained a telephone terminal box there pursuant to a utility easement. Qwest did not dispute that it held an easement on the property. Two Qwest employees testified that the terminal box was on a public right-of-way. The wire was on Qwest's easement, and Qwest had control over the premises for purposes of providing telephone service.

The jury heard testimony concerning the installation of the wire and about Washington's accident. Qwest's manager of installation maintenance testified that he had gone to Addison's

construction site and explained the options available for installing temporary telephone service. The manager told the Addison employee present that because this was a temporary construction site, Addison would be responsible for 100 percent of the cost of the time and material involved in installing the service.

The Qwest installer testified that the decision as to where to place the wire was left to his discretion. He did not recall talking to anyone from Addison before or during the installation. He made the decision to lay the wire on top of the ground based on his observation of the area and his determination that it was safe to do so. He noted that the grass in the area was less than an inch tall, and he said no warning flags were placed in the area because those flags were normally used only to mark locations of buried service. The installer testified that for temporary construction sites, the construction company paid for the wire from the construction site to the terminal box and also paid all costs if the wire was to be buried.

We conclude that the accepted work doctrine did not apply because Qwest was still in control of the premises where the work was performed and the injury had occurred. In this case, the evidence showed that Qwest maintained control of the premises at all times because of the utility easement and that Qwest had control of the placement of the wire. Qwest installed the wire at the request of Addison, but Addison never had any control of the premises where Washington's injury occurred. Addison's construction site was on the north side of Swift Road, and Washington was injured on the south side of the road. The accepted work doctrine was not applicable because when Addison accepted the work, Qwest never relinquished control over the premises where the accident occurred.

[4] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Gary's Implement v. Bridgeport Tractor Parts, ante* p. 286, 702 N.W.2d 355 (2005). Whether a jury instruction given by a trial court is correct is 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. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

Qwest maintained control over the site of Washington's accident, which occurred on a utility easement. Therefore, the accepted work doctrine was not applicable to the facts of this case. It was error for the trial court to instruct the jury that the accepted work doctrine could be relied upon as a defense in this case.

[5,6] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004). In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004). Washington adduced evidence which, if believed by the trier of fact, would establish that Qwest had a duty to protect him from injury, that it did not discharge that duty, and that he was injured as a result. Therefore, Washington is entitled to a new trial as to Qwest's liability.

DIRECTED VERDICT

[7] Washington claims that the trial court erred when it granted Addison's motion for directed verdict and dismissed Addison from the case. A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005). The court found the evidence showed that Addison requested telephone service, that Qwest installed the service and left a wire lying on the ground in a utility easement, and that Washington tripped over the wire and sustained injuries.

[8] The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003). If there is no legal duty, there is no actionable negligence. *Id.* Washington failed to show that Addison owed him a legal duty. Washington and Addison had no contractual relationship. Addison did not control the installation of the telephone wire. Its construction site was

across the street and some 300 to 700 feet away from the terminal box on the utility easement. Addison had no control over the premises on which Washington's injury occurred.

Because Addison had no control over the installation of the wire or the premises where Washington was injured, Addison had no duty to protect Washington from injury. See, *Muckey v. Dittoe*, 235 Neb. 250, 454 N.W.2d 682 (1990); *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982). The trial court did not err in granting Addison's motion for directed verdict, and this assignment of error has no merit.

CONCLUSION

For the reasons set forth above, the judgment of the district court as to Qwest is reversed and the cause is remanded for a new trial. The directed verdict in favor of Addison is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

STEPHAN, J., not participating.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., APPELLANT, V. NEBRASKA DEPARTMENT OF BANKING AND FINANCE, APPELLEE.

704 N.W.2d 784

Filed October 21, 2005. No. S-04-786.

1. **Administrative Law: Judgments: 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. 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.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded with directions.

James M. Pfeffer and Joseph T. Breckenridge, of Abrahams, Kaslow & Cassman, L.L.P., for appellant.

Jon Bruning, Attorney General, and Fredrick F. Neid for appellee.

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

GERRARD, J.

NATURE OF CASE

Mortgage Electronic Registration Systems, Inc. (MERS), appealed an order of the Department of Banking and Finance (the Department), declaring that MERS is a "mortgage banker" under Neb. Rev. Stat. § 45-702 (Reissue 2004) and therefore subject to the license and registration requirements of the Mortgage Bankers Registration and Licensing Act (the Act), Neb. Rev. Stat. § 45-701 et seq. (Reissue 2004). The district court affirmed the order, and MERS appealed. For the reasons that follow, we conclude that MERS is not a mortgage banker as defined by the Act and, therefore, reverse the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.

MERS filed a petition with the Department, requesting a declaratory order that MERS is not a "mortgage banker" under § 45-702(6) and therefore not subject to the license and registration requirements of the Act. At the hearing before the director of the Department, the parties narrowed the issue to whether MERS directly or indirectly "acquires" mortgage loans within the meaning of the Act. The Department concluded that MERS

is a mortgage banker under the Act and is therefore required to obtain a mortgage banker's license from the Department pursuant to § 45-705.

MERS filed a petition for review under the Administrative Procedure Act. The district court affirmed the order of the Department, and MERS appealed.

ASSIGNMENTS OF ERROR

MERS assigns, summarized and restated, that the district court erred in affirming the order of the Department, finding that MERS "acquires" mortgage loans and is, therefore, a "mortgage banker" subject to the requirements of the Act.

STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. 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. *Troshynski v. Nebraska State Bd. of Pub. Accountancy, ante* p. 347, 701 N.W.2d 379 (2005).

ANALYSIS

MERS assigns that the district court erred in affirming the Department's order finding MERS to be a "mortgage banker" subject to the license and registration requirements of the Act. Pursuant to the Act, persons acting as or using the title of "mortgage banker" may not do so without first obtaining a license or registering with the Department under the Act or obtaining a license under the Nebraska Installment Loan Act. § 45-705(1). Section 45-702(6) defines "mortgage banker" as

> any person not exempt under section 45-703 who, for compensation or gain or in the expectation of compensation or gain, directly or indirectly makes, originates, services, negotiates, acquires, sells, arranges for, or offers to make, originate, service, negotiate, acquire, sell, or arrange for ten or more mortgage loans in a calendar year.

Section 45-702(8) states that "[m]ortgage loan means any loan or extension of credit secured by a lien on real property, including a refinancing of a contract of sale or an assumption or refinancing of a prior loan or extension of credit." In this case, the parties agree that the inquiry is limited to whether MERS "acquires" mortgage loans under § 45-702(6). Further, although § 45-703 contains several exemptions to the Act, the parties agree that MERS does not fall under any of the exemptions.

In its order, the district court accurately characterized MERS' services as follows:

> The MERS system was created to facilitate the transfer of ownership interests and servicing rights in mortgage loans. Under the System, MERS serves as mortgagee of record for participating members through assignment of the members' interests to MERS. Mortgage lenders participate in the MERS System as members upon completion of a membership application.

The district court went on to discuss the elements of the contract between MERS and its members, referring specifically to a document entitled, "Terms and Conditions," that states, in part:

> The Member, at its own expense, shall promptly, or as soon as practicable, cause MERS to appear in the appropriate public records as the mortgagee of record with respect to each mortgage loan that the Member registers on the MERS® System. MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time. MERS shall have no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans. MERS agrees not to assert any rights (other than rights specified in the Governing Documents) with respect to such mortgage loans or mortgaged properties.

The document also states that "MERS shall at all times comply with the instructions of the beneficial owner of mortgage loans as shown on the MERS® System."

MERS argues that it does not acquire mortgage loans and is therefore not a mortgage banker under § 45-702(6) because it

only holds legal title to members' mortgages in a nominee capacity and is contractually prohibited from exercising any rights with respect to the mortgages (i.e., foreclosure) without the authorization of the members. Further, MERS argues that it does not own the promissory notes secured by the mortgages and has no right to payments made on the notes. MERS explains that it merely "immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur." Brief for appellant at 12.

The Department argues that MERS, through the assignment of lenders' interests in mortgage loans, indirectly acquires mortgage loans and therefore falls within the scope of the Act. The Department further asserts that a loan and corresponding mortgage or deed of trust are inextricably intertwined and that, accordingly, the interests acquired by MERS are interests in mortgage loans, making MERS a mortgage banker subject to the requirements of the Act.

At the hearing before the Department, documents were offered and received into evidence, and the attorneys for both parties presented arguments before the hearing officer. During the hearing, counsel for the Department described MERS' function in the mortgage industry:

> Mortgage lenders hire MERS to act as their nominee for mortgages, which allows the lenders to trade the mortgage note and servicing rights on the market without recording subsequent trades with the various register of deeds throughout Nebraska.
>
> To execute a MERS Mortgage, the borrower conveys the mortgage to MERS, who is acting as a contractual nominee. MERS becomes the recorded grantee, however, the lender retains the note and servicing right. The lender can then sell that note and servicing rights on the market and MERS records each transaction electronically on its files. When the mortgage loan is repaid, MERS, as agent grantor, conveys the property to the borrower. MERS represents that this system saves the lender and the consumer the transaction costs that would be associated with manually recording every transaction.

Subsequently, counsel for MERS explained that MERS does not take applications, underwrite loans, make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance, or provide any loan servicing functions whatsoever. MERS merely tracks the ownership of the lien and is paid for its services through membership fees charged to its members. MERS does not receive compensation from consumers. The Department does not take issue with this characterization of MERS' services.

Documents offered during the Department hearing support the limited nature of MERS' services. The hearing officer received several documents into evidence from the MERS Web site providing example forms for naming MERS as the original mortgagee of a mortgage or deed of trust or for assigning mortgages to MERS. The form naming MERS as original mortgagee of a mortgage states:

> Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property . . . .

(Emphasis omitted.) Similarly, the document naming MERS as original mortgagee of a deed of trust states:

> The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS.

(Emphasis omitted.) Both documents go on to state:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

Although we agree with the district court's characterization of the services provided by MERS and its contractual relationship with its members, we conclude that such services are not equivalent to acquiring mortgage loans, as defined by the Act. In other

words, through its services to its members as characterized by the district court, MERS does not acquire "any loan or extension of credit secured by a lien on real property." MERS does not itself extend credit or acquire rights to receive payments on mortgage loans. Rather, the lenders retain the promissory notes and servicing rights to the mortgage, while MERS acquires legal title to the mortgage for recordation purposes.

MERS serves as legal titleholder in a nominee capacity, permitting lenders to sell their interests in the notes and servicing rights to investors without recording each transaction. But, simply stated, MERS has no independent right to collect on any debt because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money. Based on the foregoing, we conclude that MERS does not acquire mortgage loans, as defined in § 45-702(8), and therefore, MERS is not subject to the requirements of the Act.

CONCLUSION

The district court erred in affirming the judgment of the Department finding MERS to be a mortgage banker under the Act. Thus, we reverse the judgment of the district court, and remand the cause to the district court with directions to reverse the determination made by the Department.

REVERSED AND REMANDED WITH DIRECTIONS.

TYSON FRESH MEATS, INC., SUCCESSOR TO IBP, INC., APPELLANT AND CROSS-APPELLEE, V. STATE OF NEBRASKA, NEBRASKA DEPARTMENT OF REVENUE, AND MARY JANE EGR, NEBRASKA STATE TAX COMMISSIONER, APPELLEES AND CROSS-APPELLANTS.

704 N.W.2d 788

Filed October 21, 2005. No. S-04-1294.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is

whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **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.
4. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is ultimately correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.
7. **Administrative Law: Appeal and Error.** In an appeal under Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999), the district court conducts a de novo review of the record of the agency.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

John M. Boehm, of Butler, Galter, O'Brien & Boehm, and Quentin "Doug" Sigel, of Scott, Douglass & McConnico, L.L.P., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

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

HENDRY, C.J.

INTRODUCTION

Following an audit by the Nebraska Department of Revenue (Department), a deficiency determination, including unpaid tax, interest, and a penalty, was issued against Tyson Fresh Meats, Inc., successor to IBP, inc. (IBP). IBP filed a petition for redetermination, arguing that the assessment of interest and the penalty were improper. After a hearing, the State Tax Commissioner (Commissioner) affirmed the assessment of interest, but waived the penalty. IBP appealed to the district court, which affirmed the order on grounds other than those asserted by the Commissioner. IBP appeals, and the Department and Commissioner (collectively State) cross-appeal.

FACTUAL BACKGROUND

The parties stipulated to the following facts: On May 31, 2000, following an audit by the Department, the Department issued a "Notice of Deficiency Determination" against IBP which totaled $1,409,177. The deficiency consisted of $916,266 in unpaid use tax, $401,284 in interest, and $91,627 in penalty. The time period covered by the audit was from September 1, 1993, to August 31, 1996. On June 26, 2000, IBP filed a "Petition for Redetermination of the Notice of Deficiency Determination," along with a check for $1,035,778 in payment of the unpaid tax and a portion of the accrued interest. In addition to the petition and check, IBP filed an "Application for Abatement of Penalty." For purposes of its petition and this appeal, IBP does not challenge the assessment of the unpaid use tax.

The parties also stipulated that prior to the audit period at issue, the parties entered into an agreement under the Employment and Investment Growth Act, commonly referred to as "L.B. 775." In that agreement, the Department agreed to refund sales and use taxes paid on the purchase of qualifying assets and improvements to real property in return for IBP's meeting of certain requirements. The parties also agreed that of the $916,266 in use tax assessed, $670,279.84 was refunded under L.B. 775. The parties further stipulated that of the $401,284 in interest originally assessed during the audit, the portion attributable to the amount of tax refunded was $293,552.94.

Finally, the parties stipulated to the issues presented at the Department's hearing. Specifically, the issues were limited to (1) "[w]hether interest should accrue on a portion of consumer's use tax where the tax attributable to that portion of the assessment was refundable under the Employment and Investment Growth Act" and (2) "[w]hether a penalty should be imposed on the Petitioner under these circumstances."

Following a hearing, the Commissioner affirmed the deficiency determination with respect to the imposition of interest in the amount of $293,552.94, concluding that pursuant to Neb. Rev. Stat. § 77-2711(11) (Reissue 2003), the Department lacked authority to abate interest. The Commissioner, however, waived

the penalty, concluding that the Department had the authority to do so and noting that IBP's record would support such a waiver.

Pursuant to the Administrative Procedure Act, IBP appealed to the district court with respect to the assessment of interest. The district court affirmed the order on different grounds, specifically finding that the Commissioner had the discretion to reduce or eliminate interest, and further, that the Commissioner had not erred in the exercise of that discretion.

ASSIGNMENTS OF ERROR

IBP argues, restated, that the district court erred in (1) finding that IBP owed interest on portions of use tax which were ultimately refunded, (2) finding that the Department had exercised discretion in its assessment of interest, (3) failing to remand with instructions for the Department to reconsider the assessment of interest given its discretion, and (4) failing to remand for a determination of the nature of an audit compromise agreement between IBP and the Department.

On cross-appeal, the State argues that the district court erred in finding it had discretion to reduce or eliminate interest owed by IBP. The State does not contest the waiver of penalty.

STANDARD OF REVIEW

[1-3] 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. *Jefferson Cty. Bd. of Ed. v. York Cty. Bd. of Ed., ante* p. 407, 703 N.W.2d 257 (2005). 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.* 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. *Caspers Constr. Co. v. Nebraska State Patrol, ante* p. 205, 700 N.W.2d 587 (2005).

[4] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court

has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Central States Tire Recycling of Neb. v. State*, 268 Neb. 712, 687 N.W.2d 681 (2004).

ANALYSIS

IBP's principal argument on appeal is that it was improper for interest to be assessed on the use tax at issue because the tax was ultimately paid by IBP and later refunded under L.B. 775. A brief review of the relevant provisions of the Nebraska Revenue Act of 1967 is helpful. We note that the applicable tax statutes have been amended without substantive change since the time period covered by the audit; thus, we will cite to the current versions. See *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000).

Neb. Rev. Stat. § 77-2708(1)(a) (Reissue 2003) provides that "use taxes imposed by the Nebraska Revenue Act of 1967 shall be due and payable to the Tax Commissioner monthly on or before the twenty-fifth day of the month next succeeding each monthly period." See, also, § 77-2708(1)(b)(i) ("[o]n or before the twenty-fifth day of the month . . . a return . . . along with all taxes due, shall be filed with the Tax Commissioner").

Neb. Rev. Stat. § 77-2709(1) (Reissue 2003) provides that

> [i]f the Tax Commissioner is not satisfied with the return or returns of the tax or the amount of tax required to be paid to the state by any person, he or she may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns or upon the basis of any information within his or her possession or which may come into his or her possession. One or more deficiency determinations of the amount due for one or more than one period may be made. . . . In making a determination, the Tax Commissioner may offset overpayments for a period or periods, together with interest on the overpayments, against underpayments for other period or periods, against penalties, and against the interest on the underpayments.

Moreover, § 77-2709(3) provides that "[t]he amount of the determination of any deficiency exclusive of penalties shall bear interest . . . ."

Incentives available under L.B. 775 relevant in this case include, inter alia, refunds of use taxes paid under the Nebraska Revenue Act of 1967. See Neb. Rev. Stat. § 77-4105(3)(a) and (b) (Reissue 2003). Neb. Rev. Stat. § 77-4106(2)(d) (Reissue 2003) provides in part that "[a]ll refund claims shall be filed, processed, and allowed as any other claim under section 77-2708, except that the amounts allowed to be refunded under [L.B. 775] shall be deemed to be overpayments and shall be refunded notwithstanding any limitation in subdivision (2)(a) of section 77-2708."

IBP's contention that interest is not owed on refunded tax is based upon the "overpayments" language of § 77-4106(2)(d), particularly the portion of that statute which provides that "the amounts allowed to be refunded under [L.B. 775] shall be deemed to be overpayments." In its brief, IBP argues that

> [t]his "overpayments" language is critical. The LB 775 refunds are by virtue of this language deemed to be overpayments. As overpayments, the refunded amounts are offset against any initial underpayment of the amounts refunded under LB 775. Why? Neb. Rev. Stat. § 77-2708(2)(a) (2003) plainly states: "If the Tax Commissioner determines that any sales or use tax amount . . . has been erroneously or illegally collected or computed . . . , the Tax Commissioner *shall* set forth that fact in his or her records and the excess amount collected or paid may be credited on any sales, use, or income tax amounts then due and payable from the person under the Nebraska Revenue Act of 1967 (emphasis added)." Neb. Rev. Stat. § 77-2708(2)(g) also states: "Upon the allowance of a credit or refund . . . of any sum which was excessive . . . interest *shall* be allowed and paid on the amount of such credit or refund at the rate specified in Section 45-104.02 . . . (emphasis added)."
>
> Section 77-2708(2)(a) and (g) both provide that where tax amounts are overpaid, the overpayment is offset against underpayments. The net effect of this offset is that no interest is due on refunded taxes. The overpayments are offset against underpayments.

Brief for appellant at 8.

We conclude that IBP's argument is without merit. The State argues, and we agree, that with respect to the statutory framework set forth in §§ 77-2708 and 77-2709, there can be no "overpayment" to offset against an "underpayment" unless payment was made when due. Though the use tax in this case was eventually paid, that is not the relevant inquiry. The pertinent question is when the tax was paid, and in this case, it is undisputed that the tax was not paid when due.

An audit of IBP revealed that IBP had failed to pay the use tax owed pursuant to § 77-2708(1)(a) and (b)(i). Given IBP's nonpayment, the Department issued a deficiency determination against IBP pursuant to § 77-2709(1) in the amount of the unpaid tax. A plain reading of § 77-2709(3) required that the amount of this deficiency determination "shall bear interest." Thus, at the time the interest at issue was assessed, IBP had not paid the use tax it owed, and the Department was required to assess interest on that unpaid amount.

Furthermore, the subsections to which IBP directs us in support of its "overpayments" premise are inapplicable. According to the terms of § 77-2708(2)(a), that subsection applies "[i]f the Tax Commissioner determines that any sales or use tax amount, penalty, or interest has been paid more than once, has been erroneously or illegally collected or computed, or has been paid and the purchaser qualifies for a refund under section 77-2708.01." In IBP's case, IBP failed to pay the use tax owed when due. The tax was eventually paid and refunded, but it was not paid more than once and there was no error or illegality in the collection or computation of the tax, nor was IBP's refund issued pursuant to Neb. Rev. Stat. § 77-2708.01 (Reissue 2003), which deals with refunds made for certain agricultural equipment. In fact, the record contains a waiver by IBP wherein it acknowledges that the calculation of use tax in the deficiency determination was "accurate."

Likewise, § 77-2708(2)(g) is clearly inapplicable in this situation. That section provides that "[u]pon the allowance of a credit or refund of any sum erroneously or illegally assessed or collected, of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected,

interest shall be allowed . . . ." IBP claims that this subsection is relevant to this inquiry because it deals with the allowance of a refund "of any sum which was excessive" and that its L.B. 775 refund was an overpayment and thus excessive. Again, we disagree. The amount of use tax ultimately refunded to IBP was not excessive; in fact, as noted above, IBP expressly agreed that the amount of the use tax assessed and later paid was accurate and, thus, was exactly the amount owed by IBP. Finally, the refund in question was not made pursuant to any of the other circumstances set forth in this subsection, as it was not "erroneously or illegally assessed or collected," a "penalty collected without authority," or "in any manner wrongfully collected."

In its reply brief, IBP, for the first time, cites to § 77-2709(1) as additional support of its argument. Specifically, IBP relies on the portion of § 77-2709(1) which provides that "the Tax Commissioner may offset overpayments . . . against underpayments." IBP's reliance on that subsection is also misplaced. As noted previously, we have already concluded with respect to IBP's argument under § 77-4106(2)(d) that there can be no "overpayment" if payment was not made when due. The same reasoning applies to IBP's argument under § 77-2709(1). As a result, the "overpayments" language upon which IBP relies is not applicable. The district court did not err in its determination that IBP owed interest. IBP's first assignment of error is without merit.

In its second and third assignments of error, IBP argues that the district court erred in its determination that the Department properly exercised its discretion in upholding the interest assessment. IBP contends that "[t]here is simply no factual basis for the [d]istrict [c]ourt's ruling that an exercise of discretion [by the Department] occurred." Brief for appellant at 9. IBP does not challenge the district court's determination that the statutes confer such discretion upon the Department. IBP simply claims the district court erred in finding the Department exercised that discretion. Therefore, IBP asserts that given that discretion, the district court should have remanded this case to the Department with instructions to reconsider the assessment of interest.

A review of IBP's second and third assignments of error necessarily involves a consideration of the State's cross-appeal. In that cross-appeal, the State argues that although the district court

reached the correct result, it erred in its determination that the Department had discretion to waive the assessment of interest. We will therefore consider IBP's second and third assignments of error and the State's cross-appeal collectively.

In support of its cross-appeal, the State directs us to § 77-2711(11), which provides that "[t]he Tax Commissioner in his or her discretion may waive all or part of any penalties provided by the provisions of such act, but may not waive the minimum interest on delinquent taxes . . . except interest on use taxes voluntarily reported by an individual."

[5] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). Section 77-2711(11) plainly and unambiguously provides that the Department "may not waive the minimum interest on delinquent taxes." A delinquent tax is defined as "[a] tax not paid when due." Black's Law Dictionary 1496 (8th ed. 2004). The use tax owed by IBP was not paid when due, and thus was delinquent. Under the plain terms of § 77-2711(11), the Department was precluded from waiving the assessment of interest. Furthermore, the one exception, "interest on use taxes voluntarily reported," does not apply in this case. IBP's use tax was not "voluntarily reported," but assessed after an audit which resulted in a deficiency determination.

[6] We therefore agree with the State on its cross-appeal and conclude that the district court erred in finding the Department had the discretion to waive the assessment of interest. Although we disagree with the district court's reasoning, where the record demonstrates that the decision of the trial court is ultimately correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. See *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004).

Given our determination that the Department lacked discretion with regard to the waiving of interest, we need not further consider IBP's second and third assignments of error.

[7] In its fourth and final assignment of error, IBP argues that the district court should have remanded this case in order for the

Commissioner to determine the nature of a purported compromise agreement claimed to have been entered into between the Department and IBP regarding the audit. The district court, upon its de novo review of the record of the agency pursuant to Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999), found there was no evidence in the record made at the Department's hearing to support the existence of such compromise.

IBP directs this court to a portion of the record made at the Department's hearing which it contends is "some evidence in the record of the compromise between the Department and IBP and its intent," reply brief for appellant at 7, and further argues that the

> evidence is sufficient to establish that the trial court should have remanded this case for a hearing on the nature of the compromise once [it] determined that the [Department] had committed an error of law with respect to position [sic] that it lacked any authority to correct the interest computation error.

Id.

IBP contends that the following argument made by its "tax manager" on behalf of IBP at the Department's hearing supports its claim:

> Well, with respect to our vigilance to — I'll say these weren't taxes that were overlooked in the sense that they were lying there ready for us to report. These things were things that a team of examiners spent months beating the bushes and looking to make arguments to say why this thing ought to be taxed when it otherwise wasn't taxed.
>
> So we conceded those things in the spirit of cooperation and were not thinking that we're going — and while there was some merit to it, weren't ready to fight tooth and nail for every nickel. And nevertheless, we feel like we've — we're being punished now for agreeing to something that maybe on hindsight and maybe in the future we'll be more vigilant before we'll concede any points with the revenue department with respect to overlooking anything.
>
> And that's not the intent. The intent here was if it's refundable, let's go ahead and let's get this thing wrapped up and moved on. We don't want to dwell on whether or

not this item or that item is subject to tax and we just disregarded the — a whole area.

We are unable to conclude that the above-quoted colloquy supports IBP's contention. At best, this colloquy implies a "compromise" as to what would be subject to use tax, not what would be subject to an interest assessment. We conclude that the district court's finding that the record failed to support the existence of a "compromise" agreement entered into between IBP and the Department regarding the assessment of interest on delinquent use tax is supported by competent evidence and is neither arbitrary, capricious, or unreasonable. IBP's fourth assignment of error is without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

DAVID L. LERETTE, JR., AND MARY J. LERETTE, HUSBAND AND WIFE, APPELLEES AND CROSS-APPELLANTS, V. AMERICAN MEDICAL SECURITY, INC., A WISCONSIN CORPORATION, AND UNITED WISCONSIN LIFE INSURANCE COMPANY, A WISCONSIN CORPORATION, APPELLANTS AND CROSS-APPELLEES.

705 N.W.2d 44

Filed October 28, 2005. No. S-04-724.

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: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
3. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.

4. ____: ____. To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
5. **Insurance: Contracts: Claims: Proof.** In order to establish a claim for bad faith, a plaintiff must show an absence of a reasonable basis for denying the benefits of the insurance policy and the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.
6. **Actions: Insurance: Claims.** Even if an insurance company ultimately grants a claim relating to the insured's benefits, a viable cause of action for bad faith can be based on initial denials.
7. **Actions: Torts: Insurance: Claims: Liability.** If a lawful basis for denial actually exists, the insurer, as a matter of law, cannot be held liable in an action based on the tort of bad faith.
8. **Actions: Insurance: Claims.** If the insurer has an arguable basis to deny the claim, the insured's bad faith cause of action fails as a matter of law regardless of the manner in which an investigation was or was not conducted.
9. **Insurance: Claims.** The question whether a claim is fairly debatable is appropriately decided by the court as a matter of law, and such a determination is based on the information available to the insurance company at the time the demand is presented.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Reversed and remanded with directions to dismiss.

S.P. DeVolder, of DeVolder Law Firm, and Dennis J. Green for appellants.

Sandra L. Maass, of Abrahams, Kaslow & Cassman, L.L.P., for appellees.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

David L. LeRette, Jr., and Mary J. LeRette filed a petition against American Medical Security, Inc., and United Wisconsin Life Insurance Company (collectively United Wisconsin). The action was tried in the district court for Douglas County, and two causes of action were submitted to a jury: one for breach of an insurance contract, and one for bad faith. The jury found for United Wisconsin on the breach of contract claim but found in favor of the LeRettes in the amount of $25,000 on the bad faith claim. The court entered judgment accordingly. Following entry

of judgment on the bad faith verdict, United Wisconsin filed a motion to set aside the verdict or, in the alternative, for new trial or entry of an altered or amended judgment. The motion was denied. The court also denied a request for attorney fees filed by the LeRettes pursuant to Neb. Rev. Stat. § 44-359 (Reissue 2004). United Wisconsin appeals, and the LeRettes cross-appeal. We find merit in United Wisconsin's appeal and reverse the judgment on the bad faith claim and remand the cause with directions to dismiss the bad faith claim. In view of our decision, we do not consider the LeRettes' cross-appeal.

II. STATEMENT OF FACTS

The LeRettes completed an application for health insurance from United Wisconsin on December 12, 2000. United Wisconsin issued a health insurance policy to the LeRettes and their minor children effective January 15, 2001. At the time the policy became effective, Mary was 27 years old. Shortly after the policy was issued, Mary began to submit medical bills to United Wisconsin for treatments she was undergoing for chronic pelvic pain. Mary's condition had not been disclosed in the LeRettes' health insurance application. Prompted by such bills, United Wisconsin on April 12 began a review of Mary's medical history. Mary continued to receive treatment, and following an exploratory procedure, Mary opted for a total hysterectomy to permanently alleviate her symptoms.

Pursuant to the policy, on June 14, 2001, United Wisconsin received a request from Mary's treating physician to precertify insurance benefits for the hysterectomy which was scheduled for June 18. In response, United Wisconsin asked Dr. Paul Goldstein, a doctor who was board certified in obstetrics and gynecology, to review Mary's medical records and form an opinion on medical necessity. In a letter dated June 18, 2001, Dr. Goldstein noted that Mary was 27 years of age with a 2-year history of symptoms and opined that the hysterectomy was not shown to be medically necessary and would not be appropriate until more conservative treatment regimes had been attempted and a more detailed workup had been performed to identify the cause of the condition. On the basis of Dr. Goldstein's opinion, United Wisconsin denied the precertification request.

The policy issued by United Wisconsin provided for an internal claim appeal procedure. Under the policy, if the insured disagreed with a decision made on a claim, the insured could request a review of the initial claim denial. United Wisconsin would then review the denial and notify the insured of its decision. The policy provided that the insured would normally be notified of the decision within 60 days of the request but that special circumstances might require up to 120 days. If the insured was dissatisfied with the decision, the insured could request a second review by a special panel. Under the policy, the panel would review the prior decision and would normally notify the insured of its decision within 60 days, although special circumstances might require up to 120 days.

On June 20, 2001, Mary requested the first level of review. United Wisconsin asked a second doctor, Dr. Darwish Yusah, who was also board certified in obstetrics and gynecology, to review the file. On June 27, Dr. Yusah opined that the precertification for the hysterectomy should be denied and that other treatments should be attempted before resorting to a hysterectomy. United Wisconsin therefore upheld the denial. Thereafter, the LeRettes retained legal counsel, and on July 23, through their legal counsel, requested a review by a special panel.

In other developments, based on discoveries made during its review of Mary's medical history, on July 25, 2001, United Wisconsin requested that Mary sign exclusionary riders related to asthma and ovarian cysts. The LeRettes requested a first-level review of the decision to request the riders. As part of the review related to the riders, United Wisconsin provided records to Dr. Alan Cameron, a doctor certified in family practice but not certified in obstetrics and gynecology. Following his review, Dr. Cameron noted that the record was unclear whether Mary had been treated for the asthma and cyst conditions within the 1-year preexisting conditions exclusionary period set forth in the policy. Dr. Cameron therefore recommended that United Wisconsin withdraw the request for such riders, and based on such recommendation, the request for the riders was dropped.

Although the hysterectomy precertification issue was evidently beyond the scope of the review United Wisconsin had requested, United Wisconsin had provided information regarding

the issue to Dr. Cameron. Thus, as an incident to his response dated August 31, 2001, Dr. Cameron opined on the issue. Dr. Cameron agreed with Drs. Goldstein and Yusah that further testing might be appropriate under all the circumstances and that the hysterectomy might not be medically necessary. However, Dr. Cameron recommended that precertification be granted because further testing followed by an eventual hysterectomy would be more costly.

The appeal panel considered Dr. Cameron's recommendation with regard to the hysterectomy precertification issue and accepted his recommendation in favor of the insured's position. On September 11, 2001, United Wisconsin reversed its denial and granted Mary's request for precertification. Further, upon completion of the medical history review on September 18, United Wisconsin informed the LeRettes and their medical service providers that it was lifting the hold it had placed on payment of medical bills, and United Wisconsin thereafter paid such bills. Mary had the hysterectomy surgery on October 12, 4 months after her initial request for precertification.

On October 21, 2002, the LeRettes filed the present action against United Wisconsin. By the time of trial, the petition consisted of two causes of action: breach of contract and bad faith. Prior to trial, on February 27, 2004, pursuant to United Wisconsin's motion for summary judgment, the district court had dismissed additional claims of intentional infliction of emotional distress and loss of parental consortium. This ruling is not at issue on appeal.

The case was tried to a jury on March 22 through 25, 2004. At trial, the LeRettes claimed that United Wisconsin had breached its contract by not timely paying all amounts due under the policy to medical providers and that there was an outstanding balance due of $940.13. With respect to the bad faith cause of action, the LeRettes objected to United Wisconsin's initial denial of benefits for Mary's hysterectomy and the manner with which it conducted the investigation in relation thereto. Certain other assertions of bad faith regarding handling of David's claims were at issue, but were dismissed by directed verdict.

At trial, after the LeRettes rested their case, United Wisconsin moved for directed verdict. The court denied the motion, and

United Wisconsin presented its defense. After the defense rested, the court announced that it was "reversing" its prior decision on the motion for directed verdict. The court then granted directed verdict in favor of United Wisconsin to the extent that the LeRettes were presenting a bad faith claim relating to insurance claims that had been made by David. The court thus dismissed the bad faith claim as to David, and this ruling is not challenged on appeal. United Wisconsin renewed its motion for directed verdict as to the remainder of the case. The court denied the renewed motion. The cause of action for breach of contract related to untimely paid and outstanding bills and the cause of action for bad faith related to initial denials of precertification for Mary's hysterectomy were submitted to the jury. The jury returned a verdict for United Wisconsin on the breach of contract claim and a verdict for Mary on the bad faith claim in the amount of $25,000. The verdict in favor of United Wisconsin on the breach of contract claim is not challenged on appeal by any party. The court entered judgment on the verdict on the bad faith claim on March 26, 2004.

On April 2, 2004, United Wisconsin filed a motion to set aside the verdict and judgment on the bad faith claim or, in the alternative, for new trial or an altered or amended judgment on the bad faith claim. In support of the motion, United Wisconsin argued that it was entitled to judgment in its favor on the bad faith claim because, inter alia: (1) the jury verdict in favor of United Wisconsin on the breach of contract cause of action precluded an award on the bad faith cause of action; (2) United Wisconsin had a right to rely on the opinions of doctors when it denied precertification for Mary, and it therefore should not be subject to a claim of bad faith based on such initial denials; (3) United Wisconsin ultimately paid the claim for benefits asserted by Mary; (4) United Wisconsin did not commit any act of bad faith; and (5) the LeRettes did not establish any damages. United Wisconsin also took issue with certain jury instructions. The court rejected each of United Wisconsin's arguments and overruled the motion on May 19.

On April 6, 2004, the LeRettes filed an application for reimbursement of attorney fees pursuant to § 44-359 which provides

that in "an action upon any type of insurance policy" the court "shall allow the plaintiff a reasonable sum as an attorney's fee." On May 19, the court denied the LeRettes' application for attorney fees. The Court reasoned that the LeRettes' success on the cause of action for bad faith was an award on a tort claim and therefore their award was not achieved in "an action upon any type of insurance policy" for purposes of awarding attorney fees under § 44-359.

United Wisconsin appeals. The LeRettes cross-appeal.

III. ASSIGNMENTS OF ERROR

In its appeal, United Wisconsin generally asserts that the district court erred in denying its motions for directed verdict and its motion to set aside the verdict or for new trial or entry of an altered or amended judgment. Specifically, United Wisconsin claims that the court erred in denying its motion for directed verdict related to Mary's bad faith claim and further erred in entering judgment on the jury's verdict in favor of Mary on the bad faith claim. United Wisconsin further asserts, inter alia, that the court erred in entering judgment on the bad faith claim because (1) the jury had failed to find for the LeRettes on the breach of contract cause of action relating to untimely paid and unpaid medical bills, (2) United Wisconsin had the right to rely on the opinions of medical experts in initially denying the precertification request for Mary's hysterectomy, (3) United Wisconsin did not ultimately deny benefits to Mary for her hysterectomy, and (4) there was insufficient evidence to submit Mary's bad faith claim to the jury and insufficient evidence to support the jury's verdict in favor of Mary on the bad faith claim concerning the initial denials related to her hysterectomy. United Wisconsin also argues that because the LeRettes misrepresented Mary's medical history in the application, the district court erred in failing to instruct the jury on the affirmative defense of misrepresentation by deceit or to direct a verdict on such basis.

In their cross-appeal, the LeRettes claim that the district court erred in concluding that § 44-359 did not apply to a bad faith claim and in denying their application for attorney fees under § 44-359.

IV. STANDARDS 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. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

[2] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005).

[3,4] On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Parks v. Merrill, Lynch*, 268 Neb. 499, 684 N.W.2d 543 (2004). To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id.*

V. ANALYSIS

United Wisconsin generally asserts that the district court erred in denying its motion for directed verdict as to Mary's bad faith claim and in denying its motion to set aside the jury verdict with respect thereto. United Wisconsin makes various arguments in support of these assertions. We first address United Wisconsin's argument that the verdict on the bad faith claim in connection with the initial denials to precertify Mary's hysterectomy should be set aside because the jury failed to find a breach of contract concerning untimely paid and unpaid medical bills. We next address United Wisconsin's assertion that because it ultimately granted Mary's request for precertification for the hysterectomy surgery, Mary's bad faith claim in connection with the initial

denials must fail. Finally, we address whether the evidence presented by Mary on the bad faith claim was sufficient to submit to the jury. As explained more fully below, we conclude that Mary's evidence of bad faith was insufficient as a matter of law and that the district court erred in submitting such claim to the jury. Accordingly, we reverse.

1. NEBRASKA RECOGNIZES THE TORT OF FIRST-PARTY BAD FAITH IN CONNECTION WITH POLICIES OF INSURANCE

[5] In *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991), *disapproved on other grounds, Wortman v. Unger*, 254 Neb. 544, 578 N.W.2d 413 (1998), we recognized a tort of bad faith refusal to "settle" a claim with an insured policyholder. In connection with the tort of bad faith, we stated that "a first-party bad faith cause of action is based upon allegations that the insurer, in bad faith, refuses to settle with its own policyholder insured, who thereby suffers some type of direct loss." *Id.* at 54, 464 N.W.2d 776. In *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991), we noted that it is the breach of the covenant of good faith and fair dealing from which liability in the tort of bad faith springs. We have stated that in order to establish a claim for bad faith, a plaintiff must show an absence of a reasonable basis for denying the benefits of the insurance policy and the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003); *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998).

(a) Breach of the Insurance Contract in Connection With Untimely Paid and Unpaid Medical Bills Was Not a Prerequisite to Prevailing on the Bad Faith Claim in Connection With Initial Denials for Mary's Hysterectomy

As an initial matter, United Wisconsin argues that because the jury found in United Wisconsin's favor on the LeRettes' breach of contract cause of action, its verdict in favor of Mary on the bad faith claim cannot stand. Given the facts of this case, we reject United Wisconsin's argument.

The court has examined the cases, not repeated here, which the parties have cited on this issue. United Wisconsin asserts that

other courts have held that a breach of contract is a prerequisite to bringing a bad faith claim. United Wisconsin refers us to *State Farm Fire & Casualty Co. v. Slade*, 747 So. 2d 293 (Ala. 1999) (in order to recover on claim of bad faith failure to investigate, insured must show that insurer breached contract), and *Liberty Nat. Fire Ins. Co. v. Akin*, 927 S.W.2d 627 (Tex. 1996) (in most circumstances, insured may not prevail on bad faith claim without first showing that insurer breached contract). However, other courts have held that an insured does not need to prevail on the breach of contract claim to prevail on the claim for bad faith. E.g., *State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d 813 (Wyo. 1994). In cases such as each of the foregoing, the insured generally alleged that the same conduct by the insurer amounted to both a breach of contract and bad faith. Given the record in the instant case in which the core set of facts on the breach of contract cause of action and the core set of facts on the bad faith cause of action differ, the authorities on which the parties rely are inapposite.

In the case at hand, as submitted to the jury, the breach of contract claim was a cause of action separate and distinct from the bad faith cause of action. Although both causes of action unavoidably shared facts in common, the cause of action for the breach of contract was directed at United Wisconsin's alleged failure under the contract of insurance to pay or timely pay $940.13 in outstanding medical bills, several of which were incurred after Mary's hysterectomy, whereas the cause of action for bad faith was grounded in the fact that Mary had initially been denied precertification in connection with the hysterectomy. The causes of action in this case were separate and not dependent on each other. Therefore, contrary to United Wisconsin's assertion, the LeRettes were not required to prevail on their breach of contract cause of action relating to untimely paid and unpaid bills as a prerequisite to prevailing on the bad faith cause of action relating to initial denials in connection with Mary's hysterectomy.

(b) Ultimate Payment of Benefit Does Not Preclude a Viable Bad Faith Claim

United Wisconsin argues that because it eventually granted Mary's request for precertification, there could be no claim for

bad faith because there was ultimately no denial of benefits. We conclude that the fact that United Wisconsin ultimately granted Mary's request for precertification did not as a matter of law preclude a viable bad faith claim.

[6] In *State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d at 828, the Wyoming Supreme Court noted that an implied covenant of good faith and fair dealing is present in every contract of insurance and stated that "the subsequent payment of a denied . . . claim does not absolve an insurer from compliance with the duty of good faith and fair dealing." We have recognized an implied covenant of good faith and fair dealing in medical insurance contracts. *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991). Further, in *Ruwe*, we implicitly recognized that a claim of bad faith can encompass a delay in the settlement of benefits. We therefore conclude that even if an insurance company ultimately grants a claim relating to the insured's benefits, a viable cause of action for bad faith can be based on initial denials.

Other courts are in agreement with our conclusion that ultimate payment of benefits does not preclude a bad faith claim. See *Best Place, Inc. v. Penn America Ins. Co.*, 82 Haw. 120, 920 P.2d 334 (1996) (tort of bad faith allows an insured to recover even if insurer performs express covenant to pay claims); *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986) (insurer's eventual performance of express covenant by paying claim does not release it from liability for bad faith; implied duty of good faith and fair dealing is breached when insurance company's conduct damages very protection or security which insured sought to gain by buying insurance). Accordingly, we reject United Wisconsin's argument asserting that its ultimate payment of benefits in this case precluded a judgment in favor of the LeRettes on the bad faith claim.

2. The Evidence Presented Was Insufficient to Support a Bad Faith Claim

We next consider whether the evidence presented by the LeRettes was sufficient to submit Mary's bad faith claim related to initial denials concerning her hysterectomy to the jury. As to this issue, we conclude that the evidence related to Mary's bad

faith claim was not sufficient to have been submitted to the jury and that the district court erred in denying United Wisconsin's motion for directed verdict addressing the entire bad faith cause of action. Accordingly, we reverse, and remand with directions to dismiss the bad faith claim.

In *Braesch v. Union Ins. Co.*, 237 Neb. 44, 57, 464 N.W.2d 769, 777 (1991), *disapproved on other grounds, Wortman v. Unger*, 254 Neb. 544, 578 N.W.2d 413 (1998), we first adopted the standard of care in bad faith claims as follows:

> "To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the [insurance] policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one. 'Bad faith' by definition cannot be unintentional."

Quoting *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978).

[7-9] We repeated this standard and further discussed the requirements for a bad faith claim in *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998), and in *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003). In both *Radecki* and *Williams*, we affirmed the district court's grant of a directed verdict in favor of the insurer on bad faith claims. We stated in *Radecki* that "if a lawful basis for denial actually exists, the insurer, as a matter of law, cannot be held liable in an action based on the tort of bad faith." 255 Neb. at 229, 583 N.W.2d at 325. We further stated that it must be determined "whether, at the time of each denial, [the insurer] had an arguable basis on which to deny the claim" and if the insurer "had such a basis, [the insured's] bad faith cause of action fails as a matter of law regardless of the manner in which an investigation was or was not conducted." 255 Neb. at 230, 583 N.W.2d at 326. The question "[w]hether a claim is fairly debatable is appropriately decided by the court as a matter of law . . . and such a determination is based on the information available to the insurance company at the time the demand is presented." *Id.* Upon the record presented, we conclude that because United Wisconsin had an arguable basis on which to initially deny

precertification at the time of each such denial, the LeRettes' bad faith claim as to Mary's hysterectomy fails as a matter of law.

In the present case, United Wisconsin denied Mary's request for precertification on two occasions. Mary invoked the appeal process provided in the contract, and ultimately, United Wisconsin granted her request. In this regard, we note that the timeframe during which the appeals were conducted and concluded were within the timeframes set forth in the policy.

United Wisconsin initially denied Mary's request on the basis of Dr. Goldstein's opinion which concluded that the hysterectomy was not medically necessary. In his opinion, Dr. Goldstein noted Mary's age and concluded that the hysterectomy would not be appropriate until further treatment had been attempted and further testing had been done. United Wisconsin denied the request again based on the review by Dr. Yusah, who opined that precertification should be denied as not medically necessary and that other treatments should be attempted before resorting to a hysterectomy.

Although the LeRettes presented evidence that Mary's doctor recommended the hysterectomy, United Wisconsin was allowed to rely in good faith on its own experts' opinions rather than the opinion of the insured's expert. See *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92 (Iowa 1995) (insurance company not obligated to disregard opinion of its own expert in favor of insured's expert's opinion), *overruled in part on other grounds, Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775 (Iowa 2000). Indeed, we have observed that "'[t]he insurer . . . must be accorded wide latitude in its ability to investigate claims . . . .'" *Braesch v. Union Ins. Co.*, 237 Neb. 44, 58, 464 N.W.2d 769, 778 (1991) (quoting *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985)), *disapproved in part on other grounds, Wortman v. Unger*, 254 Neb. 544, 578 N.W.2d 413 (1998).

The LeRettes' evidence did not indicate that United Wisconsin's experts' opinions were unsound or false or that there was an absence of a reasonable basis to deny benefits. The evidence presented by the LeRettes did not inject doubt as to the fact that United Wisconsin had an arguable basis to initially deny the request for precertification. The question of whether a claim is fairly debatable is appropriately decided by the court as

a matter of law. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998). As a matter of law, Mary's claim was fairly debatable and United Wisconsin had an arguable basis for initially denying benefits at the time of each such denial.

Despite their failure to show an absence of a reasonable basis for initially denying Mary's claim, the LeRettes refer us to various actions by United Wisconsin related to the initial denials which the LeRettes claim nevertheless demonstrate that United Wisconsin acted with bad faith. However, as anticipated in *Radecki*, where as here, the insurer had an arguable basis on which to initially deny the claim, the bad faith cause of action fails as a matter of law regardless of the manner in which an investigation was or was not conducted.

We conclude that the LeRettes did not present evidence to support a claim of bad faith. Therefore, the claim should not have been submitted to the jury, and the district court should have granted United Wisconsin's motion for directed verdict as to the entire bad faith cause of action at the close of the evidence. Because a directed verdict at the close of the evidence would have been appropriate, the district court should have granted United Wisconsin's motion to set aside the verdict and should have dismissed the claim. We therefore reverse the judgment on the cause of action for bad faith and remand the cause to the district court with directions to dismiss the claim.

Because we reverse the judgment on the bad faith cause of action and remand the cause for dismissal of the bad faith claim, it is not necessary to address United Wisconsin's assignment of error with respect to jury instructions regarding the purported defense of misrepresentation by deceit.

3. Cross-Appeal: Attorney Fees Pursuant to § 44-359

The LeRettes filed a cross-appeal and assigned error to the district court's denial of their application for attorney fees made as successful parties under § 44-359. Because we reverse the judgment in favor of the LeRettes, we do not consider this cross-appeal.

VI. CONCLUSION

We conclude that the evidence was not sufficient to submit the bad faith claim to the jury. The district court therefore erred

in overruling United Wisconsin's motion for directed verdict on the bad faith cause of action in its entirety and in denying United Wisconsin's motion to set aside the verdict. We therefore reverse the judgment entered on the bad faith claim, and we remand the cause to the district court with directions to dismiss the bad faith claim.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

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

705 N.W.2d 221

Filed October 28, 2005. No. S-04-970.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. **Postconviction: Evidence: Witnesses: Appeal and Error.** In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995) for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.
3. **Criminal Law: Effectiveness of Counsel: Proof.** It is the criminal defendant's burden to demonstrate that he or she was prejudiced by the alleged deficiencies of counsel.
4. **Constitutional Law: Search and Seizure: Waiver.** The right to be free from an unreasonable search and seizure, as guaranteed by the 4th and 14th Amendments to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen.
5. **Constitutional Law: Search and Seizure: Duress.** To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice and not the product of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.
6. **Criminal Law: Insanity.** The doctrine of irresistible impulse is a theory of moral insanity that is not recognized by this state.
7. **Criminal Law: Mental Health: Intent.** There are a variety of mental conditions which bear upon the ability to form a specific intent. A specific intent, in turn, bears

at least upon the degree of criminality which may be assessed and may determine whether any criminality exists at all.

8. **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.
9. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.
10. **Trial: Homicide: Jury Instructions.** A misstatement of an element of manslaughter during closing arguments could not have prejudiced the defendant where the jury, under a step instruction, convicted the defendant of first degree murder and therefore would not have reached the issues of second degree murder and manslaughter.

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

W. Russell Bowie for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

Necdet Canbaz appeals from the order of the district court denying Canbaz' motion for postconviction relief after an evidentiary hearing.

BACKGROUND

Following a 2004 jury trial resulting in guilty verdicts, Canbaz was convicted of first degree murder and use of a weapon to commit a felony in the shooting death of Debora Peralta. His convictions and sentences were affirmed by this court on direct appeal in *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000). The underlying facts as set forth in *Canbaz* are repeated here:

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

that he was angry with Peralta and wanted to hurt her and kill her and her family members.

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

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

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

In Canbaz' statement to the police, he admitted that he was very upset when Peralta moved out. He admitted that Peralta took out a protection order against him after the move because she was scared. He admitted that he had a sale in late August to dispose of his belongings. He admitted that he went to Peralta's apartment the day of the shooting, purportedly to recover $30,000 which she had taken from him when she left his home earlier that day. Canbaz stated Peralta was on the telephone when he pushed away some bookcases blocking the door and entered the apartment and

> that he picked up the receiver and said hello. Further, he admitted that as they were leaving the apartment, Peralta ran away from him and that he shot her. He also stated he had an airline ticket to leave for Turkey to see his father, with a departure date a few days after the shooting. However, he denied ever saying that he would kill Peralta or her family.

259 Neb. at 584-86, 611 N.W.2d at 398-99.

Prior to trial, a hearing had been held to determine the voluntariness of Canbaz' statement to the police. The statement was taken in an interview room at the Council Bluffs police station. One of the officers present for the statement testified that Canbaz was advised of his *Miranda* rights and that care was taken to make sure he understood the things he was being questioned about and the rights that he had. The officer believed that Canbaz understood and waived his right to have appointed counsel present at that time. At no time did any officer threaten Canbaz or use force or make promises to induce Canbaz into making a statement. The officer described Canbaz as very cooperative. Canbaz did not ever state an unwillingness to talk about the shooting or make any other complaint. The officer testified that it did not appear that Canbaz was under the influence of alcohol or drugs. Rather, it appeared that Canbaz understood what was occurring, understood what he was saying, and was not confused. Canbaz, in the statement, explained that he had given the statement freely and voluntarily, and he declined to add or change anything in the statement. After the hearing, the trial judge specifically found with respect to Canbaz' statement that Canbaz had been given his *Miranda* rights at the time of the interview and that Canbaz had voluntarily, knowingly, and intelligently waived his privilege against self-incrimination and his right to have appointed counsel present at the interrogation. The court found that Canbaz' statement was freely, voluntarily, knowingly, and intelligently made.

Canbaz did not raise an insanity defense, but instead introduced expert medical testimony from Dr. Bruce D. Gutnik in an effort to negate the State's evidence of premeditation. In a hearing on the prosecution's motion in limine regarding Gutnik's testimony, trial counsel explained that he did not seek to put forth an "irresistible impulse" defense, which is not recognized by

Nebraska law. Trial counsel's theory was that when Peralta ran, Canbaz reacted impulsively, and not out of premeditation. This, trial counsel explained, was wholly distinct from an "irresistible impulse." The trial court ruled that it would allow testimony as to the issue of impulsive behavior being a part of Canbaz' mental condition generally, but would not allow Gutnik to testify as to Canbaz' mental state specifically at the time of the shooting.

Gutnik testified at trial that at the time of the shooting, Canbaz was suffering from a major depressive disorder with psychosis, panic disorder, and disassociative amnesia. However, Gutnik also testified that Canbaz could, at the time this incident occurred, form an intent of action. Gutnik testified, without objection, that people like Canbaz with a major depressive disorder can have trouble with memory and with thinking clearly at times and that this condition leads to impulsivity. He further testified that he would expect a person suffering from that condition to have his or her judgment "impaired." Gutnik elaborated that a person suffering from a condition such as Canbaz' would have his or her judgment "clouded," as if looking "through a fog or a cloud and you can't quite see all the information around you, and what you do see is distorted. So you are making judgment calls based on partial information and distorted information." With regard to the disassociative amnesia aspect of Canbaz' diagnosis, Gutnik testified that one was much more likely to have disassociative amnesia, or not remember details about an event, if that event were not planned.

After Gutnik testified, the State called Dr. Y. Scott Moore as a rebuttal witness concerning Gutnik's testimony. Moore opined that Canbaz was not suffering from a major depressive disorder at the time of the shooting because Canbaz did not display significant characteristics common to a major depressive disorder. Moore also opined that Canbaz was not suffering from disassociative amnesia because Canbaz was able to give a clear account of the events which occurred during, prior to, and after the shooting.

During closing argument, trial counsel argued that Canbaz was not denying responsibility for killing Peralta or claiming to have been insane at the time of the killing. However, trial counsel argued that Canbaz' mental condition was relevant to deciding

what crime he had committed. Trial counsel stated that in order for an act to be first degree murder, it must be deliberate, such that the defendant considered the probable consequences of his or her act before committing it. Trial counsel explained to the jury that all the elements of first degree murder combine to mean, in simple terms, that the defendant must have a plan. Trial counsel then proceeded to illustrate how Canbaz did not in fact have such a plan. Trial counsel argued to the jury that at the time of the shooting, Canbaz was "clearly upset, clearly confused, scared, and obviously feeling a sense of betrayal from the events that had just taken place." He pointed out that Canbaz was suffering from a major psychotic depression that impaired his ability to think clearly, impairing his judgment and clouding his reasoning. Trial counsel characterized the shooting as an "impulsive" act. At this point, the prosecution objected on the ground that such was not a legal argument under Nebraska law, but the trial court overruled the objection.

Trial counsel then proceeded to argue that the jury should find Canbaz guilty of the lesser crime of manslaughter because the shooting was the result of a sudden quarrel, defined as a "passion, suddenly aroused, which clouds reason and prevents rational action." Trial counsel then explained:

> "Clouds," that's exactly the terminology that Dr. Gutnick [sic] used in describing his mental condition. It does not necessarily require an exchange of angry words or an altercation contemporaneously with the killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim. They don't have to get into a fisticuffs for this to take place.

In the prosecution's rebuttal during closing arguments, the prosecutor stated:

> [T]he definition of sudden quarrel means a legally recognized and sufficient provocation causing a reasonable person to lose normal self-control. A quarrel is an argument. It's a fight between people. That's what a manslaughter is, people punching each other, hitting each other, getting in a fight and somebody dies.
>
> This isn't any quarrel by any stretch of the imagination. Don't be fooled by going along with what defense counsel

> wants in this case, a manslaughter. This is no manslaughter case.

Trial counsel objected to the use of the word "fooled," and the trial court overruled the objection.

The instructions given by the trial court to the jury defined the "sudden quarrel" element of manslaughter as

> a legally recognized and sufficient provocation causing a reasonable person to lose normal self-control; or passion suddenly aroused which clouds reason and prevents rational action. It does not necessarily require an exchange of angry words or an altercation contemporaneous with the killing and does not require a physical struggle or other combative corporal contact between the Defendant and the victim.

Canbaz filed a motion for postconviction relief on February 13, 2004. The deposition testimony of trial counsel for Canbaz was entered into evidence at the postconviction hearing. Trial counsel explained that he did not file a motion to suppress the evidence found in the search of Canbaz' vehicle because Canbaz had consented to the search. He did not want to risk alienating the jury by making objections that were going to be overruled. Trial counsel explained that he did not make a motion to suppress Canbaz' statement to the police because Canbaz had been advised of his *Miranda* rights and that the indication was Canbaz had voluntarily waived those rights. Trial counsel stated that he believed he had discussed the voluntariness of the statement with Canbaz and that a decision was made not to proceed with a motion to suppress.

Trial counsel testified that when discussing the case with Canbaz, he always did so in English and had no trouble communicating with Canbaz in that language. Canbaz always appeared to understand what trial counsel was saying, and trial counsel understood Canbaz' responses, which were appropriate to the questions being asked. At no point did Canbaz request an interpreter skilled in his native language. It was trial counsel's judgment that he was communicating appropriately with Canbaz in English, and trial counsel stated that had it been otherwise, he would have sought an interpreter.

Trial counsel stated that Canbaz had been able to describe to him all of the events that occurred the day of the shooting, but

that there was some indication that Canbaz did not remember clearly the shooting itself. Canbaz never denied actually killing Peralta. Trial counsel stated that he had retained Gutnik to do an evaluation for purposes of competency to stand trial and also with regard to Canbaz' mental status on the date of the shooting. He did not believe that Gutnik's evaluation supported an insanity defense. Trial counsel stated that because his research had indicated that "irresistible impulse" was not a recognized defense to first degree murder under Nebraska law, "irresistible impulse" was not the nature of Canbaz' defense. Trial counsel described his trial strategy instead as trying to avoid a conviction for first degree murder by showing a lack of premeditation.

Trial counsel also testified as to why he did not object to the prosecution's statement made in its rebuttal closing argument that under the definition of a sudden quarrel, people have to be "punching each other, hitting each other, getting in a fight and somebody dies." Trial counsel said that although he could not recall specifically, it was his opinion that "objecting to opposing counsel's closing argument can have technical consequences with regard to [counsel's] relationship and rapport with the jury." Furthermore, trial counsel testified that objections made during closing arguments usually receive a negative reaction from the judge, thereby conveying to the jury that counsel's actions are inappropriate. Trial counsel stated that such objections also have the possibility of "creating a negative reaction from the jury members themselves with regard to [counsel's] conduct, irrespective of how the judge handles it." Trial counsel stated that he did object to the prosecutor's statement that the jury "shouldn't be fooled" by trial counsel's manslaughter argument. He noted that he had already argued the proper legal definition of sudden quarrel and that the proper definition was found in specific jury instructions.

The deposition testimony of Canbaz was also entered into evidence at the postconviction hearing. Canbaz had the services of an interpreter, although he answered many questions himself in English and before the interpreter had interpreted the questions. Canbaz' postconviction counsel reminded him on a couple of occasions to answer in Turkish "so that there isn't any confusion." Canbaz explained that for the last 20 years, he had

lived in Nebraska and had communicated mostly in English. He admitted that he had some trouble answering in Turkish since it had been a long time since he had spoken the language. Canbaz stated that when he gave his statement to the police, the police spoke English, and that he understood some of the things they were asking him, but not everything. He did not ask them for an interpreter. Canbaz testified that he had told trial counsel that he did not know English, but that trial counsel had stated that Canbaz did not need an interpreter because trial counsel "would defend [him] and would say everything on [his] behalf." Canbaz stated that when he was examined by Gutnik, the conversation was in English and that he did not "exactly" understand all his questions. However, he did understand some of the questions. Canbaz testified that he did not recall any conversation with trial counsel regarding whether to make a motion to suppress.

The postconviction court denied Canbaz' motion for postconviction relief. The court found that a warrant for Canbaz' arrest had been issued for murder in the first degree and use of a weapon to commit a felony. The postconviction court delineated the facts supporting reasonable cause for the warrant and found that the search of the hotel room was pursuant to the arrest. The court found that Canbaz had given both verbal and written consent to search his vehicle. The court further found that Canbaz was advised of his *Miranda* rights at that time and voluntarily gave the officers the key to his vehicle. Regarding the statement, the postconviction court again noted that Canbaz had been notified of his *Miranda* rights and had voluntarily waived those rights. The trial court had held a hearing on the voluntariness of Canbaz' statement and had found the statement to be voluntary. The postconviction court concluded that trial counsel's decision not to object to any of the evidence from the searches or to the statement was a tactical decision presumed to be reasonable. The postconviction court further found that even if counsel had been deficient, the outcome of the trial would not have changed. The court noted that Canbaz had been dating Peralta, that Peralta had a protection order against him, and that witnesses observed Peralta being shot by a man fitting Canbaz' description and the man then driving away in a red Jeep with a license number matching the Jeep registered to Canbaz.

On the issue of Canbaz' alleged diminished mental capacity, the postconviction court found that the goal at the time of trial was to avoid a conviction of first degree murder. The court found that trial counsel was aware that "irresistible impulse" was not a defense. Trial counsel did not set forth such a defense, but instead based the defense on lack of premeditation and sudden quarrel, in an attempt to procure a conviction of manslaughter rather than first degree murder. The trial court instructed the jury on manslaughter and sudden quarrel. The postconviction court concluded that it would not second-guess reasonable strategic decisions by trial counsel, and it could find no alleged deficiency that would have changed the outcome of the case.

Canbaz appeals from the denial of postconviction relief.

STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

[2] In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995) for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous. *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992).

ASSIGNMENT OF ERROR

Canbaz assigns that the trial court erred in failing to grant postconviction relief.

ANALYSIS

Canbaz was represented by the same counsel at trial and on direct appeal, and therefore, he is not procedurally barred from

asserting a claim of ineffective assistance of counsel. See, *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003); *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

We first note that it is not entirely clear from Canbaz' brief whether he might be trying to argue that trial counsel failed to subject the prosecution's case to meaningful adversarial testing, and therefore prejudice should be assumed under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). For instance, without further elaboration as to how he has been prejudiced, or even exactly how trial counsel was deficient, Canbaz points out that his trial counsel did not file any pretrial motions and that trial counsel was the one who identified and offered the note purportedly authored by Canbaz stating that he had killed Peralta. Canbaz similarly complains that trial counsel should have tested the prosecution's case before calling Gutnik because Gutnik admitted on cross-examination that Canbaz told Gutnik that he had killed Peralta. Also mentioned is the fact that trial counsel failed to object to (1) a police officer's identification of the source of a page made to Peralta the day she was killed as coming from Canbaz' home and (2) the prosecution's referral to the person who shot Peralta as "the defendant," "although there was never any identification of Canbaz as the shooter by any eyewitness." Brief for appellant at 11. Finally, without making any assertion that Canbaz would have testified or did want to testify or that such testimony would have changed the outcome of the case, Canbaz seems to make some complaint about trial counsel's deciding not to call Canbaz to testify in his own defense. Canbaz concludes at one point in his brief: "Trial counsel abandoned the defendant by failing to test the prosecution's case at all. Canbaz may as well have proceeded pro se." *Id.* at 7.

In *United States v. Cronic*, 466 U.S. at 659, the U.S. Supreme Court explained that where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." In *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), we elaborated that prejudice will be presumed: (1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where

counsel fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify the presumption of ineffectiveness without inquiry into counsel's actual performance at trial. Prejudice will also be presumed where there is an actual conflict of interest among multiple defendants jointly represented by the same counsel. See, *United States v. Cronic, supra*; *State v. Trotter, supra.* Nothing in the evidence before us supports a claim that Canbaz' trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, and therefore, our analysis of Canbaz' complaints will be conducted under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Under *Strickland*, to establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt. See *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

CANBAZ' STATEMENT

Trial counsel testified that he did not object to the admission of Canbaz' confession because Canbaz had been advised of his *Miranda* rights and the indication was that he had voluntarily waived those right. Trial counsel further testified that he believed he had discussed with Canbaz whether to make a motion to suppress the confession and that a decision was made not to proceed with such a motion, although Canbaz' deposition testimony denies this. Canbaz claims that the failure of trial counsel

to object to the confession deprived him of effective assistance of counsel.

Canbaz states: "The only evidence prior to trial that Canbaz was Mirandized came at a hearing to determine the voluntariness of his statement, given after he was removed from his hotel room, and after he gave consent to search his car." Brief for appellant at 9. However, the import of said facts in an ineffective assistance of counsel analysis is never explained.

Canbaz further alleges that trial counsel should have investigated whether the confession was in fact voluntary. Specifically, Canbaz asserts that his trial counsel was deficient in failing to investigate the possibility that Canbaz' use of prescription antidepressants and his "history of mental illness," coupled with his lack of proficiency in English and "the strain of the situation," deprived him of a minimal understanding of his statements. *Id.* at 13. With regard to whether this failure to investigate prejudiced him, Canbaz states only that it "may have been the situation" that Canbaz was unable to understand the meaning of his statements. *Id.* at 12. Had it been shown that Canbaz' statement was not voluntary, the inference would then be that the court would have sustained a motion to suppress. Canbaz then concludes that "[h]ad Canbaz' statement been suppressed, there would have been no 'story', no background, for the jury." *Id.* at 9. Combining the assumption that the statement would be suppressed with the assumption that the gun and other items found from the search of Canbaz' vehicle would also be suppressed, Canbaz concludes:

> The only evidence would have been that Canbaz and Peralta were dating, she had a protection Order against him, and a man shot her and left in a red Jeep. Canbaz' statement clarifies all of the details, and since Canbaz did not testify, none of those details could be rebutted.

Id. at 9-10.

[3] It is the criminal defendant's burden to demonstrate that he or she was prejudiced by the alleged deficiencies of counsel. *State v. Ray*, 266 Neb. 659, 668 N.W.2d 52 (2003). The argument that an investigation "may have" concluded that Canbaz lacked sufficient powers of reason and volition to voluntarily make a confession, and that therefore, his confession "may have" been

excluded upon proper objection, is unsustainable where Canbaz was given an opportunity to prove prejudice in his postconviction hearing and he failed to do so. Canbaz' burden was to show that an investigation *would* have concluded that Canbaz lacked sufficient powers of reason and volition to voluntarily make a confession. Only then could it be said that a motion to suppress the confession would have been sustained, and only then would we consider whether under the remaining evidence, the fact finder would have had a reasonable doubt concerning Canbaz' guilt of first degree murder. Canbaz presented no evidence in this regard. He did not bring forth a mental health expert at all. Instead, the only evidence relevant to Canbaz' voluntariness was set forth in the trial record, consisting of the testimony of Gutnik and Moore, and of the arresting officer at the voluntariness hearing. This evidence does not support a finding that Canbaz lacked sufficient powers of reason and volition to voluntarily make a confession.

It seems that Canbaz may believe that he is entitled to a presumption of both deficient performance and prejudice as to the failure to investigate the voluntariness of his confession. Canbaz sets forth our statement in *State v. Nielsen*, 243 Neb. 202, 224, 498 N.W.2d 527, 543 (1993), as follows:

> The failure of counsel to investigate or move to suppress a questionable confession is not per se ineffective assistance of counsel if it can be shown from the record that the evidence is so overwhelming against the defendant that failure to investigate or suppress the confession was a reasonable strategic move by counsel or that the defendant suffered no prejudice from counsel's inaction.

Canbaz relies heavily on the assertion that the evidence was not "overwhelming" against him. Canbaz apparently assumes that his statement was "questionable" and that therefore, so long as the evidence is not "overwhelming" against him, trial counsel's alleged failure to investigate the voluntariness of the confession was per se ineffective assistance of counsel.

The proposition quoted in *Nielsen* was derived from *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992), which presented an appeal from the district court's refusal to grant an evidentiary hearing on a motion for postconviction relief. The statement quoted is not found in the body of the opinion, but, rather,

in a syllabus point. In the opinion itself, we instead state: "There is . . . *no* per se rule mandating investigation or suppression of questionable confessions." (Emphasis supplied.) *Id.* at 916, 492 N.W.2d at 20. We thus noted that it was "debatable whether the deficiency requirement . . . is even met." *Id.* Nevertheless, we decided the case on the ground that even if the defendant could have shown that his counsel's representation was deficient, the defendant had failed to tell us why the results would have been different. The evidence against him was "overwhelming" regardless of the confession. *Id.* at 917, 492 N.W.2d at 21.

In *State v. Nielsen, supra*, we addressed a contention that the postconviction hearing judge erred in finding that statements made to law enforcement officials while in jail were voluntary. We concluded that even if we assumed that the statements constituted a confession, and further assumed they were inadmissible, any error in receiving the statements was harmless beyond a reasonable doubt because other evidence produced by the State overwhelmingly established Nielsen's guilt.

The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to law of sufficient prejudice, that course should be followed. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). In *State v. Nielsen, supra*, and *State v. Lyman, supra*, we simply disposed of the ineffective assistance of counsel claims by addressing the prejudice prong of the ineffective assistance of counsel test first. To the extent that any statement made in those cases could be construed as removing the defendant's burden to prove in a postconviction hearing both deficiency and prejudice, such language is expressly disapproved.

The postconviction court found that Canbaz' statement was made voluntarily. The record supports that conclusion, and it is not clearly erroneous. Because Canbaz failed to prove at the postconviction hearing that his statement was involuntary, a claim of ineffective assistance of counsel cannot be predicated on trial counsel's failure to object to the admission of that statement.

Items From Search of Vehicle

Canbaz next asserts that ineffective assistance resulted from trial counsel's failure to object to the introduction of items found

in Canbaz' vehicle, including the gun, gun case, handcuffs, duct tape, and ammunition. Canbaz states that "[a]ny consent given by Canbaz was the result of a forced entry into his hotel room, and in-custody questioning designed to elicit incriminating statements or evidence, specifically a consent to search his car." Brief for appellant at 9. Canbaz does not elaborate further as to how the evidence procured from the search of his vehicle was inadmissible.

[4,5] The right to be free from an unreasonable search and seizure, as guaranteed by the 4th and 14th Amendments to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice and not the product of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *Id.*

A police officer who was involved in the arrest of Canbaz and the search of his hotel room and vehicle testified that he and fellow officers entered Canbaz' hotel room pursuant to a warrant for Canbaz' arrest. He testified that Canbaz was very cooperative and that he gave consent to the search of his vehicle.

The postconviction court found that Canbaz had voluntarily given consent to the search of his vehicle, and again, such finding was not clearly erroneous. As such, trial counsel's failure to object to the admission of the evidence procured from the search of Canbaz' vehicle cannot be the basis for an ineffective assistance claim.

Advancing Improper Defense

Canbaz next asserts that trial counsel was ineffective by repeatedly making reference to the theory of "irresistible impulse," which is a defense not recognized in Nebraska. See *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984). Canbaz claims that each reference in trial counsel's closing argument to impulsive behavior was objected to by the prosecution. Canbaz asserts that rather than asking Gutnik questions about whether Canbaz acted impulsively, trial counsel should have asked Gutnik

whether Canbaz suffered from diminished mental capacity when Peralta was shot. Citing *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999), Canbaz states that diminished mental capacity is a defense recognized in Nebraska and that it "would have been fodder for a closing argument consistent with the medical diagnosis of defendant's expert." Brief for appellant at 14. Canbaz concludes: "The continued use of the impulsive theory shows that counsel was not familiar with the state of Nebraska law at the time of the trial." *Id.*

In a hearing during trial on the prosecution's motion in limine regarding Gutnik's testimony, trial counsel explained that he did not seek to expound a sudden impulse defense. Trial counsel's theory was that when Peralta ran, Canbaz reacted impulsively, and not out of premeditation. This, trial counsel explained, was wholly distinct from an "irresistible impulse." The trial court ruled that it would allow testimony as to the issue of impulsive behavior being a part of Canbaz' mental condition generally, but would not allow Gutnik to testify as to Canbaz' mental state specifically at the time of the shooting.

Gutnik accordingly later testified, without objection, that people like Canbaz with a major depressive disorder can have trouble with memory and with thinking clearly at times and that this condition leads to impulsivity. He further testified that he would expect a person suffering from that condition to have his or her judgment "impaired." Gutnik elaborated that a person suffering from a condition such as Canbaz' would have his judgment "clouded," as if looking "through a fog or a cloud and you can't quite see all the information around you, and what you do see is distorted. So you are making judgment calls based on partial information and distorted information."

During closing arguments, trial counsel explicitly stated that Canbaz was not denying responsibility for killing Peralta or claiming to have been insane at the time of the killing. Trial counsel argued that Canbaz was suffering from a major psychotic depression that impaired his ability to think clearly and clouded his reasoning. This, trial counsel argued, was relevant to deciding whether Canbaz acted with premeditation as opposed to acting as the result of a "sudden quarrel."

[6,7] The postconviction court concluded that trial counsel did not set forth an "irresistible impulse" defense, and the evidence supports that conclusion. The doctrine of "irresistible impulse" is a theory of moral insanity that is not recognized by this state. See *State v. Jacobs*, 190 Neb. 4, 205 N.W.2d 662 (1973). Trial counsel made it clear that he was not trying to argue that Canbaz acted without intent, but, rather, that the level of such intent did not rise to first degree or second degree murder. In *State v. Vosler*, 216 Neb. 461, 468, 345 N.W.2d 806, 811 (1984), we explained that "there are a variety of mental conditions which bear upon the ability to form a specific intent. A specific intent, in turn, bears at least upon the degree of criminality which may be assessed and may determine whether any criminality exists at all."

[8] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). As the above illustrates, trial counsel did in fact argue diminished mental capacity insofar as that related to premeditation and sudden quarrel. We need not decide whether every characterization of the law by trial counsel was legally correct so long as Canbaz was not prejudiced as a result. Certainly, it was an abundantly reasonable tactical decision not to go further and, as Canbaz suggests, argue that prescription antidepressants and drinking alcohol the night before the killing, combined with his depressive disorder and the stress of the situation, made him incapable of forming the requisite intent. Canbaz has failed to prove that trial counsel was ineffective in its defensive strategy.

Admission of Intent in Closing Argument

Canbaz, during oral argument for this appeal, asserted that trial counsel was also ineffective in admitting to the jury during closing argument that Canbaz acted intentionally in shooting Peralta. Specifically, trial counsel stated to the jury the following:

> Now, [the prosecutor] talked to you about intent, intentional. There is no requirement in manslaughter that it be unintentional. If it's upon a sudden quarrel, it can still be an intentional act. I think it was an intentional act. It doesn't matter. Manslaughter can be an intentional act as long as it's

> upon a sudden quarrel, and that's actually what happened in this case.

This statement was made after much argument as to Canbaz' "clouded" judgment, along with his propensity to act impulsively under the "major psychotic depression" he suffered from, and the extensive argument as to how Canbaz lacked any "plan" to kill Peralta. Trial counsel told the jury that manslaughter can be an intentional act and that Canbaz' action was an "intentional act" in an attempt to get a conviction for manslaughter, despite the expert testimony that Canbaz was capable of forming an intent of action and that he was not insane at the time of the killing.

[9] However, we need not decide whether trial counsel was deficient in making the statement that the shooting was "an intentional act" or whether any such deficiency was prejudicial, because Canbaz failed to raise this argument in his brief on appeal. To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. *Lange v. Crouse Cartage Co.*, 253 Neb. 718, 572 N.W.2d 351 (1998). See, also, *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997); *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993), *postconviction relief granted*, 249 Neb. 381, 543 N.W.2d 725 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). We thus will not address this issue further.

Failure to Object in Rebuttal Argument

[10] Lastly, Canbaz asserts that trial counsel was ineffective in failing to object to prosecution's statements during rebuttal closing argument that a "sudden quarrel" or manslaughter is "people punching each other, hitting each other, getting in a fight and somebody dies." The jury in Canbaz' trial was instructed under a step instruction for first degree murder. We have stated that a defendant convicted of first degree murder could not have been prejudiced by error in the instructions on second degree murder and manslaughter because under a step instruction, the

jury would not have reached the issues of second degree murder and manslaughter. *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004). See, also, *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003) (where jury was adequately instructed on element of intent with respect to second degree murder, any alleged failure to further define term "sudden quarrel" at earlier stage of step instruction would not constitute plain error). It likewise follows that a misstatement of an element of manslaughter during closing arguments could not have prejudiced the defendant where the jury, under a step instruction, convicted the defendant of first degree murder and therefore would not have reached the issues of second degree murder and manslaughter. The jury, having found Canbaz guilty of first degree murder, would never have considered whether the shooting arose out of a "sudden quarrel." Accordingly, the failure to object to any alleged misstatement as to the meaning of "sudden quarrel" cannot form the basis for an ineffective assistance of counsel claim.

CONCLUSION

For the foregoing reasons, we affirm the district court's order denying postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT,
v. RENEE GRIFFIN, APPELLEE.
705 N.W.2d 51

Filed October 28, 2005. No. S-05-062.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
3. **Criminal Law: Courts: Judgments: Appeal and Error.** An order of the district court reversing a judgment of the county court in a criminal case, vacating the sentence, and remanding the case for imposition of sentence may be reviewed under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004).

4. **Sentences.** In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
5. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
6. ____. Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
7. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.
8. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

Appeal from the District Court for Dakota County, MAURICE REDMOND, Judge, on appeal thereto from the County Court for Dakota County, KURT RAGER, Judge. Exceptions sustained in part and in part overruled, and cause remanded with directions.

Edward H. Matney, Dakota County Attorney, for appellant.

Bryan E. Smith, Jr., Dakota County Public Defender, and on brief, William L. Binkard, for appellee.

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

STEPHAN, J.

The State brings this appeal pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), contending that the district court for Dakota County, sitting as an intermediate appellate court, erred in modifying an appeal bond and determining that a criminal sentence entered by the county court for Dakota County was excessive. While we find no error in the modification of the appeal bond, we conclude that the district court erred in determining that the sentence was excessive.

BACKGROUND

A complaint charging Renee Griffin with third degree assault was filed in the county court on May 25, 2004. During a group

arraignment on the same day, Griffin was advised of her Fifth and Sixth Amendment rights. The court then examined Griffin individually and ascertained that she understood her rights and wished to waive reading of the complaint. The court further determined that Griffin wished to proceed without an attorney, even though she had previously filed an affidavit of financial condition. After Griffin indicated that she wished to plead guilty, the State provided a factual basis for the charge, which included allegations that Griffin was one of four persons who assaulted a victim at a bar in Homer, Nebraska, on May 20. According to the prosecutor, Griffin struck the victim with a drinking glass on the head and elbow, causing a tendon in the victim's elbow to be severed. After the factual basis was given, the court asked Griffin whether that was what had happened and Griffin responded, "No." When asked by the court, "Well, what happened? Did you assault this lady, yes or no?" Griffin responded, "Yes." Griffin then clarified that she wanted the court to accept her guilty plea. After examining Griffin to ascertain that she understood the consequences of a guilty plea, the court determined that she had entered the plea knowingly, voluntarily, and intelligently, and found her guilty of the charged offense.

Griffin then informed the court that she wished to proceed to sentencing without an attorney. The State recommended that Griffin be sentenced to the statutory maximum of 1 year in jail and a $1,000 fine due to the serious nature of the assault and the severity of the injuries suffered by the victim, which it alleged could result in permanent disfigurement. See Neb. Rev. Stat. § 28-106 (Cum. Supp. 2004). When asked if she had anything to say with respect to sentencing, Griffin replied only that she had a 2-year-old son and that "due to the stupidity of my actions that night . . . I believe I learned my lesson." The county judge sentenced Griffin to 350 days in jail, noting, "I could've sent you to the penitentiary. Your actions are, as you've indicated, very stupid. There's no excuse for them."

On June 23, 2004, Griffin filed a notice of appeal "from the judgment and sentence of the [county] court entered herein on May 25, 2004, for the reason that said sentence was excessive." The notice of appeal was signed by Griffin and an attorney appearing on her behalf. Griffin did not file a separate statement

of errors with the district court, as required by Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 2000). On June 25, the county court issued an order suspending Griffin's period of confinement during the appeal on the condition that she either enter into a written recognizance with the State of Nebraska in the amount of $10,000 with surety or sureties approved by the county court or deposit a cash bond of $1,000. See Neb. Rev. Stat. § 25-2730(3) (Cum. Supp. 2004). On or about July 20, while the appeal was pending, Griffin filed a motion requesting that the district court reduce the terms of her appeal bond. See § 25-2730(6). On August 3, the district court granted the motion and reduced the bond requirement to a recognizance of $10,000 secured by Griffin's signature.

On December 8, 2004, the district court entered an order finding that the assignment of error in Griffin's appellate brief "complied in substance" with the requirements of rule 52. The court thereafter analyzed whether the county court abused its discretion in sentencing Griffin. Finding that the sentence was nearly the statutory maximum, that the county court failed to order a presentence investigation, and that the county court did not articulate sufficient reasons for its imposition of the sentence, the district court concluded that the sentence imposed was excessive, and reversed, and remanded for further proceedings. The State requested and was granted leave to file this appeal pursuant to § 29-2315.01.

ASSIGNMENTS OF ERROR

The State assigns, restated and renumbered, (1) that the district court erred in modifying the appeal bond to a personal recognizance bond with no surety; (2) that the district court, sitting as an intermediate appellate court, erred in reviewing Griffin's appeal of her sentence under an abuse of discretion standard when Griffin failed to timely file a statement of errors with the district court; (3) that the district court erred in concluding that the county court abused its discretion in imposing Griffin's sentence.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the

court below. *State v. Jonusas*, 269 Neb. 644, 694 N.W.2d 651 (2005); *State v. Pathod*, 269 Neb. 155, 690 N.W.2d 784 (2005).

[2] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

ANALYSIS

Modification of Appeal Bond

Section 25-2730 governs the initial setting and subsequent modification of bonds in criminal appeals from county to district court. The statute provides in pertinent part:

> (3) . . . Execution of a sentence to a period of confinement shall be suspended only if (a) the county court, in its discretion, allows the defendant to continue at liberty under the prior recognizance or bail or (b) the defendant enters into a written recognizance to the State of Nebraska, with surety or sureties approved by the county court or with a cash bond, filed with the clerk of the county court. The condition of the recognizance shall be that the defendant will prosecute the appeal without delay and abide and perform the judgment and sentence of the district court. Upon the filing of the notice of appeal, the county court shall fix the amount of the recognizance or cash bond, which shall be a reasonable amount. The cash bond shall be returned upon the fulfillment of the conditions of the bond.
>
> . . . .
>
> (6) In any case, the district court, on motion after notice and hearing and upon such terms as justice shall require, may stay any order or judgment appealed from, order a renewal or additional surety of an undertaking, or order the amount of the undertaking or recognizance increased or decreased. The action of the district court shall be certified by the clerk to the clerk of the county court.

The State does not question that the district court was authorized by § 25-2730(6) to amend the terms of Griffin's bond. However, it contends that the statute does not permit the district

court to alter the form of the bond from a cash or surety bond specified in § 25-2730(3) to a personal recognizance bond with no approved surety.

There is no prior case law interpreting § 25-2730. Whether the statute permits the bond reduction ordered by the district court is an issue of statutory interpretation for which we are required to make an independent conclusion. See, *State v. Jonusas, supra*; *State v. Pathod, supra*. We conclude that the plain meaning of that portion of § 25-2730(6) which authorizes the district court to "order the amount of the undertaking . . . increased or decreased" permitted the reduction of the appeal bond in this case to "a recognizance bond of $10,000 secured by the signature of [Griffin]." This is consistent with the general discretion of the district court to prescribe the amount and conditions of an appeal bond in a criminal case. See *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994).

SENTENCE

[3] An order of the district court reversing a judgment of the county court in a criminal case, vacating the sentence, and remanding the case for imposition of sentence may be reviewed under § 29-2315.01. *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989). In this case, the State contends that appellate review is limited to plain error because Griffin did not properly assign error in her appeal to the district court by complying with rule 52(I)(G). That rule requires that "[w]ithin 10 days of the filing of the bill of exceptions in the district court, the appellant shall file with the district court a statement of errors, which shall consist of a separate, concise statement of each error a party contends was made by the trial court." *Id.* The rule further states that "[c]onsideration of the case will be limited to errors assigned and discussed," although "[t]he district court may, at its option, notice a plain error not assigned." *Id.* The record in this case reflects that the bill of exceptions was filed in the district court on July 14, 2004. As noted above, Griffin did not file a statement of errors as required by rule 52(I)(G). However, the district court found that she had "complied in substance" with the rule because her brief on appeal submitted on July 20 raised the issue of excessive sentence.

Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error. See *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997). See, also, *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995); *State v. Fiedler*, 5 Neb. App. 629, 562 N.W.2d 380 (1997), *affirmed* 253 Neb. 727, 571 N.W.2d 789 (1998). We disagree with the conclusion of the district court that assignments of error in an appellate brief constitute compliance with rule 52(I)(G), inasmuch as such briefs are not filed of record in the district court.

However, the record reflects that Griffin specifically raised the issue of excessive sentence in her notice of appeal which was filed in the county court on June 23, 2004, and included in the transcript filed in the district court pursuant to rule 52(I)(B)(1)(c). In *State v. Boye*, 1 Neb. App. 548, 550, 499 N.W.2d 860, 861 (1993), the Nebraska Court of Appeals considered a criminal appeal that originated in the county court and was appealed to the district court pursuant to a notice of appeal, which notice recited that the " 'conviction is contrary to law,' " that " 'certain evidence was improperly entered over objection,' " and that " 'the sentence imposed is excessive.' " No statement of errors was filed pursuant to rule 52(I)(G). The Court of Appeals held that the notice of appeal was not an adequate substitute for a statement of errors, except for the claim of excessive sentence. The court reasoned that the "purpose of the rule is to specifically direct the attention of the reviewing court to precisely what error was allegedly committed by the lower court and to advise the nonappealing party of what is specifically at issue in the appeal" and concluded that the statement in the notice of appeal claiming excessive sentence "is concise, fulfills the purpose of the rule, and will be reviewed by this court as an assigned error." 1 Neb. App. at 550, 499 N.W.2d at 861. We reach the same conclusion here, and thus, we treat the issue of excessive sentence as assigned error. Thus, the issue before us is whether the district court, sitting as an intermediate appellate court, erred in concluding that the county court abused its discretion in sentencing Griffin to serve a term of confinement of 350 days, with credit for time served. See *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989).

[4-8] In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.* Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id.* A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Anglemyer, supra.*

Griffin was convicted of assault in the third degree, a Class I misdemeanor punishable by a maximum of 1 year's imprisonment, a $1,000 fine, or both. See Neb. Rev. Stat. §§ 28-310 (Reissue 1995) and 28-106. The record reflects that Griffin's crime involved considerable violence and resulted in a significant injury. The transcript includes the affidavit of the arresting officer stating that according to witnesses, Griffin engaged in a fistfight with the victim while in a bar and then dragged the victim to the ground and struck her with a glass until it broke, severing a tendon in the victim's elbow. These facts were recited by the prosecutor as the factual basis for Griffin's plea. In recommending a maximum sentence, the prosecutor further represented that the victim would require surgery and may have permanent disfigurement due to the injury inflicted by Griffin.

The transcript includes the citation issued to Griffin which lists her date of birth as April 23, 1979. The record does not reflect information concerning Griffin's prior criminal record, if any, or her mentality, education, experience, or social or cultural background, which would generally be included in a report of presentence investigation. See Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2004). No presentence investigation was ordered in this case. Because Griffin's offense was a Class I misdemeanor, the county court could have ordered a presentence investigation, but was not required to do so. See, § 29-2261(1) and (2); *State v. Jablonski*, 199 Neb. 341, 258 N.W.2d 918 (1977), *overruled on other grounds, State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980); *State v. Cardin*, 194 Neb. 231, 231 N.W.2d 328 (1975). The only mitigating information offered by Griffin when she appeared for sentencing was that she was the mother of a 2-year-old child and that due to the "stupidity" of her actions, she felt that she had learned a lesson. The county judge commented that the victim would "have to live with the lesson you've learned for quite a while." Even assuming for purposes of our review that Griffin had no prior criminal record, we cannot conclude that the county court abused its discretion in imposing the sentence. Given the senseless violence of Griffin's conduct and its consequences for her victim, a sentence at the upper end of the sentencing range for a Class I misdemeanor cannot be deemed clearly untenable or unjust.

Under Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2004), this court may reverse an appellate ruling of a district court in a criminal case where the defendant has not been placed legally in jeopardy. In *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989), an appeal brought by the State pursuant to § 29-2315.01, we held that the district court, sitting as an intermediate appellate court, erred in determining that the county court had imposed an excessive sentence and that reinstatement of the sentence imposed by a county court after it was vacated by the district court would not subject the defendant to double jeopardy. Our holding was based upon *United States v. DiFrancesco*, 449 U.S. 117, 136, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980), in which the U.S. Supreme Court held that "[t]he double jeopardy considerations that bar reprosecution after an acquittal do not prohibit

review of a sentence." Accordingly, we order the reinstatement of the sentence originally imposed upon Griffin by the county court for Dakota County.

CONCLUSION

For the reasons discussed above, we overrule the State's exception to the order of the district court for Dakota County modifying the appeal bond. However, we sustain the State's exception to the separate order of the district court entered on December 8, 2004, in which that court determined that Griffin's sentence was excessive. We hereby remand the cause to the district court for Dakota County with directions to reinstate and affirm the sentence imposed upon Griffin by the county court for Dakota County.

EXCEPTIONS SUSTAINED IN PART AND IN PART OVERRULED, AND CAUSE REMANDED WITH DIRECTIONS.

CITY OF LINCOLN, NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. REALTY TRUST GROUP, INC., APPELLEE AND CROSS-APPELLANT.

705 N.W.2d 432

Filed November 4, 2005. No. S-04-813.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Rules of Evidence: Expert Witnesses: Real Estate.** Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), is part of the statutory scheme that governs the admissibility at trial of expert opinion testimony regarding the value of real estate.
4. **Rules of Evidence: Expert Witnesses.** Four preliminary questions must be answered in order to determine whether an expert's testimony is admissible: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded in light of Neb. Evid. R.

403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations.

5. **Eminent Domain: Damages.** The determination of similarity of comparable tracts of land for purposes of admissibility and the determination of damages is left largely to the discretion of the fact finder.
6. **Expert Witnesses.** 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.
7. **Expert Witnesses: Records.** An expert's opinion should be rejected if the record does not support a finding that the expert had a sufficient foundation for his or her opinion.
8. **Expert Witnesses.** A perceived weakness with the sufficiency of an expert's foundation does not necessarily translate into a challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
9. ____. Not every attack on expert testimony amounts to a claim under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
10. **Rules of Evidence: Expert Witnesses.** In a bench trial, an expert's testimony will be admitted under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), and given the weight to which it is entitled.

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

Dana W. Roper, Lincoln City Attorney, and Margaret M. Blatchford for appellant.

Douglas W. Ruge II for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellant, the City of Lincoln, Nebraska, initiated this condemnation action in the county court for Lancaster County against appellee, Realty Trust Group, Inc. (Realty Trust), as part of a widening project for O Street in Lincoln. The property condemned included the right of access for one of two driveways that provided access to Realty Trust's property from O Street. Pursuant to statute, the county court appointed three appraisers to appraise the property and determine the damages sustained by Realty Trust.

Following the return of the appraisers' award, the city filed a petition with the district court for Lancaster County, and Realty Trust filed a responsive pleading seeking additional relief.

The district court case was tried to the court. Prior to trial, the city filed a motion to prevent Realty Trust's expert witness, a real estate appraiser, from testifying at trial regarding the after-taking value of the property for the reason that the expert's opinion was unreliable under the framework set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and adopted by this court in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). The district court treated the motion as a motion in limine and overruled the city's motion. The city renewed its motion during trial, and the district court again overruled the motion.

Following the trial, the district court entered judgment for Realty Trust in the amount of $174,940. The city filed a motion for new trial, and Realty Trust filed a motion to alter or amend the judgment. The city's new trial motion was denied. Realty Trust's motion to alter or amend the judgment was sustained, in part. In connection with this ruling, the district court indicated that it had relied on the opinion of Realty Trust's expert and that having determined that it made an error in its calculation of the award, the district court increased the judgment by $9,853, for a total judgment in favor of Realty Trust of $184,793. The city appeals, and Realty Trust cross-appeals. We conclude that with the exception of the district court's failure to award attorney and expert witness fees to Realty Trust, the district court did not err. Accordingly, we affirm in part, and in part reverse, and remand with directions.

STATEMENT OF FACTS

In July 2002, the city initiated a condemnation proceeding in the county court for Lancaster County to condemn certain commercial property belonging to Realty Trust as part of a widening project for O Street in Lincoln. The record reflects that Realty Trust's property is located generally on the southwest corner of 70th and O Streets and consists of an irregularly shaped parcel with approximately 575 feet of frontage along the south side of O Street and approximately 345 feet of frontage along the west side of 70th Street.

In the condemnation proceeding, the city sought to obtain fee title to a portion of Realty Trust's property. The city also sought a temporary easement during construction and permanent easements for sanitary sewer and for street lighting. Finally, because part of the widening project involved creating a right-turn lane from O Street onto 70th Street, the city sought to acquire the right of access for the easternmost of the two driveways that provided access to Realty Trust's property from O Street. In argument before this court, the parties agreed that the loss of this right of access as a component of the after-taking value of Realty Trust's property is the focus of this appeal.

Following the city's initiation of its condemnation proceeding, the county court appointed three appraisers. The three appraisers returned a report awarding Realty Trust $124,693 in damages as a result of the city's taking. The city filed a petition in the district court for Lancaster County objecting to the appraisers' report. In its responsive pleading filed in district court, Realty Trust also took issue with the damages awarded in the appraisers' report.

Before trial, the city moved to prevent Realty Trust's expert witness, Robin Spence, a real estate appraiser, from testifying at trial. On January 23, 2004, the district court held an evidentiary hearing on the city's motion to determine whether to admit Spence's testimony. The city couched its argument as one directed to the reliability of Spence's testimony and sought exclusion under *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). In *Schafersman*, this court adopted the framework for evaluating expert testimony set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its progeny (*Daubert/Schafersman*). Realty Trust opposed the motion and argued that *Daubert/Schafersman* was not implicated and that the city's challenge to Spence's testimony was a conventional challenge directed to the foundation of Spence's opinion.

In its "Order Re: Motion in Limine on Defendant's Expert" filed February 3, 2004, the district court denied the city's motion, stating that "[t]his case is to be tried to the court. In this context, the court finds that the motion should be denied."

The case came on for trial to the court on March 23 and 24, 2004. Six witnesses testified at trial, including Richard Keith,

the city's expert witness, and Spence. At the commencement of the trial, the parties stipulated that the only issue before the court was the compensation due Realty Trust as a result of the taking.

During trial, Spence testified that he was a real estate appraiser with approximately 19 years' experience appraising property. He further testified that he was a member of the Appraisal Institute, signifying his completion of a 5-year evaluation period during which peers in the appraisal industry evaluated his appraisal skills. He also testified that he was required to complete continuing education in order to retain this membership designation. Spence stated that he appraised on average "around [one] hundred" properties per year, approximately half of which were commercial properties.

During Spence's testimony, the city renewed its objection, claiming that Spence was "not qualified to make an opinion on damages." The district court overruled the city's objection without comment. Spence was permitted to testify.

During trial, Keith and Spence agreed on a number of areas regarding the after-taking value of Realty Trust's property. Keith and Spence both stated that the highest and best use of the property was "vacant for redevelopment." Further, both experts agreed that Realty Trust had sustained $54,543 in damages due to the city's taking of the temporary easement, the permanent easement, and the property in fee. The primary area of difference between the two experts' opinions centered on the impact on the after-taking value of Realty Trust's property due to the loss of one of the two driveways that provided access to Realty Trust's property from O Street. Keith valued the loss of the right of access at $100. Spence described the methodology he employed and thereafter stated that in his opinion, the loss of value due to the closing of the driveway was $527,423. According to Keith's testimony, the value of the entire taking was $54,793. Spence valued the taking at $582,216.

The evidence adduced at trial also included the testimony of Robert Weigel, who, along with his wife, was the owner of Realty Trust. Weigel testified that the present value of the property in 2002 was $201,464. Also included in the record is a copy of a 1979 judgment and order issued by the district court for Lancaster County in docket 257, page 193, on an application for

a writ of mandamus filed by Weigel and his wife against the State of Nebraska, Department of Roads, and the City of Lincoln. The mandamus action involved the same property that is the subject of this condemnation proceeding and was based, in part, upon a 1970 settlement between Weigel and the State of Nebraska, Department of Roads. In the 1970 settlement, the State, in summary, agreed to build a driveway permitting access to Weigel's property from O Street. According to the 1979 judgment in docket 257, page 193, the district court, relying in part upon the 1970 settlement, ordered the city to remove traffic signs restricting access to Realty Trust's easternmost driveway from O Street, concluding that the "placement of signs on either side of [the] driveway reading 'DO NOT ENTER' constitute[d] a taking of property . . . without due process."

Following the conclusion of the bench trial in the instant case, the district court entered judgment on April 12, 2004, in favor of Realty Trust in the amount of $174,940. The city filed a motion for new trial, and Realty Trust filed a motion to alter or amend the judgment. In its motion for new trial, the city raised a number of issues concerning Spence's testimony. The city's motion for new trial was overruled.

Realty Trust's motion to alter or amend the judgment was sustained in part. In support of its posttrial motion, Realty Trust had argued, inter alia, that the district court erred in its calculation of damages. Acknowledging that the values it had used were based on Spence's opinion, the district court agreed with Realty Trust's argument and concluded that it had made an error in its April 12, 2004, order in valuing the temporary easement. The district court concluded that "[t]his error was carried into the calculation of the judgment in this case." The district court ordered that the judgment awarded in favor of Realty Trust be increased by $9,853, for a total judgment of $184,793.

In its motion to alter or amend the judgment, Realty Trust had also argued that the district court erred in failing to award it its attorney and expert witness fees under Neb. Rev. Stat. § 76-720 (Reissue 2003). The district court overruled that portion of Realty Trust's motion to alter or amend the judgment, stating that "fees should not be awarded."

The city appealed, and Realty Trust cross-appealed.

ASSIGNMENTS OF ERROR

The city assigns seven errors that can be restated as four. The city claims, restated, that the district court erred (1) in overruling the city's *Daubert/Schafersman* motion in relation to Spence's opinion testimony, including failing to make specific findings of fact in its order overruling the motion; (2) in overruling the city's foundational objections to Spence's opinion testimony; (3) in awarding compensation to Realty Trust attributable to the loss of access from O Street as a result of the taking; and (4) in overruling the city's motion for new trial.

For its cross-appeal, Realty Trust assigns four errors that can be restated as three. Realty Trust claims, restated, that the district court erred (1) in finding that Realty Trust was not entitled to its attorney and expert witness fees under § 76-720, (2) in overruling Realty Trust's objection to the city's expert witness' review of Spence's appraisal, and (3) in its award of damages as a result of the city's condemnation action.

STANDARD OF REVIEW

[1,2] Generally, a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

ANALYSIS

Appeal: The District Court Did Not Abuse Its Discretion by Admitting Spence's Testimony

On appeal, the city claims that the district court erred in overruling the city's motion to exclude Spence's expert opinion evidence. The city urges us to apply a *Daubert/Schafersman* analysis to this issue. We decline to do so and determine that the district court did not abuse its discretion in admitting Spence's testimony and in according it the weight it deserved.

We have noted:

> Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), provides that "[i]f scientific, technical, or other

> specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Pursuant to Neb. Rev. Stat § 27-705 (Reissue 1995), "an expert's opinion is ordinarily admissible if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination."

Heistand v. Heistand, 267 Neb. 300, 309-10, 673 N.W.2d 541, 549 (2004).

[3] We have previously stated that Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), is part of the statutory scheme that governs the admissibility at trial of expert opinion testimony regarding the value of real estate. *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989). As noted above in our standard of review, generally, a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Smith v. Colorado Organ Recovery Sys., supra.* A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

[4] Four preliminary questions must be answered in order to determine whether an expert's testimony is admissible: (1) whether the witness qualifies as an expert pursuant to rule 702; (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded in light of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003); *Childers v. Phelps County*, 252 Neb. 945, 568 N.W.2d 463 (1997). The record reflects that prior to the trial in this case, the city filed a motion objecting to Spence's

expert appraiser testimony and challenging the admissibility of his opinion concerning damages. On January 23, 2004, an evidentiary hearing was held on the city's motion, at which hearing numerous affidavits, depositions, and other exhibits were admitted. The district court permitted oral argument on the motion, and the parties were allowed to submit written argument following the hearing. Thereafter, in an order filed February 3, the district court overruled the motion, stating that the "case is to be tried to the court. In this context, the court finds that the motion should be denied."

On appeal, the city challenges the district court's receipt of Spence's expert testimony in which he rendered an opinion concerning the after-taking value of the property, which opinion served as a basis for the district court's award of damages. Spence's opinion was derived, in part, from his experience, his examination of other commercial properties, and his review of land sales.

The city couches its objection to Spence's opinion in terms of reliability and, therefore, argues that consideration of the admissibility of Spence's testimony should be made under the *Daubert/Schafersman* framework, which replaced the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and shifted the focus of the inquiry regarding the admissibility of certain expert testimony to an assessment of reliability and methodology. Realty Trust responds that the core of the city's argument is an objection to the foundation of Spence's expert opinion that does not implicate *Daubert/Schafersman* and should be analyzed under a conventional expert opinion analysis. We agree with Realty Trust.

[5] As stated in its brief, the city objected to Spence's opinion, which was based on the comparable sales method, because of a "lack of comparable sales for the after-taking value" and because of certain assumptions. Brief for appellant at 15. Realty Trust notes that the city's objection essentially takes issue with the comparables which Spence selected and with the fact that Spence's opinion was based on such comparables. In this regard, Realty Trust correctly notes that we have stated that the determination of similarity of comparable tracts for purposes of admissibility and the determination of damages is left largely to

the discretion of the fact finder. See *Thacker v. State*, 193 Neb. 817, 229 N.W.2d 197 (1975).

[6-8] We recognize that 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. *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004). That is, an expert's opinion should be rejected if the record does not support a finding that the expert had a sufficient foundation for his or her opinion. *Id.* A perceived weakness with the sufficiency of an expert's foundation, however, does not necessarily translate into a challenge under *Daubert/Schafersman*. Given the nature of the city's concern regarding Spence's testimony, we determine, in this bench trial, that a *Daubert/Schafersman* hearing was not indicated and that the district court properly treated the matter as the subject of a motion in limine.

[9] It has been observed that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), "does not create a special analysis for answering questions about the admissibility of all expert testimony." *U.S. v. Sinclair*, 74 F.3d 753, 757 (7th Cir. 1996). Indeed, we have previously noted that not every attack on expert testimony amounts to a *Daubert/Schafersman* claim. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005) (stating that challenge to expert witnesses' credibility is not *Daubert/Schafersman* claim). Elsewhere, it has been stated with regard to scientific opinions that "if it is a technique of uncontroverted validity [the *Daubert*] inquiry can be resolved by judicial notice." *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 n.10 (3d Cir. 1994). See, also, *U.S. v. Johnson*, 56 F.3d 947 (8th Cir. 1995) (noting that because court had previously determined DNA profiling was reliable under *Daubert*, courts in future could take judicial notice of finding of reliability). In this regard, we note that provided there is adequate foundation, materiality, and relevance, we have long accepted the comparables method for valuation as a valid approach, and we determine that we need not reconsider its validity on this occasion. See *Wear v. State of Nebraska*, 215 Neb. 69, 75, 337 N.W.2d 708, 713 (1983) (stating in eminent domain case that

"evidence as to the sale of comparable property admissible as evidence of market value").

In the area of condemnation, the courts have been especially reluctant to exclude expert opinions regarding damages under a *Daubert* analysis, noting that the gatekeeper function of *Daubert* is not intended to serve as a replacement for the adversary system. See, e.g., *U.S. v. 14.38 Acres of Land, Sit. in Leflore Cty. MS*, 80 F.3d 1074 (5th Cir. 1996). In this regard, it has been noted that proper deference should be shown to the fact finder as the arbiter of conflicting opinions in condemnation cases and that "[t]his is especially true in an eminent domain action, in which '[e]xpert opinion testimony acquires special significance . . . where the sole issue is the value of condemned property.' " *Id.* at 1077. See, similarly, *Guadalupe-Blanco River Authority v. Kraft*, 39 S.W.3d 264 (Tex. App. 2001), *reversed on other grounds* 77 S.W.3d 805 (Tex. 2002).

The record reflects that Spence demonstrated he had sufficient knowledge, skill, training, and education to establish himself as an expert in real estate appraisal. Pursuant to rule 702, Spence demonstrated that he had a reliable basis in knowledge and experience in the discipline. Thus, he was qualified to testify as an expert witness on the issues of values and damages. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). Spence's testimony was based on an accepted approach to appraisals, was relevant, and was designed to assist the trier of fact as to the controverted issues of values and damages. The district court did not abuse its discretion in receiving Spence's testimony into evidence.

[10] In the instant case, the city's objection to Spence's expert opinion is properly treated as a foundational objection under rule 702, and the record shows Spence's opinion had a sufficient foundation to be admitted. The distinction between admissibility and weight, however, becomes critical. See *Perry Lumber Co. v. Durable Servs.*, 266 Neb. 517, 667 N.W.2d 194 (2003). In a bench trial, an expert's testimony will be admitted under rule 702 and given the weight to which it is entitled. See, generally, *Eicher v. Mid America Fin. Invest. Corp., ante* p. 370, 702 N.W.2d 792 (2005) (stating that in bench trial, it is presumed court considered only competent and relevant evidence). We

note that it has been observed elsewhere in a case involving challenges to the admissibility of experts' opinions, regarding the value of a mobile home and mold and air quality in a mobile home, that the

> majority of Plaintiff's objections attack the credibility of the testimony by trying to establish that the experts did not have adequate information prior to making their determination. . . . [I]t is not this Court's responsibility to determine the correctness of the overall opinion. Plaintiff's objections are more properly the subject of cross-examination than a *Daubert* motion.

Pizal v. Monaco Coach Corp., 374 F. Supp. 2d 653, 656 (N.D. Ind. 2005). Similarly, in the instant case, the district court did not abuse its discretion in admitting Spence's opinion testimony and, following cross-examination, crediting his testimony in some degree in its determination of damages.

For the reasons stated above, we determine the city's assignments of error related to this issue are without merit.

Appeal: The City's Remaining Assignments of Error Are Without Merit

We have considered the city's remaining assignments of error, and we conclude they are without merit.

Cross-Appeal: The District Court Abused Its Discretion by Denying Realty Trust an Award of Attorney and Expert Witness Fees

In its cross-appeal, Realty Trust assigns as error the district court's refusal to award Realty Trust its attorney and expert witness fees. Pursuant to § 76-720, when both parties object to the award of the appraisers "and the final judgment is greater in any amount than the award, the court may in its discretion award to the condemnee a reasonable sum for the fees of his or her attorney and for fees necessarily incurred for not more than two expert witnesses." In this case, both parties objected to the award of the appraisers, and the district court's judgment exceeded the appraisers' award.

We have reviewed the record and note that the instant case was subject to considerable pretrial activity; the trial lasted 2

days, including the presentation of numerous witnesses and documentary evidence; and the case was complex. The district court gave no reason for the denial of attorney and expert witness fees. In view of the increase in the final award, Realty Trust was eligible for attorney and expert witness fees under § 76-720.

Given the record presented on appeal, we conclude the district court abused its discretion in failing to award Realty Trust the fees for its attorney and up to two expert witnesses. Accordingly, we reverse that portion of the district court's order that denied Realty Trust its attorney and expert witness fees and remand the cause with directions to award Realty Trust a reasonable sum for its attorney fees and for the fees necessarily incurred by up to two of its expert witnesses.

CROSS-APPEAL: REALTY TRUST'S REMAINING ASSIGNMENTS OF ERROR ARE WITHOUT MERIT

We have considered Realty Trust's remaining assignments of error, and we conclude they are without merit.

CONCLUSION

For the reasons stated above, we conclude that the district court did not abuse its discretion in its receipt of evidence and its reliance thereon in making its award. We further conclude, however, that given the record in the instant appeal, the district court abused its discretion in failing to award Realty Trust's attorney and expert witness fees when both parties objected to the initial appraiser award and the district court's judgment exceeded the appraisers' award. Accordingly, we affirm the district court's judgment in this case in all respects, except for that portion of the judgment that denied Realty Trust its attorney and expert witness fees, and we remand the cause to the district court with directions to award attorney and expert witness fees in accordance with the provisions of § 76-720.

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

HENDRY, C.J., not participating.

GARY R. HEITZMAN, APPELLANT, V. HARLAN THOMPSON ET AL., APPELLEES.

705 N.W.2d 426

Filed November 4, 2005. No. S-04-928.

1. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Rules of the Supreme Court: Pleadings.** Neb. Rev. Stat. § 25-801.01 (Cum. Supp. 2004) provides that the Nebraska Rules of Pleading in Civil Actions must be followed in all civil actions filed on or after January 1, 2003.
3. **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.
4. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error.
5. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be construed liberally; if as so construed the petition states a cause of action, the demurrer must be overruled.
6. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
7. **Evidence: Pleadings: Appeal and Error.** An appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
8. **Actions: Mental Distress.** To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege facts showing (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.
9. **Mental Distress.** Whether conduct is extreme and outrageous is judged on an objective standard based on all the facts and circumstances of the particular case.
10. ____. To recover for intentional infliction of emotional distress, the facts must be such that when heard, an average member of the community would resent the actor and exclaim, "Outrageous!"
11. ____. Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that result from living in society do not rise to the level of extreme and outrageous conduct.
12. **Public Health and Welfare: Death.** Under Neb. Rev. Stat. § 71-1339 (Cum. Supp. 2002), the right to control the disposition of a deceased's remains vests first in the surviving spouse, unless other directions have been given by the decedent.

Appeal from the District Court for Thurston County: DARVID D. QUIST, Judge. Affirmed.

Scott D. Freese for appellant.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellee Harlan Thompson.

Michael J. Frey, and, on brief, Tonya A. Oetken, of Hellige, Frey & Roe, R.L.L.P., for appellees Dale B. Meyer and Cynthia Struve.

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

PER CURIAM.

Gary R. Heitzman sued his stepbrother, Harlan Thompson; Dale B. Meyer; and Cynthia Struve for intentional infliction of emotional distress. The claim arose when Thompson, a licensed funeral director, transported and embalmed the body of Heitzman's father without notifying him. The district court sustained Thompson's demurrer and dismissed the petition because it lacked sufficient facts to state a cause of action. Heitzman appeals. Because Heitzman did not plead facts that rise to the level of outrageous conduct, his petition fails to state a cause of action for intentional infliction of emotional distress.

BACKGROUND

We summarize the factual allegations in Heitzman's petition, which for the purposes of reviewing a demurrer, we accept as true. Heitzman is the natural son of Ralph Heitzman (Ralph), who died on July 29, 2000. In addition to Heitzman, Ralph was survived by his wife, Marcella Thompson-Heitzman (Marcella), and stepson, Thompson. Thompson is a licensed funeral director in both Nebraska and Iowa.

On July 29, 2000, Thompson removed Ralph's body from his home and transported it to the Meyer Brothers Colonial Chapel, a funeral home in Sioux City, Iowa, operated by codefendants Meyer and Struve. Thompson, however, did not obtain a transit permit before moving the body. At the funeral home, Thompson embalmed Ralph's body without notifying Heitzman. Thompson

embalmed the body "under the direction and control, and pursuant to the authority of Defendants" Meyer and Struve, and in his capacity as a licensed funeral director.

Thompson also contacted the Thurston County sheriff's office, telling them that Ralph died at home and that the deputy sheriff or county coroner need not verify Ralph's death. Heitzman alleged in his amended petition that Thompson also "made false and fraudulent statements to [the] Sheriff's office relative to Ralph Heitzman dying while in hospice care," although the content of these statements was not addressed in the petition. Further, he alleged Thompson did not notify the Nebraska Bureau of Vital Statistics that Ralph's death certificate could not be completed and filed within 5 business days after the death.

In addition, the petition states that

> the actions of the Defendant Harlan Thompson are outrageous, grossly immoral and dishonorable conduct by said Defendant Harlan Thompson and that the same were intentional acts, and were breaches of the obligation of the Defendant Harlan Thompson as a licensed funeral director and embalmer, towards the Plaintiff herein and constitutes [sic] Unprofessional Conduct of a Licensed Funeral Director or Embalmer of the State of Nebraska.

The petition further states that Meyer and Struve's

> participation in the receipt of the body of Ralph Heitzman, the embalming of the body of Ralph Heitzman on the premises of the Meyer Brothers Colonial Chapel and the other actions of the Defendant Harlan Thompson, constitutes [sic] the permitting, aiding or abetting the gross immoral or dishonorable conduct of [Thompson] and constitute willful and intentional acts of outrageous conduct to the Plaintiff by Defendants Dale B. Meyer and Cynthia Struve, whom [sic] owed a duty of care to Plaintiff regarding the same.

Because of the defendants' actions, Heitzman has alleged "general damages consisting of pain and suffering, anxiety, sleep loss, high blood pressure, extreme emotional distress, embarrassment and public humiliation in his community, and special damages for mental health counseling, doctor visits and prescriptive medications."

Thompson demurred, claiming the petition failed to set forth facts sufficient to state a claim. Treating the demurrer as a motion pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), the court sustained the demurrer and gave Heitzman 21 days to further plead.

After Heitzman amended his petition, Thompson filed another demurrer for failure to state a claim. The court sustained the demurrer, treating it as a rule 12(b)(6) motion. The court dismissed Heitzman's action as to Thompson, ruling that the petition failed to state a claim upon which relief could be granted and that the defects could not be cured by amendment. Heitzman then appealed, but the Nebraska Court of Appeals dismissed for lack of jurisdiction because the petition was still pending against defendants Meyer and Struve. See *Heitzman v. Thompson*, 12 Neb. App. li (No. A-03-869, Apr. 19, 2004).

On remand, Meyer and Struve demurred to Heitzman's amended petition, alleging that it failed to state a claim. The court sustained the demurrer and dismissed the action as to Meyer and Struve. Heitzman then appealed the sustaining of the demurrers and dismissing of the action.

ASSIGNMENTS OF ERROR

Heitzman assigns that the district court erred by sustaining Thompson's demurrer to the amended petition and dismissing the action as to Thompson.

STANDARD OF REVIEW

[1] When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997).

ANALYSIS

[2,3] Before we address the district court's ruling on Thompson's demurrer, we pause to clarify any confusion as to what pleading rules apply. It appears that the court and the parties were confused whether the demurrer filed after January 1, 2003, should be treated as a rule 12(b)(6) motion. Neb. Rev. Stat.

§ 25-801.01 (Cum. Supp. 2004) provides that the Nebraska Rules of Pleading in Civil Actions must be followed in all civil actions filed on or after January 1, 2003. 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. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). Here, Heitzman filed the original petition on July 26, 2002. Thus, we treat Thompson's demurrers as demurrers, not as rule 12(b)(6) motions to dismiss.

Meyer and Struve's Demurrer

[4] Although Heitzman appealed the sustaining of both demurrers, he assigned error only as to Thompson's demurrer. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error. *Eicher v. Mid America Fin. Invest. Corp.*, *ante* p. 370, 702 N.W.2d 792 (2005). Because Heitzman does not assign as error that the court sustained Meyer and Struve's demurrer, we do not address it; we affirm the district court's order sustaining Meyer and Struve's demurrer and the dismissal of the action as to them.

Intentional Infliction of Emotional Distress

[5-7] In ruling on a demurrer, the petition is to be construed liberally; if as so construed the petition states a cause of action, the demurrer must be overruled. *Vosburg v. Cenex-Land O'Lakes Agronomy Co.*, 245 Neb. 485, 513 N.W.2d 870 (1994). A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Id.* But an appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Id.*

[8] To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege facts showing (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and

(3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. See *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997).

[9,10] Whether conduct is extreme and outrageous is judged on an objective standard based on all the facts and circumstances of the particular case. *Brandon v. County of Richardson, supra.* The facts must be such that when heard, an average member of the community would resent the actor and exclaim, "Outrageous!" See Restatement (Second) of Torts § 46, comment *d.* at 73 (1965).

[11] Moreover, mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that result from living in society do not rise to the level of extreme and outrageous conduct. *Brandon v. County of Richardson, supra* (citing Restatement, *supra*). We have set a high hurdle for establishing outrageous conduct. See, e.g., *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981).

In *Davis*, the plaintiff was burned when a filling station attendant negligently splashed radiator fluid on her, burning her face, neck, and back. Because her clothes were soaked with hot radiator fluid, the plaintiff was forced to remove her shirt and part of her undergarments. The plaintiff's sister then asked the attendants for a towel so the plaintiff could cover herself, and after two or three requests, a station employee finally gave her a dirty fender cover. The two women decided to seek emergency treatment for the plaintiff and tried to leave. When the car would not start, the station attendant told them he had removed the coil wire to prevent them from leaving and that he would not replace it until they returned the fender cover. After bartering, the women convinced the attendants to trade the fender cover for an old Texaco shirt. This court found that the two were detained for a "relatively brief period of time" and held that "the conduct of the station attendants did not rise to the level of the extreme and outrageous conduct which is essential for conduct to be actionable for intentional infliction of emotional distress." *Id.* at 71, 313 N.W.2d at 223.

Heitzman, however, relying on *Dale v. Thomas Funeral Home*, 237 Neb. 528, 466 N.W.2d 805 (1991), argues that this court has recognized "a cause of action for family members due

to the mishandling of funeral and disposition arrangements." Brief for appellant at 9. The facts in *Dale*, however, are distinguishable from the facts alleged here. In *Dale*, we upheld a judgment directing a verdict for the defendant funeral home in an intentional infliction of emotional distress action brought by a grieving widow. The widow made arrangements with the funeral home and gave it permission to embalm. After discussing costs with the funeral director, the widow realized she could not afford the funeral home's services. When she sought to pay for the embalming and make arrangements with another funeral home for the burial, the funeral director refused to release the body until she paid the $490 bill in cash. The widow offered to give the funeral director a $500 insurance policy in exchange for the body, but the director refused and held the body for almost 10 days, causing some of the widow's out-of-town family members to miss the funeral.

We characterized the conduct as "the nadir of crass commercialism and [as] intentional or reckless conduct which was so outrageous and extreme that the conduct exceeded the bounds of decency and toleration in a civilized community." *Id.* at 531, 466 N.W.2d at 808. We concluded, however, that the widow failed to establish that her emotional distress was so severe that no reasonable person could be expected to endure it. *Id.*

It is correct that in *Dale v. Thomas Funeral Home, supra*, we held the funeral director's conduct to be outrageous and found that it exceeded the bounds of decency. In *Dale*, however, the funeral director's outrageous conduct could be characterized as holding the corpse hostage for a ransom. In comparison, here, the alleged facts fall short. The crux of Heitzman's petition asserts that Thompson (1) transported and embalmed Ralph's body without consulting Heitzman and (2) breached his statutory duties as a licensed funeral director.

[12] Heitzman's first argument incorrectly assumes that he had a right to control the disposition of Ralph's remains. Neb. Rev. Stat. § 71-1339 (Cum. Supp. 2002) controls the disposition of the remains of a deceased person. The applicable version provided:

> The right to control the disposition of the remains of a deceased person . . . unless other directions have been given by the decedent, vests in the following persons in the

> order named: (1) The *surviving spouse*; (2) if the surviving spouse is incompetent or not available, or if there is no surviving spouse, adult child of the decedent . . . .

(Emphasis supplied.)

Heitzman alleges that he is Ralph's son and that Ralph was married to Marcella. Under § 71-1339, he fails to allege facts that give him control of Ralph's remains. Marcella, as the surviving spouse, controlled the disposition of Ralph's remains. Thompson's failure to consult Heitzman does not rise to outrageous conduct.

Heitzman next alleged that Thompson breached the following statutory duties: (1) transporting the corpse across state lines without a permit and (2) failing to file a timely death certificate. Assuming these facts are true, Heitzman's allegations might, at best, be characterized as unprofessional or careless—but not outrageous. Because we determine the petition fails to allege sufficient facts to state a cause of action for intentional infliction of emotional distress, we affirm.

CONCLUSION

We conclude that Heitzman has not pled a cause of action to support recovery under a theory of intentional infliction of emotional distress. Accordingly, the order sustaining Thompson's demurrer and the dismissal of the action is affirmed.

AFFIRMED.

CONNOLLY, J., participating on briefs.

JON SMITH ET AL., APPELLANTS, V. CITY OF PAPILLION, NEBRASKA, A CITY OF THE FIRST CLASS LOCATED IN SARPY COUNTY, NEBRASKA, ET AL., APPELLEES.

705 N.W.2d 584

Filed November 10, 2005. No. S-04-1358.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Ordinances: Zoning: Injunction: Equity.** An action to declare a zoning ordinance void and to enjoin its enforcement is equitable in nature.

3. **Equity: Appeal and Error.** A case in equity is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
5. **Jurisdiction: Standing.** The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.
6. **Standing: Zoning: Case Disapproved.** An adjacent landowner has standing to object to the rezoning of property if such landowner shows some special injury separate from a general injury to the public. To the extent that *Eastroads, Inc. v. City of Omaha*, 237 Neb. 837, 467 N.W.2d 888 (1991), implies adjacent landowners have standing to object to the rezoning of property without alleging a special injury, it is disapproved.
7. **Municipal Corporations: Ordinances: Words and Phrases.** 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. 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 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. **Zoning: Comprehensive Development Plans.** A comprehensive development plan is a guideline that is not binding but is merely a policy statement that may be implemented through zoning; it is the actual zoning which has the force of law.
11. **Ordinances: Presumptions: Proof.** Courts will generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority and that the burden rests on those who challenge their validity.
12. **Zoning: Municipal Corporations.** The validity of a zoning ordinance must be determined by an examination of the facts presented in the particular case.
13. **Zoning: Municipal Corporations: Presumptions.** Great deference is given to a city's determination of which laws should be enacted for the welfare of the people. When the city rezones a parcel of property, the action is presumed to be valid absent clear and satisfactory evidence to the contrary.
14. ____: ____: ____. When a city considers a request for rezoning based upon a plan or representation by the developer, it is presumed that the city grants the request after making the determination that the plan as represented is in the interest of public health, safety, morals, and the general welfare.

15. **Zoning: Words and Phrases.** Spot zoning generally refers to the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned and to the detriment of the area and other owners therein.
16. **Zoning.** The validity of spot zoning depends on more than the size of the spot, and spot zoning as such is not necessarily invalid, but its validity depends upon the facts and circumstances appearing in each particular case.
17. **Zoning: Comprehensive Development Plans.** Three elements are typically present in invalid spot zoning: A small parcel of land is singled out for special and privileged treatment, the singling out is not in the public interest but serves only the interests of the landowner, and the action is not in accord with a comprehensive plan.
18. **Zoning.** The exercise of the power to zone may not be denied on the ground that individual property rights may be adversely affected thereby.
19. **Injunction: Final Orders: Appeal and Error.** The denial of a temporary restraining order is not a final, appealable order, and that issue merges into the final decree.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Michael D. McClellan and William E. Gast, of Gast & McClellan, for appellants.

Michael N. Schirber, of Schirber & Wagner, L.L.P., for appellee City of Papillion.

James M. Bausch, Shawn D. Renner, and Steven M. Delaney, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee Market Pointe, L.L.C.

Irving B. Epstein, of Epstein & Epstein, for appellee Kae S. Pavlik, trustee of the Duane M. Pavlik Family Trust.

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

GERRARD, J.

NATURE OF CASE

After the Papillion City Council took action to amend the City of Papillion's comprehensive development plan and rezone a parcel of land to accommodate a large commercial development, adjacent landowners brought an action to declare such actions void and enjoin any activity consistent with the rezoning. The district court denied the landowners' requests, and they

appealed. For the following reasons, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

The City of Papillion hired an urban planner to prepare a comprehensive development plan (CDP) for the city in 1995 and again in 2002. The 2002 CDP was adopted via resolution No. 1275 on September 3, 2002, and highlighted the area of 72d Street and Highway 370 for significant commercial development. In early 2004, the planner was contacted by the city to draft an amendment to the 2002 CDP to accommodate a large commercial project under consideration. Specifically, he was instructed to opine as to whether the area in the southeast quadrant of the intersection of 72d Street and Giles Road was a "defensible site" for commercial development and to prepare a plan amendment addressing that property.

In May 2004, the City of Papillion approved the amendment as resolution No. R04-0054, amending the 2002 CDP to allow for commercial development of approximately 75 acres of property southeast of the intersection of 72d Street and Giles Road. The proposed development included construction of a Wal-Mart Supercenter on the site, along with other businesses, forming a development called Market Pointe. In July 2004, the city passed ordinance No. 1443, changing the zoning of the site from agricultural to mixed use, and approved resolutions Nos. R04-0083 through R04-0086, which dealt with a final plat, mixed-use development agreement, subdivision agreement, and water connection agreement for the site. According to the Papillion city code, the mixed-use classification is meant to accommodate projects that combine several compatible land uses into an integrated development.

The plaintiffs—11 individuals who own real property adjacent to the site (the Homeowners)—filed a complaint against the owner of the site, Kae S. Pavlik, trustee of the Duane M. Pavlik Family Trust; the developers, The R.H. Johnson Company and Papillion Place, L.L.C., also known as Market Pointe, L.L.C.; and the city (collectively the Defendants). The Homeowners sought a judgment declaring the approval of ordinance No. 1443 and the related development plans and agreements to be invalid

and void, in violation of the city code and the Homeowners' due process rights. In addition, the Homeowners sought a judgment declaring resolution No. R04-0054 to be illegal and void, arbitrary and capricious, and a violation of the Homeowners' due process rights. Finally, the Homeowners sought an order temporarily and permanently restraining the Defendants from engaging in any activity authorized by the approval of ordinance No. 1443, the zone change from agricultural to mixed use, and any related development plans.

The Defendants filed motions for summary judgment, which came on for hearing in September 2004. In its order dated September 15, 2004, the district court overruled the Defendants' motions for summary judgment and set trial for the case on September 22. The court also denied the Homeowners' request for a temporary restraining order.

Thereafter, the Homeowners filed a motion for continuance and to correct the record by vacating the court's ruling on their temporary restraining order. In their motion, the Homeowners explained that no motion or application for a temporary restraining order had been made by any of the parties to the action and that, thus, the court's ruling on such a motion should be vacated and stricken from the record. The court overruled both motions. In response to the Homeowners' request to correct the record, the court explained that its decision denying the temporary restraining order was in reference to the Homeowners' request for an order restraining the Defendants from activity authorized by the passage of ordinance No. 1443, as set forth in their complaint. Trial commenced on September 22, 2004.

In its judgment of November 29, 2004, the district court denied the Homeowners' request for injunctive relief and concluded that resolution No. R04-0054 was properly adopted by the city as part of the CDP and was not arbitrary, discriminatory, or unreasonable. In addition, the district court found that resolutions Nos. R04-0083 through R04-0086 and ordinance No. 1443 were valid and not unreasonable, discriminatory, or arbitrary. The court determined that the resolutions and ordinance were a proper exercise of the city's police powers and consistent with the public health, safety, morals, and general welfare of the citizens. The Homeowners timely appealed.

ASSIGNMENTS OF ERROR

The Homeowners assign, summarized and restated, that the district court erred in (1) finding that resolution No. R04-0054 was effective to amend the city's CDP, (2) finding that ordinance No. 1443 was a valid exercise of the city's zoning power, (3) failing to find that the rezoning was done for an improper purpose and was therefore invalid, and (4) failing to sustain their motion to correct the record by striking the court's ruling on a motion for a temporary restraining order.

STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004).

[2,3] An action to declare a zoning ordinance void and to enjoin its enforcement is equitable in nature. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994); *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989). A case in equity is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another. *Giger, supra.*

ANALYSIS

Homeowners Have Standing to Pursue Present Action.

[4,5] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy. *Cornhusker Pub. Power Dist. v. City of Schuyler*, 269 Neb. 972, 699 N.W.2d 352 (2005). The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *Stevens v. Downing, Alexander*, 269 Neb. 347, 693 N.W.2d 532 (2005). Prior to argument, the parties were directed to submit supplemental briefs addressing whether the Homeowners have standing to challenge the validity of the rezoning at issue in this case. For the reasons that follow, we conclude that the Homeowners have standing in the present case.

In support of the Homeowners' argument that they have standing to challenge the validity of the rezoning accomplished by the city council in this case, they cite *Eastroads, Inc. v. City of Omaha*, 237 Neb. 837, 467 N.W.2d 888 (1991). In *Eastroads, Inc.*, the plaintiff filed a petition for declaratory judgment against the defendants to declare a rezoning ordinance invalid and enjoin construction on the property in question. The district court found that the plaintiff had no standing to bring the action and granted summary judgment in favor of the defendants. On appeal, the plaintiff argued that the ordinance was arbitrary and unreasonable because of a question of ownership of the property and authority of the applicant to act for the owners in requesting the zone change. In our discussion of the issue, we cited several cases from other jurisdictions addressing irregularities in an application for rezoning property. We then concluded that although adjacent landowners have standing to object to the rezoning of property, they do not have standing to object to an irregularity in the application itself without demonstrating prejudice caused by the irregularity. Thus, we determined that the plaintiff had no standing to attack any irregularity in the application for a zoning change by reason of ownership of the property. *Id.*

In contrast to the Homeowners' argument, the Defendants rely on the reasoning of the Nebraska Court of Appeals in *SID No. 347 v. City of Omaha*, 8 Neb. App. 78, 589 N.W.2d 160 (1999). In *SID No. 347*, the property at issue was rezoned to permit construction of a fast-food restaurant and drive-through in Greenfields Plaza in Omaha. A neighborhood resident filed an action to enjoin implementation of the zoning change. The district court voided the rezoning, and the City of Omaha and the developer appealed. In addressing whether the resident had standing to bring the action, the Court of Appeals stated:

> In situations where a party seeks to restrain an act of a municipal body, as is the case here, the party must show some special injury peculiar to himself aside from a general injury to the public, and it is not sufficient that the party bringing the suit has merely a general interest common to all members of the public.

Id. at 85-86, 589 N.W.2d at 166. The resident lived in a residential area developed by Sanitary and Improvement District No.

347 and adjacent to Greenfields Plaza and had expressed concern for his safety and that of his children due to the anticipated increase in traffic which would be caused by the fast-food restaurant. However, the court concluded that the resident had not proved that traffic in the neighborhood was reasonably likely to increase to the point of causing him special damage. Thus, the Court of Appeals concluded that the resident did not have standing to bring a lawsuit to enjoin the enforcement of the rezoning ordinance. *Id.*

[6] We conclude that the reasoning in *SID No. 347* represents the better rule. It is generally held that an adjacent landowner has standing to object to the rezoning of property if such landowner shows some special injury separate from a general injury to the public. See, e.g., *Sun-Brite v. Bd. of Zoning*, 69 N.Y.2d 406, 508 N.E.2d 130, 515 N.Y.S.2d 418 (1987); *Lenette Realty v. City of Chesterfield*, 35 S.W.3d 399 (Mo. App. 2000); *Reynolds v. Dittmer*, 312 N.W.2d 75 (Iowa App. 1981). To the extent that *Eastroads, Inc. v. City of Omaha*, 237 Neb. 837, 467 N.W.2d 888 (1991), implies adjacent landowners have standing to object to the rezoning of property without alleging a special injury, it is disapproved.

We further conclude that the Homeowners have sufficiently shown a special injury to establish standing in the present action. All of the Homeowners live in the area adjacent to the site, and it appears that 8 of the 11 Homeowners live within 300 feet of the site. Neb. Rev. Stat. § 19-905 (Reissue 1997) provides a right of protest for persons residing within 300 feet of the area of the proposed zoning change and instructs the legislative body that, instead of posting notice of the proposed rezoning change on the property at issue, it may provide notice of the rezoning by personally serving occupants of the subject property and those residing within 300 feet of the area with written notice before a hearing on the rezoning. The fact that a person would be entitled to receive notice of an administrative hearing because he or she owns property adjacent or very close to the property in issue supports the conclusion that such a person would have standing in a corresponding zoning case. See, *Sun-Brite, supra* (mandatory notice of administrative hearing because party owns property adjacent to property at issue gives

rise to presumption of standing); *Reynolds, supra* (factors to be used as guide in determining sufficiency of person's interest to give standing include proximity of person's property to property to be rezoned and whether person is entitled to receive notice under zoning ordinance).

Furthermore, Robert McClure, an expert in city planning, testified that the value of homes in the area immediately to the west of the site would diminish. McClure testified that uncertainty with respect to the timeline and expected completion of the construction would also cause instability in the prices of homes. Finally, the Market Pointe project is considerably larger than the fast-food restaurant construction opposed in *SID No. 347 v. City of Omaha*, 8 Neb. App. 78, 589 N.W.2d 160 (1999), consisting of approximately 500,000 square feet on 75 acres of land. McClure indicated that the large development planned for the site would compromise the residential character of the adjacent neighborhood. Given the scope of the Market Pointe project and the proximity of the objecting landowners to the proposed development, we conclude that the Homeowners have standing to challenge the rezoning here at issue.

Resolution No. R04-0054 Effectively Amended City's CDP.

The Homeowners first assign that the district court erred in finding that resolution No. R04-0054 was effective to amend the city's 2002 CDP. The Homeowners appear to argue that the 2002 CDP was not validly amended in order to provide a basis for their later argument that the rezoning accomplished via ordinance No. 1443 was not "in accordance with" the city's operative CDP, as required under Neb. Rev. Stat. § 19-903 (Reissue 1997). In other words, the Homeowners assert that the 2002 CDP was not validly amended by resolution No. R04-0054; that the 2002 CDP remains the operative CDP, which does not contemplate commercial development at the site; and that, thus, the passage of ordinance No. 1443 was not in accordance with the operative CDP.

Neb. Rev. Stat. § 19-901 (Reissue 1997) provides the legislative body in a city of the first class, such as the City of Papillion, with the power to adopt zoning regulations, but specifies that such powers shall only be exercised after the legislative body has

> established a planning commission, received from its planning commission a recommended comprehensive development plan as defined in section 19-903, adopted such comprehensive development plan, and received the specific recommendation of the planning commission on the adoption or amendment of zoning regulations. The planning commission shall make a preliminary report and hold public hearings on its recommendations regarding the adoption or repeal of the comprehensive development plan and zoning regulations and shall hold public hearings thereon before submitting its final report to the legislative body. Amendments to the comprehensive plan or zoning regulations shall be considered at public hearings before submitting recommendations to the legislative body.

Further, § 19-903 states: "The regulations and restrictions authorized by sections 19-901 to 19-915 shall be in accordance with a comprehensive development plan . . . ." Neither § 19-901 nor § 19-903 indicates the manner in which the CDP is to be adopted and amended. In fact, Neb. Rev. Stat. § 19-904 (Reissue 1997) reveals that such details are reserved for the legislative body. Section 19-904 states:

> The legislative body of such municipality shall provide for the manner in which such regulations and restrictions, and the boundaries of such districts, shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. The legislative body shall receive the advice of the planning commission before taking definite action on any contemplated amendment, supplement, change, modification, or repeal. No such regulation, restriction, or boundary shall become effective until after separate public hearings are held by both the planning commission and the legislative body in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. Notice of the time and place of such hearing shall be given by publication thereof in a paper of general circulation in such municipality at least one time ten days prior to such hearing.

Furthermore, as stated by a noted commentator:

> The general rule is that where a charter commits the decision of a matter to the council or legislative body alone, and is silent as to the mode of its exercise, the decision may be evidenced by resolution. . . .
>
> . . . [W]here there is no general provision in the city's charter providing what must be done by ordinance but the charter does from time to time provide that particular things shall be done by ordinance, the implication is that matters which are not specifically required to be dealt with by ordinance may be dealt with otherwise.

5 Eugene McQuillin, The Law of Municipal Corporations § 15.6 at 108-10 (3d ed. 2004). Section 19-901, requiring municipal legislative bodies to adopt CDP's, does not specify the manner in which such a plan is to be adopted, which leads to the presumption that a CDP may be passed by resolution. Further, other statutory provisions applicable to municipal corporations explicitly require action by ordinance (e.g., Neb. Rev. Stat. §§ 19-913, 19-917, and 19-922 (Reissue 1997)). This certainly implies that the CDP required in § 19-901, but without direction as to the manner in which it should be passed, may be adopted via resolution.

The Homeowners' argument presents a syllogism: According to the Homeowners, legislation is passed by ordinance, and a CDP is legislation; therefore, a CDP is passed and amended by ordinance. However, in order for the conclusion that a CDP must be passed by ordinance to hold up, both premises upon which it is based must be true.

[7] 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. 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. *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291 (2003); *Sommerfeld v. City of Seward*, 221 Neb. 76, 375 N.W.2d 129 (1985). In *Sommerfeld*, 221 Neb. at 81, 375 N.W.2d at 132, this court stated:

> "It has been several times held by this court, and is, we think, the universal doctrine, that where the statute definitely prescribes a method of action, that method must be followed. Where this is not done, if the action taken by the municipality amounts to prescribing a permanent rule of conduct which is thereafter to be observed by the inhabitants of the municipality, or by its officers in the transaction of corporate business, then the rule prescribed may be more properly expressed in the form of an ordinance; but it is entirely proper to act by resolution, if the action taken is merely declaratory of will of the corporation in a given matter, and is in the nature of a ministerial act."

McQuillin is even more specific as to the distinction between matters passed by resolution versus those passed by ordinance:

> A resolution ordinarily denotes something less solemn or formal than, or not rising to the dignity of, an ordinance. . . .
>
> . . . Thus, it may be stated broadly that all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters on which the municipal corporation desires to legislate must be put in the form of ordinances. If a municipal act applies generally and prescribes a new plan or policy, it is considered legislative and must be accomplished by an ordinance rather than a resolution. It may further be stated broadly that charters contemplate that all legislation creating liability or affecting in any important or material manner the people of the municipality should be enacted by ordinances, whether the city is acting in its governmental or private capacity.

5 Eugene McQuillin, The Law of Municipal Corporations § 15.2 at 82-90 (3d ed. 2004).

[8,9] However, whether a CDP is considered legislation—and thus must be passed via ordinance—is less clear. The Homeowners argue that a CDP is legislative in nature because it provides long-term policies that guide the city into the future. 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. *Kubicek, supra.* 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 one executing or administering a law already in existence. *Id.*

[10] Although a CDP does indeed provide a long-term strategy for city development, such a characteristic does not make it legislation that must be passed by ordinance. This court has stated that a CDP is a guideline and is not binding but is merely a policy statement that may be implemented through zoning and that it is the actual zoning which has the force of law. *Omaha Fish & Wildlife v. Community Refuse*, 213 Neb. 234, 329 N.W.2d 335 (1983); *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980); *Holmgren v. City of Lincoln*, 199 Neb. 178, 256 N.W.2d 686 (1977); *Stones v. Plattsmouth Airport Authority*, 193 Neb. 552, 228 N.W.2d 129 (1975). See, also, *Copple v. City of Lincoln*, 202 Neb. 152, 158, 274 N.W.2d 520, 524 (1979) ("[t]he comprehensive plan, as adopted by the City of Lincoln, itself recognizes it is only to serve as a general guide in the development of Lincoln and Lancaster County. While the comprehensive plan specifically refers to the location of [one defendant's] property as a site for a regional multiuse shopping center, it does not necessarily follow that [the defendant's] property will, in fact, be developed as the regional shopping center").

The Homeowners cite *Kelley v. John*, 162 Neb. 319, 322, 75 N.W.2d 713, 715 (1956), in which this court stated, "[i]t seems clear to us that an ordinance adopting a comprehensive plan for zoning a city is a legislative matter." However, in *Kelley*, the comprehensive plan referred to by the court was a comprehensive *zoning* plan, as opposed to a comprehensive development plan. The plan declared to be legislative in *Kelley* was a zoning plan that actually zoned the property at issue, rather than a comprehensive development plan that merely provided guidelines for community development.

We also note that according to the record, the city's 2002 CDP was adopted via resolution. In the Homeowners' reply brief, they state that "[t]he validity of the 2002 [CDP] has never been at issue in this litigation." Reply brief for appellants at 5. Such a

statement contradicts the Homeowners' argument that the 2002 CDP could not be amended by resolution. In other words, the Homeowners contest the validity of the resolution amending the 2002 CDP and, simultaneously, rely on the validity of the 2002 CDP, also passed by resolution. Logically, the Homeowners cannot claim that an amendment to the 2002 CDP, passed in the same manner in which the original 2002 CDP was adopted, is insufficient to accomplish a change to the plan. See *Sommerfeld v. City of Seward*, 221 Neb. 76, 82, 375 N.W.2d 129, 133 (1985) (" '[i]t takes a law to repeal a law, and . . . an act which destroys should be of equal dignity with that which established the procedure . . . and . . . an ordinance may be repealed only by another ordinance and not by resolution . . .' ").

For the foregoing reasons, we conclude that resolution No. R04-0054 was administrative rather than legislative in nature, and effectively amended the 2002 CDP. The Homeowners' first assignment of error is without merit.

Ordinance No. 1443 Was Valid Exercise of City's Zoning Power.

The Homeowners assign that the district court erred in finding that ordinance No. 1443 was a valid exercise of the city's zoning power and that the zoning change was not arbitrary, capricious, or unreasonable. The Homeowners assert that the city failed to comply with the city code in adopting ordinance No. 1443 because the ordinance failed to include language of permitted uses or zoning regulations for the site; such information was only found in agreements with the developers, The R.H. Johnson Company and Papillion Place, which agreements were approved by resolution. As a result, the Homeowners argue, a true public hearing was never held on ordinance No. 1443 because the documents containing the zoning regulations and permitted uses for the rezoned site were not incorporated into the ordinance and were unavailable to the public at the time of the hearing.

Neb. Rev. Stat. § 16-404 (Cum. Supp. 2004) requires a majority vote from elected city council members for the passage of ordinances and resolutions. Further, § 16-404 requires ordinances to be read by title on three different days, unless three-fourths of the council members vote to suspend the requirement. Papillion

Mun. Code, ch. 205, art. XII, § 205-96D (2003), details the procedure for rezoning as follows:

> (1) The Planning Commission, following 10 days' notice and publication, shall hold a public hearing on each proposed text or rezoning and, following such public hearing, shall recommend action to the City Council.
>
> (2) The City Council, after publication and public hearing, shall act on the proposed amendment. A majority vote of those members either elected or appointed to the City Council is required for approval.

The planning commission, appointed by the mayor with the consent of three-fourths of the city council members, is composed of nine residents of the city, representing different professions, interests, and occupations.

In this case, the planning commission considered ordinance No. 1443 in a public hearing on March 24, 2004, which was continued to April 21. Notice of each meeting was conducted via publication pursuant to the city code. At the conclusion of the April 21 meeting, all nine planning commission members voted in favor of recommending approval of the zoning change.

A first reading of ordinance No. 1443 took place before the city council on May 4, 2004, followed by a second reading and public hearing on May 18. During the public hearing, those in attendance were invited to speak in favor of or in opposition to the zoning change proposed by ordinance No. 1443. Some of those opposing the zoning change and the Market Pointe project expressed concerns regarding the lack of information about uses that would be permitted by the mixed-use zoning designation. It was explained by various individuals, including the mayor, the city attorney, members of the city council, and the former city planning director, that a mixed-use development agreement would be presented along with the request for approval of the final plat and would detail the specific design guidelines and permitted uses for the Market Pointe project. The zoning change would be voted on and adopted, contingent upon the approval of the mixed-use development agreement, final plat, and related agreements. The mayor and city council members further explained that proponents and opponents would be invited to speak at the presentation of each of those related agreements.

The city clerk testified that prior to each city council meeting, a packet of information is compiled for the city council members to use in reviewing items on the upcoming agenda and in making decisions on how to vote on such matters (the city council report). A copy of the city council report remains in the clerk's office where it is available to the public. The city clerk further testified that the city council report is typically completed and available to the public before 5 p.m. on the Friday before each scheduled city council meeting.

The record shows that the mixed-use development agreement between the City of Papillion and Market Pointe, L.L.C., which agreement sets forth the permitted uses and design guidelines for the Market Pointe project, was not part of the city council report prepared prior to the May 18, 2004, city council meeting. However, the city council report included a summary of information about the Market Pointe project prepared by the developers, The R.H. Johnson Company and Papillion Place, along with responses to questions and concerns regarding the development. The mixed-use agreement itself was available as part of the city council report prepared prior to the July 20 city council meeting—the third and final reading of ordinance No. 1443. At the July 20 meeting, ordinance No. 1443 was passed, contingent upon the approval of resolutions Nos. R04-0083, Market Pointe final plat; R04-0084, mixed-use agreement; R04-0085, subdivision agreement between the city, Market Pointe, L.L.C., and Sanitary and Improvement District No. 259 (SID No. 259); and R04-0086, sewer and water connection agreement between SID No. 259, Market Pointe, L.L.C., and the city.

After ordinance No. 1443 was approved by a unanimous vote, the city council addressed each resolution, calling for comments by proponents and opponents before voting on the resolution. Addressing the city council, some of the individuals opposing the Market Pointe project expressed concern about the list of businesses permitted in the development and referenced the list provided in the mixed-use agreement, indicating that they indeed had access to such information prior to the July 20, 2004, meeting. In addition, many of the individuals referred to the hours of evidence and testimony that had been placed before the city

council in opposition to the Market Pointe project, acknowledging their opportunity to address the planning commission and city council with their concerns.

The Homeowners note that Papillion Mun. Code, ch. 205, art. V, § 205-30 (2003), states that an ordinance establishing a mixed-use district establishes the uses permitted within its boundaries. Section 205-30 also states that an application for approval of such a district must contain, among other things, a development plan that includes a site layout and a description of all use types included in the area, and specific proposed development regulations for the project, including the specific use types permitted within the proposed district.

The text of ordinance No. 1443 did not include the permitted uses of the proposed rezoning of the site from agricultural to mixed use. However, the passage of ordinance No. 1443 was made contingent upon the approval of four related agreements, resolutions Nos. R04-0083 through R04-0086, all of which provided further information about the Market Pointe project and were presented to the city council for approval after opportunities for public comment. In other words, while the ordinance standing alone did not contain the detailed use restrictions required by the city code, the ordinance did not stand alone; rather, it was part of a package of related resolutions which did contain the necessary information. Considering the size of the proposed Market Pointe project, it is reasonable to permit the city council to pass multiple agreements in pursuit of a complete and desirable package of legislation. See *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989).

In *Hansen v. City of Norfolk*, 201 Neb. 352, 267 N.W.2d 537 (1978), the plaintiffs sought to have a zoning ordinance of the city of Norfolk declared void and to enjoin enforcement of the ordinance. The plaintiffs claimed that an inadvertent error in the legal description of the area affected by the ordinance made the ordinance void. However, the plat and map that accompanied the planning commission proceedings clearly showed the correct boundaries, and the evidence showed that neither the plaintiffs nor anyone else was misled or confused by the description. After the district court found that the plaintiffs failed to prove facts sufficient to establish the invalidity of the ordinance and

dismissed the action, the plaintiffs appealed. This court looked to other courts for guidance in affirming the judgment of the district court, stating: "Where there have been minor errors in zoning maps or legal descriptions but the ordinances were reasonably capable of comprehension, other courts have found no difficulty in validating the ordinances or zoning amendments involved." *Hansen*, 201 Neb. at 358, 267 N.W.2d at 540.

Hansen is instructive in this case because, even though the text of ordinance No. 1443 did not specify the details of the mixed-use development, it was accompanied by documents that did provide those details. Thus, the scope of the rezoning proposed in ordinance No. 1443 was reasonably capable of comprehension, even though the ordinance alone did not establish the permitted uses of the mixed-use area.

The Homeowners in this case argue that they were not given a meaningful opportunity to protest the components of the Market Pointe project. However, a review of the record reveals that they had chances to voice their concerns in various settings, including at townhall meetings where audience members included city council members, at planning commission meetings, at city council meetings, and in one-on-one conversations with city council members. The city council may not have come to the decision urged by the Homeowners, but the Homeowners were indeed given adequate opportunities to make their elected officials aware of their concerns. Their second assignment of error is without merit.

Rezoning Was Consistent With City's Duty to Promote Health, Safety, and Welfare of Citizens.

The Homeowners argue that the rezoning of the site was done for the sole benefit of the developers, The R.H. Johnson Company and Papillion Place, constituting "spot zoning." In addition, the Homeowners argue that the rezoning was approved only in order to take advantage of resulting tax benefits. Therefore, the Homeowners argue that the rezoning was arbitrary and capricious and should be declared void.

Section 19-901(1) states:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative bodies in

> cities of the first and second class and in villages may adopt zoning regulations which regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

In addition, § 19-903 requires that zoning regulations be designed to lessen street congestion; secure safety from flood, fire, panic, and other dangers; provide adequate light and air; prevent overcrowding; facilitate transportation, water, sewerage, schools, parks, and other public requirements; protect property against depreciation; protect the tax base; secure economy in governmental expenditures; and preserve and protect historic areas. Further, Papillion Mun. Code, ch. 205, art. I, § 205-3 (2003), provides that the purposes of zoning are to serve the public health, safety, and welfare; classify property to reflect its suitability for specific uses; provide for sound, attractive development; encourage compatibility of adjacent land uses; protect environmentally sensitive areas; and advance the objectives of the CDP.

[11-14] Courts will generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority and that the burden rests on those who challenge their validity. *K N Energy v. Cities of Alliance & Oshkosh*, 266 Neb. 882, 670 N.W.2d 319 (2003). The validity of a zoning ordinance must be determined by an examination of the facts presented in the particular case. *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963). This court gives great deference to a city's determination of which laws should be enacted for the welfare of the people. When the city rezones a parcel of property, we presume the validity of that action absent clear and satisfactory evidence to the contrary. *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989). When the city considers a request for rezoning based upon a plan or representation by the developer, it is presumed that the city grants the request after making the determination that the plan as represented is in the interest of public health, safety, morals, and the general welfare. *Id.*

[15-17] The Homeowners contend this case presents an example of spot zoning. Spot zoning generally refers to the singling

out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned and to the detriment of the area and other owners therein. The validity of spot zoning depends on more than the size of the spot, and spot zoning as such is not necessarily invalid, but its validity depends upon the facts and circumstances appearing in each particular case. *Bucholz, supra.* In *Bucholz*, this court addressed whether a zoning change was arbitrary and capricious and therefore unconstitutional spot zoning, listing three elements typically present in invalid spot zoning: A small parcel of land is singled out for special and privileged treatment, the singling out is not in the public interest but serves only the interests of the landowner, and the action is not in accord with a comprehensive plan.

[18] In this case, the Homeowners failed to present evidence sufficient to rebut the presumption of validity given to the city's actions in approving ordinance No. 1443 and the related resolutions and thus showing that such action by the city was arbitrary and capricious. It is difficult to characterize a 75-acre development as a "small parcel of land"; indeed, the size and scope of the development form the basis of the Homeowners' opposition. As will be discussed in more detail below, the city determined that the economic development promised by the Market Pointe project was in the public interest. And, as noted above, the city duly amended its CDP after considering its effects. Although the Homeowners presented the expert testimony of McClure in support of their contention that their property values would decrease as a result of the Market Pointe project, such evidence does not establish that the rezoning is either illegal or arbitrary and capricious. The Homeowners appear to rely primarily on the potential consequences of the new development on their property values as justification for invalidating the rezoning ordinance. However, the exercise of the power to zone may not be denied on the ground that individual property rights may be adversely affected thereby. *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963). In short, the Homeowners did not prove that this case involves illegal spot zoning.

The Homeowners further argue that the city's attention to the economic benefits of the Market Pointe project was an improper

basis for rezoning. The mayor testified about the shortage of retail development in Papillion and the complaints by residents having to travel long distances to shop. The mayor testified about the city's interest in preventing this leakage—that is, preventing Papillion residents from going outside the community to shop. Specifically, the mayor testified that around 50 percent of the dollars spent by Papillion residents are spent outside Papillion, substantially higher than the 8- to 11-percent leakage in La Vista and Bellevue. The mayor indicated that retail development in Papillion would be convenient for Papillion residents and that the city would benefit from the revenue from commercial development.

Although the city made clear its interest in the economic benefits of the rezoning, the record shows that the city did not rezone the site without evaluating the potential consequences to surrounding areas. The evidence presented shows that the city studied the effects of the proposed development on traffic and arranged for numerous adjustments to the design of the development in order to address specific concerns of adjacent landowners (i.e., no outdoor intercom, larger number of trees, limited fast-food restaurants). The planning commission and city council heard hours of testimony from adjacent landowners regarding concerns about the Market Pointe project, but ultimately, the planning commission unanimously recommended approval of the Market Pointe project zoning change, and the city council adopted the zoning change by a unanimous vote.

In sum, based on the record in this case, the Homeowners failed to overcome the presumption that the city acted within its zoning power and did so in pursuit of the health, safety, and welfare of Papillion residents.

Issue Regarding Motion to Correct Record Is Moot.

The Homeowners assign that the district court erred in overruling their motion to correct the record by striking the court's ruling on a motion for a temporary restraining order. The Homeowners assert that such a motion was never made and that therefore, they had no opportunity to present evidence to the court on such a motion. Further, they argue that by ruling on a matter not before the court and prior to the presentation on the

merits, the court created an appearance that it had predetermined the merits of the action. Accordingly, the Homeowners argue that the portion of the court's September 15, 2004, order ruling on a temporary restraining order is void.

[19] The district court correctly overruled the Homeowners' motion to correct the record because, contrary to their argument, they indeed requested a temporary restraining order in their complaint. In any event, any issue with respect to a temporary restraining order is moot; the denial of a temporary restraining order is not a final, appealable order, and that issue merges into the final decree. See, *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002); *State ex rel. Douglas v. Ledwith*, 204 Neb. 6, 281 N.W.2d 729 (1979). The Homeowners' final assignment of error is without merit.

CONCLUSION

Based on the record presented in this appeal, we conclude that the Homeowners failed to present sufficient evidence to overcome the presumption that the actions of the city council were valid. Thus, we affirm the judgment of the district court.

AFFIRMED.

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

IN RE APPLICATION OF DAVID V. HARTMANN FOR ADMISSION TO THE NEBRASKA STATE BAR ON EXAMINATION.

705 N.W.2d 443

Filed November 10, 2005. No. S-34-040002.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** Under Neb. Ct. R. for Adm. of Attys. 15 (rev. 2000), the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. **Attorneys at Law: Proof.** The applicant for admission to the Nebraska State Bar bears the burden of proving good character by producing documentation, reports, and witnesses in support of the application.

4. **Attorneys at Law.** A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant for admission to the Nebraska State Bar may constitute a basis for denial.

Original action. Application denied.

Sean J. Brennan for applicant.

Brad Roth and Chris Blomenberg, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., for Nebraska State Bar Commission.

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

PER CURIAM.

David V. Hartmann appeals from a decision of the Nebraska State Bar Commission (Commission), denying his application to take the July 2004 bar examination, based upon its determination that Hartmann does not meet the character and fitness requirements for admission. We sustain the Commission's recommendation that Hartmann not be allowed to sit for the Nebraska bar examination.

BACKGROUND

Hartmann, whose date of birth is August 22, 1961, obtained his law degree in May 2002 and initially applied to take the July 2002 bar examination. In his application, Hartmann disclosed his complete criminal history, which included a 1977 charge of reckless driving, a 1992 charge of driving under the influence that was later reduced to reckless driving, a 2001 charge of improper passing that was subsequently dropped, and a 2002 charge of third degree sexual assault. The latter charge was based on allegations made by K.H.V., Hartmann's niece who was then 15 years old. The charge was pending in Seward County at the time of Hartmann's application. On or about May 13, 2002, the Commission received an anonymous letter from a "concerned citizen" informing it of the sexual assault charge. On June 25, the Commission notified Hartmann that it would permit him to sit for the July 2002 examination but was withholding approval of his application on character and fitness grounds until

further investigation could be completed. Hartmann did not pass the July 2002 examination, and thus the character and fitness issues became moot.

Hartmann then applied to sit for the February 2003 bar examination. In this application, he explained that the sexual assault charge had been dismissed in Seward County but had been refiled and was then pending in Lancaster County. This charge was eventually amended to third degree assault. Hartmann was convicted on his plea of no contest and paid a $1,000 fine as ordered. Hartmann also notified the Commission of a November 2002 charge of driving under the influence (DUI) and his conviction on a reduced charge of willful reckless driving which resulted in a fine and a term of probation that Hartmann had completed.

Hartmann was unable to sit for the February 2003 bar examination because his Army National Guard unit was mobilized into active federal service. He subsequently filed an application to take the July 2004 bar examination. This application completely and accurately informed the Commission of all his prior criminal history. By letter dated May 24, 2004, the Commission notified Hartmann that it was refusing him permission to take the examination "on the grounds that [he] lack[ed] the necessary character and fitness for admission." The Commission advised Hartmann of his appeal rights under Neb. Ct. R. for Adm. of Attys. 10 (rev. 2000). Hartmann requested a hearing before the Commission, which was held on October 5 and 26, 2004. Prior to the hearing, the Commission specified that it had denied Hartmann's application based on his 1992 and 2002 DUI charges, which were reduced to reckless driving and willful reckless driving, respectively; his conviction on the third degree assault charge; and allegations that he had committed offenses involving minors.

K.H.V. was married in June 2004 and resides in another state. She provided written statements to the Commission and testified at the hearing about the incident which led to Hartmann's charge of third degree sexual assault, later amended to third degree assault for "threaten[ing] another in a menacing manner." See Neb. Rev. Stat. § 28-310(1)(a) (Reissue 1995). According to K.H.V., Hartmann took her, her brother, and a female friend to a movie in Lincoln, Nebraska, on December 29, 2001. K.H.V. testified that Hartmann sat next to her in the movie theater and

placed a coat over the armrest between their seats. She testified that during the movie, Hartmann repeatedly touched her in a sexual manner with his hand beneath the coat. In his testimony, Hartmann testified that he attended the movie with K.H.V. and the others on January 5, 2002. He admitted that he placed his hand on K.H.V.'s leg early in the movie in an attempt to retrieve some candy that she was "hiding." He then stated: "And the truth is that I — I left my hand on her leg longer than I should have." When asked why he did so, he replied:

> In retrospect, it seems to me that in the — the warmth of that moment and given the closeness that [K.H.V.] and I felt as uncle and niece, it made me — and given the fact that I had been, in my opinion, having a dismal holiday season, it just made me feel comfortable and better.

When asked how long he left his hand on his niece's leg, he replied, "I don't know. It was longer than it should have been." Hartmann stated that he touched only the "middle outer part" of K.H.V.'s leg. He emphatically denied that he touched K.H.V. in a sexual manner or that his hand was under a coat when he touched her leg. Although he described the initial contact as "horsing around," he acknowledged that it was "a horrible mistake on my part to — to maintain that contact."

On March 14, 2002, Hartmann wrote a letter to K.H.V. and her parents in which he apologized for his actions at the movie theater without specifically describing those actions. Hartmann supplied a copy of this letter to the Commission along with other information concerning the movie theater incident. In the letter, Hartmann stated:

> I remember exactly when things went wrong in my relation with [K.H.V.] It was at our Thanksgiving family meal here at home in the year 2000, I felt [K.H.V.'s] legs against mine under the dinner table, and it was comforting somehow. As crazy as this might sound, I think that at first it was a kind of innocent flirtation going on, if you can use that phrase in this context—but, as we all now know, it went further than that, much further than it ever should have.

Hartmann testified that this letter was written after his brother and sister-in-law, the parents of K.H.V., told him that K.H.V. was upset about the incident at the movie theater. He testified that the

letter referred to his touching of his niece's leg during the movie, as recounted in his testimony, and that at the time he wrote the letter, he was not aware that K.H.V. had alleged any contact of a sexual nature. The criminal charge arising from this incident was initially filed in April 2002. Hartmann testified that he eventually entered a no contest plea to the reduced charge of third degree assault, in part to spare members of his family from appearing in court "to argue about something that should have been resolved at the family level." He now regrets his decision to enter into the plea agreement.

In her testimony at the hearing and in written statements submitted to the Commission, K.H.V. also accused Hartmann of unlawful conduct on numerous occasions before the movie theater incident and later on the same day that the incident occurred. She claimed that many of the incidents occurred during family gatherings. Hartmann denied these accusations, except for one occasion on which he admitted touching his niece's knee while seated next to her at a table. Although he acknowledged a "level of flirtation" between himself and K.H.V. beginning in late 2000 or 2001, Hartmann denied that the relationship was romantic or sexual in nature. Hartmann's attorney brought out various inconsistencies in the account of events which K.H.V. gave to the Commission and previous accounts she had given to others, including law enforcement personnel. He also adduced evidence that a poem she claimed to have written and given to her grandmother was a copyrighted work published on the Internet. Numerous members of Hartmann's extended family testified and submitted written statements disputing K.H.V.'s allegations and questioning her veracity and that of her mother.

Hartmann testified that while in college in 1988, he had had a problem with a girl friend and began binge drinking. He quit drinking in 1996, but resumed in 2002 and continued until after his DUI arrest in November of that year. He admitted that his relapse in 2002 was because of stress he was experiencing because of dissention among members of his family after the sexual assault charges were filed. After his DUI arrest, however, Hartmann attended a substance abuse course and alcohol counseling, and at the time of the hearing, he characterized his alcohol use as "extremely infrequent."

In response to an allegation that he had been terminated from a teaching position, Hartmann testified concerning an incident which occurred when he was employed as a teacher at a parochial middle school in another state. After the conclusion of the school year, he wrote a letter to one of his female students in which he expressed his admiration for her and his hope that they could meet again when she was older. When he wrote the letter, Hartmann was 28 years old and the student was 14. Hartmann denied that he was pursuing a sexual relationship with the student. After being alerted to the letter by the parents of the student, the school principal contacted Hartmann and told him that the letter was inappropriate. School officials encouraged him to seek counseling before returning to the classroom. Hartmann decided to leave the teaching profession and return to Nebraska. He provided the Commission with a letter from the school principal confirming that Hartmann was employed as a teacher for the 1990-91 school year, that he fulfilled his teaching obligations for that year, and that his resignation was voluntary.

Two mental health professionals testified at the hearing. Mary Lutz-Priefert, a licensed mental health practitioner and certified professional counselor, began seeing K.H.V. in January 2004 and counseled with her approximately 30 times prior to the hearing. Lutz-Priefert diagnosed K.H.V. with posttraumatic stress disorder. She testified that K.H.V. was very consistent in her reports of Hartmann's conduct and that it was "[v]ery, very unlikely" that her reports were fabricated. During cross-examination, however, Lutz-Priefert admitted that she had not reported the allegations to authorities and that she was not aware of what the police were told about what had happened at the movie theater. Although Lutz-Priefert testified that she always asked K.H.V. very open-ended questions, K.H.V. subsequently testified that Lutz-Priefert would sometimes ask her direct questions about whether specific conduct had occurred.

Dr. Robert D. Larson, a clinical psychologist, also testified at the hearing. Larson began seeing Hartmann after the Commission denied Hartmann permission to take the July 2004 bar examination and had met with him eight times prior to the hearing. He believed that Hartmann was always truthful with him. According to Larson, Hartmann admitted that he placed his hand on K.H.V.'s

leg during the movie and kept it there for an inappropriate amount of time, approximately 1 hour. Hartmann also admitted to Larson that he had touched K.H.V.'s leg or knee with his hand at a Thanksgiving meal. Larson described Hartmann's touching as a means of deriving emotional gratification and a feeling of comfort and stated that the acts were not done for sexual gratification.

Based upon what he deemed to be a reliable psychological evaluation performed by another psychologist, Larson diagnosed Hartmann with "[m]ajor depressive disorder, adjustment disorder with depressed mood, and personality disorder not otherwise specified." Larson explained that the adjustment disorder is a reactive depression caused by situational circumstances and that the major depressive disorder is characterized by long-term bouts of depression. The personality disorder involves dependency issues. According to Larson, Hartmann forms a premature emotional attachment to women he dates and then feels a very strong sense of rejection when the relationship ends. To relieve the pain of these rejections, Hartmann has turned to abusing alcohol and to romantically idealizing young women, resulting in his "making choices and even actions that were just not wise, not appropriate."

Larson testified that Hartmann had made progress in identifying and taking responsibility for his "pattern" of behavior with young women and had become aware of how he views them in an inappropriate way. However, Larson also testified that because his counseling time with Hartmann had been limited, he was still in the assessment phase of treatment and had not had an opportunity "to get too much into the intervention phase," which he planned to address in further counseling. Larson also testified that he had noted, but had not addressed, Hartmann's issues related to alcohol use.

Larson stated that because Hartmann was aware of his problem and motivated to resolve it, it was his opinion that Hartmann would be able to provide legal services to clients without risk of harm. However, he acknowledged that Hartmann's representation of a young female client could elicit "different kinds of emotional responses" which would need to be addressed in counseling. Larson testified that he intended to continue meeting with Hartmann about once every 3 weeks. When asked by

a member of the Commission to give his assessment of how Hartmann would function under a high degree of stress, Larson replied: "I think that there are times where he may get somewhat overwhelmed by the level of stress that he's under. And so I guess . . . I see that, at this point, still a work in progress."

Hartmann agreed with Larson's assessment and admitted that in retrospect, he had made mistakes in forming emotional attachments to his former student and K.H.V. He testified that he has benefited from Larson's counseling and that he would continue seeing him "until I feel confident . . . that I can persevere no matter . . . what happens in my emotional life." Hartmann confirmed his statement to Larson that he was currently involved in a stable relationship with an adult female and submitted a letter from this person, which was supportive of his application.

In addition to the letters from family members identified above, Hartmann submitted letters from former employers, including a governmental agency and a private law firm where he worked as a law clerk. The letters were supportive of his character and fitness for admission to the bar. The record also includes a favorable military fitness report pertaining to Hartmann, completed in January 2004. One of Hartmann's law professors testified at the hearing in support of his application. There is no indication that any of these persons, other than members of Hartmann's family, had knowledge concerning the incident involving K.H.V. or Hartmann's psychological status as described by Larson.

On October 28, 2004, the Commission notified Hartmann that it was denying his request to take the bar examination "on the basis that he lacks the requisite fitness and character for admission to the Nebraska Bar." Hartmann filed this timely appeal pursuant to rule 10 and Neb. Ct. R. for Adm. of Attys. 15 (rev. 2000).

ASSIGNMENT OF ERROR

Hartmann's sole assignment of error is that the Commission erred in finding he lacks the requisite character and fitness for admission to the Nebraska bar.

STANDARD OF REVIEW

[1] Under rule 15, the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before

the Commission. *In re Application of Roseberry, ante* p. 508, 704 N.W.2d 229 (2005); *In re Application of Silva*, 266 Neb. 419, 665 N.W.2d 592 (2003).

ANALYSIS

[2] The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. *Id.* Nebraska statutory law further provides: "No person shall be admitted . . . unless it is shown to the satisfaction of the Supreme Court that such person is of good moral character." Neb. Rev. Stat. § 7-102(1) (Cum. Supp. 2004). We have delegated administrative responsibility for bar admissions solely to the Commission. *In re Application of Silva, supra.*

Neb. Ct. R. for Adm. of Attys. 3 (rev. 2005), which governs the admission of attorneys, describes the applicable standards for character and fitness of attorneys as follows:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission.

In addition to the admission requirements otherwise established by these rules, rule 3 recites the following essential eligibility requirements for admission to the practice of law in Nebraska:

> (a) The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;
>
> (b) The ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, and others;
>
> (c) The ability to conduct oneself with respect for and in accordance with the law and the Nebraska Rules of Professional Conduct;
>
> . . . .
>
> (f) The ability to exercise good judgment in conducting one's professional business;

> (g) The ability to avoid acts that exhibit disregard for the health, safety, and welfare of others;
>
> . . . .
>
> (j) The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

Appendix A to our rules governing the admission of attorneys further clarifies the character and fitness standards and provides in part:

> The primary purposes of character and fitness screening before admission to the bar of Nebraska are to assure the protection of the public and to safeguard the justice system. . . . The public is adequately protected only by a system that evaluates character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their attorneys.

[3,4] The applicant for admission bears the burden of proving good character by producing documentation, reports, and witnesses in support of the application. *In re Application of Roseberry, ante* p. 508, 704 N.W.2d 229 (2005); *In re Application of Silva*, 266 Neb. 419, 665 N.W.2d 592 (2003). " ' "A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission." ' " *In re Application of Roseberry, ante* at 516, 704 N.W.2d at 234. Appendix A to our rules governing the admission of attorneys lists the following as relevant conduct that should be treated as cause for further inquiry before the Commission decides whether an applicant possesses the character and fitness to practice law:

1. misconduct in employment;
2. acts involving dishonesty, fraud, deceit, or misrepresentation;
3. abuse of legal process, including the filing of vexatious lawsuits;
4. neglect of financial responsibilities;
5. neglect of professional obligations;

6. violation of an order of a court, including child support orders;

7. evidence of mental or emotional instability;

8. evidence of drug or alcohol dependence or abuse;

9. denial of admission to the bar in another jurisdiction on character and fitness grounds;

10. disciplinary action by an attorney disciplinary agency or other professional disciplinary agency of any jurisdiction.

When there is evidence that an applicant has engaged in any such conduct, the Commission is required to "determine whether the present character and fitness of an applicant qualify the applicant for admission" based on the consideration of the following factors:

1. the applicant's age at the time of the conduct;

2. the recency of the conduct;

3. the reliability of the information concerning the conduct;

4. the seriousness of the conduct;

5. the factors underlying the conduct;

6. the cumulative effect of the conduct or information;

7. the evidence of rehabilitation;

8. the applicant's positive social contributions since the conduct;

9. the applicant's candor in the admissions process;

10. the materiality of any omissions or misrepresentations.

Id.

In this case, K.H.V. has made multiple allegations that the unlawful conduct on the part of Hartmann extended over a period of years. Hartmann has denied these allegations, with the exception of his account of the January 2002 movie theater incident which led to his plea of no contest to a reduced charge of third degree assault, a Class I misdemeanor. Insofar as we can determine from the record, only the allegation pertaining to the incident at the movie theater resulted in the filing of a criminal charge. There is thus sharply conflicting evidence as to the uncharged allegations of criminal conduct and those originally

charged allegations which were not resolved by Hartmann's no contest plea to the reduced charge. However, in view of the facts which are not in dispute by virtue of Hartmann's plea, as well as his testimony and other evidence submitted by him in this proceeding, we need not resolve this conflict.

The admitted facts are that Hartmann, then a 39-year-old, third-year law student, placed his hand on the leg of his 15-year-old niece in a darkened movie theater and left it there for an inappropriate period of time and that on the basis of this conduct, he pled no contest and was convicted of third degree assault, in that he "threaten[ed] another in a menacing manner." See § 28-310(1)(b). Hartmann also admitted that he had previously placed his hand on his niece's leg or knee while seated next to her at a family dinner. We consider these facts in the context of certain other undisputed information which includes the inappropriate personal letter which Hartmann, as a 28-year-old middle school teacher, wrote to his former student, then 14 years old, and Hartmann's 1992 and 2002 DUI arrests, which led to his pleading guilty to reduced charges of reckless and willful reckless driving. Tying these facts together is Larson's testimony that Hartmann suffers from psychological disorders which have produced a pattern of conduct marked by "making choices and even actions that were just not wise, not appropriate." Larson testified that Hartmann was making progress in understanding and dealing with these problems and expressed an opinion that he would not pose a risk to clients if permitted to practice law. However, when questioned by a commissioner about Hartmann's ability to function under stress, he replied: "I think there frankly still needs to be dealing with his stress management abilities. I think that there are times where he may get somewhat overwhelmed by the level of stress that he's under. And so I guess . . . I see that, at this point, still a work in progress."

Based upon our de novo review of these undisputed portions of the record, we conclude that there is a pattern of behavior which, because of its seriousness and recency, reflects adversely upon Hartmann's present character and fitness to engage in the practice of law. This conduct casts significant doubt upon Hartmann's ability to conduct himself with respect for, and in accordance with, the law; to exercise good judgment; and to

avoid acts that exhibit disregard for the health, safety, and welfare of others. We further conclude that there is insufficient evidence of rehabilitation to safely predict that the pattern of behavior will not recur. The practice of law is a profession which can be attended by significant stress, and a lawyer's inability to manage such stress can harm the interests of a client. See, e.g., *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002) (lawyer's failure to take necessary actions on behalf of clients related to untreated depression). Substance abuse is often a factor in attorney discipline cases. See, *State ex rel. Counsel for Dis. v. Hughes*, 268 Neb. 668, 686 N.W.2d 588 (2004); *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004). At the time of the hearing, Hartmann was still undergoing treatment for the psychological condition to which he attributes his conduct, and Larson could not state with a reasonable degree of certainty that his problems were resolved. We conclude that the record does not afford a sufficient basis for predicting when, if, or how such resolution will occur. We are neither bound nor persuaded by Larson's opinion that Hartmann would pose no risk to clients if admitted to the practice of law. Accordingly, we affirm the recommendation of the Commission to deny Hartmann's application for admission.

APPLICATION DENIED.

IN RE INTEREST OF DEVIN W. ET AL.,
CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,
V. LERRY M., APPELLANT, AND JILLIAN M.,
APPELLEE AND CROSS-APPELLANT.
707 N.W.2d 758

Filed December 2, 2005. No. S-04-250.

1. **Judgments: Jurisdiction.** A jurisdictional question that does not involve a factual dispute is a matter of law.
2. **Statutes.** Statutory interpretation is a question of law.
3. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.

4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
5. **Jurisdiction: Juvenile Courts.** Subject matter jurisdiction is vested in the juvenile court by an adjudication that a child is a juvenile described in Neb. Rev. Stat. § 43-247 (Cum. Supp. 2002).
6. ___: ___. Subsection 5 of Neb. Rev. Stat. § 43-247 (Cum. Supp. 2002) extends the juvenile court's jurisdiction to parents, guardians, or custodians who have custody of any juvenile described in § 43-247.
7. **Juvenile Courts: Parental Rights.** Pursuant to Neb. Rev. Stat. § 43-247 (Cum. Supp. 2002), a child, not the parent, is adjudicated in order to protect the child's rights. The rights of a parent are determined in the dispositional phase of the case.

Petition for further review from the Nebraska Court of Appeals, IRWIN, MOORE, and CASSEL, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, LINDA S. PORTER, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Dennis R. Keefe, Lancaster County Public Defender, and Reggie L. Ryder for appellant.

Gary E. Lacey, Lancaster County Attorney, Jodi L. Nelson, Kara E. Mickle, Daniel Packard, and Julie Agena, Senior Certified Law Student, for appellee State of Nebraska.

Lisa F. Lozano for appellee Jillian M.

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

MILLER-LERMAN, J.

NATURE OF CASE

Jesse M. is the minor son of appellant, Lerry M., and appellee and cross-appellant, Jillian M. The State filed a supplemental petition in a pending juvenile court proceeding alleging that Jesse lacked proper parental care by reason of the fault or habits of Jillian. The separate juvenile court of Lancaster County determined the allegations of the petition to be true and found Jesse to be a child as defined under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). At the time the juvenile court adjudicated Jesse, he resided with Lerry and Jillian. During a subsequent review hearing, the juvenile court found that it would be in the

best interests of Jesse to be removed from the physical custody of his parents and placed in out-of-home foster care. Lerry filed an appeal from the juvenile court's order removing Jesse, and Jillian filed a cross-appeal. In a published opinion, the Nebraska Court of Appeals concluded that the juvenile court was without subject matter jurisdiction to adjudicate Jesse or to conduct any subsequent proceedings regarding Jesse because there were no allegations in the petition that Jesse lacked proper parental care by reason of the conduct of Lerry, a custodial parent. *In re Interest of Devin W. et al.*, 13 Neb. App. 392, 693 N.W.2d 901 (2005). The Court of Appeals reversed the juvenile court's orders and remanded the cause with directions to dismiss the proceeding. *Id.* The State petitioned for further review. We granted the petition for further review. Because the juvenile court acquired subject matter jurisdiction upon adjudicating Jesse as a child under § 43-427(3)(a), the conclusion of the Court of Appeals to the effect that the juvenile court lacked subject matter jurisdiction as to matters involving the father, Lerry, was in error. We reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals for further proceedings.

STATEMENT OF FACTS

Lerry and Jillian are the natural parents of Jesse, born May 25, 2001. The present juvenile action arose initially out of proceedings involving Jesse's older full brother, Brien M., born June 4, 1998, and Jesse's older half brother, Devin W., born November 4, 1996. James W., Devin's natural father, did not reside in Nebraska, and his parental rights with respect to Devin were eventually terminated.

The facts relevant to the instant appeal were described in the Court of Appeals' opinion as follows:

> The State filed a juvenile petition on March 9, 2001, in the interest of Devin and Brien. The State alleged that Devin and Brien lacked proper parental care due to the fault or habits of Jillian in that on or after February 18, 2001, Jillian subjected Devin to inappropriate physical discipline resulting in physical injury to Devin. The State further alleged that Jillian's actions placed both Devin and

Brien at risk of harm. The State made no allegations concerning either Lerry or James.

An adjudication hearing was held on March 26, 2001, and continued to April 12. Jillian admitted the allegations in the petition, which admission was accepted by the court. The court found Devin and Brien to be children as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998).

On May 25, 2001, the day Jesse was born to Lerry and Jillian, the State filed a supplemental petition, alleging that Jesse lacked proper parental care by reason of the fault or habits of Jillian in that she had previously subjected Devin to inappropriate physical discipline, which act resulted in the filing of a juvenile court petition and Devin's adjudication, and that she had not corrected the conditions that served as the basis for that prior adjudication. The State alleged that this situation placed Jesse at risk of harm. The State made no allegations against Lerry in the supplemental petition.

On June 1, 2001, a dispositional hearing was held on the original petition and a rehabilitative plan was put into effect, which plan included the removal of Devin and Brien from the home of Lerry and Jillian. Devin and Brien were placed in foster care, and the court ordered reasonable visitation with Lerry and Jillian as arranged by the Department of Health and Human Services (the Department).

An adjudication hearing on the supplemental petition and a review hearing on the original petition were held on July 23, 2001. The juvenile court found that the allegations of the supplemental petition were true by a preponderance of the evidence and found Jesse to be a child as defined by § 43-247(3)(a) (Cum. Supp. 2002). The court scheduled the supplemental petition for disposition and ordered the Department to prepare a case plan.

On October 22, 2001, a dispositional hearing on the supplemental petition and a review hearing on the original petition were held. The juvenile court found that the health and safety of Devin and Brien required their continued removal from the family home and that it was in their best interests to remain in an out-of-home placement. . . . As to

Jesse, the court found it in Jesse's best interests that he remain in the temporary legal custody of the Department and in the physical care of Jillian. . . . Review hearings were held on January 8, February 7, and May 7, 2002. Following each hearing, the juvenile court found it in the best interests of Jesse that he remain in the temporary legal custody of the Department but in the physical care of Jillian. The court continued Devin and Brien's out-of-home placement, with supervised visitation by Jillian, and again provided for separate, unsupervised visitation by Lerry if Lerry so requested. . . .

The State filed a second supplemental petition on September 5, 2002. In count I of the petition, the State alleged that Devin and Brien lacked proper parental care due to the fault or habits of Lerry in that between February 8 and August 29, 2002, Lerry failed to have regular or consistent visitation or contact with Devin and Brien or failed to provide emotional care or support to them, placing them at risk of emotional harm. The State alleged in count II of the petition that between May 29, 2001, and August 29, 2002, (1) Devin and Brien had been removed from the family home and placed in the temporary legal custody of the Department, (2) Devin and Brien had been residing in foster care, (3) Lerry had knowledge of Devin and Brien's placement, and (4) Lerry failed to provide proper care, supervision, shelter, or support for Devin and Brien, placing them at risk of emotional harm. The State made no allegations in the second supplemental petition concerning Jesse.

A hearing was held on October 2, 2002, concerning all three petitions. With regard to the adjudication made in the second supplemental petition, Lerry entered a denial of the allegations therein, and the court set the second supplemental petition for formal hearing. With regard to its review of the original petition and supplemental petition, the court made findings similar to those made following the previous review hearings. However, the court found that while services had been provided in compliance with the case plan, poor progress had been made to alleviate the causes of the out-of-home placement of Devin and Brien.

The primary permanency plan for Devin and Brien remained one of reunification, with a new target date of February 2003.

On December 17, 2002, Lerry pled no contest to count II of the second supplemental petition. Count I was dismissed. The juvenile court found that Devin and Brien were children as defined by § 43-247(3)(a) in that they lacked proper parental care through the fault or habits of Lerry. The court also conducted a review of the petition and supplemental petition and made findings similar to those made following the October 2 hearing.

On January 23, 2003, a review hearing was held on the petition and supplemental petition and a disposition hearing was held on the second supplemental petition. The court found it in the best interests of Jesse for the Department to retain his temporary legal custody but found that Jesse should remain in the physical care of Jillian. The court found continued out-of-home placement to be in Devin's and Brien's best interests. . . . The court continued to note that poor progress had been made to alleviate the causes of the out-of-home placement of Devin and Brien and noted poor progress toward alleviating the cause of adjudication as it related to Jesse.

At a review hearing on May 5, 2003, the juvenile court found it in the best interests of Jesse that he remain in the physical care of Lerry and Jillian. Devin and Brien continued in out-of-home placement. The court found that reasonable efforts had been made to return custody of Devin and Brien to Jillian but that returning said custody to Jillian would be contrary to Devin's and Brien's welfare. The court again found that poor progress had been made to alleviate the causes of the out-of-home placement of Devin and Brien and the cause of adjudication as it related to Jesse. The court established a safety plan to maintain Jesse in the physical custody of Lerry and Jillian as follows:

"a. [Lerry and Jillian] shall place Jesse . . . in daycare with a licensed child care provider approved by the [Department]. Jesse shall attend daycare Monday through Friday, for a minimum of six (6) hours per day.

"b. [Lerry and Jillian] shall only leave Jesse . . . in the care of a licensed child care provider or other individual previously approved in advance by the case manager.

"c. [Lerry and Jillian] shall ensure that any individual who provides care for Jesse . . . is informed of [the safety plan] and has agreed to comply with [its] terms.

"d. [Lerry and Jillian] shall follow all recommendations of [Jesse's] medical care provider, and shall ensure that Jesse attends all regularly scheduled medical appointments.

"e. [Lerry and Jillian] shall allow family support workers, case managers, or the Guardian Ad Litem access to Jesse . . . and to the home in which he resides, and shall be subject to unannounced drop-in visits at all reasonable hours.

"f. [Lerry and Jillian] shall cooperate with a [family support worker] as arranged by the . . . Department. . . .

"g. No other individual shall reside in the home of [Lerry and Jillian] without approval of the . . . Department. . . .

"h. No other individuals shall be in the home with Jesse . . . for extended periods of time (over 3 hours) without approval of the . . . Department[.]" . . . The safety plan requirements were again continued at the review hearing of July 15.

In May 2003, Lerry and Jillian relinquished their parental rights as to Devin and Brien. As a result of this relinquishment, and the termination of James' parental rights as to Devin in August 2003, Devin and Brien were on track to be adopted by their foster family with a target date of February 2004.

A review hearing concerning Jesse was held on January 14, 2004. The State offered exhibit 57, the case plan and court report of the caseworker, prepared January 9, 2004; exhibit 58, the report of the guardian ad litem; and exhibit 59, the court-appointed special advocate's report. Exhibit 58 was received by the court without objection. Lerry objected to the receipt of exhibits 57 and 59 on the grounds of foundation, hearsay, denial of due process, and lack of the right of confrontation. Jillian joined in the objection to exhibit 57. The court received exhibits 57 and 59 over

Lerry's and Jillian's objections. The court recognized that the caseworker was not present but, after verifying that she was still employed by the Department, allowed the hearing to be continued so that Lerry and Jillian could cross-examine her concerning her report. The court noted that the court-appointed special advocate was present at the hearing and could be cross-examined if the parties desired. After brief testimony by Lerry, the hearing was recessed and continued until February 3.

At the February 3, 2004, hearing, the court heard further testimony from Lerry, as well as testimony from Jillian. Lerry offered exhibits 60 and 61, which were notebooks containing reports documenting Jesse's progress in daycare, and exhibit 64, an "Intensive Family Preservation Discharge Summary" from a company providing visitation supervision and other services. These exhibits were received without objection. The guardian ad litem offered exhibit 63, an updated version of his above-mentioned report, exhibit 58. The court received exhibit 63 over Lerry's and Jillian's objections on the grounds of foundation, hearsay, and denial of due process. The State offered exhibit 62, which included a February 2 addendum to the caseworker's report. The court received exhibit 62 over Lerry's and Jillian's objections on the grounds of foundation, hearsay, denial of due process, and lack of the right of confrontation. The State called the caseworker to testify, and she was thoroughly cross-examined by both Lerry and Jillian. . . .

At the close of the February 3, 2004, hearing, the juvenile court pronounced its ruling from the bench, finding that the evidence supported the Department's recommendation for an out-of-home placement for Jesse. The court further found that there had been reasonable efforts to maintain Jesse's placement in the parental home but that it would be contrary to his welfare for him to remain there. We note the court's comments regarding its jurisdiction over Lerry: "I would advise the parties that I feel that the Court's jurisdiction over [Lerry] is very limited. There's been no adjudication involving [Lerry] with regard to

> Jesse . . . . The petition that was adjudicated against [Lerry] involved only Devin and Brien . . . . But because [Jesse] is residing with [Jillian] in the family home and the evidence is that [Jillian] is the primary caretaker for [Jesse], I am approving the [D]epartment's recommendation for out-of-home placement at this time, but the parenting assessment that you've requested that the Court order of [Lerry or] any additional individual therapy I think is beyond the scope of the Court's jurisdiction at this point, given that [Lerry], with regard to Jesse, is an unadjudicated parent. The adju[dic]ation related to children that he's not a parent to and [whom] there's no plan to reunify [him] with. So with . . . that, I will approved [sic] the out-of-home placement at this time but not those provisions relating to [Lerry], in the absence of a further filing and adjudication thereon."
>
> The juvenile court entered an order on February 5, 2004, setting forth its findings from the February 3 hearing. The court found it in the best interests of Jesse that he be given an out-of-home placement in licensed foster care. The court found that reasonable efforts had been made to maintain Jesse's physical custody with Lerry and Jillian. The court found that it would be contrary to Jesse's welfare, health, and safety for him to remain in Lerry and Jillian's home, due to Jillian's failure to follow the court-ordered safety plan, evidence that Jesse had been exposed to cigarette smoke and excessive profanity in the family home despite his health problems and young age, Lerry's limited role in the supervision or parenting of Jesse, Jillian's failure to apply parenting skills for which extensive training had been provided, Jillian's failure to consistently participate in and make progress in her individual counseling, and the family's ongoing financial instability.

In re Interest of Devin W. et al., 13 Neb. App. 392, 393-400, 693 N.W.2d 901, 903-07 (2005).

Lerry appealed to the Court of Appeals, assigning as error the juvenile court's order removing Jesse. In addition to challenging the juvenile court's order removing Jesse from Lerry and Jillian's home, Lerry assigned as error the juvenile court's

receipt of certain exhibits into evidence. Jillian filed a cross-appeal and assigned as error the juvenile court's order removing Jesse.

The Court of Appeals did not reach the assigned errors involving evidentiary rulings or the propriety of removal because it concluded that the juvenile court lacked jurisdiction. In its opinion, the Court of Appeals stated that it "must first address the issue of subject matter jurisdiction in this case as it relates to Lerry, a custodial parent against whom no allegations or accusations have been adjudicated in relation to Jesse." *Id.* at 400, 693 N.W.2d at 907. In this regard, the Court of Appeals noted that the "risk of harm to [Jesse alleged in the supplemental petition] is posed by [Jillian] and there have been no direct allegations of a lack of proper parental care by [Lerry]." *Id.* at 403, 693 N.W.2d at 909. The Court of Appeals relied upon its earlier decision in *In re Interest of Kelly D.*, 3 Neb. App. 251, 526 N.W.2d 439 (1994), and determined that due to "the lack of an adjudication as to [Lerry]," the juvenile court lacked subject matter jurisdiction for the adjudication of Jesse on July 23, 2001. *In re Interest of Devin W. et al.*, 13 Neb. App. at 403, 693 N.W.2d at 909.

In its opinion, the Court of Appeals reasoned that in order for the juvenile court to properly assert jurisdiction, " 'the petition must allege facts which would show that the child lacks proper parental care by reason of the inadequacy of any parent whose custody or right to custody might be affected, so that both parents may understand that the litigation concerns their respective rights.' " (Emphasis omitted.) *Id.* at 402-03, 693 N.W.2d at 908-09 (quoting *In re Interest of Kelly D., supra*). The Court of Appeals concluded that "[b]ecause of the omission of any allegations showing that Jesse lacked proper parental care by reason of the inadequacy of Lerry, a parent whose custody of Jesse or right to such custody might be affected, the supplemental petition was inadequate to form the basis of the juvenile court's jurisdiction." *In re Interest of Devin W. et al.*, 13 Neb. App. at 403-04, 693 N.W.2d at 909. The Court of Appeals reversed the orders of the juvenile court pertaining to Jesse and remanded the cause with directions to dismiss the proceeding.

The State petitioned for further review from the Court of Appeals' decision. We granted the State's petition for further review.

ASSIGNMENT OF ERROR

The State asserts, restated, that the Court of Appeals erred in determining that the juvenile court was without jurisdiction for the adjudication of Jesse.

STANDARDS OF REVIEW

[1-3] A jurisdictional question that does not involve a factual dispute is a matter of law. *In re Application of Metropolitan Util. Dist., ante* p. 494, 704 N.W.2d 237 (2005). Statutory interpretation is a question of law. *Farber v. Lok-N-Logs, Inc., ante* p. 356, 701 N.W.2d 368 (2005). To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *In re Application of Metropolitan Util. Dist., supra.*

ANALYSIS

In its petition for further review, the State claims that the Court of Appeals erred when it concluded that the juvenile court was without jurisdiction for the adjudication of Jesse. We agree with the State. We conclude that the juvenile court acquired subject matter jurisdiction over Jesse upon his adjudication as a child described in § 43-247(3)(a); that such jurisdiction extended to Jesse's custodial parent, Lerry, pursuant to § 43-247(5); and that, therefore, the Court of Appeals erred as a matter of law when it concluded that the juvenile court lacked jurisdiction. We reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals for further proceedings.

[4] Subject matter jurisdiction deals with the court's ability to hear a case. *Anderson v. Wells Fargo Fin. Acceptance*, 269 Neb. 595, 694 N.W.2d 625 (2005). We recently stated: "Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved." *State v. Thomas*, 268 Neb. 570, 584, 685 N.W.2d 69, 82 (2004).

The subject matter jurisdiction of the juvenile court relative to this case is set forth in § 43-247, which provides, inter alia, as follows:

> The juvenile court shall have exclusive original jurisdiction . . . as to any juvenile defined in subdivision (3) of this section, and as to the parties and proceedings provided in subdivision[] (5) . . . of this section. . . .
>
> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> . . . .
>
> (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian is unable to provide or neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile . . . .
>
> . . . .
>
> (5) The parent, guardian, or custodian who has custody of any juvenile described in this section.

We have specifically noted that § 43-247(3)(a) "gives a juvenile court exclusive, original jurisdiction over '[a]ny juvenile . . . who lacks proper parental care by reason of the fault or habits of his or her parent.'" *In re Interest of Sabrina K.*, 262 Neb. 871, 875, 635 N.W.2d 727, 731 (2001). Such jurisdiction continues "until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction." § 43-247. Further, we have repeatedly noted that to obtain jurisdiction over a juvenile, the court's only concern is whether the condition in which the juvenile presently finds himself or herself fits within the asserted subsection of § 43-247. *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184

(2004); *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999).

[5] With regard to juvenile court adjudication proceedings under § 43-247, we have stated that subject matter jurisdiction is vested in the juvenile court by an adjudication that a child is a juvenile described in § 43-247. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). More importantly for the present case that is before us by virtue of the opinion of the Court of Appeals assailing the shortcomings of the supplemental petition relative to Lerry, we have noted that "it is the adjudication that a child is a juvenile, as characterized in § 43-247, which vests subject matter jurisdiction in a juvenile court, not the petition by which an adjudication is requested." See *In re Interest of L.D. et al.*, 224 Neb. 249, 259-60, 398 N.W.2d 91, 98 (1986).

[6] In considering the Nebraska Juvenile Code, we have stated that "[s]ubsection 5 of § 43-247 extends the juvenile court's jurisdiction to parents, guardians, or custodians who have custody of any juvenile described in [§ 43-247]." *In re Interest of J.T.B. and H.J.T.*, 245 Neb. at 630, 514 N.W.2d at 639. Thus, we have observed that "when a juvenile court adjudicates a minor under § 43-247(3), it also obtains exclusive jurisdiction over the 'parent . . . who has custody of any juvenile described in this section.' " *In re Interest of Sabrina K.*, 262 Neb. at 875, 635 N.W.2d at 732 (quoting § 43-247(5)). Stated another way, "an adjudication under the Nebraska Juvenile Code brings all the parties [identified in § 43-247(3) and (5)] under the juvenile court's exclusive jurisdiction." 262 Neb. at 877, 635 N.W.2d at 733.

We give a plain meaning to the Nebraska Juvenile Code provisions found at § 43-247(3)(a) and (5). See, e.g., *Caspers Constr. Co. v. Nebraska State Patrol, ante* p. 205, 700 N.W.2d 587 (2005). To summarize, pursuant to the plain meaning of the controlling statutes, subject matter jurisdiction is vested in the juvenile court by an adjudication that a child is a juvenile described in § 43-247(3)(a), and pursuant to subsection 5 of § 43-247, the juvenile court's jurisdiction is extended to parents who have custody of any juvenile who has been found to be a child described in § 43-247. Thus, in the instant case, the juvenile court acquired jurisdiction over Jesse and his custodial

father, Lerry, when it found conditions that fit § 43-247(3)(a) and adjudicated Jesse as a juvenile within the meaning of § 43-247(3)(a). See *In re Interest of Sabrina K., supra.*

In *In re Interest of Devin W. et al.*, 13 Neb. App. 392, 402-03, 693 N.W.2d 901, 908-09 (2005), the Court of Appeals stated that with regard to a petition seeking to adjudicate a child under § 43-247, " 'the petition must allege facts which would show that the child lacks proper parental care by reason of the inadequacy of any parent whose custody or right to custody might be affected, so that both parents may understand that the litigation concerns their respective rights.' " (Emphasis omitted.) (Quoting *In re Interest of Kelly D.*, 3 Neb. App. 251, 526 N.W.2d 439 (1994).) This reasoning misapprehends the juvenile court's jurisdiction and the purpose of the adjudication procedure, which we explained in *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

In *In re Interest of Amber G. et al.*, the father claimed that the juvenile court lacked jurisdiction because the petitions under which his four children were adjudicated alleged generally that the children were at risk due to the fault and habits of their mother, and there were no allegations in the petitions that the father abused or neglected his children. We disagreed, stating "[t]his is clearly an erroneous interpretation of the jurisdiction of the juvenile court and the two-step process involved in juvenile proceedings." *Id.* at 980, 554 N.W.2d at 148. We explained the "two-step process," stating:

> In Nebraska, the rights of the parent and the child are protected by the separate adjudication and dispositional phases of the dependency proceeding. A petition brought under § 43-247(3)(a) is brought on behalf of the child, not to punish the parents. *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995). The purpose of the adjudication phase of the proceeding is to protect the interests of the child; the purpose of the dispositional phase is to determine placement and the rights of the parties in the action. . . . It is not improper for the court to sustain jurisdiction at the adjudication phase if the State [establishes a] lack of proper parental care in the child's present living situation. See *In re Interest of Constance G., supra.*

In re Interest of Amber G. et al., 250 Neb. at 980, 554 N.W.2d at 148.

In *In re Interest of Amber G. et al.*, we noted that the mother had admitted the allegations of the petitions at the separate adjudications involving the children. We concluded that because the juvenile court obtained jurisdiction over the children at the adjudication stage, the father's argument that the juvenile court lacked jurisdiction because the petitions lacked specific allegations as to him was without merit. See, similarly, *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001) (concluding that biological father's claim that juvenile court lacked sufficient basis for adjudication because petition contained no allegations that he was unfit or unable to exercise appropriate parental care was without merit and further concluding that because allegations in petition had been admitted by child's custodial guardians, juvenile court properly acquired jurisdiction).

[7] The juvenile court's order from which Lerry appealed refers to Lerry as an "unadjudicated parent." Moreover, the Court of Appeals discusses "the lack of an adjudication as to" Lerry. *In re Interest of Devin W. et al.*, 13 Neb. App. at 403, 693 N.W.2d at 909. We disapprove of this language, which does not accurately reflect the purpose or substance of an adjudication proceeding. As stated above, pursuant to § 43-247, a child, not the parent, is adjudicated in order to protect the child's rights. The rights of a parent are determined in the dispositional phase of the case. See *In re Interest of Brian B. et al.*, 268 Neb. 870, 878, 689 N.W.2d 184, 191 (2004) (stating "purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not the adjudication phase").

In *In re Interest of Devin W. et al.*, 13 Neb. App. at 403, 693 N.W.2d at 909, the Court of Appeals stated that Lerry was entitled to "an adjudication hearing to defend against any such allegations [of harm]." As explained above, we do not believe such statement accurately reflects the purpose of an adjudication hearing. Further, for the sake of completeness, we note that the juvenile court's adjudication order reflects that Lerry was present and represented by counsel during the adjudication hearing. We also note that no appeal was filed from the court's adjudication order,

and thus it became a final order. See *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986).

We conclude that the Court of Appeals erred as a matter of law when it concluded that the juvenile court was without jurisdiction for the adjudication of Jesse on July 23, 2001, and all subsequent proceedings. To the contrary, the juvenile court became vested with subject matter jurisdiction over Jesse when it found at the adjudication hearing that Jesse was a child within the meaning of § 43-247(3)(a), and the juvenile court's jurisdiction extended to the custodial parent, Lerry, pursuant to § 43-247(5). To the extent that *In re Interest of Kelly D.*, 3 Neb. App. 251, 526 N.W.2d 439 (1994), or other opinions refer to adjudicated parents or reach conclusions at odds with our reasoning, they are disapproved.

In view of the foregoing, we reverse the decision of the Court of Appeals. We recognize that upon granting further review that results in the reversal of a decision of the Court of Appeals, this court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). Due to its conclusion regarding jurisdiction, the Court of Appeals did not reach Lerry's discrete assignments of error or the assignment of error raised in Jillian's cross-appeal, and we conclude that under these circumstances, it is appropriate for the Court of Appeals to consider Lerry's and Jillian's separate assignments of error in the first instance. Thus, we do not reach their assignments of error.

CONCLUSION

We conclude that because Jesse was adjudicated to be a juvenile within the meaning of § 43-247(3)(a), the juvenile court became vested with subject matter jurisdiction and jurisdiction extended to the custodial parent, Lerry, pursuant to § 43-247(5). We reverse the decision of the Court of Appeals that had concluded there was a lack of jurisdiction and remand the cause to the Court of Appeals for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE,
v. PETER J. ALBA, APPELLANT.
707 N.W.2d 402

Filed December 2, 2005. No. S-04-1125.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and SIEVERS, Judges, on appeal thereto from the District Court for Douglas County, J. MICHAEL COFFEY, Judge. Judgment of Court of Appeals affirmed.

Casey J. Quinn for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Pursuant to a plea agreement, Peter J. Alba pled guilty to two counts of sexual assault of a child, first offense. At the time the crimes to which Alba pled were committed, the offenses were Class IV felonies, for which the available penalties were a maximum of 5 years' imprisonment, a $10,000 fine, or both. The district court for Douglas County accepted the pleas, convicted Alba, and imposed consecutive sentences of 5 to 10 years' imprisonment on the first count and 10 to 15 years' imprisonment on the second count, based on the mistaken belief that the crimes were Class II felonies. Alba appealed, claiming his sentences were excessive.

On appeal, the Nebraska Court of Appeals concluded that Alba was improperly sentenced, vacated the sentences, and remanded the cause for resentencing as Class IV felonies. *State v. Alba*, 13 Neb. App. 519, 697 N.W.2d 295 (2005). The State petitioned for further review, claiming that the plea agreement should have been vacated because it was based on the mutually mistaken assumption that the offenses were Class II felonies

and that the parties should have been directed by the Court of Appeals to negotiate a new plea agreement. Although our reasoning differs from that of the Court of Appeals, we affirm the decision of the Court of Appeals which vacated Alba's sentences and remanded the cause for resentencing.

STATEMENT OF FACTS

In its opinion, the Court of Appeals described the facts of this case as follows:

> On October 28, 2003, Alba was charged by information with two counts of second offense sexual assault of a child, Class IC felonies, pursuant to Neb. Rev. Stat. § 28-320.01(3) (Cum. Supp. 1996). Count I alleged that "on or about the 1st day of January, 1997," Alba subjected B.A., "a person of less than fourteen years of age or younger, to sexual contact." Count II alleged that "on or about the 1st day of January, 1997," Alba subjected Z.A., "a person of less than fourteen years of age or younger, to sexual contact."
>
> On August 5, 2004, pursuant to a plea agreement, the State amended the information to allege each count as a first offense, which the State and the judge said made each count a Class II felony. The amended information expressly categorizes the crimes as Class II felonies. At the plea hearing, the trial judge, without objection from defense counsel or the State, advised Alba about the crimes and their penalties as though the crimes were Class II felonies, telling Alba that the crimes each carried a maximum prison sentence of 50 years and a minimum prison sentence of 1 year. Alba entered a plea of nolo contendere and was advised by the judge that he was pleading no contest to two Class II felonies, each of which carried a sentence as described above. A factual basis was entered, Alba's pleas were accepted, and an order was entered on September 27, 2004, sentencing Alba to imprisonment for 5 to 10 years on count I and for 10 to 15 years on count II, the sentences to be served consecutively.

State v. Alba, 13 Neb. App. at 521, 697 N.W.2d at 298-99. Alba appealed to the Court of Appeals and assigned as error that the court had imposed an excessive sentence as to each count.

The Court of Appeals noted that although the prosecutor and the district court judge had said that each count of first offense sexual assault of a child was a Class II felony, at the time Alba was alleged to have committed the crimes in 1997, first offense sexual assault of a child was in fact a Class IV felony under Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 1996). The Court of Appeals further noted that the sentencing statute had been amended but that such amendments were not applicable to Alba. The maximum sentence for a Class IV felony was 5 years' imprisonment, a $10,000 fine, or both, see Neb. Rev. Stat. § 28-105 (Reissue 1995), and the Court of Appeals therefore concluded that the sentences of imprisonment of 5 to 10 years on count I and of 10 to 15 years on count II exceeded the applicable statutory range and should be vacated.

Because the sentences were the result of a plea agreement, the Court of Appeals went on to consider whether the plea agreement must also be vacated, as the State contended, or whether, as Alba contended, the proper remedy in the case before it was to order resentencing under the correct gradation of the crimes to which Alba had pled. The Court of Appeals rejected the State's arguments, stating that while "the State was mistaken [as to the proper gradation of the crimes], it bears the risk of its own mistake" and that the mistake did not form a basis for recission of the plea agreement. *State v. Alba*, 13 Neb. App. 519, 534, 697 N.W.2d 295, 307 (2005). The Court of Appeals concluded that Alba was entitled to a lawful sentence based on the crimes to which he and the State had agreed he would plead, and the Court of Appeals therefore vacated Alba's sentences and remanded the cause to the district court with directions to resentence Alba, treating his offenses as Class IV felonies. One judge on the three-judge panel of the Court of Appeals dissented. As to the plea agreement, the dissenting opinion stated that because both the State and Alba were mutually mistaken as to the proper gradation of the crimes to which Alba agreed to plead, the appropriate remedy was to order the plea withdrawn as invalid and to allow the parties to negotiate an entirely new plea agreement.

The State petitioned for further review of the Court of Appeals' decision. We granted further review.

ASSIGNMENT OF ERROR

The State asserts on further review that the Court of Appeals erred in remanding the cause for resentencing rather than vacating the plea agreement and remanding the cause for further proceedings.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Gass*, 269 Neb. 834, 697 N.W.2d 245 (2005).

ANALYSIS

We note initially that Alba filed his appeal in the Court of Appeals and raised excessiveness of sentences as his sole assignment of error. Alba raised no issue regarding the validity of his plea-based convictions and did not seek to have his convictions vacated. We further note that the State did not file a complimentary error proceeding pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), raising an issue as to whether a plea agreement should be vacated where it is based on the parties' mutual mistake. Finally, we note that neither party moved in the district court to have Alba's plea withdrawn. Therefore, for purposes of this appeal, Alba stands convicted.

On petition for further review, the State asks this court to reverse the Court of Appeals' decision and to order that Alba's plea-based conviction be reversed and that the plea agreement be ordered rescinded. We believe, however, it is significant in this case that Alba presented his appeal as one limited to the issue of the proper sentences which may be imposed upon a defendant who stands convicted of sexual assault of a child, first offense. Because the cause is on appeal only with regard to the issue of excessive sentences, the questions raised and the relief requested by the State cannot be afforded in this appeal, and the scope of appellate analysis is limited to excessiveness of sentences.

In the present appeal, it was not necessary for the Court of Appeals to consider whether it should grant the relief requested by the State in Alba's appeal. Nevertheless, we agree with the Court of Appeals' ultimate conclusion that because Alba's sentences exceeded statutory limits, he was improperly sentenced.

Alba pled to two counts of sexual assault of a child, first offense. At the time Alba committed the crimes, the offense was classified as a Class IV felony, see § 28-320.01, which bore a maximum sentence of 5 years' imprisonment, see § 28-105. The sentences imposed on Alba as to each count included imprisonment in excess of 5 years, and as a result, the sentences exceeded statutory limits. We therefore conclude that the Court of Appeals did not err in vacating the sentences and ordering that the cause be remanded for resentencing.

CONCLUSION

We conclude that the only issue before the Court of Appeals was Alba's claim of excessive sentences and that the relief requested by the State was outside the proper scope of the appeal and need not have been considered by the Court of Appeals. However, we agree with the Court of Appeals' conclusion that the sentences imposed exceeded the statutory limits for the crimes to which Alba pled and was found guilty. Therefore, although our analysis differs from that of the Court of Appeals, we affirm the Court of Appeals' decision which vacated Alba's sentences and remanded the cause for resentencing of the crimes as Class IV felonies.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MARK M. GROSSHANS, APPELLANT.
707 N.W.2d 405

Filed December 2, 2005. No. S-04-1370.

1. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
3. **Administrative Law.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.

4. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
5. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
6. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed.

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

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

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

WRIGHT, J.

NATURE OF CASE

Mark M. Grosshans appeals from a conviction for sales tax evasion.

SCOPE 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. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[2] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial

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

FACTS

Grosshans was charged by information in York County with two counts of willfully attempting to avoid sales tax, a Class IV felony, in violation of Neb. Rev. Stat. § 77-2713(1) (Reissue 1996). The first count related to a motorcycle purchased in 2003, and the second count related to a Chevrolet Corvette purchased in 2001. The jury found Grosshans guilty of count I and not guilty of count II.

Grosshans purchased a motorcycle from Frontier Harley-Davidson (Frontier) of Lincoln, Nebraska, on January 30, 2003. The purchase price was $17,925, not including accessories and freight, and Grosshans did not trade in any vehicle as part of the transaction. Grosshans received the manufacturer's certificate of origin for the motorcycle signed by the dealer and a completed "Form 6," which is a Nebraska Department of Revenue sales tax form that shows the sales tax computation.

The manager of Frontier testified that the sales tax computation was completed before the Form 6 was given to Grosshans. The form showed the total sales price, no trade-in allowance, and a tax due on the sale in the amount of $1,256.76. Grosshans' signature appeared on the Form 6 as the purchaser.

Grosshans obtained a Nebraska certificate of title for the motorcycle in his name from the Lancaster County treasurer on March 14, 2003. On the same day, he signed the title over to Joshua Buck. A certificate of title to the motorcycle was then issued to Buck by Lancaster County on the same day.

On April 11, 2003, Buck signed the motorcycle title back to Grosshans and his mother. That same day, Grosshans went to the motor vehicle division of the Lancaster County treasurer's office to register the motorcycle. A title clerk, Doylene Christian, assisted Grosshans. She had known him as an acquaintance for several years when Grosshans was the fire chief in York, Nebraska. She testified that Grosshans attempted to register and license the motorcycle after telling her that it was a gift. When Grosshans presented Christian with the title to the motorcycle, she checked the records and determined that no sales tax had

ever been paid on the motorcycle. She told Grosshans that the motorcycle could not be gifted when the sales tax had not been paid. Grosshans then asked: " 'Can't you just do this for me?' " Christian responded: " 'No, I could lose my job.' " Christian contacted her supervisor, Susan Ross, who thereafter assisted Grosshans in his attempt to register the motorcycle in Lancaster County.

Ross testified that the title history on her computer showed that Frontier had transferred the title to Grosshans and that sales tax had not been paid after the transfer by the dealer. Ross stated she told Grosshans that he would need to pay the sales tax, to which he responded that he would go to York County to title the vehicle. Ross testified that she intended to call York County concerning Grosshans, but by the time she returned from lunch, Grosshans had already licensed the motorcycle in York County. Ross stated that York County faxed her the Form 6 that had been used to license the motorcycle in York County. She reviewed the form and noticed that no sales tax had been paid by Grosshans when he registered the motorcycle in York County. Although Grosshans told Christian at the Lancaster County treasurer's office that the motorcycle had been gifted to him, the sales tax form used to license the motorcycle in York County indicated no sales tax was paid because there were two trade-ins of equivalent value. Ross then notified the automobile fraud division of the Nebraska State Patrol.

When Investigator Stanley Funkey interviewed Grosshans, Grosshans confirmed the motorcycle was new when he purchased it from the dealer. Grosshans told Funkey that he transferred the title to Buck in order to extend the in-transit period so as to allow Grosshans time to receive an endorsement for a motorcycle operator's license. Funkey told Grosshans an extended in-transit period was not needed, and Grosshans then explained that the reason for the title transfers to and from Buck was to avoid the sales tax. Funkey testified concerning the Form 6 used by Grosshans to register the title in York County. He explained that the two vehicles listed as trade-ins were not actually traded in or transferred in exchange for the motorcycle.

Loretta Heiden, York County treasurer, testified concerning the titling and registration of the motorcycle in York County on

April 11, 2003. She testified that no sales tax was collected on the motorcycle by her office because the Form 6 provided by Grosshans showed that there were two vehicles traded in for the motorcycle and that the trade-ins equaled the cost of the motorcycle. Heiden explained that the person licensing the vehicle would have represented to the clerk that the trade-ins were of equal value. Heiden also stated that the Form 6 was signed by Grosshans "[u]nder penalties of law" as being "correct and complete." She explained that no sales tax was collected because the York County treasurer's office relied upon the accuracy of the representation of the person licensing the motor vehicle, who in this case was Grosshans.

On June 19, 2003, the Department of Revenue wrote to Grosshans, advising him that he owed sales tax on the motorcycle. Grosshans then paid the sales tax indicated on the Form 6.

The jury found Grosshans guilty of the count related to the motorcycle and not guilty of the second count. He was sentenced to probation and ordered to serve 90 days in the county jail on 45 consecutive weekends and to pay costs of $581.42. Grosshans timely appeals.

ASSIGNMENTS OF ERROR

Grosshans assigns as error that the district court erred in admitting evidence related to regulations adopted by the Department of Revenue and in instructing the jury. He also asserts as error that the evidence was insufficient to support the conviction.

ANALYSIS

Grosshans claims the district court erred in admitting into evidence a certified copy of 316 Neb. Admin. Code, ch. 1, § 020 (1998), the sales and use tax regulations of the Department of Revenue. Although the regulations were received in evidence and used as the basis for some of the jury instructions, they were not given to the jury during its deliberation.

At trial, Grosshans objected to receipt of the regulations based on hearsay and confrontation grounds. In his brief, Grosshans argues that the admission of the regulations was an attempt by the State to offer " 'proof' " that sales tax was due because the transactions were not " 'gifts' " as defined by the regulations.

See brief for appellant at 7. Grosshans argues that the regulations were inadmissible to prove sales tax was due and that this was the only trial evidence offered by the State to establish that fact. We conclude this argument is without merit.

The regulation which Grosshans objects to provided, in pertinent part: "020.05 The purchase of a licensed motor vehicle may be exempt for any of the following reasons . . . 020.05C The motor vehicle is a gift to the applicant or received through inheritance and tax was previously paid by the donor or prior owner . . . ."

[3] The Tax Commissioner is empowered by law to make, adopt, and publish such rules and regulations as necessary and desirable to carry out the powers and duties imposed upon the Department of Revenue. See Neb. Rev. Stat. § 77-369 (Reissue 2003). The regulations were certified by Nebraska's Secretary of State as having been adopted by the Department of Revenue and approved by the offices of the Attorney General and the Governor. Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law. *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004).

We review the admission of the regulations for an abuse of discretion. In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). We conclude there was no abuse of discretion in the district court's receiving the regulations into evidence.

In conjunction with the above assignment of error, Grosshans argues that the evidence was insufficient to support the conviction. Grosshans argues that without the admission of the regulations, there was no evidence from which the jury could conclude that sales tax was due on the transactions in question. After acquiring a legal interest in the motorcycle and before licensing or registering it, Grosshans conveyed legal title to a third party,

Buck. Grosshans argues that Buck then conveyed the title to him, creating a transfer not at retail, and that the sales tax law therefore did not apply.

Grosshans was charged with violating § 77-2713(1), which provided:

> Any person required under the provisions of sections 77-2702.03 to 77-2713 to collect, account for, or pay over any tax imposed by the Nebraska Revenue Act of 1967 who willfully fails to collect or truthfully account for or pay over such tax and any person who willfully attempts in any manner to evade any tax imposed by such provisions of such act or the payment thereof shall, in addition to other penalties provided by law, be guilty of a Class IV felony.

[4] On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005). We conclude that the verdict was supported by relevant evidence and that such evidence was sufficient for the jury to find Grosshans guilty of count I.

The evidence established that Grosshans purchased the motorcycle new at retail on January 30, 2003, and did not register it for more than 30 days. He had received a properly completed sales tax form from the dealer showing that he owed $1,256.76 in sales tax. Pursuant to Neb. Rev. Stat. § 77-2703(1)(i) (Cum. Supp. 2000), the sales tax was owed by Grosshans 30 days after he purchased the motorcycle. Grosshans transferred the motorcycle to Buck, and Buck then transferred the title back to Grosshans, but no sales tax was paid for either of these transfers.

Grosshans then attempted to register the motorcycle in Lancaster County but was told that the motorcycle could not be registered because he had to pay the sales tax. Grosshans traveled to York County and registered the motorcycle there. No sales tax was collected in York County because Grosshans represented on the sales tax form that the tax was offset by a trade-in allowance from two other vehicles. Grosshans did not claim an exemption from sales tax based upon a gift, even though

Grosshans had earlier the same day attempted to register the motorcycle in Lancaster County, claiming it was a gift. The evidence established that Grosshans eventually paid the sales tax after receiving an assessment letter from the Department of Revenue.

[5] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Jonusas*, 269 Neb. 644, 694 N.W.2d 651 (2005). The evidence here, viewed and construed most favorably to the State, shows that Grosshans failed to truthfully account for or pay the sales tax that was due on the motorcycle.

Grosshans attempted to register the motorcycle in Lancaster County and avoid paying sales tax by claiming it was a gift. When he was told that he could not register the motorcycle in Lancaster County without paying the sales tax, he employed a different method to avoid paying the tax in York County. He signed the Form 6 in York County representing that there had been a trade-in of two vehicles when he purchased the motorcycle. Grosshans' registering the vehicle in York County and signing the Form 6 representing that there had been a trade-in was an attempt to avoid the sales tax that was due on the purchase of the motorcycle. Funkey testified that the alleged trade-ins did not occur.

Grosshans also argues that jury instruction No. 8, which incorporated the provisions of the exhibit containing the regulations, eliminated the State's burden of proof on the subject of whether a tax was due. We disagree.

During the jury instruction conference, Grosshans objected to instruction No. 8 to the extent that it instructed the jury as to the applicable regulations. Grosshans argued that including them in the instructions placed undue comment, undue weight, and undue significance on the evidence. He asked for a special instruction that the regulations were not laws. Instead, the district court instructed the jury as follows:

> Under Neb. Admin. R. & Regs., Tit. 316, Ch. 1, the Nebraska Department of Revenue's Rules and Regulations relating to sales taxes on motor vehicles,
>
> 020.05 The purchase of a licensed motor vehicle may be exempt if:
>
> 020.05C The motor vehicle is a gift to the applicant or received through inheritance and the sales tax was previously paid by the donor or prior owner.
>
> "Gift," in tax law, refers to a transfer of property or a payment made without conditions, from detached and disinterested generosity, out of affection, respect, charity or like impulses, and not from a sense of any moral or legal duty or from the incentive of anticipated benefits or anticipated economic benefits. Black's Law Dictionary 619 (5th ed. 1979).

The court's instruction was correct, and Grosshans' request for an instruction that the regulations were not laws was properly denied.

As noted previously, agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law. *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004). We have applied this policy to a number of tax-related cases in holding that tax regulations have the effect of law. See, *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002) (taxation of gross receipts); *Affiliated Foods Co-op v. State*, 259 Neb. 549, 611 N.W.2d 105 (2000) (taxation of postage as cost of transportation); *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000) (taxation of component parts); *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue*, 259 Neb. 24, 607 N.W.2d 857 (2000) (sales tax on purchases for tax-exempt organizations); *Val-Pak of Omaha v. Department of Revenue*, 249 Neb. 776, 545 N.W.2d 447 (1996) (taxation of direct-mail advertising); *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995) (tax credits); *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989) (sales and use tax exemption).

[6] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach

a conclusion independent of the determination reached by the trial court. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005), *cert. denied* 546 U.S. 947, 126 S. Ct. 449, 163 L. Ed. 2d 341. The district court did not err by instructing the jury as to the content of the regulations. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005). Grosshans has not demonstrated that he was prejudiced because of the instruction given by the court.

CONCLUSION

The district court did not err in admitting the certified copy of the sales and use tax regulations of the Department of Revenue. There was sufficient evidence to support the conviction that Grosshans was required to pay sales tax imposed by the Nebraska Revenue Act of 1967 on the purchase of a motorcycle and that he willfully attempted to evade the sales tax on the motorcycle contrary to the provisions of § 77-2713(1). The judgment and sentence of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
GREGORY G. HALL, APPELLANT.
708 N.W.2d 209

Filed December 2, 2005. No. S-04-1478.

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. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
3. **Sentences: Prior Convictions.** Neb. Rev. Stat. § 29-2221(1) (Reissue 1995) provides for enhanced mandatory minimum and maximum sentences for a convicted defendant who has been twice convicted of a crime, sentenced, and committed to prison in this or any other state for terms of not less than 1 year.

4. **Sentences: Prior Convictions: Proof.** In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove the fact of prior convictions by a preponderance of the evidence and the trial court determines the fact of prior convictions based upon the preponderance of the evidence standard.
5. **Trial: Evidence: Appeal and Error.** Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal.
6. **Trial: Evidence: Words and Phrases.** An objection on the basis of insufficient foundation is a general objection.
7. **Trial: Evidence: Appeal and Error.** If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose.
8. **Sentences: Prior Convictions: Right to Counsel: Waiver: Proof.** When using a prior conviction to enhance a sentence, the State has the burden to prove the defendant was represented by counsel at the time of conviction and sentencing, or had knowingly and voluntarily waived representation for those proceedings.
9. **Prior Convictions: Records: Proof.** The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.
10. **Rules of Evidence: Records: Proof.** Copies of judicial records that are certified by a deputy clerk for the clerk of the district court and impressed with the court's seal do not require extrinsic evidence of authenticity for admission under Neb. Evid. R. 902, Neb. Rev. Stat. § 27-902 (Reissue 1995).
11. **Sentences: Prior Convictions: Right to Counsel: Waiver: Proof.** The preponderance of the evidence standard of proof applies to the State's burden to prove that a defendant had or waived counsel at the time of the prior conviction and sentencing.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Gregory A. Pivovar for appellant and Gregory G. Hall, pro se.

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

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

HENDRY, C.J.

INTRODUCTION

This is Gregory G. Hall's second direct appeal from his sentencing as a habitual criminal, following this court's remand for

a new enhancement hearing. See *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004).

BACKGROUND

In September 2002, Hall was charged in Sarpy County, Nebraska, with one count of possession of a controlled substance with intent to deliver, one count of possession of a controlled substance, and two counts of delivery of a controlled substance. Hall was also charged as a habitual criminal. In January 2003, pursuant to a plea agreement, Hall pled guilty to one count of delivery of a controlled substance, a Class III felony, and the State dismissed the three remaining counts, but not the habitual criminal charge. At the evidentiary hearing on the habitual criminal charge, the State introduced evidence of Hall's prior convictions from Platte County and Douglas County, Nebraska, and Bernalillo County, New Mexico. Based on his convictions in Platte and Bernalillo Counties, the district court found that Hall was a habitual criminal and sentenced him to 10 years' imprisonment.

In his first direct appeal, Hall conceded that the State had met its burden of proof in regard to his Platte County conviction. *Hall, supra.* However, this court found merit to Hall's argument that the State's evidence of his New Mexico conviction was insufficient to support enhancing his sentence because it did not show that he had or waived counsel at the time of his conviction. We noted that "contrary to the district court's observations, Hall was not convicted and sentenced on the same day, but, rather, was convicted by a jury on July 16, 1981, and thereafter sentenced on September 8." *Id.* at 96-97, 679 N.W.2d at 765.

We concluded that although the evidence showed Hall had been represented by counsel at the time he was sentenced, it did not show he had been represented at the time of the jury's guilty verdict. We rejected the State's argument that the issue was controlled by *State v. Sherrod*, 229 Neb. 128, 134, 425 N.W.2d 616, 621 (1988) (holding that State satisfied its burden to prove prior, counseled conviction by producing evidence that defendant had or waived counsel "at a critical point in the proceedings," which proof then shifts burden to defendant to show that he was unrepresented at prior conviction). We concluded that the issue was

controlled by our more recent decision in *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), in which we held that the State's evidence must show defendant had or waived counsel at the time of his or her prior convictions. We therefore concluded that the district court erred in finding Hall to be a habitual criminal, vacated Hall's sentence, and remanded the cause for a new enhancement hearing. *Hall, supra.*

On September 24, 2004, the district court conducted a new enhancement hearing. At the hearing, the following exchange occurred:

> [Prosecutor]: The first thing I would like to do, Your Honor, is offer any exhibits, any and all exhibits that were offered previously at the enhancement hearing [exhibits 1 through 12] that was held on this case.
>
> [Defense]: Judge, I'm going to object to that. I wasn't counsel of record at the time and I'm not sure all proper objections were made to those exhibits.
>
> THE COURT: Okay. The objection is overruled. The previous exhibits are received, will be considered by the court.
>
> [Prosecutor]: I would also like to —
>
> THE COURT: Except I suppose the one that — how it got back here was the one conviction down in New Mexico.
>
> [Prosecutor]: I think I would still like that exhibit offered and received. It might not be sufficient unless I add to it.
>
> THE COURT: Okay.
>
> [Prosecutor]: That's I guess what I would like to be able to do.
>
> [Defense]: To that particular exhibit [exhibit 7], Judge, I would offer a form and foundation objection.
>
> THE COURT: Okay. And that's overruled.
>
> [Prosecutor]: I would like to offer and mark new exhibits and, Judge, what number are we up to at this point?
>
> THE COURT: I was going to tell you that would be Exhibit No. 13.
>
> [Prosecutor]: I would offer to the Court Exhibit 13, which is a six-page document which has been certified by the clerk's office in Bernalillo County, New Mexico, and I would offer that at this time and, then, I would ultimately

make some comments as to what's contained within that exhibit.

[Defense]: Judge, my objection to the six-page document is, again, form and foundation. The documents are simply certified, they're not authenticated. The statute in this particular area calls for an authenticated document in order for it to be valid. The case law in this particular area accepts certified copies of this Court's judgment, but has continuously upheld that out-of-state documents have to be authenticated, and those documents are not authenticated.

The court took under advisement the objection to exhibit 13. The record shows that exhibit 13 includes copies of the same documents contained within exhibit 7. Those documents showed Hall's grand jury indictment, listing the public defender's office as his defense attorney, and the trial court's signed judgment and sentence, showing that Hall was represented by Ron Koch at sentencing. Exhibit 13 also included additional certified copies from Hall's New Mexico proceeding as follows: (1) the appearances page from a deposition taken for trial, showing that Hall was represented by Koch; (2) the prosecutor's notice of witnesses sent to Koch and the attorney for Hall's codefendant; and (3) a court-captioned filing showing Hall's representation by Koch, the charges, disposition, and dates trial commenced and concluded.

On October 4, 2004, the court entered a written order in which it found that the State's evidence showed Hall was represented by Koch at his 1981 jury trial and that Hall was sentenced to more than 1 year of incarceration by the court. The court stated that the documents were certified by the clerk of the district court in New Mexico, without specifically addressing Hall's authentication objection. The court found that Hall was a habitual criminal, ordered a presentence investigation, and set a date for sentencing. On December 27, the court sentenced Hall to a term of 10 years' imprisonment with credit for time served. Hall appeals.

ASSIGNMENTS OF ERROR

Hall assigns that the district court erred in (1) overruling his objections to exhibits 1 through 12 previously offered at the first enhancement hearing, because the exhibits were not re-marked

and reoffered on an individual basis in the second hearing, and (2) finding that he had two prior convictions for which he served a term of imprisonment of more than 1 year.

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. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005). A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

ANALYSIS

[3,4] Nebraska's habitual criminal statutes provide for enhanced mandatory minimum and maximum sentences for a convicted defendant who "has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state . . . for terms of not less than one year." Neb. Rev. Stat. § 29-2221(1) (Reissue 1995); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove the fact of prior convictions by a preponderance of the evidence and the trial court determines the fact of prior convictions based upon the preponderance of the evidence standard. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

In Hall's first direct appeal, we stated, "Hall concedes that the State met its burden with respect to the Platte County [Nebraska] conviction and that this conviction is valid for enhancement purposes." *State v. Hall*, 268 Neb. 91, 96, 679 N.W.2d 760, 765 (2004). We remanded for a new enhancement hearing only because we concluded that the State had failed to meet its burden of showing Hall was represented by counsel at the time of his New Mexico conviction.

The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit or prosecution. See *Gales, supra* (declining to reconsider, in appeal from resentencing, issues decided in first direct appeal). Matters previously addressed in

an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. *Id.* Although Hall assigns that the district court erred in concluding he had two prior convictions, his arguments are limited to the validity of his New Mexico conviction. Hall does not present materially or substantially different facts regarding his Platte County conviction. Thus, we do not consider in this appeal the validity of Hall's Platte County conviction for enhancement purposes.

In support of his first assignment of error, Hall argues that the district court's receipt of the 12 exhibits from the first enhancement hearing without requiring the State to re-mark and reoffer the exhibits individually "is violative of [Hall's] right to confrontation and constitutes improper judicial notice of those exhibits." Brief for appellant at 9.

[5] Neb. Evid. R. 103(1), Neb. Rev. Stat. § 27-103(1) (Reissue 1995), provides: "Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and: (a) . . . 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 . . . ." This court has stated, " '[t]he reason for the requirement of specificity is to permit both court and counsel to better deal with the objection, either by way of counsel's correction of the claimed error, or as assistance to the court for a fair and more accurate ruling.' " *State v. Richard*, 228 Neb. 872, 885, 424 N.W.2d 859, 867 (1988) (concluding that defense counsel's relevancy objections were insufficient to alert trial court to issue of improper impeachment raised on appeal and thus failed to preserve issue for appeal), quoting *Langenheim v. City of Seward*, 200 Neb. 740, 265 N.W.2d 446 (1978). In addition:

> "Unless the objection to offered evidence be sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom in the court of appeal."

State v. Farrell, 242 Neb. 877, 883, 497 N.W.2d 17, 21 (1993) (determining that defendant's general objections to evidence at trial, which referred to relevancy and arguments made earlier,

did not sufficiently alert trial court to grounds for error alleged on appeal), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). See, also, *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005) (holding that defendant's foundation objection failed to preserve challenge on appeal to admissibility of expert testimony). But see *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003) (holding that defense counsel's objections at trial explicitly referring to same objections he had made at previous hearing sufficiently alerted State and trial court to specific ground of objection and preserved issues for appeal).

At the enhancement hearing, Hall stated his basis for objection to exhibits 1 through 12: "Judge, I'm going to object to that. I wasn't counsel of record at the time and I'm not sure all proper objections were made to those exhibits." The record shows that at no time during the enhancement hearing did defense counsel explain or otherwise alert the trial court as to what "proper objections" he believed were not made with respect to exhibits 1 through 12. Simply stated, defense counsel's objection did not sufficiently enlighten the trial court as to the basis for any objection to these exhibits. Furthermore, there is nothing apparent from the record that the basis for defense counsel's objection concerned the issues of judicial notice or confrontation. See *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003) (holding that nothing has been preserved for appellate review when grounds specified for objection at trial are different from grounds advanced on appeal). The record before this court clearly shows the trial court never had an opportunity to rule on the issues now raised by Hall in his first assignment of error. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. McDonald*, 269 Neb. 604, 694 N.W.2d 204 (2005).

[6,7] Hall's objection to exhibit 7 presents a similar problem. Although Hall did "offer a form and foundation objection" to exhibit 7, again, no specific ground for that objection was stated, nor is it apparent from the record. An objection on the basis of insufficient foundation is a general objection. *King, supra.* If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the

evidence was not admissible for any purpose. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). Neither circumstance exists given this record. We determine that with respect to exhibits 1 through 12, Hall's evidentiary objections did not preserve the issues he raises on appeal, and we do not address them.

In contrast, Hall's objection to exhibit 13 does not present the lack of specificity noted with respect to exhibits 1 through 12. The ground for Hall's form and foundation objection to exhibit 13 was clearly articulated when he stated that "the documents are simply certified, they're not authenticated." We determined that Hall's evidentiary objection to exhibit 13 has been preserved for appellate review, which we address in Hall's second assignment of error.

In his second assignment of error, Hall argues that the district court erred in finding he had two prior convictions because "Exhibit 13 was not properly authenticated and was therefore insufficient for enhancement purposes." Brief for appellant at 11.

Hall initially argues that the first page of exhibit 13 is not certified and that the remaining pages were certified by a deputy clerk, not the clerk of the district court in New Mexico whose name is on the certification stamp. Hall's first contention is simply incorrect. The certification for the first page of exhibit 13 is on the back of page 1 and is in the same form as the certification on all the other pages. Thus, Hall's argument is reduced to the sufficiency of the certifications.

Neb. Rev. Stat. § 29-2222 (Reissue 1995) provides:

> At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.

[8,9] Applying this section, this court has held that when using a prior conviction to enhance a sentence, the State must additionally "prove the defendant was represented by counsel at the time of conviction and sentencing, or had knowingly and voluntarily waived representation for those proceedings." *State v. King*, 269 Neb. 326, 336, 693 N.W.2d 250, 260 (2005). The

existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

Whether a copy of an official record is "duly authenticated" is governed by Neb. Evid. R. 902, Neb. Rev. Stat. § 27-902 (Reissue 1995), which provides, in relevant part:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (1) A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution;
>
> . . . .
>
> (4) A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian *or other person authorized to make the certification*, by certificate complying with subdivision (1), (2) or (3) of this section or complying with any Act of Congress or the Legislature or rule adopted by the Supreme Court of Nebraska which are not in conflict with laws governing such matters.

(Emphasis supplied.)

Subsection (4) specifically addresses copies of official records. Each copy in exhibit 13 is impressed with the court's official seal, stamped with a certification by the clerk of the district court in New Mexico "as a true and correct copy of the original filed in my office," and signed by the deputy clerk. The inscription on the attestation line identifies the signature as belonging to the deputy clerk.

In *State v. Munn*, 212 Neb. 265, 322 N.W.2d 429 (1982), this court rejected the defendant's contention that a copy of an

out-of-state court record required a judge's certification of an attestation by a deputy clerk and court seal. Neb. Rev. Stat. § 25-1285 (Reissue 1995) provides that judicial records of Nebraska and federal courts can be proved by the clerk or custodian's certification, accompanied by the official seal of office. In contrast, to prove judicial records from other states, former Neb. Rev. Stat. § 25-1286 (Reissue 1979) then imposed an additional requirement that a judge or magistrate certify that the clerk's attestation and court seal were in due form of law.

[10] The certification in *Munn, supra*, was accompanied by the court's seal, and the inscription was essentially the same as presented in this case. The inscription gave the clerk's name and title, certifying the record as a true and correct copy, and identified the signature on the attestation line as that of the deputy clerk. We held that the copy of the record was admissible under rule 902(1) and that the adoption of the Nebraska Evidence Rules had repealed § 25-1286. See, also, *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005) (accepting deputy clerk's attestation on certification of record of Florida conviction as sufficient to prove self-authenticating record when accompanied by court's seal). Accord, *AMFAC Distribution Corp. v. Harrelson*, 842 F.2d 304 (11th Cir. 1988); *Mathis v. State*, 930 S.W.2d 203 (Tex. App. 1996); *State v. Clites*, 73 Ohio App. 3d 36, 596 N.E.2d 550 (1991). Thus, the certifications in exhibit 13 complied with the requirements in rule 902(1) and did not require extrinsic evidence of authenticity for admission. The district court did not abuse its discretion in admitting exhibit 13.

Hall next argues that the documents in exhibit 13 are insufficient to prove a prior conviction in New Mexico. Hall admits that a certified copy is sufficient to prove a judgment and commitment in this state, but contends in one sentence of his brief that an out-of-state conviction should be held to a higher standard. We reject this contention. The admissibility of evidence in criminal cases is controlled by Nebraska Evidence Rules. *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005). Rule 902 does not distinguish between in-state and out-of-state court records in its requirements, and we have applied it equally to in-state and out-of-state records of convictions. Compare *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985) (analyzing

whether certification of in-state conviction complied with rule 902), *overruled on other grounds, State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000), with *Gales, supra.*

We recently held that the State must prove the fact of prior convictions by a preponderance of the evidence. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003) (discussing rationale for excepting prior convictions from general rule that facts which increase punishment must be submitted to jury and proved beyond reasonable doubt). Exhibit 13 includes a properly certified copy of a signed judgment and sentencing order to a term of imprisonment over 1 year. We conclude that this evidence is sufficient to establish the fact of Hall's prior conviction in New Mexico. See *Gales, supra.* That, however, does not end our inquiry.

In Hall's first direct appeal, we noted that "Hall concedes that the State met its burden with respect to the Platte County [Nebraska] conviction and that this conviction is valid for enhancement purposes." *State v. Hall*, 268 Neb. 91, 96, 679 N.W.2d 760, 765 (2004). We remanded for a new enhancement hearing after finding the State failed to meet its burden of showing that Hall was represented by counsel at the time of his New Mexico conviction. Exhibit 13 was introduced by the State in an effort to show Hall was represented by counsel when convicted in New Mexico, and we now turn to the sufficiency of exhibit 13 for that purpose.

[11] This court has not previously articulated a specific standard for the State's burden of proving that a defendant had or waived counsel at the time of a prior conviction and sentencing. As noted, however, we apply a preponderance of the evidence standard to the State's burden to prove prior convictions. *Hurbenca, supra.*

We have also stated that "in order to establish evidence's sufficient probative force to prove an earlier conviction for the purpose of sentence enhancement, the evidence must, with some trustworthiness, reflect a court's act of rendering judgment." *State v. Gales*, 269 Neb. 443, 478, 694 N.W.2d 124, 157 (2005), citing *State v. Linn*, 248 Neb. 809, 539 N.W.2d 435 (1995). See, also, *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004) (specifically adopting *Linn* standard in habitual criminal cases

and concluding that state's evidence established with requisite trustworthiness rendering of prior judgments despite lack of judge's signature on judgments). Compare *Parke v. Raley*, 506 U.S. 20, 35, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992) (declining to hold that due process requires state to prove by "clear and convincing extrarecord evidence" that defendant understood rights he was waiving at prior plea-based conviction when no transcript of prior proceeding exists).

Read together, our case law demonstrates that in a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel. We review exhibit 13 under that standard.

Pages 1 and 2 of exhibit 13 show that Hall was represented by Koch prior to his New Mexico trial. Specifically, page 1 of exhibit 13 shows that Koch was Hall's attorney of record for a deposition taken for Hall's trial and page 2 shows that Koch was also notified of a witness the prosecutor intended to call at trial. Page 4 shows that Hall was represented by the public defender's office when the grand jury returned the New Mexico indictment. Page 3 shows that (1) a jury was selected on July 9, 1981, (2) trial began on the same date, (3) Hall was found guilty of robbery while armed with a deadly weapon on July 16, and (4) Hall was represented by Koch.

Finally, pages 5 and 6 are certified copies of the court's "Judgment, Sentence and Commitment." That judgment states that on August 25, 1981, Hall was "sentenced to the custody of the Corrections Division of the Criminal Justice Department" to be imprisoned for a term in excess of 1 year. The judgment further shows that defendant appeared at sentencing personally "and by his attorney RON KOCH."

We conclude that the State's evidence establishes with requisite trustworthiness, based upon a preponderance of the evidence, that Hall was (1) convicted of a crime, sentenced, and committed to prison for a term of not less than 1 year and (2)

was represented by counsel throughout his trial in New Mexico, including the time of his conviction.

CONCLUSION

The district court properly relied upon copies of court records showing Hall's prior conviction in New Mexico because the certification complied with rule 902. Further, this evidence was sufficient to establish with requisite trustworthiness that Hall was represented by counsel at the time of that prior conviction.

AFFIRMED.

DARREL KIMMINAU, APPELLANT, V. URIBE REFUSE SERVICE AND EMC INSURANCE COMPANY, ITS WORKERS' COMPENSATION INSURANCE CARRIER, APPELLEES.

707 N.W.2d 229

Filed December 2, 2005. No. S-05-012.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
3. **Workers' Compensation: Case Disapproved.** *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), is disapproved to the extent that it conflicts with the express provisions of Neb. Rev. Stat. § 48-120(8) (Reissue 2004).

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

Eric B. Brown and Ellen A. Pillar, of Atwood, Holsten & Brown Law Firm, P.C., L.L.O., for appellant.

Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees.

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

GERRARD, J.

BACKGROUND

The claimant, Darrel Kimminau, was employed as a garbage hauler by Uribe Refuse Service (Uribe) for approximately 10 years before suffering a repetitive trauma injury to his left shoulder that left him with a 20-percent impairment to his left upper extremity. Uribe was directed by the single judge of the Workers' Compensation Court to pay medical expenses incurred in the treatment of the injury, and the review panel of the Workers' Compensation Court additionally directed Uribe to provide future medical care for the injury. Neither the compensability of Kimminau's injury nor the benefits awarded are at issue in this appeal.

Rather, the issue in this appeal is the Workers' Compensation Court's power to order Uribe to directly reimburse Kimminau's health insurance carrier. The single judge directed Uribe to pay for Kimminau's medical expenses, and Kimminau asked that his health insurance carrier be directly reimbursed. The single judge, however, declined to do so, citing this court's decision in *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). The review panel affirmed that determination. Kimminau timely appealed, and we granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

Kimminau assigns, restated, that the Workers' Compensation Court erred in relying on *Dawes, supra*, in declining to order Uribe to reimburse Kimminau's health insurance carrier for medical payments it made relating to his compensable injury.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Vega v. Iowa Beef Processors, ante* p. 255, 699 N.W.2d 407 (2005).

ANALYSIS

The issue presented in this appeal requires this court to address the apparent conflict between this court's opinion in *Dawes, supra*, and Neb. Rev. Stat. § 48-120(8) (Reissue 2004). In *Dawes*, one of the issues presented to this court was whether the Workers' Compensation Court had erred in directing the claimant's employer to directly reimburse the claimant's health insurance carrier for medical and hospital expenses paid by the insurer on the claimant's behalf. Addressing the issue as one of subrogation, this court held that the Workers' Compensation Court did not have general equitable jurisdiction and did not have jurisdiction to resolve contractual disputes between employees and third-party insurers; thus, we concluded that the Workers' Compensation Court did not have jurisdiction to determine the insurer's subrogation interest in the claimant's workers' compensation award. However, the parties did not rely upon, and this court did not discuss, the effect of § 48-120(8), which provided:

> The Nebraska Workers' Compensation Court shall order the employer to make payment directly to the supplier of any services provided for in this section or reimbursement to anyone who has made any payment to the supplier for services provided in this section. No such supplier or payor may be made or become a party to any action before the compensation court.

We note that § 48-120(8) was amended by 2005 Neb. Laws, L.B. 238, but those changes are stylistic and not pertinent to this appeal.

[2,3] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005). The plain language of § 48-120(8), while not affording the Workers' Compensation Court with jurisdiction to resolve every disagreement that may arise with respect to the rights and obligations of a third-party insurer, does clearly provide that the Workers' Compensation Court shall order an employer to directly reimburse medical care providers and medical insurers for the reasonable medical, surgical, and hospital services supplied to a workers' compensation claimant pursuant to § 48-120. *Dawes v.*

Wittrock Sandblasting & Painting, 266 Neb. 526, 667 N.W.2d 167 (2003), is disapproved to the extent that its holding conflicts with the express provisions of § 48-120(8).

Kimminau's assignment of error in this appeal has merit. Although we recognize that the Workers' Compensation Court acted in good faith reliance on our decision in *Dawes*, we must remand this cause for further proceedings pursuant to § 48-120(8).

We take this opportunity to comment on the Workers' Compensation Court's response to the situation presented by this case. The single judge and majority of the review panel, while noting the provisions of § 48-120(8), nonetheless reasoned that *Dawes* was controlling. The dissenting member of the review panel, while respectfully acknowledging *Dawes*, concluded that § 48-120(8) governed the issue. The principled but candid decisions of the single judge and majority of the review panel, and the respectful disagreement of the review panel dissenter, are fine examples of the judicial system working at its best—with civility, collegiality, and professionalism.

CONCLUSION

For the foregoing reasons, the decision of the review panel affirming in part the order of the single judge is reversed and the cause is remanded to the Workers' Compensation Court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF B.R. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BILLY B., APPELLANT, AND CRYSTAL B., APPELLEE.

708 N.W.2d 586

Filed December 2, 2005. No. S-05-063.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.

2. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Rules of Evidence: Medical Assistance: Health Care Providers.** Neb. Rev. Stat. § 27-803(3) (Cum. Supp. 2004) applies to persons seeking medical assistance from persons who are expected to provide some form of health care.
4. **Motions to Dismiss: Waiver: Appeal and Error.** A defendant who, after the overruling of a motion for dismissal made at the close of the plaintiff's evidence, adduces evidence on its own behalf waives any error on the motion for dismissal.
5. **Juvenile Courts: Jurisdiction: Proof.** In order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), the State must prove the allegations of the petition by a preponderance of the evidence.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Affirmed.

David A. Fournier, of Fournier Law Office, for appellant.

Stuart J. Dornan, Douglas County Attorney, Nicole Brundo Goaley, and Carrie Ferguson, Senior Certified Law Student, for appellee State of Nebraska.

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

MCCORMACK, J.

NATURE OF CASE

Billy B. appeals the December 23, 2004, order of the separate juvenile court of Douglas County, adjudicating B.R., E.B., and N.B. to be juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) in that they lacked proper parental care by reason of the fault and habits of Billy. Billy argues that certain testimonial evidence presented at the adjudication hearing was inadmissible hearsay. He also argues that the evidence did not support the adjudication of the children based on the supplemental petition and that the court erred by denying his motion for summary judgment.

BACKGROUND

Billy is the stepfather of B.R., born September 3, 1999, and the natural father of E.B., born August 17, 2001, and N.B., born

June 27, 2003. On March 19, 2004, the State of Nebraska filed a petition in the juvenile court alleging that the children are within the meaning of § 43-247(3)(a) by reason of the faults and habits of Billy and his wife, Crystal B.

Thereafter, the State filed a two-count supplemental petition. The supplemental petition alleged that the children were within the meaning of § 43-247(3)(a) by reason of the fault and habits of Billy, in that Billy had subjected B.R. to inappropriate sexual contact, placing the children at risk of harm. Billy entered a denial as to the supplemental petition. The State then filed a second supplemental petition. This petition alleged that the minor children were within the meaning of § 43-247(3)(a) by reason of Billy's use of alcohol and/or controlled substances. Billy entered an admission to the second supplemental petition.

In December 2004, the adjudication of the supplemental petition and second supplemental petition came before the juvenile court. Also before the court were the disposition and permanency planning on the original petition regarding Billy and Crystal, as well as the immediate disposition on the second supplemental petition with regard to Billy. At the hearing, the State presented testimonial evidence regarding the alleged sexual abuse of B.R.

Alleged Sexual Abuse Testimony

Ellen Rupp, a pediatrician at Boys Town National Research Hospital, testified that she conducted an examination of B.R. and E.B. in response to issues that the girls' foster family had expressed concerning sexualized behavior by B.R. at the foster home. Rupp testified that according to the foster family, B.R. would "hump" other children, refer to sex acts, and touch her private parts frequently in public and in private. Rupp testified that E.B. also demonstrated some of these behaviors, but she more often complained of pain, particularly at night, and would sometimes awaken complaining of pain. No objection was made regarding this testimony. Rupp testified that during her examination of B.R., she noticed that B.R.'s hymen was thickened. She explained that the thickening of the hymen can be the result of trauma, such as scratches from fingers or something being inserted into the vagina. However, it can also result from getting

estrogens in the diet, such as hormonally treated meat, certain kinds of plastic, and eating birth control pills. Although the latter causes are unusual, Rupp testified that recently, they are not that uncommon. Rupp further testified that based on observations made during the physical examination, she could not say with a reasonable degree of medical certainty whether B.R. had been sexually abused. She did, however, request that B.R. and E.B. be seen at "Project Harmony," a facility which provides services to suspected victims of child abuse.

LaJean Henry, a licensed foster parent who fostered the children in her home on or about March 19, 2004, for about 30 days as an emergency placement, also testified. Henry testified that she had observed B.R. "humping" E.B. and that the girls would kiss each other on the mouth. Henry testified that she had discussed with B.R. good touching and bad touching and that B.R. had indicated that she had experienced bad touching. Specifically, Henry testified that B.R. told her that "somebody put their pinkie in her." Henry believed that the "somebody" B.R. was referring to was Billy.

Testimony was also received from Sheryl Overby, a therapist with Lutheran Family Services. Overby began seeing B.R. in May 2004, and at the time of the adjudication hearing, she had conducted approximately 23 therapy sessions with B.R. Overby testified that during the course of their sessions, B.R. made several references to her "daddy" touching her genitalia and had stated that she touched her "daddy's pee-pee."

On cross-examination, Overby testified that she had four sessions with B.R. before B.R. made any reference to any kind of touching and that during 18 or 19 of their sessions, B.R. did not mention any type of sexual abuse. She also testified that B.R. had made no reference to sexual abuse prior to Overby's introducing a book about sexual abuse and that questions about sexual abuse had been introduced into therapy for the purpose of eliciting information.

In addition, Billy and Crystal were each called to testify. When Crystal was asked if Billy had inappropriately touched B.R. or E.B., she invoked her Fifth Amendment constitutional right against self-incrimination. When Billy was asked if he had ever inappropriately touched the girls, he testified that he had not.

HEARSAY TESTIMONY

Overby also testified regarding conduct that had been relayed to her by the children's foster mother. Specifically, Overby testified the foster mother reported that either B.R. or E.B. had put her mouth on the other's genital area when the children were not dressed and that the girls had been kissing each other with their tongues. Counsel for Billy twice objected to the testimony of Overby regarding observations relayed to her by the foster mother as hearsay. The court overruled Billy's objections under the medical diagnosis exception to hearsay. Overby then went on to testify, without objection, the foster mother had reported that B.R. did not want her foster father to read her a story in bed and that E.B. and N.B. became very tense with their legs when the foster mother attempted to clean their genital areas. Overby opined that this behavior is consistent with sexual abuse. However, she stated that the behavior was also consistent with trauma and that being placed in foster care is enough of a trauma for some children to exhibit such behaviors.

On December 23, 2004, the juvenile court entered an order adjudicating the children on the second supplemental petition. With regard to the disposition on the original petition and second supplemental petition, the court ordered that the children remain in the custody of the Nebraska Department of Health and Human Services and the court set forth a rehabilitative plan to correct, eliminate, or ameliorate the situation or condition on which adjudication was obtained. The juvenile court also adjudicated the children based on the supplemental petition. The court found that the State's evidence was probative, that the witnesses were credible and reliable, and that the counts contained in the supplemental petition were true based on a preponderance of the evidence. Disposition on the supplemental petition was not determined at that time. Rather, disposition on the supplemental petition was scheduled for hearing on a later date. Billy timely appealed the juvenile court's December 23 order.

ASSIGNMENTS OF ERROR

Billy assigns, restated, that the juvenile court erred in (1) allowing the testimony of Overby over his objections, (2) denying his motion for summary judgment, and (3) finding that the

allegations set forth in the supplemental petition were true by a preponderance of the evidence.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004).

[2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004).

ANALYSIS

Medical Diagnosis and Treatment Exception to Hearsay Testimony

Pursuant to Neb. Rev. Stat. § 27-803(3) (Cum. Supp. 2004), the juvenile court admitted the testimony of Overby regarding observations relayed by B.R.'s foster mother to Overby, who was B.R.'s therapist, that one of the girls put her mouth on the other girl's private parts or genitalia. Billy objected to this testimony on the basis of hearsay, which objection was overruled. Billy claims that this testimony does not fall within the § 27-803(3) exception because the exception applies only to statements made by a declarant patient, not to statements made by a third party. We disagree.

Section 27-803(3) provides an exception to the hearsay rule, regardless of the availability of the declarant, for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to

diagnosis or treatment." This exception is identical to Fed. R. Evid. 803(4).

[3] Although the heart of this exception lies in statements made by a patient to a treating physician, the exception casts its net wider than the patient-physician relationship. Under the federal and Nebraska rules of evidence, statements admissible under the medical diagnosis and treatment exception are not restricted to statements made by the patient and the statements need not be made to a physician. *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994); 2 McCormick on Evidence § 277 (John W. Strong et al., 5th ed. 1999). As a general rule, the exception applies to persons seeking medical assistance from persons who are expected to provide some form of health care. *Vacanti v. Master Electronics Corp., supra.* Thus, "[t]he declarant need not be the patient—need not be the person who is experiencing the symptoms to be diagnosed or treated. In other words, the statement need not refer to the declarant's own symptoms." G. Michael Fenner, The Hearsay Rule 202 (2003).

We conclude that the statements made by B.R.'s foster mother were admissible under § 27-803(3). B.R.'s foster mother observed first hand the conduct she subsequently described to Overby. The fact that the statements in question came from the patient's foster mother, not the patient herself, does not preclude their admissibility under § 27-803(3), as long as the evidence satisfactorily demonstrates that the circumstances under which the statements were made were such that the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment, that the declarant's statements were reasonably pertinent to such diagnosis or treatment, and further, that a doctor would reasonably rely on such statements. See *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004).

The record reflects that B.R. began seeing Overby in May 2004 for foster care adjustment purposes. Based on B.R.'s behavior in her foster home, concerns arose that B.R. had been sexually abused. Clearly, evidence that B.R. had been sexually abused was important to her medical diagnosis and psychological treatment, and therefore, information relating to that possibility was properly admitted under § 27-803(3). Hence, we conclude that Overby's testimony was admissible under § 27-803(3).

Motion for Summary Judgment

[4] Billy argues that the juvenile court erred in denying what he terms his motion for summary judgment made at the close of the State's case. We need not address whether the standard for summary judgment had been met because a juvenile court does not have the power to grant summary judgment. *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002). Based upon its substance, we treat Billy's motion as a motion to dismiss at the close of the State's evidence. The juvenile court overruled the motion, and Billy proceeded to present his case. A defendant who, after the overruling of a motion for dismissal made at the close of the plaintiff's evidence, adduces evidence on its own behalf waives any error on the motion for dismissal. *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001).

Supplemental Petition

Finally, Billy argues that the court erred in finding that the allegations contained in the supplemental petition were true by a preponderance of the evidence.

[5] In order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. See *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005). The court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

The supplemental petition alleged that Billy is the stepfather of B.R. and the natural father of E.B. and N.B. The parties stipulated to this allegation. The supplemental petition alleged that the children came within the meaning of § 43-247(3)(a), lacking proper parental care by reason of the fault or habits of Billy in that Billy subjected B.R. to inappropriate sexual contact, placing the children at risk of harm.

At the adjudication hearing, the State presented evidence regarding B.R.'s sexualized behavior in her foster home. B.R.'s therapist opined that this behavior indicated prior sexual abuse. Evidence was also presented regarding allegations made by B.R. that her "daddy" had inappropriately touched her.

Billy testified that he had never inappropriately touched B.R. or E.B. However, we give deference to the juvenile court's decision to reject Billy's testimony on this matter. See *In re Interest of Corey P. et al., supra.* When the evidence is in conflict in a juvenile case, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *Id.*

Reviewing the evidence in its totality, we conclude that the record supports the finding that the allegations contained in the supplemental petition are true and that the children come within the meaning of § 43-247(3)(a).

CONCLUSION

We conclude that Overby's testimony describing B.R.'s conduct, which was relayed to her by B.R.'s foster mother, was admissible under § 27-803(3). We further conclude that the juvenile court did not err in overruling Billy's motion to dismiss at the close of the State's evidence and that the court properly found that the allegations contained in the supplemental petition were true by a preponderance of the evidence.

AFFIRMED.

CONNOLLY, J., participating on briefs.

JOHN F. McLEAY, M.D., APPELLANT AND CROSS-APPELLEE, V. BERGAN MERCY HEALTH SYSTEMS CORP., DOING BUSINESS AS BERGAN MERCY MEDICAL CENTER, APPELLEE AND CROSS-APPELLANT.

708 N.W.2d 592

Filed December 9, 2005. No. S-04-117.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Federal Acts: Health Care Providers: Immunity.** Whether an entity or individual is entitled to Health Care Quality Improvement Act of 1986 immunity is a question

of law for the court to decide and may be resolved whenever the record becomes sufficiently developed.

4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

David S. Houghton and J.P. Sam King, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellant.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

In this appeal, John F. McLeay, M.D., challenges certain actions taken against him by Bergan Mercy Health Systems Corp. (Bergan) preceding Bergan's suspension of McLeay's surgical privileges. The district court granted summary judgment in favor of Bergan, finding that Bergan was immune from liability for damages under the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11101 et seq. (2000). McLeay appeals, and Bergan cross-appeals.

II. FACTUAL BACKGROUND

McLeay is a general surgeon in Omaha, where he has been a solo practitioner since 1963. He has also been a member of the medical staff at Bergan since that year. At all relevant times, McLeay had general surgical privileges at both Bergan and St. Joseph Hospital.

On or about October 19, 1992, McLeay received a certified letter from Bergan. The letter informed McLeay that an investigation into the medical care he had provided to patients at Bergan had been authorized by a surgery advisory committee. It further stated that "[i]f the peer review process ends with a recommendation that would adversely [a]ffect your clinical privileges or Staff membership, you will be notified of such recommendations and

given notice of your right to a hearing in accordance with the Medical Center's Fair Hearing Plan."

McLeay was next informed about the investigation in a December 2, 1992, letter from Richard Hachten, the president of Bergan. McLeay was informed that a monitoring requirement was immediately being imposed upon his surgical privileges per the recommendation of the medical executive committee. This monitoring required that another surgeon attend any surgical procedure performed by McLeay. The letter further stated that the "monitoring requirement will remain in effect until the corrective action procedure, of which you were previously notified, has been completed in accordance" with Bergan's bylaws. It also stated that McLeay would have an opportunity to meet with an ad hoc review committee investigating the clinical care provided to his patients.

The first communication McLeay received from the ad hoc committee came in a December 23, 1992, letter. The letter invited McLeay to attend a meeting of the ad hoc committee on December 29. The letter informed McLeay that at the meeting, he would be "informed of the general nature of the information and will be given an opportunity to discuss it with the Committee." The letter also stated that "[t]he meeting is informal. It is not a hearing and none of the rules concerning hearings outlined in the Bylaws apply to this meeting."

Present at the December 29, 1992, meeting were Drs. Dwaine Peetz and Daniel McKinney. The third member of the committee, Dr. Richard Feldhaus, was not present. At the meeting, McLeay first became aware of the subject of the investigation—medical care he had previously provided to eight patients (the eight cases). The committee asked McLeay about the care he provided in the eight cases, and McLeay was able to review some records from the eight cases.

McLeay next heard from the ad hoc committee when Peetz telephoned him on January 7, 1993, and asked McLeay to meet with the committee the next day. At the meeting, they discussed the eight cases and the monitoring requirement. McLeay was also given a list of five minor procedures that he could perform without a monitor. According to McLeay, the committee also agreed to later provide a "laundry list" of outpatient surgical

procedures that would also be exempted from the monitoring requirement. Several months later, Hachten informed McLeay that his request to receive a "laundry list" of exempted procedures had been denied.

McLeay testified that he was told by the ad hoc committee that the monitoring requirement would be in effect for 6 to 12 months, after which time, McLeay could apply for reinstatement. Minutes of the January 7, 1993, meeting stated that the minutes were privileged communications and not subject to disclosure under Nebraska law. The minutes memorialized the monitoring requirement and also stated that McLeay would be removed from the call list for the emergency medicine department. The minutes were signed by McLeay.

The matter then went to the medical executive committee. The medical executive committee approved the monitoring requirement and four minor procedures excluded from the monitoring requirement. The minutes of the medical executive committee were signed by McLeay. Bergan's board of directors approved the agreement between McLeay and the ad hoc committee, as supplemented by the medical executive committee.

On February 26, 1993, McLeay received a letter from Bergan. It informed McLeay that the hospital had submitted a report to the "National Practitioner Data Bank" (databank). McLeay testified that prior to receiving this letter, the databank had never been raised as a topic in any of his discussions with the hospital. The report submitted to the databank indicated that a monitoring requirement had been imposed on McLeay's surgical procedures. The report indicated that the duration of the action taken by Bergan was indefinite and constituted a reduction of clinical privileges for "Incompetence/Malpractice/Negligence."

On December 2, 1993, 1 year after the monitoring requirement had been imposed on his surgical procedures, McLeay sent a letter to Peetz requesting reinstatement. On June 1, 1994, McLeay was informed that Bergan's board of directors decided not to remove the monitoring requirement but did direct that criteria be established so that McLeay could work toward removing the monitoring requirement. McLeay was never notified of any such criteria.

During the afternoon of December 9, 1994, McLeay received a telephone call from Feldhaus saying that Feldhaus and Hachten wanted to meet with McLeay that afternoon and talk about McLeay's privileges. McLeay insisted on having counsel present at the meeting. Five minutes later, Hachten telephoned McLeay and told him that his privileges at Bergan were being suspended because of additional information regarding McLeay's care of a patient in July 1991.

On December 13, 1994, McLeay received a letter from Hachten. As reasons for the suspension, the letter mentioned the eight cases as well as several new cases McLeay had never previously heard concerns about. On February 8, 1995, Bergan reported McLeay's suspension to the databank, again indicating that it was for "Incompetence/Malpractice/Negligence" and for an indefinite duration.

III. PROCEDURAL BACKGROUND

McLeay initially filed a petition against Bergan on January 6, 1995. A jury trial was held in November 1998. The jury was instructed on two counts: breach of contract and breach of Bergan's bylaws. The jury returned a verdict in favor of McLeay in the amount of $451,000 on the breach of contract claim and $1 on the breach of bylaws claim. Bergan appealed the verdict to the Nebraska Court of Appeals, which vacated the verdict, reversed the judgment, and remanded the cause because of the erroneous admission of expert testimony. *McLeay v. Bergan Mercy Health Sys.*, No. A-99-474, 2001 WL 185263 (Neb. App. Feb. 27, 2001) (not designated for permanent publication).

On remand, McLeay filed the operative petition against Bergan on May 22, 2002. It included separate causes of action for breach of contract, fraudulent representation, fraudulent concealment, negligent misrepresentation, and mutual mistake. It also included, for the first time, a claim for defamation. More specifically as it relates to his defamation claim, McLeay alleged two separate instances of defamatory statements made by Bergan: the report filed with the databank on February 22, 1993, and the report filed with the databank on February 8, 1995.

Bergan demurred to the petition, asserting, among other things, that McLeay's defamation claim was barred by the

statute of limitations. The district court sustained the demurrer as to the 1993 databank report, but overruled the demurrer as to the 1995 databank report.

Each party filed a motion for summary judgment. At the summary judgment hearing, the entire record from the 1998 jury trial was received into evidence. The district court sustained Bergan's motion for summary judgment and denied McLeay's motion for summary judgment, finding that Bergan was immune from any liability for damages under the HCQIA. McLeay appeals, and Bergan cross-appeals. We moved the case to our docket.

IV. ASSIGNMENTS OF ERROR

McLeay assigns that the district court erred in (1) finding that Bergan was entitled to immunity under HCQIA; (2) finding that McLeay waived his claims against Bergan; (3) failing to find that Bergan's reports to the databank were false and that therefore, Bergan was not entitled to immunity under HCQIA; (4) determining as a matter of law that Bergan was required to report the monitoring requirement to the databank; (5) finding that there was no evidence of malice regarding Bergan's submission of its second report to the databank; and (6) failing to find that Bergan was not immune under HCQIA from McLeay's claims for equitable relief.

On cross-appeal, Bergan assigns that the district court erred in overruling its demurrer and summary judgment motion on the February 8, 1995, report to the databank on the ground that this defamation claim was barred by the statute of limitations.

V. STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Hans v. Lucas, ante* p. 421, 703 N.W.2d 880 (2005); *Eicher v. Mid America Fin. Invest. Corp., ante* p. 370, 702 N.W.2d 792 (2005).

[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. *Spear T Ranch v. Nebraska Dept. of Nat. Resources, ante* p. 130, 699 N.W.2d 379 (2005); *Fraternal Order of Police v. County of Douglas, ante* p. 118, 699 N.W.2d 820 (2005).

VI. ANALYSIS

1. HCQIA Immunity With Regard to Peer Review Process

In his first assignment of error, McLeay claims that the district court erred in granting summary judgment in favor of Bergan because Bergan was entitled to immunity under HCQIA. We agree.

[3] HCQIA was enacted to "'encourag[e] physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior.'" *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1321 (11th Cir. 1994). The process by which physicians and hospitals evaluate and discipline staff doctors is the peer review process. In furtherance of its purpose, HCQIA grants limited immunity in suits brought by disciplined physicians from liability for money damages to those who participate in professional peer review actions, as that term is defined in HCQIA. 42 U.S.C. § 11111(a). Whether an entity or individual is entitled to HCQIA immunity is a question of law for the court to decide and may be resolved whenever the record becomes sufficiently developed. See *id.*

To avail itself of the immunity granted by HCQIA, the professional review action by a professional review body must be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a).

> A professional review action is defined in HCQIA as
>
> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges . . . of the physician.

42 U.S.C. § 11151(9). The monitoring requirement imposed on McLeay falls within this definition. Likewise, there is no dispute that Bergan is a "professional review body," as that term is defined in § 11151(11).

As explained by both the 9th and 11th Circuit Courts of Appeals, HCQIA reverses the normal burden of proof and establishes a presumption that the professional review action has met the four standards of § 11112(a) unless the presumption is rebutted by a preponderance of the evidence. "In a sense, the presumption language in HCQIA means that the *plaintiff* bears the burden of proving that the peer review process was *not* reasonable." (Emphasis in original.) *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d at 1333. Thus, we must consider in the instant case whether McLeay " 'provided sufficient evidence to permit a jury to find that he ha[d] overcome, by a preponderance of the evidence, the presumption' " that Bergan " 'would reasonably have believed' that it had met the standards of section 11112(a)." See *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1334 (11th Cir. 1994). Accord *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992). If not, Bergan's motion for summary judgment was properly granted.

Section 11112(a)(1) of the HCQIA immunity test is satisfied if " 'the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients.' " *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d at 1334-35.

McLeay offered the deposition testimony of Drs. Anthony Pantano and James Mailliard. Each doctor either reviewed the medical files for the eight cases that instigated the investigation into McLeay's surgical procedures or assisted McLeay during

his care of those patients. Each testified that the care provided by McLeay was consistent with the appropriate standards of care and that McLeay did nothing that would merit any disciplinary action taken against him.

Viewing this evidence in the light most favorable to McLeay and giving McLeay the benefit of all reasonable inferences, we conclude that there is a genuine issue of material fact as to whether Bergan imposed the monitoring requirement in the reasonable belief that it was in furtherance of quality health care. The record is entirely silent on the reasonable belief which formed the basis for imposing the monitoring requirement. Although the record indicates that an investigation was initiated because of concerns regarding the care McLeay provided in the eight cases, it fails to indicate how McLeay's performance was deficient or what allegations were made against him. Thus, there is nothing in the record to establish that Bergan had a reasonable belief the monitoring requirement would further quality health care in light of the contrary testimony of Pantano and Mailliard.

Having determined that there is an issue of material fact as to whether Bergan's actions satisfied the first requirement of § 11112(a), we need not determine whether McLeay met his burden with regard to the remaining requirements of that section. Because a question of fact exists with regard to the first requirement of § 11112(a), we conclude that the district court erred in granting summary judgment in favor of Bergan on the issue of Bergan's immunity under that section.

2. Databank Reports

McLeay's third through sixth causes of action relate to Bergan's 1993 and 1995 reports to the databank.

(a) 1993 Databank Report

Pursuant to 42 U.S.C. § 11133(a)(1), "Each health care entity which—(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days . . . shall report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3)." Immunity for submitting reports to the databank under § 11134 is provided for in § 11137(c), which

provides: "No person or entity . . . shall be held liable in any civil action with respect to any report made under this subchapter (including information provided under subsection (a) of this section[)] without knowledge of the falsity of the information contained in the report."

As we stated above, the monitoring requirement imposed on McLeay's surgical procedures in December 1992 was a professional review action, which is defined in part as an action that adversely affects a physician's clinical privileges. See § 11151(9). Thus, under § 11133(a), Bergan was required to report the monitoring requirement to the databank.

[4] The district court, with regard to the 1993 report to the databank, determined that any claims in regard to this report were barred by the statute of limitations. Although McLeay's assignments of error with regard to the 1993 report do not directly address the district court's ruling on this report, we will determine whether the granting of that demurrer was correct prior to addressing McLeay's assignments of error. The 1993 report was filed on February 22, 1993. The first claim made by McLeay in regard to this report was asserted in his amended petition filed 9 years later on May 22, 2002. The statute of limitations as set forth in Neb. Rev. Stat. § 25-208 (Cum. Supp. 2004) is 2 years. As such, the district court was correct in sustaining Bergan's demurrer to McLeay's causes of action relating to the 1993 report to the databank. It is not necessary, therefore, to address McLeay's assignments of error in this regard. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Gary's Implement v. Bridgeport Tractor Parts, ante* p. 286, 702 N.W.2d 355 (2005).

(b) 1995 Databank Report

We next address Bergan's claim on cross-appeal that the district court erred in failing to grant Bergan's demurrer and motion for summary judgment of McLeay's defamation cause of action, based on Bergan's filing of an allegedly false report to the databank on February 8, 1995. McLeay asserts that this claim, filed for the first time in his amended petition in May 2002, relates back to the original petition, which was filed in January 1995. We note that the facts giving rise to this claim

occurred after the filing of the original petition. The record does not reveal that there was any claim made for any defamation prior to the May 2002 amended petition. Thus, the issue presented is whether a claim can relate back to a petition which predates the action or actions giving rise to the claim. We have not previously addressed this.

In *Gelbard v. Bodary*, 270 A.D.2d 866, 706 N.Y.S.2d 801 (2000), a physician brought a defamation action against a member of the peer review committee of the hospital where the physician's staff privileges were revoked. The *Gelbard* court held that to the extent a peer review committee member's statement to the hospital's ad hoc review committee allegedly contained new and distinct slander, a claim based on those statements did not relate back to the original complaint for statute of limitations purposes, because the original complaint did not give notice of the transaction or occurrence or series of transactions or occurrences to be proved pursuant to a new slander claim.

In *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89 (Tex. App. 1997), the Texas Court of Appeals held that claims in an oil and gas operator's amended petition for tortious interference with a prospective business relationship and slander of title respecting the operator's alleged transactions with third parties to sell oil and gas did not exist when the operator filed the original petition. Thus, the claims did not relate back to the date of the original petition for limitations purposes in an action against working interest owners where the operator filed the original petition before the transactions came into existence.

Similarly, in *Fikes v. Furst*, 133 N.M. 146, 61 P.3d 855 (N.M. App. 2002), *reversed in part on other grounds* 134 N.M. 602, 81 P.3d 545 (2003), a defamation action brought by a professor against another professor, the New Mexico Court of Appeals held that an amended complaint did not relate back to the date the original complaint was filed for statute of limitations purposes where the amended complaint cited facts, conduct, and injuries not alleged in the original complaint. In *Fikes*, the original complaint set forth the following alleged defamatory statements: The plaintiff was not qualified to work on a certain research project, the university where the plaintiff had earned his doctoral degree had " 'disowned' " the plaintiff, the university

" 'didn't want anything to do with him,' " and the university was " 'sorry [it] had ever given him or provided him with a doctor's degree.' " 133 N.M. at 156, 61 P.3d at 865. The subsequent defamatory statements, which the plaintiff claimed related back to the original complaint, were that the plaintiff was a " 'lousy anthropologist,' " that he was " 'incapable of doing a competent job on [a certain] manuscript,' " that he was " 'paranoid,' " that he committed unethical and professional misconduct, and that he was racist. *Id.* at 151, 61 P.3d at 860.

We agree with the decisions of these courts and likewise conclude that because the alleged defamation regarding the 1995 report by Bergan to the databank occurred after the original petition was filed, the claim could not relate back to that petition. Since the claim could not relate back to the original petition, the claim with regard to the report to the databank of February 8, 1995, was first raised in the amended petition filed May 22, 2002. As such, the claim is barred by the statute of limitations. See § 25-208. The district court, therefore, erred in not granting Bergan's demurrer to that portion of the amended petition claiming defamation as a result of Bergan's 1995 report to the databank.

3. Waiver

In his second assignment of error, McLeay argues that the district court erred in finding that he had waived his claims against Bergan. In its December 24, 2003, order, the district court found that at the time McLeay's clinical privileges were suspended, he received notice of the reasons and was given an opportunity to be heard and have a hearing. McLeay requested a hearing, and the hearing was set for March 9, 1994. McLeay subsequently requested that the hearing be postponed, and it was never rescheduled. Pursuant to *Babcock v. Saint Francis Med. Ctr.*, 4 Neb. App. 362, 543 N.W.2d 749 (1996), the physician waives the requirement that the enumerated conditions under § 11112(b) be followed if the physician fails to object to the notice of hearing procedures. The district court did not make any finding as to the effect of the failure to reschedule the hearing.

The district court found that McLeay "voluntarily and without objection agreed to the recommendations of the ad hoc

committee." McLeay claims the recommendation of the ad hoc committee was on the condition that he was to receive a "laundry list" of exempted procedures which he could perform and that the monitoring requirement would be in effect only for 6 to 12 months. Since there is a factual dispute as to what McLeay agreed to with regard to the ad hoc committee recommendation, there is a genuine issue of material fact which precludes summary judgment on the waiver issue.

VII. CONCLUSION

We conclude that the district court erred in determining that Bergan was entitled to immunity under HCQIA and in granting summary judgment in favor of Bergan. Because there remain disputed issues of fact concerning HCQIA immunity, we remand the cause to the district court for further proceedings. However, because the issue of immunity is a question of law, "[u]nder no circumstances should the ultimate question of whether the defendant is immune from monetary liability under HCQIA be submitted to the jury." See *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1333 (11th Cir. 1994). If the cause proceeds to trial and a jury returns a verdict awarding damages to McLeay but the evidence conclusively demonstrates that Bergan satisfied HCQIA standards for peer review procedures, then the court should grant posttrial judgment as a matter of law upon a proper motion. See *Bryan v. James E. Holmes Regional Medical Center, supra.*

We further conclude that the district court correctly sustained Bergan's demurrer on McLeay's claims relating to the 1993 report of McLeay's monitoring requirement to the databank. We also conclude that the district court erred in failing to grant Bergan's demurrer to that portion of the amended petition claiming defamation relating to the 1995 report to the databank, and we remand the cause to the district court with instructions to sustain Bergan's demurrer relating to the 1995 report to the databank.

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

GERRARD, J., concurs in the result.

MELVIN R. CERNY AND LINDA CERNY, APPELLANTS AND CROSS-APPELLEES, AND GEOTECHNICAL SERVICES, INC., A NEBRASKA CORPORATION, APPELLEE, V. MICHAEL LONGLEY, M.D., ET AL., APPELLEES, AND NEBRASKA SPINE SURGEONS, P.C., APPELLEE AND CROSS-APPELLANT.

708 N.W.2d 219

Filed December 9, 2005. No. S-04-481.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
4. ___: ___. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.
5. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** Whether a physician or surgeon failed to use a reasonable standard of care is a matter that must usually be proved by expert testimony.
6. **Malpractice: Negligence: Informed Consent: Expert Witnesses: Proof.** In a medical malpractice or negligence action, expert testimony is required to prove the standard of care in an informed consent case.
7. **Physicians and Surgeons: Health Care Providers: Expert Witnesses: Words and Phrases.** Under the professional theory of a physician's duty to disclose the risks of a treatment or procedure, expert evidence is indispensable to establish what information would ordinarily be provided under the prevailing circumstances by physicians in the relevant and similar localities.
8. **Malpractice: Physicians and Surgeons: Affidavits: Negligence: Summary Judgment.** The affidavit of a defendant physician in a malpractice case that states that he or she met the standard of care presents a prima facie case of lack of negligence for summary judgment purposes.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

James D. Sherrets and Theodore R. Boecker, of Sherrets & Boecker, L.L.C., for appellants.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., for appellees Michael Longley, M.D., Eric Phillips, M.D., Nebraska Spine Surgeons, P.C., Nebraska Spine Center, L.L.C., and Nebraska Center, L.L.P.

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

CONNOLLY, J.

Melvin R. Cerny and his wife, Linda Cerny, appeal the district court's order granting the appellees' motion for summary judgment. The Cernys alleged that the appellees, physicians Michael Longley and Eric Phillips, and their employer, Nebraska Spine Surgeons, P.C., negligently treated Melvin and failed to inform him of the risks of spinal surgery. The appellees presented deposition testimony and the affidavits of Longley and Phillips, in addition to affidavits from out-of-state experts, stating that they met the standard of care. Because the appellees' affidavits and deposition testimony provided evidence that the standard of care was met and the Cernys did not rebut with their own expert testimony, we affirm.

BACKGROUND

Melvin suffered serious injuries in a motor vehicle collision. After experiencing continuing pain, the appellees treated him. The appellees, along with other unidentified physicians, performed surgery which rendered Melvin a paraplegic.

The Cernys sued, alleging that the appellees failed to provide the care and skill ordinarily used by other health care providers in the same circumstances and same or similar locality. They also alleged that Melvin did not give informed consent for the surgical procedure. The Cernys raised only the issue of informed consent on appeal.

According to the Cernys, the appellees failed to give Melvin the information that normally would be given under similar circumstances. The Cernys alleged that the appellees failed to inform Melvin of the risk of paralysis or alternative procedures that had less risk of paralysis.

The appellees moved for summary judgment. In support of the motion, Longley and Phillips each filed a personal affidavit

and deposition testimony asserting that he was licensed in Nebraska, that he was familiar with the standard of care, and that the standard was met by himself and the other appellees.

Longley, as the lead surgeon, testified that he had discussed the risks of surgery at length with Melvin. According to Longley, he informed Melvin of the options, including nonoperative treatment and the potential risks and benefits of surgery. Longley noted that nonoperative options were not acceptable because bed rest was difficult for Melvin because of his weight. Longley stated that the risk of paralysis from surgery varied among the medical literature. Some studies indicated no paraplegia over a large number of cases; others reported a 30-percent risk of minor neurological injury. Longley stated that he informed Melvin of the range of risk and that he believed that Melvin had a 1-percent risk of paraplegia with surgery and a much greater risk of it without surgery. Phillips testified that he had reviewed Longley's deposition and did not disagree with anything in it.

The appellees also presented the affidavits of spine surgeons located in Minnesota and New York who opined that the appellees met the standard of care. The surgeons averred that the injury Melvin suffered required surgery and that if surgery had not been performed, the condition would have likely worsened and led to paralysis. They also averred that the surgery performed was very specialized—performed by a limited number of spine surgeons throughout the United States—and that the information provided for informed consent was standard throughout the United States. They then opined that the appellees provided Melvin with adequate information to give him the opportunity to give informed consent for the surgery. The Cernys' objections to the affidavits were overruled.

Melvin submitted an affidavit stating that the appellees never informed him that he had an option not to proceed with surgery and that they did not inform him of the risk that he could become a paraplegic. In particular, Melvin averred:

> I was never informed . . . that I had the option of not proceeding with surgery. Dr. Longley always discussed risk in the context of the different surgical procedures. It was never relayed as a choice between surgery and no surgery, but

> between which surgery would be performed, as Dr. Longley indicated I would become paraplegic without surgery.
>
> . . . .
>
> . . . Dr. Longley did not advise me that there was any significant risk of becoming paraplegic as a consequence of the surgical procedure he recommended. Had I known there was a 50-50 risk that I would be paraplegic following the surgery recommended by Dr. Longley, or that there was any substantial risk of paraplegia associated with it, I would not have elected to go forward with the surgery.

The Cernys did not present expert evidence. Because they failed to present expert evidence to rebut the appellees' evidence that they met the standard of care, the district court granted the appellees' motion for summary judgment. The Cernys appeal.

ASSIGNMENTS OF ERROR

The Cernys assign, rephrased and consolidated, that the court erred by admitting the affidavits of surgeons from outside the locality and by granting the appellees' motion for summary judgment.

On cross-appeal, Nebraska Spine Surgeons assigns that the court erred in failing to sustain the motion for summary judgment on the ground it had been released based upon a previous satisfaction of the Cernys' claim for damages in an amount in excess of the Hospital-Medical Liability Act.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Eicher v. Mid America Fin. Invest. Corp., ante* p. 370, 702 N.W.2d 792 (2005).

[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. *Spear T Ranch v. Nebraska Dept. of Nat. Resources, ante* p. 130, 699 N.W.2d 379 (2005).

[3] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W.2d 599 (2003).

[4] A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. *Durkan v. Vaughan*, 259 Neb. 288, 609 N.W.2d 358 (2000).

ANALYSIS

The Cernys argue that the affidavits and deposition testimony provided by the appellees were insufficient to justify summary judgment for the appellees. The Cernys contend that because the out-of-state surgeons were not from the same locality as the appellees, the affidavits should not have been admitted and could not establish the absence of a question of material fact. The Cernys, however, ignore that the appellees presented the affidavits of Longley and Phillips opining that all the appellees met the standard of care.

[5,6] Whether a physician or surgeon failed to use a reasonable standard of care is a matter that must usually be proved by expert testimony. See *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000). We have also specifically held that expert testimony is required to prove the standard of care in an informed consent case. See, e.g., *Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992).

Informed consent is defined in Nebraska by Neb. Rev. Stat. § 44-2816 (Reissue 2004), which states:

> 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.

[7] We have construed § 44-2816 as a legislative enactment of the "professional theory" of a physician's duty to disclose the risks of a treatment or procedure. *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004); *Eccleston v. Chait, supra.* Under the professional theory, "'"expert evidence is indispensable to establish what information would ordinarily be provided under the prevailing circumstances by physicians in the relevant and similar localities."'" *Hamilton v. Bares*, 267 Neb. at 822, 678 N.W.2d at 80.

[8] Although the Cernys focus on the affidavits of experts from out-of-state, the appellees also presented deposition testimony about the risks of the surgery, what Melvin was told, and the affidavits of Longley and Phillips stating that they met the standard of care. We have held that the affidavit of a defendant physician in a malpractice case that states that he or she met the standard of care presents a prima facie case of lack of negligence for summary judgment purposes. See, e.g., *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). The burden then shifts to the plaintiff to present expert testimony to show that an issue of material fact exists and that it prevents summary judgment as a matter of law. See *Wagner v. Pope, supra.*

Here, the appellees presented testimony that Melvin was informed of a range of the risks of surgery, the risks of other possible procedures, the concern that nonoperative procedures were not feasible, and the belief that the risk of paraplegia from the surgery was 1 percent. They averred that they were familiar with the standard of care and that the standard of care was met. Once the appellees presented expert evidence, they established a prima facie case that if the evidence were uncontroverted at trial, they would be entitled to judgment as a matter of law. That showing shifted the burden to the Cernys to produce evidence of a factual issue. See *id.* The Cernys did not present expert evidence to contradict the appellees' expert opinions. Therefore, the Cernys failed to meet their burden of producing evidence.

The Cernys, however, contend that they did not need expert testimony to prove that the appellees failed to meet the standard. But in this case, Melvin's proffered evidence as a layperson is insufficient to prove a prima facie case of medical malpractice. Melvin's affidavit asserts that he should have been told that he had a 50-percent or "substantial" risk of paraplegia and that he was wrongly informed of the "risk in the context of the different surgical procedures." However, Melvin, as a layperson, is not qualified to testify that the standard of care requires that (1) he be informed that he had a 50-percent risk of paraplegia, (2) he be informed of the risk that is not presented in the "context of different surgical procedures," and (3) he had the option of not proceeding with surgery when he had been informed of the high risk of paraplegia if he chose to forgo surgery. Instead, the Cernys were required to present expert testimony to rebut the evidence provided by the appellees that their disclosures were sufficient. See, generally, *Wagner v. Pope, supra*. Because the Cernys failed to present expert evidence, summary judgment was properly granted.

CONCLUSION

We determine that the appellees presented expert evidence that they met the standard of care. Because the Cernys then failed to provide expert evidence of their own, there was no genuine issue of material fact and summary judgment was proper. Accordingly, we affirm.

Given our disposition of this case, we need not address Nebraska Spine Surgeons' assignment of error on cross-appeal.

AFFIRMED.

McCORMACK, J., not participating.

CITY OF COLUMBUS, APPELLEE, V. GREGORY E. SWANSON, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND ALLIED PROPERTY AND CASUALTY INSURANCE CO., THIRD-PARTY DEFENDANT, APPELLEE.

708 N.W.2d 225

Filed December 9, 2005. No. S-04-714.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.
3. **Statutes.** The meaning of a statute is a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Clark J. Grant, of Grant & Grant, for appellant.

Cathy S. Trent and Stephen L. Ahl, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee Allied Property and Casualty Insurance Co.

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

STEPHAN, J.

The issue presented in this case is whether an automobile liability insurance policy was effectively canceled as to the named insured for nonpayment of premium. The named insured received timely statutory notice, but others having an interest in the policy did not. We agree with the district court that the cancellation was effective.

BACKGROUND

Allied Property and Casualty Insurance Co. (Allied) issued personal automobile policy No. PPC 0009439209-0 to Gregory E. Swanson, age 19, for the policy period of October 30, 1999, to May 1, 2000. The vehicle insured under the policy was a 1984 Mercury Cougar, which Gregory had purchased with $2,500 borrowed from his father, Kenneth Swanson. A declarations page in the policy bearing an effective date of February 7, 2000, lists Gregory as the "named insured" and Kenneth as a "loss payee." An endorsement incorporated into the policy names Kenneth as a "designee." This endorsement states that liability coverage for the covered automobile applied to the designee, subject to the additional provision that Allied "will pay damages for which the designee becomes legally responsible only if the damages arise out of acts or omissions of: a) you or any 'family member', or b) any other covered person using 'your covered auto' described below with your permission." Allied regarded Kenneth as an "additional insured" under the policy pursuant to this endorsement. The vehicle was titled in the names of Gregory and his mother, Diane C. Swanson, but Diane's name does not appear on the policy, and the record does not reflect whether Allied was aware of her ownership interest when the policy was issued.

On February 7, 2000, Allied sent, by certified mail to Gregory at his residence in Lincoln, Nebraska, written notice that unless a premium payment of $216.25 was received by Allied on or before February 20, 2000, it would cancel the policy effective 12:01 a.m. on that date. The premium payment was not received prior to February 20, and Allied canceled the policy on that date. While operating the vehicle on February 25, in Columbus, Nebraska, Gregory was involved in a collision with a police vehicle owned by the City of Columbus.

The collision resulted in damage to the police vehicle in the amount of $15,605 and damage to the Mercury in the amount of $2,500. At the time of the accident, neither Kenneth nor Diane had received any notice of cancellation from Allied and they were unaware of the notice of cancellation which Allied had sent to Gregory.

On the same day that the collision occurred, Allied mailed notice of cancellation of the policy to Kenneth at his address in

Monroe, Nebraska. Kenneth received this notice on February 28, 3 days after the collision. He immediately tendered payment to Allied's agent for the premium due.

The city instituted this action against Gregory, alleging that his negligence resulted in property damage to the police vehicle in the amount of $15,605. Gregory filed a third-party action against Allied, seeking indemnification under the policy with respect to any liability he may have to the city as a result of the collision. Allied denied coverage on the ground that its cancellation of the policy for nonpayment of premium was effective 5 days before the accident occurred. Both Gregory and Allied moved for summary judgment. The district court granted Allied's motion, determining that Allied's cancellation of the policy was effective as to Gregory despite Allied's failure to provide notice of the pending cancellation to Diane as the cotitled owner or Kenneth as an additional insured. Following a bench trial, the district court entered judgment against Gregory in favor of the City of Columbus in the amount of $15,605, plus costs. Gregory perfected this timely appeal, which we moved to our docket on our own motion.

ASSIGNMENT OF ERROR

Gregory assigns, restated, that the trial court erred as a matter of law in determining that Allied did not need to give either Diane or Kenneth advance notice to effect a valid cancellation of the Allied automobile insurance policy as to Gregory.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *NEBCO, Inc. v. Adams, ante* p. 484, 704 N.W.2d 777 (2005); *Hans v. Lucas, ante* p. 421, 703 N.W.2d 880 (2005). When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further

proceedings as the court deems just. *Channer v. Cumming, ante* p. 231, 699 N.W.2d 831 (2005); *In re Estate of Bauer, ante* p. 91, 700 N.W.2d 572 (2005).

[3,4] The meaning of a statute is a question of law. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004); *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Stevens v. Downing, Alexander*, 269 Neb. 347, 693 N.W.2d 532 (2005).

ANALYSIS

An insurer's right to cancel an automobile liability policy during the policy period is governed by statute. See *Glockel v. State Farm Mut. Auto Ins. Co.*, 219 Neb. 222, 361 N.W.2d 559 (1985). Neb. Rev. Stat. § 44-515 (Reissue 2004) specifies permissible grounds for cancellation, including nonpayment of premium. In February 2000, when Allied sought to cancel the policy at issue in this case, Neb. Rev. Stat. § 44-516(1) (Cum. Supp. 2000) provided:

> No notice of cancellation of a policy to which section 44-515 applies shall be effective unless mailed by registered or certified mail to the named insured at least thirty days prior to the effective date of cancellation, except that if cancellation is for nonpayment of premium, at least ten days' notice of cancellation accompanied by the reason therefor shall be given. The requirements of this subsection shall apply to a cancellation initiated by a premium finance company for nonpayment of premium.

The policy at issue in this case provided:

> **A. Cancellation.** This policy may be cancelled during the policy period as follows:
>
> . . . .
>
> 2. We may cancel by mailing by registered or certified mail to the named insured shown in the Declarations at the last address known by us:
>
> a. At least 10 days notice:
>
> 1) If cancellation is for nonpayment of premium[.]

It is undisputed that Allied gave Gregory timely notice of cancellation for nonpayment of premium prior to the accident

from which the city's claim arises. The district court concluded that because Gregory "was afforded both the time and opportunity either to pay the policy premium or to obtain other insurance," he had no coverage under the policy. It is likewise undisputed that Kenneth did not receive notice of cancellation until several days after the accident, and no notice of cancellation was ever sent to Diane. The district court concluded that while "Allied's failure to provide advance notice of the cancellation to Kenneth and Diane Swanson would result in the retention of their rights under the policy," it did not alter the cancellation of the policy with respect to Gregory. In this appeal, Gregory argues that the reasoning of the district court is contrary to the principles applied by this court in *Hansen v. U.S.A.A. Casualty Ins. Co.*, 206 Neb. 147, 291 N.W.2d 715 (1980), and *Kent v. Dairyland Mut. Ins. Co.*, 177 Neb. 709, 131 N.W.2d 146 (1964).

In *Kent*, William Kent and his 18-year-old son, Stanley Kent, were coowners of a motor vehicle which was involved in an accident while Stanley was driving. Stanley had secured insurance on the vehicle at the direction of William, although the latter did not personally participate in the transaction with the insurer. The policy specifically named both men as insureds. Prior to the accident, Stanley wrote a letter to the insurer requesting cancellation of the policy. That letter was received on the day of the accident, and the insurer contended that it resulted in cancellation of the policy effective at 12:01 a.m. on that date. Accordingly, the insurer denied coverage for claims arising from the accident which occurred later that day. After retaining counsel and negotiating a settlement of the claims against them related to the accident, the Kents brought suit against the insurer to determine the rights of the parties under the policy and to recover the sums which they expended in the defense and settlement of the claim. *Id.* At trial, William testified that he did not know that Stanley intended to cancel the policy and the insurance agent testified that he did not inform William of Stanley's cancellation. The trial court entered judgment for the Kents, and the insurer appealed, arguing that the cancellation was effective, because under the contract, Stanley was vested with authority to cancel the policy. We rejected the insurer's argument and affirmed the court's holding, reasoning that because the policy permitted cancellation by

the "named insured" and both the Kents were insured under the policy, Stanley could not cancel the policy without the knowledge or consent of William.

In *Hansen v. U.S.A.A. Casualty Ins. Co., supra*, we considered the issue of "[w]hether an insurer, before canceling the insurance covering a motor vehicle owned by several individuals, must give notice of such cancellation to all the owners even though not all the owners are shown on the face of the policy as the named insured." 206 Neb. at 147, 291 N.W.2d at 716. The insured vehicle was coowned by a husband and wife and titled in both of their names, with rights of survivorship. Only the husband was specifically listed as a named insured, but the policy specifically provided that coverage would extend to a spouse who was a member of the same household. The wife was identified in the policy as the principal operator of the insured vehicle. After the couple separated, the husband instructed the insurer to cancel the insurance on the vehicle, which was in the possession of the wife, and to notify her of the cancellation. The wife was involved in an accident after the insurer received these instructions but before it notified the wife of the cancellation. In considering the question of whether the policy remained in force so as to provide liability coverage to the wife at the time of the accident, we noted that the facts differed from those in *Kent* in that the vehicle, while jointly owned, was not jointly insured. Based upon what we viewed as compelling policy reasons against causing a motorist to become unknowingly uninsured, we held that an automobile insurer

> may not cancel the policy, either at the request of a named insured or at the company's initiative, until notice is given to all persons known to have an ownership interest in the motor vehicle, at their last known addresses, in enough time to afford them a reasonable opportunity to obtain other insurance.

Hansen v. U.S.A.A. Casualty Ins. Co., 206 Neb. 147, 156, 291 N.W.2d 715, 720 (1980).

The facts of the instant case do not fall squarely within the holdings of either *Kent v. Dairyland Mut. Ins. Co.*, 177 Neb. 709, 131 N.W.2d 146 (1964), or *Hansen v. U.S.A.A. Casualty Ins. Co., supra*. Although Diane was shown as a coowner on the title

to the vehicle, this fact is not reflected in the policy, and there is nothing in the record to establish that the joint ownership was ever made known to Allied prior to the accident. Although Kenneth was an "additional insured" who did not receive notice of cancellation prior to the accident, he was not listed in the policy as a "named insured," and the city's property damage claim was not based upon his personal liability, but, rather, on that of Gregory, who did receive such notice. No claim against either Diane or Kenneth is asserted in this action. Moreover, unlike *Kent* and *Hansen*, this case involves a cancellation initiated by the insurer for nonpayment of premium, thus implicating the notice requirements of § 44-516(1).

The term "policy" as used in § 44-516(1) is defined by Neb. Rev. Stat. § 44-514(1) (Reissue 2004) as "an automobile liability policy . . . delivered or issued for delivery in this state, insuring a natural person as named insured or one or more related individuals resident of the same household." Section 44-516(1) requires that advance notice of cancellation for nonpayment of premium be mailed to the "named insured." The Allied policy specifically states that the "named insured" is the person identified as such in the policy declarations, in this case Gregory, who did not reside in his parents' household. While Gregory does not dispute the fact that he received the notice required by § 44-516(1), he contends that cancellation was nevertheless ineffective because Allied did not send advance notice of cancellation to Kenneth, who is an additional insured under the policy, and to Diane, who is not identified in the policy but was a coowner of the insured vehicle.

This argument assumes a requirement for effective cancellation which our Legislature has not seen fit to include in § 44-516(1). In *Metropolitan Property & Cas. v. Zeller*, 246 Ga. App. 637, 541 S.E.2d 433 (2000), cited by Gregory in support of his argument, the court held that an automobile insurance policy was not effectively canceled for nonpayment of premium despite the requisite notice to the insured, because the insurance company failed to send notice to the lessor, which was named in the policy as lien/loss payee. However, this result was dictated by a Georgia statute which required advance notice of cancellation " 'to the named insured *and any lienholder*.' "

(Emphasis in original.) *Id.* at 637, 541 S.E.2d at 434, quoting Ga. Code Ann. § 33-24-44(d) (1990). The Georgia court specifically determined that the lessee was a lienholder entitled to statutory notice. The Nebraska Legislature could have conditioned effective cancellation of an automobile liability policy upon advance notice to lienholders, loss payees, additional insureds, or others having an interest in an automobile insurance policy, but it has not. Section 44-516(1) requires notice only to the "named insured," who in this case was Gregory.

Other cases relied upon by Gregory also do not support his argument that the failure of Allied to send notice of cancellation to his parents prevented cancellation of the policy as to him. The opinion in *Toyota Motor Credit Corp. v. Felton*, 305 A.D.2d 582, 760 N.Y.S.2d 510 (2003), does not refer to any statutory notice requirements. The policy covering a leased vehicle named the lessor as an additional insured and loss payee and provided that a loss payee would be given the same notice of cancellation for nonpayment of premium that is given to the named insured. It was undisputed that the lessee, who was the named insured, received notice of cancellation prior to the accident which resulted in a personal injury claim against both the lessee and lessor. The lessor settled the claim and successfully sought reimbursement under the policy, based on the fact that it had not received notice of cancellation as required by the terms of the policy. The opinion does not address the issue of whether the cancellation was effective as to the lessee who did receive the required notice of cancellation. In addition, *Accardo v. Clarendon Nat. Ins. Co.*, 751 So. 2d 975 (La. App. 2000), held that cancellation of a policy was not effective as to an additional insured who was not notified when the named insured surrendered the policy, an issue which is not presented in the instant case.

As noted by the district court, there is authority in support of Allied's argument that a breach of whatever obligation it may have had to give advance notice of cancellation to Kenneth or Diane would not affect its cancellation of the policy as to Gregory. *Pawlick v. N.J. Auto. Full Ins.*, 284 N.J. Super. 629, 666 A.2d 186 (1995), and *O'Neill v ACIA*, 175 Mich. App. 384, 438 N.W.2d 288 (1989), involved leased vehicles in which timely

advance notice of cancellation had been given to the lessee driver, but not to the lessor named as an additional insured under the policy. Both courts held that cancellation was effective as to the lessee, notwithstanding the failure of the insurer to give proper notice to the lessor. The *O'Neill* court specifically noted the absence of

> any public policy considerations underlying the statute [requiring notice of cancellation to named insured] which would justify treating the policy as being in force as to all insureds, particularly where, as here, the cancellation results from the failure of the insured seeking the relief to comply with his obligation to pay premiums.

175 Mich. App. at 390, 438 N.W.2d at 291.

Allied complied with § 44-516(1) in giving advance notice of cancellation for nonpayment of premium to Gregory as its named insured. He was thereby placed on notice that he would become uninsured if he did not pay the premium due by the specified date. When he failed to do so, the policy was canceled as to him. Because this cancellation occurred prior to the accident which gave rise to Gregory's liability to the city as determined in this action, Allied had no obligation to indemnify Gregory for that liability.

We note from the record that the city filed a separate action against Diane and Kenneth arising from the same accident, in which action the city asserted a claim based upon the family purpose doctrine. That action was voluntarily dismissed without prejudice prior to commencement of this action. Because Diane and Kenneth are not parties to this action, we express no opinion as to any rights they may have or might assert under the insurance policy in question.

CONCLUSION

For the reasons discussed, we find no error and therefore affirm the judgment of the district court.

AFFIRMED.

CONNOLLY, J., participating on briefs.

SHAN COLLETT, APPELLANT, V.
KIMBERLY A. COLLETT, APPELLEE.
707 N.W.2d 769

Filed December 9, 2005. No. S-04-850.

1. **Modification of Decree: Alimony: Appeal and Error.** An appellate court entrusts the modification of an alimony award to the discretion of the trial court and reviews the trial court's decision de novo on the record for abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Modification of Decree: Words and Phrases.** A material change of circumstances constituting grounds for modification of a dissolution decree means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
4. **Modification of Decree: Alimony.** Changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony award.
5. **Constitutional Law: Statutes.** Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state law that conflicts with federal law is invalid.
6. ____: ____. Before state law governing domestic relations will be overridden as preempted by federal law, it must do major damage to clear and substantial federal interests.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Affirmed.

John F. Simmons and Jeffrey L. Hansen, of Simmons Olsen Law Firm, P.C., for appellant.

A. James Moravek, of Curtiss, Moravek, Curtiss, Margheim & Miller, for appellee.

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

STEPHAN, J.

Shan Collett appeals from an order of the district court for Box Butte County which modified the alimony award included in a decree dissolving his marriage to Kimberly A. Collett. The modification increased the alimony which Shan was required to pay Kimberly from $1 per year to $950 per month for 123 months and required Shan to maintain insurance on his life, with Kimberly as

the named beneficiary, until the alimony is paid in full. We affirm the judgment of the district court.

FACTS

Both parties are veterinarians. During their marriage, First National Bank made a loan to Shan to enable him to open a veterinary practice in Alliance, Nebraska. Although the loan documents are not included in the record, it is apparent from the testimony that the loan was secured by a building, various equipment, and inventory purchased by Shan for the practice. Kimberly did not sign the promissory note, but she executed a written guaranty because the bank would not otherwise make the loan to Shan.

The clinic experienced financial difficulties soon after opening in September 2000. Shan defaulted on payments to the bank, and in November 2001, he filed a bankruptcy proceeding under chapter 7 of the U.S. Bankruptcy Code. Kimberly received notice of the bankruptcy prior to trial in the dissolution action and advised her lawyer of the filing, but she did not file an adversary proceeding or petition for her own discharge in bankruptcy.

Trial in the dissolution proceeding initiated by Shan was held on December 6, 2001. Shan testified that the value of the clinic property was approximately equal to the outstanding balance due on the loan. Shan also offered evidence that he intended to move to California, where he had secured employment as a veterinarian at a gross annual salary of $67,500, plus benefits and bonuses as deemed appropriate by his employer. At the time of trial, Kimberly was employed in Alliance, with an annual income of $52,000.

The decree of dissolution was filed on March 8, 2002, and provided in relevant part:

> 20. Commencing January 1, 2002, and on the first day of each year thereafter, [Shan] shall pay to [Kimberly] the sum of $1 alimony.
>
> a. This alimony payment shall terminate only upon the death of [Kimberly]; or
>
> b. On the first day of the month after which [Kimberly] has no further liability for debts discharged by [Shan]; or
>
> c. On the first day of the month after which [Kimberly] has no further liability for student loans to be paid by [Shan].

> If [Kimberly] must pay any money on [Shan's] debts discharged in bankruptcy or if [Kimberly] must pay any more than 50% of the consolidated student loan, either result is a material change in circumstances requiring that the $1 per year alimony be increased to a monthly amount that will, after requiring [Shan] to pay [Kimberly's] increased income tax liability due to the alimony award, pay all of [Kimberly's] payments to discharge these two obligations in full.
>
> . . . .
>
> 24. [Shan] is ordered to pay all debts incurred during the marriage as it appears that everything owed was connected to his self-employment and the opening of his new vet clinic. Since he has filed bankruptcy, all of these bills will be discharged anyway.

First National Bank eventually foreclosed and took possession of the real and personal property of the clinic which was owned by Shan and apparently pledged as security on the loan. The bank sold the real estate, and Kimberly assisted the bank in disposing of the remaining equipment and inventory. By this time, Shan had moved to California and did not assist in the liquidation. After the sale of all property, equipment, and inventory, there was a deficiency for which the bank sued Kimberly as guarantor. Summary judgment was entered in favor of the bank on November 25, 2003, in the amount of $68,696, which included the deficiency and accumulated interest.

On December 4, 2003, Kimberly filed a motion to modify alimony. In her operative amended motion filed on February 25, 2004, Kimberly cited the language of the decree pertaining to alimony and alleged that by virtue of the deficiency judgment against her, there was a material change in circumstances requiring an increase in the alimony award until the deficiency judgment was paid in full. Shan filed an answer generally denying her allegations and further alleging that the original alimony award was void as a conditional order. Shan also alleged that modification would "violate the 'fresh start' benefit of filing bankruptcy," that the debt which was the subject of the deficiency judgment had been discharged in his bankruptcy, that Kimberly "had the option of filing an adversary proceeding in

the bankruptcy case to declare the marital debts non-discharged and failed to do so," and that the bankruptcy was contemplated at the time of the decree of dissolution and therefore did not constitute a material change in circumstances.

At a hearing on her motion, Kimberly introduced evidence that in order to satisfy the deficiency judgment, she would be required to pay $800 a month for 122 months, plus a final payment of $181.46. She also submitted evidence that an increase of $800 a month in her alimony would increase her tax liability by approximately $164.41 per month and that her income had decreased while her expenses had increased since entry of the decree.

The district court determined that the provisions in paragraph 20(b) and (c) of the original decree were void and unenforceable. The court also found there was a material change in circumstances because payment of the deficiency judgment would substantially reduce Kimberly's income and standard of living. The court determined that the change in circumstances was not contemplated by the parties at the time of the dissolution because they both believed the assets of Shan's veterinary practice in Alliance would be sufficient to cover his loan to the bank. Based upon these findings, the district court modified its original alimony award and ordered Shan to pay alimony in the amount of $950 per month effective July 1, 2004, for a period of 123 months, with the payments to terminate "only in the death of [Kimberly] or the completion of the above-required alimony payments." The court also ordered Shan to obtain term life insurance in the amount of $70,000 until the alimony was paid in full.

Shan commenced this timely appeal, which we removed to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Shan's sole assignment of error is that the district court erred in increasing the award of alimony.

STANDARD OF REVIEW

[1-2] An appellate court entrusts the modification of an alimony award to the discretion of the trial court and reviews the trial court's decision de novo on the record for abuse of

discretion. *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002); *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Bowers v. Scherbring*, 259 Neb. 595, 611 N.W.2d 592 (2000).

ANALYSIS

Neither party has appealed from the determination of the district court that portions of the decree of dissolution were conditional and void, and we therefore disregard those provisions in our analysis. So viewed, the decree awarded Kimberly alimony in the amount of $1 per year. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in Neb. Rev. Stat. § 42-365 (Reissue 2004) make it appropriate. See *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

[3] Because alimony, albeit nominal, was allowed in the original decree, the award is subject to modification for "good cause shown" pursuant to § 42-365. In this context, "good cause" means a material and substantive change in circumstances and depends upon the circumstances of each case. *Bowers v. Scherbring, supra*; *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997). A material change of circumstances constituting grounds for modification of a dissolution decree means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

Was Alleged Change in Circumstances Within Contemplation of Parties at Time of Dissolution?

[4] Changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony award. *Pope v. Pope, supra*; *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992). Shan characterizes the change in circumstances upon which the

modification order was based as the "bankruptcy discharge of the First National Bank debt and the impact of that discharge on Kimberly." Brief for appellant at 12. Shan argues that these circumstances were within the contemplation of the parties at the time of the dissolution proceeding and thus cannot be considered a material change in circumstances justifying a modification of alimony. Shan's argument is based in part on the language of the decree which the district court subsequently declared was conditional and therefore void. Having successfully advanced the argument that these provisions were void, Shan cannot now claim that they lend substantive support to his position regarding the contemplation of the parties in this appeal.

At Shan's request, the district court struck language from the decree which could be viewed as prejudging the issue of whether there was a change in circumstances sufficient for purposes of future modification of the alimony award. Striking the language did not preclude the court from subsequently considering a request for modification based upon events which transpired subsequently to the decree. See *In re Marriage of Geil*, 509 N.W.2d 738 (Iowa 1993). As the moving party, Kimberly bore the burden of proving a material and substantial change in circumstances which would justify modification of the alimony award. See *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

The record clearly establishes that Kimberly had notice of the bankruptcy filing which occurred in November 2001, and the district court specifically referred to the filing and the discharge of Shan's debts in the decree. However, the material change in circumstances upon which the district court modified the alimony award was neither the filing of the bankruptcy nor the resulting discharge of Shan's indebtedness to the bank; rather, the material change was Kimberly's subsequent liability to the bank for the deficiency judgment. The record in this case does not include evidence received at the trial of the dissolution proceeding. However, at the modification hearing, Shan testified that at the time of his bankruptcy filing, he assumed that the property which secured the bank loan "was worth about what I owed on it." He acknowledged that this was also his testimony at the dissolution proceeding a few weeks after his filing. There is no indication that Kimberly had any different expectation.

Although it is clear that the parties contemplated Shan's bankruptcy and the discharge of his personal indebtedness to the bank, it is likewise apparent that the parties expected that the unpaid balance of the loan would be satisfied by the bank's foreclosure and sale of the collateral. Thus, the record supports the district court's finding that the 2003 deficiency judgment against Kimberly was not within the contemplation of the parties at the time of trial in 2001.

Effect of Bankruptcy Upon Power of State Court to Modify Alimony Award Based Upon Change in Circumstances

[5,6] Shan's principal argument is that modification of the alimony award violates the U.S. Bankruptcy Code and must therefore be set aside under the Supremacy Clause of the U.S. Constitution. Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state law that conflicts with federal law is invalid. *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003); *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002). Before state law governing domestic relations will be overridden as preempted by federal law, it must do major damage to clear and substantial federal interests. *Rose v. Rose*, 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979).

Shan argues that the modification of his alimony obligation deprives him of the "fresh start" provided by a discharge of indebtedness under the U.S. Bankruptcy Code, a central purpose of which is "to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991), quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 54 S. Ct. 695, 78 L. Ed. 1230 (1934). In order to ensure that the debtor receives the benefit of a "fresh start," a discharge under Chapter 7 of the U.S. Bankruptcy Code "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect,

recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2) (2000). See *In re Fluke*, 305 B.R. 635 (D. Del. 2004).

Generally, a bankruptcy discharge does not discharge the debtor from any debt for a domestic support obligation. At the time of Shan's discharge, 11 U.S.C. § 523(a)(5) (2000) provided in relevant part that a discharge under that title did not discharge an individual debtor from any debt to a "former spouse . . . for alimony to, maintenance for, or support of such spouse . . . in connection with a separation agreement, divorce decree or other order" of a state court of record. Likewise, other types of debts incurred in the course of a marital dissolution proceeding were not dischargeable in bankruptcy unless:

> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . . . or
>
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15). We understand Shan to argue that because Kimberly did not file an adversary proceeding objecting to the dischargeability of Shan's indebtedness to the bank under § 523(a)(15), she cannot now seek a modification of alimony on the basis of the deficiency judgment which is related to the debt.

Shan relies upon *In re Fluke, supra*, which is instructive but distinguishable. In that case, a dissolution decree incorporated a property settlement agreement by which the wife assumed sole responsibility for $9,415.15 in debt incurred jointly by the parties during the marriage, and the husband assumed sole responsibility for other marital debt. The wife subsequently declared bankruptcy. In an adversary proceeding filed by the husband, the bankruptcy court determined that the debt was dischargeable because the conditions specified in § 523(a)(15)(A) and (B) were met. As a result of the wife's discharge, the husband remained obligated to the creditors for the debt. He returned to the state court which had entered the decree of dissolution and sought modification of other provisions of the

property settlement based on the wife's " 'bad faith in discharging her assumed debts to bankruptcy.' " *In re Fluke*, 305 B.R. at 637. The state court ordered the wife to pay the husband the full amount of the discharged debt in 36 monthly installments in order to give the husband " 'the benefits that were bargained for.' " *Id.* In response, the wife sought relief from the bankruptcy court on grounds that by obtaining the state court order, the husband and his attorney violated the discharge injunction of § 524(a). In determining that there had been a violation of the injunction, the bankruptcy judge held that by seeking relief in state court following the wife's bankruptcy discharge, the husband "attempted to modify a discharged property settlement without seeking leave to do so from the bankruptcy court." *In re Fluke*, 305 B.R. at 643. The court further noted that because the dissolution decree did not provide for alimony, support, or maintenance payments, the husband "was not seeking a modification of such on-going obligations to address changed circumstances," but, rather, "willfully attempted to 'end run' around the discharge." *Id.* at 643-44.

This case is distinguishable from *In re Fluke*, 305 B.R. 635 (D. Del. 2004), in that the original decree did include an award of alimony and the postbankruptcy modification of that award was sought on the basis of a material change in circumstances. Other courts addressing this scenario have rejected arguments that modification of alimony is merely a "repackaging" of debts discharged in bankruptcy and thus prohibited by federal law, if the party seeking modification is able to demonstrate an actual change in financial circumstances subsequent to the dissolution and bankruptcy of the former spouse. See, *In re Siragusa*, 27 F.3d 406, 407 (9th Cir. 1994); *Smith v. Smith*, 741 So. 2d 420 (Ala. Civ. App. 1999); *In re Marriage of Trickey*, 589 N.W.2d 753 (Iowa App. 1998). The court in *In re Marriage of Trickey* articulated what we believe to be the correct analytical approach:

> If the modification is essentially a reinstatement of the property settlement under the guise of alimony, the modification violates section 524 and is not permitted. . . . Mere attempts to "end run" around a bankruptcy discharge are not allowed. . . . However, if the alimony modification merely takes into account the fact that one spouse would

> no longer receive the property settlement payments upon which the original support award was premised and the discharge results in changed financial circumstances, then modification will not violate federal bankruptcy law.

(Citations omitted.) 589 N.W.2d at 757. In *In re Marriage of Trickey*, the court held that because the parties understood at the time of the decree that lump-sum property settlement payments discharged in bankruptcy were contingent upon the success of the former spouse's business, the bankruptcy could not serve as a basis for modification of alimony. However, the court held that the prolonged period of the alimony recipient's unemployment was unanticipated and did constitute a change in circumstances which warranted an upward modification of the original alimony award.

In *In re Siragusa, supra*, the court determined that a post-bankruptcy alimony modification did not violate the discharge injunction where there was no showing that the former wife was attempting to reinstate a discharged property settlement obligation. Instead, the modification was based on the changed circumstance that the former wife would not receive the future property settlement payments upon which the original alimony award was premised. The court noted that the former husband's bankruptcy constituted a changed circumstance in that it "altered both [the former wife's] need and [the former husband's] ability to pay." *In re Siragusa*, 27 F.3d at 408. The court therefore concluded that the resulting modification was justified in that it "merely takes into account the fact that [the former wife] would no longer receive the property settlement payments upon which the original alimony was premised." *Id.*

Noting that "not every modification of periodic alimony is considered a violation of the Bankruptcy Code," the court in *Smith v. Smith, supra*, determined that the former husband's bankruptcy discharge of his obligation to make future payments of alimony in gross resulted in a change in the former wife's financial circumstances sufficient to warrant an increase in periodic alimony and that such modification was not barred by federal law. 741 So. 2d at 422.

Although we have not previously addressed the precise issue presented here, this court has considered a postdissolution

bankruptcy discharge in determining whether an alimony award should be modified on the basis of a material change in circumstances. In *Anderson v. Anderson*, 206 Neb. 655, 294 N.W.2d 372 (1980), a dissolution decree included provisions ordering the husband to pay substantial marital debts and to make alimony payments of $200 a month for 10 years. After changing jobs, the husband filed an application to modify the alimony downward, citing his decreased earnings and the fact that the debts he was ordered to assume were "of such magnitude that it was impossible for him to continue making the alimony payments." *Id.* at 656, 294 N.W.2d at 373. After filing the application for modification, but before the hearing, the husband filed bankruptcy and obtained a discharge of some of his indebtedness. In affirming an order that determined that there had not been a change in circumstances sufficient to justify eliminating or reducing the alimony award, this court referred to the relief afforded the husband by virtue of his bankruptcy discharge, concluding that the husband's "change in income and expenses has approximately kept pace with each other." *Id.* at 658, 294 N.W.2d at 374.

In this case, there is evidence that the deficiency judgment resulted in a substantial and material change in Kimberly's financial circumstances. She testified that due to a job change, her annual income had dropped from $52,000 at the time of the decree to approximately $38,000 at the time of the modification hearing. She testified that she has only $200 to $300 remaining each month after payment of her bills. Kimberly testified that she has not made any payments on the deficiency judgment and has no property from which it could be satisfied. She presented evidence establishing that to satisfy the judgment over a 10-year period, it would require that she make debt service payments of $800 per month, and that if she received this amount in alimony, her income tax liability would increase.

Shan testified that his expenses had increased and that he could not afford to pay additional alimony. However, he also testified that his monthly income had increased from $1,400 at the time of the original decree to $4,000 at the time of the modification hearing, and that his housing costs, insurance, and some of his utilities are provided or paid for by his employer.

The record establishes that Kimberly's liability for the deficiency judgment has resulted in a material and substantial change in the relative economic circumstances of the parties which was not within the reasonable contemplation of the parties at the time of the decree of dissolution. Satisfaction of the deficiency judgment over a 10-year period in her current circumstances would alter Kimberly's monthly cashflow from slightly positive to decidedly negative. Because the modification of the alimony award was specifically attributed to this proven change in circumstances, it is not contrary to or preempted by federal bankruptcy law. See, *In re Siragusa*, 27 F.3d 406 (9th Cir. 1994); *Smith v. Smith*, 741 So. 2d 420 (Ala. Civ. App. 1999).

CONCLUSION

For the reasons discussed herein, we conclude on the basis of our de novo review of the record that the district court did not abuse its discretion in modifying the original alimony award. Accordingly, we affirm.

AFFIRMED.

POLLY N. ANDRES, APPELLANT, V. McNEIL COMPANY, INC., AND E & K OF OMAHA, INC., APPELLEES.

707 N.W.2d 777

Filed December 9, 2005. No. S-04-953.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
4. **Limitations of Actions: Contractors and Subcontractors: Negligence.** Neb. Rev. Stat. § 25-223 (Reissue 1995) is a special statute of limitations applying to builders and contractors making improvements to real property.

5. **Limitations of Actions: Legislature: Intent.** A special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject.
6. **Limitations of Actions: Pretrial Procedure.** Discovery, as applied to the statute of limitations, occurs when one knows of the existence of an injury or damage and not when he or she has a legal right to seek redress in court.
7. ____: ____. Under the discovery principle, discovery occurs when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.
8. **Fraud: Limitations of Actions.** The doctrine of fraudulent concealment may render a statute of limitations defense unavailable.
9. **Fraud: Estoppel: Limitations of Actions: Proof.** In order to successfully assert the doctrine of fraudulent concealment and thus estop the defendant from claiming a statute of limitations defense, the plaintiff must show the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the misconduct.
10. **Fraud: Limitations of Actions: Proof.** Under the doctrine of fraudulent concealment, the plaintiff must show that he or she exercised due diligence to discover his or her cause of action before the statute of limitations expired.
11. **Summary Judgment.** The primary purpose of a summary judgment procedure is to pierce the allegations made in the pleadings and to show conclusively that the controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law.
12. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
13. ____: ____. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Thomas M. Locher and Timothy M. Morrison, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellant.

Robert S. Keith and Kellie R. Harry, of Engles, Ketcham, Olson & Keith, P.C., for appellee E & K of Omaha, Inc.

Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee McNeil Company, Inc.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellant Polly N. Andres sued appellees McNeil Company, Inc. (McNeil), a contractor, and E & K of Omaha, Inc. (E&K), one of McNeil's subcontractors, in the district court for Douglas County, alleging that her home was defectively constructed. Appellees each filed motions that the district court treated as motions for summary judgment. In their motions, appellees asserted that appellant's claims were barred by the applicable statutes of limitations. The district court granted the motions and dismissed appellant's complaint in its entirety. We find no error in that portion of the court's ruling dismissing the complaint as to E&K. However, because we conclude that a genuine issue as to a material fact remains concerning whether McNeil fraudulently concealed pertinent information, thereby preventing appellant from gaining timely knowledge about allegedly defective construction of the home within the 4-year statute of limitations set forth in Neb. Rev. Stat. § 25-223 (Reissue 1995), we reverse that portion of the district court's order that dismissed appellant's complaint against McNeil. Accordingly, we affirm in part, and in part reverse, and remand for further proceedings.

STATEMENT OF FACTS

Appellant and her husband contracted with McNeil to design and build a house located in Omaha, Nebraska. The house was completed in January 1994. The house had a 1-year warranty on workmanship and materials, with 3 additional years for the roof and 5 additional years for the "Exterior Insulation Finish System," or EIFS, a type of exterior faux-stucco covering. In their briefs, the parties also refer to the EIFS as "Dryvit." The parties agreed during oral argument that the terms "EIFS" and "Dryvit" refer to the same material, the exterior faux-stucco covering on the house. E&K was the subcontractor that installed the EIFS.

On May 28, 2003, appellant filed suit against appellees. The complaint contains five "counts," asserted against appellees as follows: count I, "Breach of Implied Duty to Perform in a Workmanlike Manner," alleged against both appellees; count II, "Breach of Implied Warranty of Habitability," alleged against

both appellees; count III, "Negligence," alleged against both appellees; count IV, "Fraudulent Concealment," alleged against McNeil; and count V, "Breach of Express Warranty," alleged against McNeil.

In summary, appellant alleges that McNeil completed the construction of the home in 1994 and that soon after taking possession of the house, she and her husband began to experience water leaking into the home through the tile roof, resulting in water damage to the interior of the home. Appellant alleges that she contacted McNeil, who in turn contacted a subcontractor, to make repairs to the tile roof. Appellant alleges that the subcontractor made certain repairs to the roof; however, the roof continued to leak. Appellant further alleges that in approximately the fall of 2002, as a result of the ongoing water problems with the roof, she contacted a roofing company that informed appellant that the leaks were caused by improper construction of the roof. Appellant alleges that this was the first information made known to her that the original installation of the roof was improper and that it was at this time she was informed that water intrusion had been detected in certain of the interstitial areas of the house coated with the EIFS material applied by E&K.

Taken as a whole, appellant alleges in her complaint that McNeil fraudulently concealed material facts regarding the defective construction of the house and that McNeil's conduct prevented appellant, despite her diligence, from discovering McNeil's misconduct until 2002. Appellant's specific allegations include the following:

> 6. Subsequent to [appellant's] taking possession of the home, [appellant] continued to request that . . . McNeil complete . . . nonconforming work to complete the home. This nonconforming work included, but was not necessarily limited to, the roof, which leaked. . . . McNeil provided continued assurances that the roof leak was but a minor problem and would be made to conform to workmanlike standards. . . . McNeil called upon a subcontractor . . . to provide necessary inspection and work to conform with the original implied and express warranties . . . . McNeil repeatedly assured [appellant] that the necessary work was completed and these assurances continued.

. . . .

12. . . . McNeil knew of said defects at all pertinent times, but continually assured [appellant] that such defects did not exist and that any leaks could be easily remedied.

. . . .

15. [McNeil's] actions, including his [sic] concealment of material facts, have caused such damage to [appellant's] property that repairs will not restore the property to its original market value. . . .

. . . .

33. . . . McNeil at all times fraudulently . . . concealed the nature of defects and the potential for damages associated with the accumulation of water in the interior of the home.

34. . . . McNeil at all times fraudulently . . . concealed that it had known that during the construction of the home that the original roof subcontractor and E & K, failed to perform proper roof tile installation work and EIFS application, even though repeatedly requested to do so, and concealed that during this same period of time [McNeil] repeatedly requested the roofing contractor to correct work which it had performed, and further concealed that during this time [McNeil] knew that many items about the roofing contractor's work were not acceptable and were not fixed after repeated requests, while disclosing none of this to [appellant]. . . . McNeil further knew of the improper EIFS application but took no action to correct the same and actively concealed it from [appellant].

. . . .

37. Due to [McNeil's] concealment of relevant facts [appellant] does not know with certainty the exact nature of each and every reason for the roof and EIFS failure.

. . . .

41. . . . McNeil concealed and continues to conceal from [appellant] material facts which have prevented [appellant] from discovering [McNeil's] negligence.

42. . . . McNeil's fraudulent concealment . . . ha[s] caused [appellant] damage.

43. [McNeil] should be estopped from asserting any claim of the statute of limitations due to the active

> concealment of material facts as noted above preventing [appellant] from asserting her claim prior to disclosure of the material facts in September and October of 2002.

In appellant's complaint, she also alleged that she had sustained various damages and sought relief therefor.

In response to the allegations in appellant's complaint, appellees each filed a motion to dismiss. In the motions to dismiss, each appellee asserted that appellant's complaint failed to state a cause of action because appellant had failed to file her complaint within the applicable statute of limitations. The motions originally came on for hearing on September 4, 2003. Following appellees' submission of evidence in support of their motions, the district court, without objection from the parties, treated the motions as motions for summary judgment and continued the hearing to permit further discovery.

Appellees' motions for summary judgment came on for an evidentiary hearing on March 22, 2004. The parties offered and the court admitted into evidence nine exhibits totaling approximately 600 pages. Appellees' evidence included deposition testimony from appellant and her husband to the effect that appellant and her husband knew of problems with the roof of the house and the EIFS system starting in May 1995 and that these problems had continued into 1997. Attachments to the husband's deposition included five letters from him to McNeil written between August 1994 and September 1996. The letters detail problems with the construction of the house, including water leaks, with resulting damage in the house, and cracks in the EIFS, for which appellant's husband requested that the house be "fully inspected." Referring to the deposition testimony in evidence together with the affidavit of a McNeil project manager and its attached exhibits, also in evidence, appellees argued that appellant and her husband had repeatedly contacted McNeil beginning in 1994 to request remedial work. Accordingly, appellees argued that their evidence showed that appellant's claims were barred by the statute of limitations.

In response to appellees' evidence, appellant introduced the deposition testimony of the subcontractor who had been hired by McNeil to fix the roof leaks. The subcontractor testified that when he made repairs to the roof, he found tears in the felt below

the roof tiles and a failure to cement the tiles on the hips and ridge of the roof, which led to water infiltration, bird infiltration, and deterioration of the roof. Additionally, appellant relied upon the deposition testimony of her husband, who testified that in August 2002, the subcontractor had told him that "way, way back in the beginning," the subcontractor had informed McNeil that as a result of the roof's poor construction, the roof should be replaced, but that McNeil had told the subcontractor simply to address problems as they developed. In the subcontractor's deposition testimony, he denied that he had made this specific representation to appellant's husband, although he did agree that after he had made initial repairs to the roof, he had advised his supervisor, not McNeil, of certain additional repairs that needed to be made and that his supervisor had instructed him not to make the repairs, due to "job costs." In appellant's deposition, she testified to the effect that at the time repairs were being made to her roof, no information was given to her regarding the allegedly faulty construction, and that instead, she was assured the roof was being fixed.

Appellant introduced into evidence a report from a house inspector who had been hired to evaluate the construction of the home. In the report, the inspector noted several problems with the roof and the EIFS covering, which problems had allowed water to accumulate in interior spaces in the home, leading to mold and the need to repair or replace wood, drywall, and other structural portions of the house. In appellant's deposition, she testified that sometime after November 2002, she had the entire roof on the house replaced by Last Time Roofing Company, and that when Last Time Roofing Company replaced the roof, its employees told her that the roofing problems were caused by "improper installation." Appellant's evidence included an affidavit from an estimator with Last Time Roofing Company, who stated in his affidavit that he had inspected appellant's roof prior to its replacement and that in his opinion, improper installation of the roof "allowed water to penetrate the roofing system." He further stated that improper installation problems "required rooftop inspection and specialized knowledge" to recognize or detect.

In an order filed June 30, 2004, the district court concluded that appellant's claims were time barred by the applicable statutes

of limitations and granted appellees' motions for summary judgment. In its order, the district court dismissed appellant's complaint in its entirety. On July 8, appellant filed a motion for "new trial," properly treated as a motion to alter or amend the judgment. See *Strong v. Omaha Constr. Indus. Pension Plan, ante* p. 1, 701 N.W.2d 320 (2005). The district court denied the motion. This appeal followed.

ASSIGNMENTS OF ERROR

Appellant assigns two errors. Appellant claims the district court erred in (1) sustaining McNeil's motion for summary judgment and overruling appellant's motion for "new trial" and (2) sustaining E&K's motion for summary judgment and overruling appellant's motion for "new trial."

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *NEBCO, Inc. v. Adams, ante* p. 484, 704 N.W.2d 777 (2005). 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. *Id.*

[3] Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005).

ANALYSIS

As noted above, the district court sustained appellees' motions for summary judgment, concluding that "any cause of action against [appellees] was barred . . . by operation of the statute of limitations." In reaching this conclusion, the district court determined that appellant's "claims [were] subject to the limitation periods set forth in Neb. Rev. Stat. § 25-223 (Reissue [1995]) and Neb. Rev. Stat. § 25-207 (Reissue 1995)" and that based upon these statutes of limitations, appellant's claims

against appellees were time barred because they were not filed within 4 years of January 1994. Given the allegations as set forth in the complaint, we conclude that the district court erred as a matter of law when it determined that Neb. Rev. Stat. § 25-207 (Reissue 1995) applied to the complaint. We further conclude that the sole applicable statute of limitations governing appellant's claims is § 25-223.

Section 25-207, upon which the district court relied, provides, in pertinent part, as follows: "The following actions can only be brought within four years: . . . (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud . . . ." We have stated that this portion of § 25-207 sets forth the general statute of limitations for fraud claims. See *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964).

Section 25-223, which we conclude governs this case, provides as follows:

> Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. In no event may any action be commenced to recover damages for an alleged breach of warranty on improvements to real property or deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property more than ten years beyond the time of the act giving rise to the cause of action.

[4] In considering § 25-223, this court has recognized that it is a special statute of limitations applying to builders and

contractors making improvements to real property. See *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992). We have indicated that § 25-223 governs actions brought against contractors or builders, "whether based on negligence or breach of warranty." *Id.* at 281, 481 N.W.2d at 428.

[5] With respect to arguably competing statutes of limitations, we have previously stated that " '[a] special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject.' " *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 986, 588 N.W.2d 565, 573 (1999) (quoting *Murphy v. Spelts-Schultz Lumber Co., supra*). As noted above, appellant has alleged various theories of recovery against appellees. All of her claims, however, are based upon the improvements appellees made to appellant's real property.

Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005). Because § 25-223 is a special statute of limitations governing actions against builders and contractors for improvements to real property, and because all of appellant's claims against appellees are derived from appellees' improvements to appellant's real property, we conclude that the sole statute of limitations applicable to appellant's claims against appellees is the statute of limitations set forth in § 25-223. We, therefore, conclude that the district court erred, as a matter of law, in concluding that the statute of limitations set forth in § 25-207 governed any of appellant's claims.

We note that § 25-223 contains a discovery provision, which provides that if a cause of action is not discovered within the statute's 4-year period, or within 1 year preceding the expiration of such 4-year period, then the cause of action may be commenced within 2 years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. In her brief on appeal, appellant claims, inter alia, that the defects in the construction of her house were not apparent and that thus, the district court erred in sustaining appellees' motions for summary judgment because appellant was unable to discover the source of the problems within the

4-year statute of limitations period set forth in § 25-223. We disagree with appellant's argument and determine that appellant had knowledge that problems existed within the meaning of the discovery rule.

[6,7] "Discovery, as applied to the statute of limitations, occurs when one knows of the existence of an injury or damage and not when he or she has a legal right to seek redress in court." *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 417, 507 N.W.2d 275, 281 (1993). Under the discovery principle, discovery occurs when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. *Id.* We have stated that "[i]t is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed." *Board of Regents v. Lueder Constr. Co.*, 230 Neb. 686, 696, 433 N.W.2d 485, 491 (1988).

In the instant case, there is no dispute that appellant was aware from essentially the time she took possession of the home that water leaked into the house and that such condition persisted until appellant had the roof replaced. Appellant testified that "[e]ventually" every room except for the library and one bedroom leaked. Moreover, there is evidence that appellant was aware beginning in at least August 1994 of exterior cracks in the EIFS. Although appellant may not have known the source of the leakage or cracks, the record reflects that within 1 year of her taking possession of the house, she was aware of the problems ultimately giving rise to this lawsuit. We, therefore, reject appellant's discovery-related argument.

In her brief on appeal, appellant invokes the doctrine of fraudulent concealment and argues that notwithstanding the passage of 4 years and the provisions of § 25-223, the district court nevertheless erred in sustaining appellees' motions for summary judgment. We read appellant's argument as asserting that appellees fraudulently concealed material facts, which prevented appellant from discovering her causes of action against appellees, and that as a result, appellees should be estopped from asserting the statute of limitations defense.

[8] This court has previously determined that the doctrine of fraudulent concealment may render a statute of limitations defense unavailable. See, *Schendt v. Dewey*, 252 Neb. 979, 568 N.W.2d 210 (1997); *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988). We have recognized that

> "[t]he general rule supported by the decisions in most jurisdictions is that the fraudulent concealment of a cause of action from the one to whom it belongs, by the one against whom it lies, constitutes an implied exception to the statute of limitations, postponing the commencement of the running of the statute until discovery or reasonable opportunity of discovery of the fact by the owner of the cause of action . . . ."

See *Muller v. Thaut*, 230 Neb. at 256, 430 N.W.2d at 892 (quoting with approval 51 Am. Jur. 2d *Limitations of Actions* § 147 (1970) regarding fraudulent concealment).

[9] We have explained that in order to successfully assert the doctrine of fraudulent concealment and thus estop the defendant from claiming a statute of limitations defense, the plaintiff must show "the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the [misconduct]." *Schendt v. Dewey*, 252 Neb. at 984, 568 N.W.2d at 213. See, also, *Rucker v. Ward*, 131 Neb. 25, 33, 267 N.W. 191, 195 (1936) (stating that defendant cannot " 'avail himself of the statutes of limitation as a defense,' " when defendant " 'wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit,' " quoting *Liberty Nat. Bank v. Lewis*, 172 Okla. 103, 44 P.2d 127 (1935)). We have stated that, generally, for fraudulent concealment to estop the running of the statute of limitations, the concealment must be manifested by an affirmative act or misrepresentation. *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994), *disapproved on other grounds, Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998). We have also stated that fraudulent concealment can apply regardless of the nature of the cause of action. See *Muller v. Thaut, supra.*

[10] In our cases, we have recognized limitations on a plaintiff seeking to invoke the doctrine of fraudulent concealment.

"Under the doctrine of fraudulent concealment, the plaintiff must show that he or she exercised due diligence to discover his or her cause of action before the statute of limitations expired . . . ." See *Upah v. Ancona Bros. Co.*, 246 Neb. at 594, 521 N.W.2d at 902. Further, we have stated that " 'if a plaintiff has ample time to institute his action, after the inducement for delay has ceased to operate, he cannot excuse his failure to act within the statutory time on the ground of estoppel.' " See *MacMillen v. A. H. Robins Co.*, 217 Neb. 338, 341, 348 N.W.2d 869, 871 (1984) (quoting *Luther v. Sohl*, 186 Neb. 119, 181 N.W.2d 268 (1970)). In the present case, the parties raise no issue as to whether appellant exercised due diligence, and with the exception of our noting that appellant has adequately pled diligence, we make no comment as to whether the evidence supports appellant's claimed exercise of diligence.

In support of her claim that appellees should be estopped from raising the statute of limitations defense due to their own conduct, appellant refers us to authorities that have concluded a defendant's efforts to repair a purported defect and assurances given in conjunction therewith are sufficient to estop the defendant from raising the statute of limitations defense. See, generally, *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 650 (Del. Super. 1985) (stating that defendant's representation to plaintiff that repairs had been made "implicitly concealed from the plaintiff that there may have been latent defects in the roofing material"). See, also, *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618 (Minn. App. 2000) (stating that genuine issue of material fact existed as to whether defendant was equitably estopped from asserting statute of limitations defense because of defendant's assurances that defect had been repaired). In an effort to avoid application of the doctrine of fraudulent concealment, appellees argue that efforts to repair should not toll the statute of limitations and that appellant's action is time barred. See, generally, *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. 1979) (seller's attempt to repair did not toll statute of limitations); *Tomes v. Chrysler Corp.*, 60 Ill. App. 3d 707, 377 N.E.2d 224, 18 Ill. Dec. 71 (1978) (efforts to repair do not toll statute of limitations). Contrary to the parties' arguments, resolution of whether a defendant's efforts to repair a defective item, with or without

assurances that the repair has been made, will estop the running of the statute of limitations is not decisive to the outcome of this matter on appeal. Rather than mere assurances, in the instant case, appellant asserts that there was actual concealment of the defective manner in which the house was constructed and that if established, such actual concealment would permit application of the doctrine of fraudulent concealment, thus estopping appellees from invoking the statute of limitations defense.

Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2004) provides, inter alia, that "judgment sought shall be rendered forthwith if the pleadings and the evidence admitted at the hearing show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Because we have previously stated that the pleadings frame the issues to be considered on a motion for summary judgment, *Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998), we initially consider the allegations set forth in appellant's complaint.

As quoted at length above, throughout appellant's complaint, she has alleged that notwithstanding her efforts, fraudulent concealment prevented her from discovering the defective construction of the house until 2002. Appellant's complaint claims, inter alia, that as a result of fraudulent concealment, appellees are estopped from pleading the statute of limitations as a defense because, through deception and repeated assurances that problems were being remedied, material facts were concealed from appellant, and that despite her diligence, she was unable to timely learn about the defective construction of her home. Taking the allegations in the complaint as a whole, we conclude that appellant has in essence pled the doctrine of fraudulent concealment in an effort to avoid application of the statute of limitations.

[11-13] We turn next to the evidence presented at the hearing on appellees' motions for summary judgment to determine the propriety of the district court's ruling granting the motions. It is fundamental that the primary purpose of a summary judgment procedure is to pierce the allegations made in the pleadings and to show conclusively that the controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law. See *New Tek Mfg. v. Beehner, ante* p. 264, 702 N.W.2d 336 (2005). A party moving for summary judgment

must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *NEBCO, Inc. v. Adams, ante* p. 484, 704 N.W.2d 777 (2005); *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* 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. *NEBCO, Inc. v. Adams, supra.*

In support of their motions for summary judgment, appellees presented evidence to the effect that appellant was aware of the matters complained of since 1994 and that therefore, her action filed in 2003 was time barred. Appellant offered evidence to refute appellees' claim relative to the statute of limitations. Appellant introduced into evidence the deposition testimony of the subcontractor who had been hired by McNeil to fix the leaks, who stated that when he made repairs to the roof, he found tears in the felt below the roof tiles and a failure to cement the tiles on the hips and ridge of the roof, which led to water infiltration, bird infiltration, and deterioration of the roof. Appellant also introduced into evidence the deposition testimony of her husband, who stated that the subcontractor had told him that when the subcontractor had informed McNeil that as a result of the roof's poor construction, the roof should be replaced, McNeil had told the subcontractor simply to address problems as they developed. Appellant suggests that under these circumstances, McNeil's conduct amounted to actual concealment. Appellant further presented evidence that at the time the subcontractor was repairing the roof, appellant was not informed that the roof had been constructed badly, and that to the contrary, she was repeatedly given assurances over the time period of 1995 to 2002 that the roof was being fixed. McNeil presented evidence that specifically disputed much of appellant's evidence regarding the claimed representations, conversations, and concealment.

Given the pleadings and the evidence adduced during the summary judgment hearing, and giving the inferences in favor of appellant as the nonmoving party, we conclude that there are genuine issues of material fact concerning what McNeil knew regarding the defective construction of the roof and what McNeil told the subcontractor to say and do relative to the defects. The resolution of these facts could estop McNeil from asserting the statute of limitations defense due to fraudulent concealment. That is, if McNeil fraudulently concealed pertinent information from appellant, thereby preventing appellant, despite her efforts, from gaining timely knowledge about allegedly defective construction of the home within the 4-year statute of limitations set forth in § 25-223, McNeil may be properly estopped from invoking the statute of limitations defense. Viewing the evidence in the light most favorable to appellant and giving appellant the benefit of all reasonable inferences deducible from the evidence, see *NEBCO, Inc. v. Adams, supra*, we conclude that McNeil was not entitled to summary judgment as a matter of law and that the district court erred in sustaining McNeil's motion for summary judgment.

In contrast to McNeil, the record does not contain evidence of any affirmative acts by E&K to conceal material facts with regard to the alleged defective construction of the home, and thus, there is no evidence that E&K should be barred from asserting the defense of statute of limitations. Assuming and specifically without concluding that appellant could assert a cause of action against E&K for defective construction of the house, we conclude that the district court did not err in entering summary judgment in favor of E&K and dismissing appellant's complaint against E&K.

CONCLUSION

The district court concluded that appellant's action was time barred as to both appellees. However, because there exists a genuine issue of material fact impacting whether McNeil fraudulently concealed pertinent facts concerning the allegedly defective construction of the home, thereby estopping McNeil from raising the statute of limitations as a defense, the district court erred in entering summary judgment in favor of McNeil. The judgment of the district court sustaining McNeil's motion

for summary judgment is reversed, and this matter is remanded to the district court for further proceedings. There being no genuine issues of material fact concerning the judgment of the district court sustaining E&K's motion for summary judgment, it is affirmed.

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

CONNOLLY, J., participating on briefs.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. RICHARD K. WATTS, RESPONDENT.

708 N.W.2d 231

Filed December 9, 2005. No. S-05-031.

1. **Disciplinary Proceedings.** Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by the Nebraska Supreme 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.
2. ____. Regarding the imposition of attorney discipline, each case must be evaluated individually in the light of the particular facts and circumstances of that case.
3. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
4. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
5. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any mitigating factors.

Original action. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court (the Counsel) brought this action against attorney Richard K. Watts. We sustained the Counsel's motion for judgment on the pleadings and reserved the issue of the appropriate sanction. We now order that Watts be disbarred.

BACKGROUND

In January 2005, the Counsel filed formal charges against Watts. The charges state that Watts was admitted to practice law in 1988 and was engaged in private practice. He is currently under suspension for nonpayment of bar dues and has relocated to Colorado. When he relocated, he failed to inform all his active clients.

In 2001, Watts settled a case for $621,647.08. An insurance company deposited a check in Watts' trust account for $520,000, which was made payable to both Watts and the client and was divided between them. Another check for $101,647.08 was deposited that was made payable only to Watts' trust account. The client believed that the second check was used to pay accrued medical bills, subrogation interests, and future medical bills. Not all bills were paid, however, and some bills were turned over to collection agencies. A review of the bank statements shows that $89,942.89 was paid to several health care providers and that there should be a balance of $11,704.19 still in the trust account to pay the remaining bills.

In 2004, Watts settled a workers' compensation claim for a client and issued a check written on his personal account. The check was returned twice for insufficient funds. The Counsel believes that Watts never deposited the check into his trust account. In January and April 2004, the Counsel received notice that Watts' trust account was overdrawn. Therefore, the Counsel believes that Watts did not maintain sufficient balances in the account.

In January 2004, the Counsel sent Watts a letter requesting an explanation for the overdrafts. The Counsel later sent a request for an accounting of $700 claimed to have been paid to him from a civil suit. When the Counsel received notice of the insufficient funds check, it also forwarded that and a request for a response.

In July, notice of a new grievance was sent and the Counsel requested that Watts respond to all pending grievances. Watts then telephoned, acknowledging receipt of the letter. He provided a new address and telephone number where he could be reached. Watts called again the next day and briefly explained the reasons for the overdrafts. He stated that he would return to Nebraska the following weekend to retrieve files from storage so that he could respond to the grievances. Watts did not further respond.

The formal charges allege that Watts' conduct violated his oath of office as an attorney under the following disciplinary rules: Canon 1, DR 1-102(A)(1) and (3) through (6) (misconduct), and Canon 9, DR 9-102(A) and (B)(3) and (4) (preserving identity of funds and property of client), of the Code of Professional Responsibility. Watts did not file an answer. On March 16, 2005, we sustained the Counsel's motion for judgment on the pleadings.

ANALYSIS

[1] Having granted judgment on the pleadings, the sole issue before us is the appropriate discipline. Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by this 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.

[2,3] Regarding the imposition of attorney discipline, each case must be evaluated individually in the light of the particular facts and circumstances of that case. See *State ex rel. Counsel for Dis. v. Lechner*, 266 Neb. 948, 670 N.W.2d 457 (2003). For purposes of determining the proper discipline of an attorney, we consider the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.*

[4,5] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Id.* In addition,

the determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any mitigating factors. *Id.*

Here, Watts violated several disciplinary rules and violated his oath of office as an attorney. He has failed to respond to the charges, and there is no record of mitigating factors. We have previously disbarred attorneys who, like Watts, violated disciplinary rules regarding trust accounts, mishandled client funds, and failed to cooperate with the Counsel during the disciplinary proceedings. See, *State ex rel. Counsel for Dis. v. Lechner, supra*; *State ex rel. Special Counsel for Dis. v. Brinker*, 264 Neb. 478, 648 N.W.2d 302 (2002); *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000).

We have considered the undisputed allegations of the formal charges and the applicable law. Upon consideration, we find that Watts should be disbarred from the practice of law in the State of Nebraska.

CONCLUSION

We order that Watts be disbarred from the practice of law in the State of Nebraska, effective immediately. Watts is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court. Watts is further directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
ELMORE HUDSON, JR., APPELLANT.
708 N.W.2d 602

Filed December 9, 2005. No. S-05-089.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.

2. **Postconviction: Constitutional Law.** The Nebraska Postconviction Act is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.
3. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. When such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.
4. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment to the U.S. Constitution guarantees every criminal defendant the right to effective assistance of counsel.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded with directions.

Brian S. Munnelly for appellant.

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

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

STEPHAN, J.

This is an appeal from an order denying a motion for postconviction relief without an evidentiary hearing. We conclude that appellant, Elmore Hudson, Jr., is entitled to an evidentiary hearing on certain issues raised in his postconviction motion, and we therefore reverse, and remand to the district court for further proceedings.

BACKGROUND

Following a jury trial in the district court for Douglas County, Hudson was convicted of first degree murder, attempted second degree murder, and two counts of use of a deadly weapon to commit a felony. He was sentenced to life imprisonment for the first degree murder conviction, 30 years' imprisonment for the attempted second degree murder conviction, and 20 years' imprisonment for each of the two weapons convictions, with all sentences to be served consecutively. The district court credited Hudson with 692 days served, but applied the credit against the life sentence only.

Hudson's trial counsel represented him on direct appeal. He assigned error by the district court in (1) denying Hudson's motion for new trial based upon an alleged improper communication between the trial judge and the jury concerning the length of time for deliberation; (2) denying Hudson's motion to dismiss based upon the State's alleged failure to prove that he caused the victim's death; and (3) receiving, over Hudson's objection, the testimony of an expert witness called by the State. We did not reach the issue of whether there was an improper communication between the trial court and the jury, reasoning that because Hudson "did not move for a mistrial based upon the alleged improper communication, he cannot now complain of an unfavorable verdict." *State v. Hudson*, 268 Neb. 151, 167-68, 680 N.W.2d 603, 616 (2004). We found no merit in the remaining assignments of error and affirmed the convictions and sentences. *Id.*

Following our resolution of his direct appeal, Hudson filed a pro se motion for postconviction relief in the district court for Douglas County. He subsequently filed a motion to supplement his original motion with additional allegations. Although Hudson's pleading is not artful, we conclude that it can be fairly read to raise two postconviction claims, both based upon the performance of counsel. First, Hudson alleges that counsel was ineffective in failing to object to the manner in which the district court awarded credit for time served and in failing to preserve the alleged error and raise it on appeal. Second, Hudson alleges that counsel was ineffective in failing to file the appropriate motion in the district court with respect to the alleged improper communication with the jury so as to preserve the issue for appeal. Neither claim is procedurally barred because Hudson was represented by the same attorney at trial and on direct appeal. See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

Without stating its reasons or conducting an evidentiary hearing, the district court denied Hudson's claims for postconviction relief and denied his motion to supplement his original motion. After Hudson filed a notice of appeal, the district court sustained his motion for appointment of counsel to represent him for purposes of this appeal.

ASSIGNMENTS OF ERROR

Hudson assigns that the district court erred in denying him an evidentiary hearing on his motion for postconviction relief and in denying his motion to supplement the motion for postconviction relief.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003); *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

ANALYSIS

[2,3] The Nebraska Postconviction Act is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights. Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995); *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004); *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002). An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. When such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005); *State v. McHenry, supra*; *State v. Gonzalez-Faguaga, supra.*

[4] The Sixth Amendment to the U.S. Constitution guarantees every criminal defendant the right to effective assistance of counsel. *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000). Hudson has made factual allegations of a denial of his Sixth Amendment right to effective counsel. Because the district court did not conduct an evidentiary hearing, the narrow issue before us is whether the trial record affirmatively establishes that Hudson is not entitled to postconviction relief.

We conclude that the trial record in this case does not affirmatively establish that Hudson is not entitled to postconviction relief. The trial court's application of credit for time served

solely against Hudson's life sentence appears to be in direct conflict with *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001), in which we held that a defendant who received a sentence of life imprisonment for first degree murder and a consecutive sentence of 40 to 45 years' imprisonment for use of a firearm was entitled to credit for time served against the consecutive sentence. See, also, *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996). It is apparent from the trial record that Hudson's counsel did not raise this issue at the time of his sentencing, and the record is silent as to his reasons, if any, for not doing so. The issue was not raised on direct appeal. Thus, the files and records do not affirmatively show that Hudson is entitled to no postconviction relief on this claim.

The same is true with respect to Hudson's claim that his counsel was ineffective in responding to the allegedly improper communication between the trial judge and the jury. We note that the district court did not conduct an evidentiary hearing on this issue during the pendency of the criminal case, either at the time it was first raised by Hudson's counsel prior to return of the verdict, or when the issue was raised in his motion for new trial. Compare *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). The transcript includes written questions which the jury transmitted during its deliberations and the court's written responses, but the communication which is the subject of Hudson's postconviction motion is not reflected on that document. The only information in the record concerning this event comes from a transcribed colloquy between Hudson's counsel and the trial judge prior to return of the verdict, in which each recited their understanding or recollection of what occurred. This record does not affirmatively show that Hudson is not entitled to postconviction relief.

CONCLUSION

For the reasons discussed herein, we conclude that the district court erred in denying Hudson's claims for postconviction relief without an evidentiary hearing. We therefore reverse, and remand with directions to hold an evidentiary hearing on the two claims of ineffective assistance of counsel discussed herein.

REVERSED AND REMANDED WITH DIRECTIONS.

SANTANA RODRIGUEZ, APPELLANT, V. HIRSCHBACH MOTOR LINES AND DAKOTA TRUCK UNDERWRITERS, APPELLEES.

707 N.W.2d 232

Filed December 9, 2005. No. S-05-141.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation.** Generally, whether a workers' compensation claimant has reached maximum medical improvement is a question of fact.
3. ____. Whether medical treatment is reasonable or necessary to treat a workers' compensation claimant's compensable injury is a question of fact.
4. **Workers' Compensation: Appeal and Error.** Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
5. **Workers' Compensation: Words and Phrases.** Under Neb. Rev. Stat. § 48-121 (Reissue 2004), a workers' compensation claimant may receive permanent or temporary workers' compensation benefits for either partial or total disability. "Temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or extent of the diminished employability or loss of earning capacity.
6. ____: ____. Temporary disability ordinarily continues until the claimant is restored so far as the permanent character of his or her injuries will permit.
7. **Workers' Compensation.** Compensation for temporary disability ceases as soon as the extent of the claimant's permanent disability is ascertained.
8. ____. Temporary disability should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury.
9. ____. Once a worker has reached maximum medical improvement from a disabling injury and the worker's permanent disability and concomitant decreased earning capacity have been determined, an award of permanent disability is appropriate.
10. ____. When an injured employee has reached maximum medical improvement, any remaining disability is, as a matter of law, permanent.
11. ____. A workers' compensation claimant should not receive temporary disability benefits upon reaching maximum medical improvement.
12. **Workers' Compensation: Intent.** It is the intent of the Nebraska Workers' Compensation Act that the employer pay permanent disability benefits as determined, if any, as soon as possible after maximum medical improvement has been reached.
13. **Workers' Compensation: Time.** The date of maximum medical improvement for purposes of ending a workers' compensation claimant's temporary disability is the date upon which the claimant has attained maximum medical recovery from all of the injuries sustained in a particular compensable accident. A claimant has not reached maximum medical improvement until all the injuries resulting from an accident have reached maximum medical healing.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded for further proceedings.

Tony Brock, of Shasteen, Brock & Scholz, P.C., for appellant.

Brenda S. Spilker and Christopher J. Walker, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees.

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

GERRARD, J.

The claimant in this workers' compensation action, Santana Rodriguez, suffered injuries to his neck, shoulder, knees, and back, in addition to severe depression, as a result of a work-related accident. Rodriguez was found to have reached maximum medical improvement with respect to all of those injuries except his knees. The primary issue presented in this case is whether the Workers' Compensation Court erred in concluding that Rodriguez had reached maximum medical improvement with respect to some but not all of his injuries, and denying permanent disability benefits for those injuries, instead of waiting until all his injuries could be considered together in assessing Rodriguez' loss of earning power.

BACKGROUND

Rodriguez was employed by the defendant Hirschbach Motor Lines (Hirschbach) as a truckdriver. On December 28, 2001, Rodriguez had a load of beer kegs on pallets, which were being unloaded by forklift. The kegs fell on Rodriguez, and he was injured. Rodriguez eventually filed a claim for workers' compensation benefits.

On January 23, 2002, Rodriguez was treated for complaints of left shoulder, neck, and bilateral knee pain. Rodriguez continued to receive medical treatment and, on August 29, underwent surgery on his left shoulder for rotator cuff tears. Rodriguez' physician opined that Rodriguez' knees were injured in the accident, but Hirschbach's expert opined that Rodriguez had a degenerative joint disease and that the accident was not a significant and contributing cause of his condition. Hirschbach denied

surgery for Rodriguez' knees. With respect to his neck and back pain, Rodriguez was found to have herniated disks on his cervical and lumbar spine, but surgery was not indicated because of Rodriguez' obesity. Rodriguez was also examined for depression in October and found to be significantly depressed, secondary to his work-related injuries. In July 2003, Rodriguez' doctors concluded he had reached "maximum medical improvement" for his shoulder, neck, and back injuries.

The case came on for hearing before the single judge on July 28, 2003. The parties stipulated that Rodriguez' accident arose out of and in the course of his employment and that Rodriguez was injured, but disputed the nature and extent of the injuries. The single judge concluded that Rodriguez' knee injuries and depression were the result of his work-related accident. The single judge found that Rodriguez had reached maximum medical improvement with respect to his neck, back, shoulder, and psychological injuries, but that he had not reached maximum medical improvement with respect to his bilateral knee injuries. Hirschbach was ordered to pay for Rodriguez' knee surgeries and to pay medical benefits with respect to his other injuries. The single judge determined that Rodriguez had suffered no permanent disability as a result of his neck, back, shoulder, and psychological injuries. Therefore, the single judge entered an award maintaining temporary total disability benefits for the injury to Rodriguez' knees, but denying permanent disability benefits.

Rodriguez also asked the single judge to order Hirschbach to pay for gastric bypass surgery to help achieve the weight loss necessary to permit surgery to his cervical and lumbar spine. The single judge determined that the record did not establish that the surgery was reasonable and medically necessary at that time and denied Rodriguez' request.

Rodriguez appealed to the review panel of the Workers' Compensation Court, which affirmed the single judge's award. Rodriguez argued that pursuant to our decision in *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003), when a worker sustains a scheduled member injury and a whole body injury in the same accident, the Workers' Compensation Court may consider the impact of both injuries in assessing the worker's loss of earning capacity. See, also, *Madlock v.*

Square D Co., 269 Neb. 675, 695 N.W.2d 412 (2005) (when whole body injury results from scheduled member injury, member injury should be considered in assessment of whole body impairment). Rodriguez argued that it was premature for the single judge to deny recovery for a whole body injury before Rodriguez reached maximum medical improvement with respect to his knee injuries. However, the review panel determined that *Zavala* was permissive, and while the injuries could be considered together, it was not required. The review panel also affirmed the denial of Rodriguez' request for gastric bypass surgery. Rodriguez timely appealed, and we granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Rodriguez assigns that the Workers' Compensation Court erred in (1) holding that it was required to determine his loss of earning power with respect to his neck, back, shoulder, and psychological injuries because of physicians' opinions that he had reached maximum medical improvement with respect to those injuries; (2) finding that he had reached maximum medical improvement and his temporary total disability had ceased; (3) failing to award permanent total disability benefits; and (4) refusing to find that his proposed gastric bypass surgery was necessary and reasonable to alleviate his neck and back pain.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Vega v. Iowa Beef Processors, ante* p. 255, 699 N.W.2d 407 (2005).

[2-4] Generally, whether a workers' compensation claimant has reached maximum medical improvement is a question of fact. *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996). Whether medical treatment is reasonable or necessary to treat a workers' compensation claimant's compensable injury is a question of

fact. See, *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651 558 N.W.2d 564 (1997); *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 696 N.W.2d 142 (2005).

ANALYSIS

Maximum Medical Improvement

[5-8] Rodriguez' first two assignments of error require us to consider the same question: whether Rodriguez had reached maximum medical improvement as of July 2003. Under Neb. Rev. Stat. § 48-121 (Reissue 2004), a workers' compensation claimant may receive permanent or temporary workers' compensation benefits for either partial or total disability. "Temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or extent of the diminished employability or loss of earning capacity. See, *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000); *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). Temporary disability ordinarily continues until the claimant is restored so far as the permanent character of his or her injuries will permit. *Allen v. Department of Roads and Irrigation*, 149 Neb. 837, 32 N.W.2d 740 (1948). Compensation for temporary disability ceases as soon as the extent of the claimant's permanent disability is ascertained. See *Uzendoski v. City of Fullerton*, 177 Neb. 779, 131 N.W.2d 193 (1964). In other words, temporary disability should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury. *Id.*

[9,10] We have used the term "maximum medical improvement" to describe the point of this transition from temporary to permanent disability. "Once a worker has reached maximum medical improvement from a disabling injury and the worker's permanent disability and concomitant decreased earning capacity have been determined, an award of permanent disability is appropriate." *Foote v. O'Neill Packing*, 262 Neb. 467, 474, 632 N.W.2d 313, 320 (2001). As Professor Larson explains:

> Temporary total . . . and temporary partial [disability benefits] occasion relatively little controversy, since they are ordinarily established by direct evidence of actual wage loss. In the usual industrial injury situation, there is a period of healing and complete wage loss, during which . . . temporary total is payable. This is followed by a recovery, or stabilization of the condition, and probably resumption of work, and no complex questions ordinarily arise.
>
> The commonest question is when does the "healing period" end and "stabilization" occur? The answer to this question—which is sometimes phrased as "when has maximum medical improvement (MMI) been reached?" or "when has the condition become stationary?"—determines in most states when temporary benefits cease and when the extent of permanent disability can be appraised, for purposes of making either a permanent partial or a permanent total award.

4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 80.03[2] at 80-5 to 80-7 (2005). Simply stated, when an injured employee has reached maximum medical improvement, any remaining disability is, as a matter of law, permanent. See, *Yarns v. Leon Plastics, Inc.*, 237 Neb. 132, 464 N.W.2d 801 (1991); *Heiliger, supra*; *Snyder v. IBP, inc.*, 235 Neb. 319, 455 N.W.2d 157 (1990); *Briggs v. Consolidated Freightways*, 234 Neb. 410, 451 N.W.2d 278 (1990); *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989); *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989); *Kleiva v. Paradise Landscapes*, 227 Neb. 80, 416 N.W.2d 21 (1987); *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985).

These basic principles, however, do not expressly resolve the question presented here: whether maximum medical improvement, for purposes of deciding when a claimant's disability has become permanent, is determined by reference to the date of healing for each of the injuries that result from an accident, or by reference to the date on which all of the claimant's injuries from the accident have reached maximum recovery. The Workers' Compensation Court applied the former rule in this case, but we conclude the latter rule is more consistent with our workers'

compensation jurisprudence, statutory scheme, and general principles of workers' compensation law.

[11,12] To begin with, we have consistently held that a workers' compensation claimant should not receive temporary disability benefits upon reaching maximum medical improvement. See, *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998); *Yarns, supra*; *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). A given condition cannot at one and the same time be both temporary and permanent. *Yarns, supra*. It is the intent of the Nebraska Workers' Compensation Act that the employer pay permanent disability benefits as determined, if any, as soon as possible after maximum medical improvement has been reached. See *Gibson, supra*. But the Workers' Compensation Court's reasoning in this case would result in a claimant's being potentially entitled to simultaneous permanent and temporary disability benefits resulting from the same accident—a result that is inconsistent with established precedent. See *id.* See, also, *Rayhall v. Akim Co., Inc.*, 263 Conn. 328, 819 A.2d 803 (2003) (holding that temporary incapacity benefits should be awarded until plaintiff attains permanency with respect to each of multiple injuries).

Furthermore, as in this case, it may be difficult, if not impossible, to ascertain a claimant's true permanent disability when not all of the claimant's disabling injuries have reached maximum healing. We recognized this principle in *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 199, 655 N.W.2d 692, 702 (2003), in which we concluded that when a worker sustains a scheduled member injury and a whole body injury in the same accident, the Nebraska Workers' Compensation Act

> does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. In making such an assessment, the court must determine whether the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury upon the worker's employability. If the loss of earning capacity cannot be fairly and accurately assessed without such consideration, then the court is permitted to do so.

The reason that the date of maximum medical improvement is legally significant is that the degree of a claimant's permanent disability can be ascertained only when the claimant's medical condition will not improve. *Zavala*, however, rests on the principle that determination of a claimant's permanent disability may require the court to consider the effect of different injuries that occurred in the same accident. As we explained in *Zavala*, 265 Neb. at 199-200, 655 N.W.2d at 702,

> when assessing the loss of earning capacity for a back injury, it may not be reasonable to ignore the impact that the loss of a leg would have upon the loss of earning capacity when both injuries occurred in the same accident. The back injury does not increase the disability to the scheduled member, but the impact of the scheduled member injury should be considered when assessing the loss of earning capacity of the employee. The failure to do so would ignore the realities of the situation.

Consequently, if the date of maximum medical improvement is the date upon which the claimant's permanent disability is supposed to be ascertainable, it makes little sense to assign a claimant a date of maximum medical improvement upon which, due to other injuries, the claimant's permanent disability cannot be fairly assessed. "When multiple conditions prevent a claimant's return to the former position of employment, it is imperative that a permanency determination include consideration of all allowed conditions." *State ex rel. Tilley v. Indus. Comm.*, 78 Ohio St. 3d 524, 526, 678 N.E.2d 1392, 1394 (1997) (holding that claimant had not reached maximum medical improvement because not all medical conditions were considered).

[13] In other words, even if medical evidence establishes that a claimant's different injuries have different dates of maximum medical recovery, the legally significant date—the date of maximum medical improvement for purposes of ending a workers' compensation claimant's temporary disability—is the date upon which the claimant has attained maximum medical recovery from *all* of the injuries sustained in a particular compensable accident. See, e.g., *Rayhall v. Akim Co., Inc.*, 263 Conn. 328, 819 A.2d 803 (2003); *State ex rel. Tilley v. Indus. Comm., supra*; *Hammer v. Mark Hagen Plumbing & Heating*, 435 N.W.2d 525

(Minn. 1989); *Halsey v. Dillard's, Inc.*, 897 So. 2d 1142 (Ala. Civ. App. 2004); *Bracke v. Baza'r*, 78 Or. App. 128, 714 P.2d 1090 (1986); *Mora v. Max Bauer Meat Packing, Inc.*, 378 So. 2d 119 (Fla. App. 1980). We, therefore, hold that a claimant has not reached maximum medical improvement until all the injuries resulting from an accident have reached maximum medical healing. There is no provision in Nebraska law for "partial maximum medical improvement."

We recognize that there may be circumstances in which a claimant's permanent disability may be ascertainable even though not all of the claimant's injuries have reached maximum medical healing. For instance, where it is apparent that one injury of multiple injuries has reached maximum medical healing and will render a claimant permanently and totally disabled, it may be possible to award permanent total disability benefits even before the claimant reaches maximum medical healing with respect to all the injuries resulting from an accident. See, e.g., *State, ex rel. Galion Mfg., v. Haygood*, 60 Ohio St. 3d 38, 573 N.E.2d 60 (1991). Here, however, it is apparent from the record that Rodriguez' knee injuries had not, at the time of the hearing before the single judge, reached maximum medical healing. On the record before us, the evidence was insufficient to conclude that Rodriguez had reached maximum medical improvement, or that the extent of Rodriguez' permanent disability, if any, could be ascertained without considering the effect of his knee injuries. Thus, the Workers' Compensation Court erred in concluding that Rodriguez had reached maximum medical improvement, and its determination regarding permanent disability benefits was premature.

This conclusion is dispositive of Rodriguez' first three assignments of error. For the reasons stated above, Rodriguez is correct in contending that the Workers' Compensation Court erred in finding that he had reached maximum medical improvement with respect to some of his injuries, but not others. But for those same reasons, Rodriguez' third assignment of error, that the single judge erred in not awarding permanent total disability benefits, is without merit. Since we have concluded that the record, as presented, does not permit the fair assessment of Rodriguez' permanent disability, the court did not err in failing to award

such benefits; rather, the court should have deferred deciding whether or not Rodriguez was entitled to permanent disability benefits until he reached maximum medical recovery with regard to all injuries resulting from his work-related accident.

Gastric Bypass Surgery

Rodriguez' final assignment of error is that the single judge erred in denying his request for gastric bypass surgery. The single judge concluded that there was insufficient evidence in the record to prove that gastric bypass surgery was medically necessary. Rodriguez argues that such surgery was medically necessary, because his weight precluded him from obtaining surgery to correct injuries resulting from his accident. He bases this argument primarily on the opinion of one of his physicians, who concluded there was no "perfect solution" for Rodriguez' back problems, but that "it would be [the physician's] opinion [that Rodriguez obtain] a gastric stapling so that he may at some point undergo surgical correction." Rodriguez' psychologist also opined that weight loss "surgery may be a consideration, because traditional weight control programs are not very successful in individuals with this degree of obesity."

However, the single judge denied this request. The judge noted that the medical evidence established several medical conditions that contraindicated surgery, including coronary artery disease and diabetes, placing Rodriguez at risk of emboli syndrome, pulmonary embolism, and deep vein thrombosis. But the single judge also noted that future medical benefits had been awarded and that the record "at this point" did not establish that the surgery was necessary to treat the claimant's work-related injuries.

We recognize the generally accepted principle that in some circumstances, a medically necessary weight loss program may be compensable. See, e.g., *State ex rel. Miller v. Indus. Comm.*, 71 Ohio St. 3d 229, 643 N.E.2d 113 (1994). See, also, *Hopp v. Grist Mill*, 499 N.W.2d 812 (Minn. 1993) (finding sufficient evidence to support trial court's determination that gastric bypass surgery was necessary to relieve effects of claimant's compensable injury). But here, what little evidence is present in the record suggests that to the extent gastric bypass surgery would be therapeutic, it would not be to directly relieve the effects of Rodriguez'

injury. Rather, an additional level of speculation is present, since the surgery is simply intended to make Rodriguez more amenable to more surgery that, in turn, might better his condition. Compare *State ex rel. Williams v. Cincinnati Country Club*, 83 Ohio St. 3d 284, 699 N.E.2d 505 (1998). Cf. *Castro v. Gillette Group, Inc.*, 239 Neb. 895, 479 N.W.2d 460 (1992) (affirming denial of medical treatment where physician's testimony was couched in terms of possibility and hopefulness).

Given the sparseness of the record concerning whether gastric bypass surgery was medically reasonable and necessary to treat Rodriguez' compensable injuries, and whether gastric bypass surgery would even suffice to make Rodriguez a candidate for further surgery to treat his compensable injuries, we cannot say the single judge was clearly wrong in determining that there was not sufficient evidence at this time to establish that gastric bypass surgery was necessary to the treatment of Rodriguez' work-related injuries. Rodriguez' final assignment of error is without merit.

CONCLUSION

The Workers' Compensation Court erred in concluding that Rodriguez had reached maximum medical improvement and, therefore, also erred in making a determination as to Rodriguez' permanent disability. The judgment of the Workers' Compensation Court is reversed to that extent. The court's denial of Rodriguez' request for gastric bypass surgery is affirmed, as are those aspects of the award not contested on appeal. This cause is remanded for further proceedings consistent with this opinion.

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

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JAMES C. HART, JR., RESPONDENT.

708 N.W.2d 606

Filed December 9, 2005. No. S-05-376.

1. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
2. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
3. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any aggravating or mitigating factors.
4. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events and throughout the proceeding.
5. ____. In a proceeding to discipline an attorney, cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.

Original action. Judgment of disbarment.

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

No appearance for respondent.

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

PER CURIAM.

NATURE OF CASE

On March 23, 2005, formal charges were filed by the State of Nebraska on behalf of the Counsel for Discipline of the Nebraska Supreme Court, as relator, against the respondent, James C. Hart, Jr., who was admitted to the practice of law in the State of Nebraska on February 28, 1972. After Hart failed to file an answer to the formal charges in the present case, we sustained the relator's motion for judgment on the pleadings and must now determine the appropriate sanction.

FACTUAL AND PROCEDURAL BACKGROUND

The formal charges state that Hart practices law in Omaha, Nebraska. After Jedediah Conelly was indicted in federal district court in Nebraska for conspiracy to distribute and possess methamphetamine and possession of a firearm, his parents hired Hart to represent Conelly, in place of a court-appointed attorney. Conelly's mother signed a fee agreement, stating that Hart was to receive a retainer of $1,500, but Hart received only $1,200 at that time. Hart filed a motion to reopen the detention hearing regarding Jedediah, and the court scheduled a hearing on the motion for December 16, 2003. Hart failed to appear for the hearing, and the court reset the hearing for December 31.

In February 2004, Conelly entered a guilty plea based on an agreement reached with the assistant U.S. Attorney. When Hart failed to appear for sentencing on May 6 before U.S. District Judge Joseph F. Bataillon, Judge Bataillon had Hart located in the Douglas County District Court and ordered him to appear in front of the federal court immediately. Hart eventually appeared, and after the sentencing proceedings, Judge Bataillon addressed Hart regarding his failure to attend multiple hearings and fined him $100 for failing to abide by the court's scheduling orders.

Subsequently, Conelly attempted to contact Hart to pursue an appeal of the sentence but received no response. Conelly ultimately contacted the court directly, and Judge Bataillon accepted Conelly's letter as a timely notice of appeal. The court granted Conelly's request to proceed in forma pauperis and appointed Hart to represent Conelly at the government's expense. Notice of the appointment was sent to Hart in June 2004. Hart failed to correspond with Conelly and take steps to prosecute the appeal.

In August 2004, Judge Bataillon contacted the Counsel for Discipline to inform them of Hart's failure to abide by the scheduling orders in Conelly's case. On August 17, the Counsel for Discipline sent a certified letter to Hart detailing Judge Bataillon's concerns and instructing Hart to file a response within 15 days. Hart telephoned the Counsel for Discipline on September 8 and confirmed his receipt of the letter but explained that he had been away on vacation and would submit a response within the following week. On September 30, Hart had yet to

submit a response, prompting the Counsel for Discipline to send a letter of reminder to Hart. On October 7, Hart filed a response to the grievance, claiming that his problems resulted from scheduling conflicts and that Conelly's father had indicated to Hart that Conelly and his parents would hire a new attorney to prosecute the appeal.

On November 3, 2004, Kent L. Frobish, the Assistant Counsel for Discipline, sent a letter to Hart, requesting a copy of Hart's file on Conelly and a detailed record of the work Hart did for Conelly. Hart's response was requested by November 11. After Hart failed to respond, Frobish sent another letter on December 1, asking Hart to schedule a time when Frobish could visit Hart's office to review Conelly's file. Hart met with Frobish at the office of the Counsel for Discipline on December 15 and presented what he indicated was the entire file concerning Conelly's representation. The file did not contain any notes or documents dated after February 24, 2004, and did not include the letters and orders sent by the federal district court and U.S. Court of Appeals for the Eighth Circuit regarding Conelly's appeal, including the notice sent to Hart informing him of his appointment to represent Conelly in his appeal and the briefing schedule established by the Eighth Circuit, ordering Hart to file his brief by December 30, 2004.

As of March 23, 2005, Hart had yet to file a brief on behalf of Conelly or request an extension of the brief deadline. Furthermore, Hart has not filed a motion to withdraw as appellate counsel for Conelly.

Formal charges were filed against Hart on March 23, 2005, alleging that his conduct violated his oath of office as an attorney and Canon 1, DR 1-102(A)(1), (5), and (6); Canon 2, DR 2-110(A)(1) and (2); Canon 6, DR 6-101(A)(3); and Canon 7, DR 7-106(C)(7), of the Code of Professional Responsibility. Hart was personally served with the charges on March 28. Hart failed to file an answer or otherwise plead in this matter.

Accordingly, the Counsel for Discipline filed a motion for judgment on the pleadings on May 3, 2005. We sustained the motion on June 8, and thus, the sole issue before us is the appropriate sanction.

ANALYSIS

[1,2] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *Id.*

[3,4] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any aggravating or mitigating factors. *Id.* For purposes of determining the proper discipline, the Nebraska Supreme Court considers the attorney's acts both underlying the events and throughout the proceeding. *State ex rel. Counsel for Dis. v. Gilroy, ante* p. 339, 701 N.W.2d 837 (2005). Although Hart responded to the grievance sent to him by the Counsel for Discipline, he did so only after requesting additional time within which to file a response and, thereafter, receiving a letter of reminder from the Counsel for Discipline when he failed to meet the extended deadline. In addition, Hart ultimately met with Frobish to inspect Conelly's case file; however, Hart failed to respond to Frobish's initial request for a copy of Conelly's file, prompting Frobish to send another letter a month later, requesting a meeting with Hart to inspect the file. Any mitigating effect that might have resulted from Hart's cooperation in these instances is overshadowed by his lack of respect for the disciplinary process and the deadlines set by the Counsel for Discipline.

The facts of this case establish a trend of tardiness and disregard for scheduled court proceedings and continued neglect of a legal matter. Hart has previously received a public reprimand for similar behavior. See *State ex rel. Counsel for Dis. v. Hart*, 265 Neb. 649, 658 N.W.2d 632 (2003). In addition, formal charges alleging that Hart neglected another legal matter were

filed on August 31, 2005. The charges set forth allegations that Hart neglected a client's criminal case and failed to communicate with the client. In response to the client's grievance, Hart claimed that he did not pursue the client's case because he had not been paid. However, Hart failed to respond to a subsequent request from the Counsel for Discipline for a copy of the client's file and payment information. Hart did not file a response to the formal charges, and the Counsel for Discipline filed a motion for judgment on the pleadings. Hart failed to respond to the motion, and on November 16, we sustained the motion (case No. S-05-1034). Thus, in case No. S-05-1034, Hart has again been found in violation of his oath of office as an attorney and DR 1-102(A)(1), (5), and (6); DR 2-110(A)(1) and (2); and DR 6-101(A)(3). Although we have not reached the sanction stage in case No. S-05-1034, we take note of Hart's continuing neglect of clients' legal matters and subsequent disrespect of the disciplinary process.

[5] Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. *State ex rel. Counsel for Dis. v. Swanson*, 267 Neb. 540, 675 N.W.2d 674 (2004). Considering Hart's ongoing pattern of neglecting matters entrusted to him by his clients and his failure to communicate with the Counsel for Discipline in a timely or meaningful fashion, we conclude that disbarment is necessary in order to protect the public and maintain the reputation of the bar as a whole.

CONCLUSION

We previously sustained the relator's motion for judgment on the pleadings, finding by clear and convincing evidence that Hart violated DR 1-102(A)(1), (5), and (6); DR 2-110(A)(1) and (2); DR 6-101(A)(3); DR 7-106(C)(7); and his oath of office as an attorney. It is the judgment of this court that Hart should be and is hereby disbarred from the practice of law in the State of Nebraska, effective immediately. Hart shall comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court. Furthermore, Hart 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 10(P) (rev. 2005) and 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
DAVID L. DUNSTER, APPELLANT.
707 N.W.2d 412

Filed December 16, 2005. No. S-05-021.

1. **Motions for New Trial: Appeal and Error.** A trial court's order denying a motion for new trial is reviewed for an abuse of discretion.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Motions for New Trial: Evidence.** A new trial can be granted on grounds materially affecting the substantial rights of the defendant, including newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at trial.
4. **Criminal Law: Motions for New Trial: Evidence: Proof.** A criminal defendant who seeks a new trial because of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.
5. **Criminal Law: Sentences.** A new special procedure for raising the issue of a void criminal sentence is not recognized.

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

Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown, Solicitor General, for appellee.

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

CONNOLLY, J.

David L. Dunster appeals the district court's order denying his motion for new trial and motion to vacate his death sentence.

He contends that newly discovered evidence shows that he was not competent to plead guilty and represent himself in the initial proceeding. He also appeals the court's order denying the motion to vacate his death sentence as void ab initio. The court determined that regardless of the new evidence, Dunster was competent when he waived his rights and pled guilty. We affirm the court's order denying the motion for new trial. We dismiss Dunster's assignments of error concerning his death sentence, because a motion to vacate filed in the context of a special proceeding is not a recognized criminal procedure. We decline to recognize a new procedure when the postconviction statutes may be used to raise the issue.

BACKGROUND

Dunster pled guilty to charges of first degree murder and use of a weapon to commit a felony. On January 26, 2000, after Dunster requested the death penalty, the court sentenced him to death on the murder charge and 20 years' imprisonment on the weapon charge. Dunster appealed, contending in part that the district court erred when it allowed him to proceed pro se and when it accepted his guilty pleas. We affirmed. See *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001) (*Dunster I*).

After we decided Dunster's appeal, the U.S. Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which required jury participation in imposing a death sentence. In November 2002, the Legislature enacted 2002 Neb. Laws, L.B. 1, to provide for procedures in accordance with *Ring*.

Previously, in November 2001, Dunster moved for a new trial, alleging newly discovered evidence. In October 2002, he filed a motion to vacate his death sentence based on *Ring*. He amended the motion in April 2003 to include an argument that L.B. 1 repealed previous death penalty statutes, which he alleged repealed his death sentence.

Motion For New Trial: Proceedings in *Dunster I*

At the time of Dunster's trial and direct appeal, prisoners were prohibited access to their Department of Correctional Services (DCS) medical records. See Neb. Rev. Stat. § 83-178(2) (Reissue 1995). In 2001, the Legislature amended § 83-178 to allow access

to the records in certain circumstances. See Neb. Rev. Stat. § 83-178(2) (Cum. Supp. 2004). After receiving his records, Dunster alleged that information in them showed that he was incompetent to plead guilty and to proceed pro se at trial. Because Dunster's arguments about newly discovered evidence focus on the trial court's factual findings when Dunster entered his guilty pleas and was allowed to proceed pro se, we repeat and paraphrase pertinent facts from *Dunster I*, adding additional facts when necessary:

Sometime in the early morning hours of May 10, 1997, Dunster strangled his cellmate with an electrical cord. The cellmate's body was discovered later that day.

In July 1997, the district court appointed the Lancaster County public defender's office to represent Dunster. Attorney Michael Gooch from that office appeared on Dunster's behalf. Dunster stood mute at his November 1998 arraignment, and the court entered pleas of not guilty. In June 1999, the trial judge received a letter from Dunster requesting that the public defender's office be disqualified as his counsel.

The court held a hearing on the issues raised by Dunster's letter. In the letter, Dunster stated, "'"I have instructed them [the public defender's office] not to investigate or present any mitigating evidence at the sentencing phase" . . . . "I've told my attorneys I do not want them investigating these issues, but they tell me that, notwithstanding my desires, they're going to investigate them anyway."'" *Dunster I*, 262 Neb. at 333, 631 N.W.2d at 888. The court stated to Dunster, "'[Y]our feeling is that they're not following your directions, therefore you want them discharged.' Dunster responded, 'Exactly.'" *Id.* at 333-34, 631 N.W.2d at 888.

The court then began discussing the issue with Gooch. During this discussion, Dunster interjected, saying:

> "[Dunster]: I think I can solve this whole thing.
>
> "THE COURT: That would be nice.
>
> "[Dunster]: Okay. Disqualify the public defenders; let me withdraw my plea of not guilty; I plead guilty and then you sentence me to death. That's what I'm requesting, because I'd rather have that than live the rest of my life in a cell. Okay?

> ". . . .
>
> "THE COURT: . . . Mr. Dunster, I would not unilaterally discharge the Public Defender's Office. You obviously have a right to fire whomever you want to, and then I would have to make a decision whether — and if you tell me, 'I'm going to go ahead and represent myself,' then I would have to make a decision on whether you're aware of certain things and whether your decision is freely, voluntarily, knowingly and intelligently made on proceeding to represent yourself.
>
> ". . . I want you to have an opportunity to sit down and talk with Mr. Gooch . . . .
>
> ". . . .
>
> "[Dunster]: I will not discuss anything further with the Public Defender's Office."

Id. at 334, 631 N.W.2d at 888.

The court told Dunster that it would appoint another attorney to talk with him about the consequences of discharging the public defender's office and representing himself. Dunster responded, " 'Well, common sense tells me that's stupid to represent myself. I mean, I don't know enough about the law, but I know what I want and then that's it.' " *Id.* at 334, 631 N.W.2d at 888-89.

The court appointed the Nebraska Commission on Public Advocacy (NCPA) to advise Dunster on the consequences of discharging the public defender's office and representing himself. The hearing was continued to allow Dunster time to consult with the NCPA. Dunster later requested to withdraw "without prejudice" the issues raised in the June 8, 1999, letter. The court granted this request, and the public defender's office continued to represent Dunster.

In July 1999, a pretrial hearing commenced regarding motions Gooch had filed on Dunster's behalf. At the start of the hearing, Gooch informed the court that he would shortly be leaving the public defender's office and would not be available when Dunster's case came to trial. Dunster then requested that the NCPA immediately be appointed as his counsel. The court denied Dunster's request and determined that Dunster's case would be reassigned to a different public defender. Dunster

responded, " 'It's a merry-go-round with attorneys . . . I don't get along with the Public Defender's Office.' " *Id.* at 335, 631 N.W.2d at 889. The court reminded Dunster that the issue was not whether Dunster liked the public defender's office, but whether " 'the attorney can afford you effective counsel.' " *Id.*

Dunster later presented the court with two pro se motions. The first requested that the public defender's office be discharged and that Dunster be allowed to proceed pro se. The second requested the court to allow Dunster to withdraw his not guilty pleas and plead guilty to first degree murder and use of a weapon to commit a felony. The court spent the rest of the morning and a portion of the afternoon advising and questioning Dunster regarding his motions.

The court questioned Dunster concerning his reasons for discharging the public defender's office and advised him of his right to counsel and of the possible consequences of any decision to forgo the aid of counsel. The court also advised Dunster of the charges against him and the possible penalties, including the possible imposition of the death penalty if his guilty plea to first degree murder was accepted. Dunster responded that he was aware of his rights, the charges, and the possible penalties for his crimes. In addition, the court questioned Dunster concerning his understanding of the jury process and a variety of the consequences of proceeding pro se. Dunster stated he understood the issues and that he had discussed his decision with two attorneys.

The court further questioned Dunster as follows:

> "THE COURT: . . . Are you now under the influence of any alcohol, drugs, narcotics or other pills?
>
> "[Dunster]: Yeah, medication.
>
> ". . . .
>
> "[Q.] Does the medication affect your ability to understand what's going on around you?
>
> "[A.] No.
>
> "[Q.] Does it make you groggy or anything like that?
>
> "[A.] No.
>
> "[Q.] What effect does it have on you?
>
> "[A.] None.
>
> "[Q.] None?
>
> "[A.] None.

"[Q.] None that you're aware of, at least?

"[A.] None that I'm aware of."

Id. at 336, 631 N.W.2d at 890.

Dunster stated that he was taking "mega-doses" of Prozac, "Depitol" (Depakote), and Librium. Dunster explained: " 'I weigh 300 pounds, so I — when I say mega-doses, they would be different than what they give her [the prosecutor] and what they give me.' " *Id.* at 337, 631 N.W.2d at 890. The court then asked, " 'What effect do those have on you?' " and Dunster responded, " 'None.' " *Id.* The court further asked, " 'Do they affect your ability to understand what's going on around you?' " and Dunster responded, " 'No.' " *Id.*

The court granted the motion to discharge the public defender's office, finding that Dunster knowingly, intelligently, and voluntarily waived his right to counsel. The court then appointed the public defender's office as standby counsel.

The court explained to Dunster that if he pled guilty to the charges filed against him, he would be waiving his right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination. Dunster indicated that he understood these rights and wanted to plead guilty.

The court then read aloud the charges against Dunster. The court then asked Dunster, " 'Did this happen on or about May 10th, 1997?' " *Id.* at 337-38, 631 N.W.2d at 891. Dunster responded that it had and described details of the crime. The State then presented evidence to support the factual basis for Dunster's guilty pleas. At the conclusion of the hearing on July 14, 1999, the court accepted Dunster's pleas and found Dunster guilty of first degree murder and use of a weapon to commit a felony.

The court next explained that the proceedings would next move to the sentencing phase and how the sentencing hearing would proceed. The court stated, " 'Mr. Dunster, we've gone from phase 1 of this case, that is the guilt/innocence phase, now to the sentencing phase. I strongly urge you to have an attorney, to step aside and let the public defender represent you with respect to this phase.' " *Id.* at 338, 631 N.W.2d at 891. Dunster responded, " 'No.' " *Id.* The court also explained that Dunster would have the right at the sentencing hearing to present any mitigating evidence. Dunster stated, " 'I'm not going to present

any evidence.' " *Id.* Dunster also expressed his impatience with the time involved before sentencing, stating:

> "And I'm really getting pissed that you keep wanting to drag this out over and over, you know.
>
> . . . .
>
> ". . . I can't believe that it's so hard. I mean, you have suicide by cop, and I'm trying to commit suicide by state, and it is difficult. I could — it is really a pain in the ass to get you people to kill me."

Id.

Over Dunster's objections, the court stated that it would order a presentence report for purposes of sentencing. On July 28, 1999, the trial court wrote to the probation officer who was compiling the presentence report, stating:

> "[I]t is my understanding [DCS] has information in its possession it is willing to release to you for inclusion as part of the presentence investigation report you are preparing in [State v. Dunster]; however, [DCS] is concerned about access to the information.
>
> "I have reviewed NEB. REV. STAT. § 83-178(2) (Reissue 1994) and have decided to have you obtain the information and make it a separate attachment to your report. The attachment will only be accessible to me, without written order of the court, after notice to the parties in this case and [DCS]. If a final decision is appealed, the attachment . . . is not to be released without authorization from the appellate court."

Dunster I, 262 Neb. at 338-39, 631 N.W.2d at 891. The letter indicates that a copy of this correspondence was also sent to Dunster, Gooch, and the prosecutor.

During the week of August 6, 1999, before the sentencing hearing, Dunster indicated to standby counsel that he would like the public defender's office reappointed as his attorney. On August 6, a hearing was held to consider Dunster's request. Dunster stated that his former decision to proceed pro se and plead guilty had been impaired by the medications he was taking. The court reappointed the public defender's office to represent Dunster and continued any further proceedings until August 10.

On August 10, 1999, attorney Robert Hays from the public defender's office appeared on Dunster's behalf. Hays informed the court that he had been assigned to Dunster's case and had filed a motion on Dunster's behalf requesting a competency examination. The court granted the motion and held a competency hearing.

At the start of this hearing, Dunster made an oral motion to once again discharge the public defender's office. The court took the motion under advisement, pending the result of the competency hearing.

Dr. Y. Scott Moore, a psychiatrist, testified at the hearing. Moore testified that he had conducted a 2-hour interview with Dunster and had reviewed Dunster's medical records. Moore stated that Dunster was " 'quite well oriented' " and that " '[h]e knows . . . what the charge is [and] the possibilities of consequences if he should go to trial.' " *Id.* at 339, 631 N.W.2d at 892. Moore further stated, " 'I found absolutely no spot in which Mr. Dunster is not in contact with reality. . . . Mr. Dunster . . . can come up with a defense if he wishes. I believe that he can confer with his attorney if he chooses to do so.' " *Id.*

The court asked Moore about the medications Dunster was taking. Moore testified that Dunster was taking Depakote " 'for smoothing a mood,' " Prozac " 'to help smooth mood in people who seem to be quite volatile,' " and Librium " 'to help Mr. Dunster sleep in the evenings.' " *Id.* at 339-40, 631 N.W.2d at 892. Regarding these medications, Moore testified that he " 'saw absolutely no effect on [Dunster] of being able to interfere with his ability to answer questions or to deal with the realities of the moment.' " *Id.* at 340, 631 N.W.2d at 892. Moore also noted that Dunster was receiving a low dosage of these medications. Hays did not ask Moore any questions.

At the conclusion of the evidence, the court determined that Dunster was competent. The court then considered Dunster's oral motion to proceed pro se, questioning Dunster about his reasons for wanting to discharge the public defender's office a second time. Dunster advised the court that he was dissatisfied with the public defender's office because it wanted him to withdraw his guilty pleas and go to trial, while Dunster wanted to proceed to sentencing. Dunster also stated that he preferred being able to

speak for himself, rather than having counsel speak on his behalf. After informing Dunster of his rights, the court found that his second waiver of counsel was made knowingly, intelligently, and voluntarily. The court then granted Dunster's second motion to discharge the public defender's office and reappointed that office as standby counsel.

Dunster's sentencing hearing was conducted on November 22, 1999. Dunster appeared pro se, with Hays present as standby counsel. The court discussed the information it had received which it would consider for purposes of sentencing. The court stated it would consider Dunster's presentence investigation report contained in three bound notebooks. The court also informed the parties that the presentence investigation report included confidential mental health information from DCS. The court noted that because access to this kind of information was restricted, this mental health information would not be released to anyone unless a motion was made and a hearing held. The court also stated that it would consider the report prepared by Moore regarding Dunster's competency.

Before the State began presenting evidence, the court again urged Dunster to reconsider his decision to proceed pro se, stating:

> "THE COURT: Mr. Dunster, I have previously advised you on numerous occasions, and I know you think, probably, too many, of your right to be represented by counsel. I'm aware that, at least in my opinion, you understand that right. I strongly urge you again, sir, at this time, to accept representation by the Public Defender's Office to represent you in this sentencing phase. Do you understand that?
>
> "[Dunster]: Yes.
>
> "[Q.]: Do you wish to have that done?
>
> "[A.]: No.
>
> "[Q.]: You still want to go on your own behalf?
>
> "[A.]: Yes."

Id. at 341, 631 N.W.2d at 893.

The State then presented evidence in support of the single aggravating circumstance asserted by the State that Dunster had been previously convicted twice of first degree murder.

At the conclusion of the State's evidence, the court asked Dunster if he had any evidence to present. Dunster stated he did not, affirmed that Hays had been available to discuss the issue with him, and referred to a letter Dunster had sent to the court. In that letter, Dunster wrote that he was looking forward to the sentencing hearing and saw the possibility of a death sentence as " 'my parole & pardon all in one.' " *Id.* at 342, 631 N.W.2d at 893. In closing, Dunster told the court, " 'The position I'm in today is — I put myself there. I take full responsibility for it. . . . I'd rather just be executed than spend another day in prison.' " *Id.* at 342, 631 N.W.2d at 894.

The court issued its sentencing order on January 26, 2000. Dunster's appeal was automatically filed with this court, and the NCPA was appointed to represent Dunster on appeal. During the pendency of the appeal, Dunster wrote a letter to this court indicating that he no longer wanted to be executed.

After the appeal was docketed, but before oral argument, we requested that the district six probation office forward the confidential DCS records, which were omitted from the report previously sent to this court, and the parties were granted access to it.

We affirmed, concluding that the record showed Dunster's competency and that his actions were made knowingly, intelligently, and voluntarily. We also determined that Dunster was not denied effective assistance of counsel at his competency hearing when Hays asked no questions of Moore, because there was no prejudice when the court questioned Moore on the pertinent issues. We overruled Dunster's motion for a rehearing. *Dunster I.*

Motion For New Trial: Motion and Evidentiary Hearing

Dunster's motion for new trial focuses on the release of his medical records from DCS. The record shows that some, but not all, of the records were available to the court at the time of trial. Dunster alleged that the records show that he had serious, life-threatening, and previously undiagnosed conditions that materially affected his ability to knowingly, voluntarily, and intelligently waive his right to counsel. He also alleged that these conditions affected his understanding of his rights concerning his guilty pleas and his other constitutional rights. Dunster alleged

that these undiagnosed illnesses included: (1) chronic hepatitis C, diagnosed in November 2000; (2) type 2 diabetes mellitus, diagnosed in July 2001, causing unexplained numbness in the extremities, unexplained bleeding, mental confusion, and potentially death; (3) severe high blood pressure, diagnosed in July 2001; and (4) an acute psychotic episode, starting in February 2001, possibly triggered by medication prescribed by DCS.

Dunster alleged that the undiagnosed conditions were impossible for Moore to have considered at the time of Dunster's pleas and sentencing. He also alleged that had he known he was suffering from undiagnosed depression associated with chronic illness, prescribed improper medication, and suffered from undiagnosed conditions, that he would not have pled guilty and demanded a death sentence. At the evidentiary hearing on the motion for new trial, Moore testified and repeated that when he interviewed Dunster for the competency hearing, Dunster did not show any signs of confusion and was competent to ask the court to sentence him to death.

The district court found that the medications involved were related to Dunster's mood swings, depression, tension, dysphoria, and sleeping difficulties. Some medications were adjusted at times, and at times, Dunster refused to take the medications. Sometimes, Dunster reported problems with medications, and at other times, he stated that he felt adequately medicated. In June 1999, Dunster reported that he had adjusted to his medications and asked that he continue receiving them. The district court then found that Dunster, on all occasions while in court, was subjected to a complete examination by the court and was appropriately responsive. The court noted that his physical condition had deteriorated since sentencing and that his mental condition "ebbed and flowed" during the trial and sentencing period. But the court also found that when Dunster waived his right to representation and pled guilty, he was sufficiently aware of the consequences. Therefore, the court denied the motion for new trial.

Motion to Vacate Death Sentence

After the motion to vacate was filed, we held that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), did not apply retroactively. See, *State v. Lotter*, 266 Neb.

245, 664 N.W.2d 892 (2003); *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003). In addition, the U.S. Supreme Court held that the rule of law in *Ring* would not be applied retroactively to cases already final at the time of the *Ring* decision. *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). Relying on *Lotter* and *Gales*, the district court denied the motion. Dunster appeals.

ASSIGNMENTS OF ERROR

Dunster assigns, rephrased and consolidated, that the district court erred by failing to (1) grant a new trial because of newly discovered evidence and (2) vacate his death sentence, because 2002 Neb. Laws, L.B. 1, repealed death as a punishment, thus, the court lacked jurisdiction to impose a death sentence, and because the indictment did not allege all essential elements of capital murder. Dunster also assigns that this court committed plain error on direct appeal by failing to apply a presumption of prejudice when it determined that he was not denied effective assistance of counsel at his competency hearing.

STANDARD OF REVIEW

[1] A trial court's order denying a motion for new trial is reviewed for an abuse of discretion. See *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994).

[2] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Gass*, 269 Neb. 834, 697 N.W.2d 245 (2005).

ANALYSIS

Motion for New Trial

Dunster argues that the information in his DCS medical records shows that he was incompetent to plead guilty and defend himself. He states that had he known of the undiagnosed medical issues, he would not have pled guilty.

[3,4] A new trial can be granted on grounds materially affecting the substantial rights of the defendant, including "newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at trial." See, Neb. Rev. Stat. § 29-2101(5) (Cum. Supp.

2004); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). A criminal defendant who seeks a new trial because of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result. See *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). We review the trial court's order denying Dunster's motion for a new trial for an abuse of discretion. See *Atwater, supra.*

Here, the trial court (1) carefully and thoroughly evaluated Dunster's competency to plead guilty and represent himself; (2) exercised caution, ensuring that Dunster knowingly and voluntarily waived his rights; and (3) made detailed findings concerning Dunster's health issues and behavior at the time. In its order denying the motion for new trial, the court made specific factual findings about Dunster's health at the time of his waivers. In particular, the court noted that although Dunster's condition had since deteriorated and that although he may have been suffering from undiagnosed elements at the time of his waivers, the fact remained he was sufficiently aware of his right to representation and the consequences of his decision to waive counsel and plead guilty.

The record shows that much of the newly discovered evidence concerned problems that arose after Dunster was sentenced. Further, in the light of the trial court's specific findings of fact, the record shows that had the evidence been available at the time of Dunster's waivers, the trial court would have reached the same conclusions. Therefore, the court did not abuse its discretion when it denied the motion for new trial.

Motion to Vacate Death Sentence

Dunster contends (1) that L.B. 1 repealed the death penalty for first degree murder when the sentencing proceedings occurred before November 23, 2002, (2) that the previous statutes allowing a death sentence are facially unconstitutional under the 6th and 14th amendments, (3) that the trial court lacked subject matter jurisdiction to sentence him to death, and (4) that his death sentence is void ab initio. The State argues, however, that we lack jurisdiction over the claim because Dunster did not bring his motion to vacate in the context of an existing proceeding that

allows for further judicial review of a final criminal judgment. We agree that we lack jurisdiction over Dunster's motion to vacate his death sentence.

Dunster brought his motion to vacate as a separate special proceeding and specifically stated both in his brief and at oral argument that he did not file it under the postconviction statutes. He also has not filed it under other recognized procedures and admits that he is seeking to raise the issue in its own special proceeding. Thus, Dunster asks us to recognize a new procedure for the challenge of a purportedly void sentence.

We have held that when a criminal procedure is not authorized by statute, it is unavailable to a defendant in a criminal proceeding. See *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999). See, generally, *State v. El Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000) (declining to fashion procedure where no legislatively mandated one existed). Dunster, however, argues that language from cases stating that a void judgment may be attacked at any time in any proceeding allows him to file a motion separately from postconviction or habeas proceedings. See, e.g., *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128, *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

But the cases Dunster relies on do not hold that a new procedure can be created to allege that a sentence is void. Instead, when discussing the ability to raise the issue in "any proceeding," those cases generally address that a void judgment can be raised without concerns of waiver when it was not previously raised. The cases involved the use of a legislatively authorized procedure such as a postconviction action and did not seek the recognition of a new special proceeding. We decline to extend that language to allow the creation of new procedures, especially when at least one existing procedure is available in which to raise the issue.

[5] Here, the postconviction act specifically provides a procedure in which to file a motion seeking to vacate a sentence based on allegations that it is void. Neb. Rev. Stat. § 29-3001 (Reissue 1995). The addition of a new special procedure for raising issues of a void sentence is unnecessary and could lead to additional delay in the final resolution of cases. Therefore,

we decline to recognize a new special procedure for raising the issue of a void sentence. Because the issue was not raised in a recognized proceeding, the district court lacked jurisdiction over the claim. Thus, we also lack jurisdiction. Accordingly, we dismiss the assignments of error pertaining to the motion to vacate the sentence.

PLAIN ERROR ON APPEAL

Dunster contends that this court plainly erred on direct appeal when we found that he was not denied effective assistance of counsel. He argues that we should have applied a presumption of prejudice from *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Dunster filed a motion for rehearing after his first appeal which did not raise this issue, and we denied rehearing. We have reviewed this assignment of error and find it to be without merit.

CONCLUSION

We determine that the district court did not abuse its discretion when it denied Dunster's motion for new trial. We decline to allow a new special procedure to raise claims that a sentence is void. Because Dunster did not raise his claims under an established procedure, we lack jurisdiction over the claims and do not reach those assignments of error. Finally, we reject Dunster's argument that we plainly erred on his direct appeal. Accordingly, we affirm in part, and in part dismiss.

AFFIRMED IN PART, AND IN PART DISMISSED.

ISAAC ORTIZ, APPELLANT, V.
CEMENT PRODUCTS, INC., APPELLEE.
708 N.W.2d 610

Filed December 16, 2005. No. S-05-437.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Todd Bennett, of Rehm, Bennett & Moore, P.C., L.L.P., for appellant.

Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Isaac Ortiz, an illegal immigrant, brought the present action in the Nebraska Workers' Compensation Court against his employer, Cement Products, Inc. Ortiz alleged that he suffered injuries as a result of a work-related accident. The compensation court awarded Ortiz vocational rehabilitation services, among other benefits. Cement Products sought further review with the compensation court review panel, which reversed the compensation court's award on the issue of vocational rehabilitation. The review panel determined that because of Ortiz' undocumented status, he was not entitled to vocational rehabilitation benefits.

BACKGROUND

Ortiz, a Mexican citizen, came to the United States in approximately 1990. He has a sixth grade education and does not speak, read, or write English. Since immigrating, Ortiz has worked for several employers as a laborer, even though he has never been legally authorized to work in this country.

In May 2001, Ortiz applied for employment with Cement Products. On Ortiz' employment application, which was completed by a friend of his, Ortiz indicated that he is prevented

from working in this country because of visa or immigration status. At that time, Ortiz was not asked to provide verification that he was authorized to work in the United States. In June 2001, Ortiz filled out an employment eligibility verification form. On this form, Ortiz falsely indicated that he was a lawful resident alien and that he was authorized to work until November 27, 2004. Ortiz signed this form, indicating that he was eligible to legally work in the United States. On both Ortiz' employment application and employment eligibility verification form, he provided a falsified Social Security number.

In July 2001, Ortiz suffered a work-related accident after a large bucket of cement fell on his leg. Ortiz brought the present action in the compensation court against Cement Products, alleging injuries to his left leg and praying for temporary and permanent disability benefits, medical payments, and vocational rehabilitation benefits. Following a trial on the matter, the compensation court found that Ortiz was entitled to workers' compensation benefits, including vocational rehabilitation, despite his status as an illegal alien.

The compensation court stated that following Ortiz' accident, Cement Products did not have any jobs for Ortiz within his restrictions, and that with regard to alternative employment, either Ortiz was unable to perform the work or the proposed position paid an inadequate amount considering Ortiz' hourly wage and average weekly wage while employed by Cement Products. The compensation court noted that Ortiz could not presently be legally employed in the United States. It went on to state, however, that Ortiz would be unable to perform the jobs for which he has training in Mexico because of his limitations.

Cement Products timely sought further review with the review panel. The review panel reversed that portion of the award granting Ortiz vocational rehabilitation services. It determined that Ortiz was not entitled to vocational rehabilitation benefits because he was not legally authorized to work in the United States. Ortiz appeals the review panel's decision.

ASSIGNMENTS OF ERROR

Ortiz claims, restated and consolidated, that the review panel erred in (1) finding that an unauthorized alien is not entitled to

vocational rehabilitation services under the Nebraska Workers' Compensation Act and (2) failing to provide a reasoned decision.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a 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. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.*

[3,4] Statutory interpretation presents a question of law. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Madlock v. Square D Co.*, 269 Neb. 675, 695 N.W.2d 412 (2005).

ANALYSIS

Vocational Rehabilitation

As a preliminary matter, we note that neither party contests whether Ortiz is a covered employee under the Nebraska Workers' Compensation Act. Assuming, without deciding, that Ortiz is a covered employee, we turn our attention to the issue of whether Ortiz is entitled to vocational rehabilitation.

Under Neb. Rev. Stat. § 48-162.01(3) (Cum. Supp. 2002), an employee is entitled to vocational rehabilitation services when he or she is unable to perform suitable work for which he or she has previous training or experience. The purpose of vocational rehabilitation under workers' compensation is to restore an injured employee to suitable gainful employment. See § 48-162.01(3); *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). In order to effectuate this purpose, the employee must be eligible and willing to return to some form of employment.

At trial, Ortiz testified that he will not be returning to Mexico, but, rather, intended to remain in this country, where he may not be lawfully employed because of his illegal status. See 8 U.S.C. § 1324a (2000). Awarding Ortiz vocational rehabilitation services in light of his avowed intent to remain an unauthorized worker in this country would be contrary to the statutory purpose of returning Ortiz to suitable employment. Therefore, we hold that based upon the facts of this case, Ortiz is not entitled to vocational rehabilitation services.

Reasoned Decision

Ortiz also alleges that the review panel erred in failing to issue a reasoned opinion.

Workers' Comp. Ct. R. of Proc. 11(A) (2004) provides:

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

In its opinion, the review panel clearly explained why it believed Ortiz was not entitled to vocational rehabilitation services, which allowed this court to conduct a meaningful appellate review. Thus, we find this assignment of error to be without merit.

CONCLUSION

For the reasons discussed above, we affirm the decision of the review panel.

Affirmed.

Miller-Lerman, J., participating on briefs.

IN RE INTEREST OF ANTONIO S. AND PRISCILLA S., CHILDREN UNDER 18 YEARS OF AGE. RICHARD CALKINS, GUARDIAN AD LITEM, ON BEHALF OF ANTONIO S. AND PRISCILLA S., APPELLANTS, AND MARLIN M. AND SHARON M., APPELLEES, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLEES.

708 N.W.2d 614

Filed December 23, 2005. No. S-05-262.

1. **Judgments: Statutes: Appeal and Error.** Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.
2. **Guardians and Conservators: Minors.** Generally, custody of a minor ward is an incident of guardianship.
3. **Child Custody: Parental Rights.** A parent's natural right to the custody of his or her child is limited by the State's power to protect the health and safety of the children.
4. **Child Custody: Parental Rights: Proof.** The best interests of the children must always be considered in determining matters of child custody, and where the parent is shown to be unfit or to have forfeited his or her superior right to custody, the court may place the children in the custody of an unrelated third party.
5. **Juvenile Courts: Guardians and Conservators.** Where a guardianship is established under the Nebraska Juvenile Code as a means of providing permanency for adjudicated children who have been in the temporary custody of the Department of Health and Human Services, custody is necessarily transferred from the department to the appointed guardian(s) by operation of law.

Appeal from the County Court for Franklin County: MICHAEL OFFNER, Judge. Affirmed.

Richard Calkins, guardian ad litem, for appellants.

John C. Person for appellee Ellis S.

Monika E. Anderson, Special Assistant Attorney General, for appellee Nebraska Department of Health and Human Services.

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

STEPHAN, J.

The issue presented in this appeal is whether a change in guardianship under the Nebraska Juvenile Code necessarily results in a change in custody. We conclude that it does.

FACTS

Priscilla S. was born December 29, 1989, and Antonio S. was born October 8, 1991. In 2002, they were adjudicated by the county court for Wayne County, sitting as a juvenile court, as children described by Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) due to abuse by their biological father. The court placed the children in the custody of the Nebraska Department of Health and Human Services (DHHS). DHHS placed the children in foster care, and eventually, the foster parents were made guardians of the children. However, this guardianship was dissolved in 2003 and the temporary care, custody, and control of the children were returned to DHHS by the court.

The case was subsequently transferred to the county court for Franklin County, sitting as a juvenile court. In April 2004, the children were placed in a foster home with Marlin M. and Sharon M. in Franklin, Nebraska. On November 1, Marlin and Sharon filed a petition with the county court for Franklin County, sitting as a juvenile court, requesting that they be appointed legal guardians for Priscilla and Antonio. Their request was consistent with the case plan formulated by DHHS, which recommended guardianship for the children as the permanency objective. At a December 20 hearing, the court adopted the case plan and concluded that the "permanency goal" was guardianship. The guardian ad litem did not object to the case plan. However, he did question whether the guardianship would affect the children's future eligibility for the State of Nebraska's former ward program which provides educational and insurance benefits to former state wards. Because of this issue, the hearing was continued until January 24, 2005.

Prior to the rescheduled hearing, Marlin and Sharon filed an amended petition in which they requested that they be appointed guardians of Priscilla and Antonio, but that DHHS "retain custody" of the children while "care" of the children was placed with Marlin and Sharon by the establishment of the guardianship. Marlin and Sharon requested that DHHS be "relieved of the obligation to supervise" the children and requested that the guardian ad litem be required to file a report at review hearings as to the placement and progress of the children. The petition also alleged that it was in the children's best interests to qualify

for the State's former ward program. On January 3, 2005, DHHS filed an application for change of custody and establishment of guardianship, requesting that Marlin and Sharon be appointed guardians of the children and that DHHS "be relieved of all supervisory, custodial and case management obligations in this matter."

A hearing on Marlin and Sharon's amended petition and the application filed by DHHS was held on January 24, 2005. Marlin and Sharon both testified that they were willing to accept guardianship of the children. Subsidized guardianship agreements entered into between DHHS and Marlin and Sharon were offered and received into evidence. Marlin testified that although both children had aspirations of postsecondary education, he and Sharon would be financially unable to aid the children in obtaining those goals. Marlin further testified that Priscilla in particular was very interested in "the thought of having an actual mom and dad" and that this achievement would be "very important for her mentality and self-being." The children's caseworker testified that Priscilla wanted "a permanent place so she doesn't have to worry about movin' and she has a mom and dad." The caseworker testified that even if the guardianship would affect the children's eligibility for former ward benefits, establishment of the guardianship was still in their best interests. In the guardian ad litem's report offered at the hearing, he disagreed. He opined that it would be in the best interests of the children to remain qualified for the former ward program, noting that "[u]nless the guardianship can be approved and still provide the benefits of the former ward program the Guardian Ad Litem cannot recommend a guardianship." He requested that care be with Marlin and Sharon, while custody of the children remain with DHHS.

On February 14, 2005, the court issued an order finding that it was in the best interests of the children to establish a guardianship with Marlin and Sharon. The court determined that it had no authority to order that the guardianship conferred only care on Marlin and Sharon, leaving the children in the custody of DHHS. It noted, however, that if care and custody could be separated, it would be in the best interests of the minor children for care to remain with Marlin and Sharon and custody to remain

with DHHS, so that the children would remain eligible for former ward benefits. The court ultimately granted DHHS' application and appointed Marlin and Sharon as guardians of Priscilla and Antonio, placing the children in their care and custody.

The guardian ad litem filed this timely appeal, which we removed to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). The biological father of the children filed a brief agreeing with the position of the guardian ad litem. The biological mother has made no appearance in this proceeding.

ASSIGNMENT OF ERROR

The guardian ad litem assigns, restated and consolidated, that the juvenile court erred in finding that care and custody could not be split between DHHS and Marlin and Sharon for purposes of qualifying the minor children for former ward status.

STANDARD OF REVIEW

[1] Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below. *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999).

ANALYSIS

Under DHHS' former ward program, it offers financial assistance to eligible persons "to continue their education in preparing for gainful employment." In order to qualify for the program, a person must be single, be between the ages of 18 and 20, and "[b]e a former court ward of the Department or ward through relinquishment who was in out-of-home care (for example, foster home, group home, independent living) at the time of her/his discharge." Subject to certain exceptions, the youth "has to enter the Former Ward Program before discharge from the Department." Thus, a ward discharged from the custody of DHHS prior to the age of 18 would be ineligible for benefits under the former ward program. It is undisputed that it would be in the best interests of Priscilla and Antonio to preserve their eligibility under the program. Advocating for the children, the guardian ad litem urges that we recognize a form

of guardianship under which Marlin and Sharon would have care of the children but DHHS would retain custody for the specific purpose of preserving the children's eligibility to participate in the former ward program when they each reach the age of 18. We agree with DHHS that the law does not permit such an arrangement.

As a result of the adjudication of the children under § 43-247, a change of custody occurred. The children were taken from the custody of their biological parents and committed by the court to the temporary care and custody of DHHS, as authorized by Neb. Rev. Stat. § 43-284(6) (Reissue 2004). As a result of this committal, DHHS became the legal guardian of the children, and they became wards of DHHS. See Neb. Rev. Stat. §§ 43-285(1) and 43-905(1) (Reissue 2004). In its role as the guardian having custody of the children, DHHS had "authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures" on behalf of each child. § 43-285(1). DHHS was responsible for the costs of placing and caring for the children. See *In re Interest of Jeremy T., supra.* Acting pursuant to this authority, DHHS placed the children in the foster care of Marlin and Sharon but retained legal custody. Under the Nebraska Juvenile Code, the juvenile court retained jurisdiction and had the "power to order a change in the custody or care" of the children if shown to be in their best interests. Neb. Rev. Stat. § 43-295 (Reissue 2004).

In addition to providing for the temporary well-being of adjudicated children, the Nebraska Juvenile Code shall be construed "[t]o promote adoption, guardianship, or other permanent arrangements for children in the custody of the Department of Health and Human Services who are unable to return home." Neb. Rev. Stat. § 43-246(6) (Reissue 2004). Thus,

> [e]ach child in foster care under the supervision of the state shall have a permanency hearing by a court, no later than twelve months after the date the child enters foster care and annually thereafter during the continuation of foster care. The court's order shall include a finding regarding the appropriateness of the permanency plan determined for the child and shall include whether, and if applicable when, the child will be:

(a) Returned to the parent;

(b) Referred to the state for filing of a petition for termination of parental rights;

(c) Placed for adoption;

(d) Referred for guardianship; or

(e) In cases where the state agency has documented to the court a compelling reason for determining that it would not be in the best interests of the child to return home, (i) referred for termination of parental rights, (ii) placed for adoption with a fit and willing relative, or (iii) placed with a guardian.

Neb. Rev. Stat. § 43-1312(3) (Reissue 2004). Reading the various provisions of the Nebraska Juvenile Code so that they are consistent, harmonious, and sensible, it is clear that the appointment of DHHS as guardian is intended as a temporary arrangement which, insofar as possible, will be replaced by a permanent resolution, such as returning the child to his or her biological parent(s), termination of parental rights and adoption, or a new guardianship. See *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999). Each of these permanent objectives necessarily involves a change of custody.

[2-4] In this case, the acknowledged permanency goal was for the foster parents to become the guardians of Priscilla and Antonio. Generally, custody of a minor ward is an incident of guardianship. See 39 Am. Jur. 2d *Guardian and Ward* §§ 9 and 97 (1999). A parent's natural right to the custody of his or her child is limited by the State's power to protect the health and safety of the children. *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). "The best interests of the children must always be considered in determining matters of child custody, and where the parent is shown to be unfit or to have forfeited his superior right to custody, the court may place the children in the *custody* of an unrelated third party." (Emphasis supplied.) *Id.* at 982, 554 N.W.2d at 149. We have referred to such an arrangement under the Nebraska Juvenile Code as a "permanent guardianship." *Id.* at 985, 554 N.W.2d at 150. Although such a guardianship does not achieve a degree of permanency equivalent to parenthood or adoption, it creates greater rights than foster parenthood and "more closely approximates a

natural parent-child relationship." *In re Interest of Eric O. & Shane O.*, 9 Neb. App. 676, 693, 617 N.W.2d 824, 836 (2000). See, also, *In re Interest of Amber G. et al., supra.*

DHHS regulations and the federal regulations on which they are largely based indicate that a permanent guardianship is intended to transfer significant rights and duties, including the right of custody, to the guardian. DHHS guidelines recommend that legal guardianship will be supported as a permanency goal when, inter alia, the guardian and the child can function effectively without supervision by DHHS. 390 Neb. Admin. Code, ch. 6, § 004(4) (1998). DHHS regulations also provide: "Upon approval of the court of the guardianship, the worker will close the case. Once the court order establishes guardianship, the Department no longer has any authority or responsibility for the child except as might exist due to a subsidized guardianship." 390 Neb. Admin. Code, ch. 6, § 004.03 (1998). According to federal regulations, "legal guardianship" is a legitimate permanency goal defined as

> a judicially-created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, *custody* of the person, and decision-making. The term *legal guardian* means the caretaker in such a relationship.

(Emphasis supplied.) 45 C.F.R. § 1355.20(a) at 265 (2004).

This case involves a subsidized guardianship in which DHHS agrees to make payments to the guardians to meet the needs of the children. This arrangement is authorized by Neb. Rev. Stat. § 43-284.02 (Reissue 2004), which provides in part: "The Department of Health and Human Services may make payments as needed on behalf of a child who has been a ward of the department after the appointment of a guardian for the child." This statutory language contemplates a succession of custody from DHHS to the new guardians. The subsidized guardianship agreements executed by Marlin and Sharon and a representative of DHHS specifically provide for termination "[i]f the child is no longer in the custody of the guardian(s)."

[5] The guardian ad litem correctly argues that a guardianship under the Nebraska Juvenile Code is subject to the continuing jurisdiction of the juvenile court which retains the power to terminate the guardianship. Nevertheless, as noted previously, guardianship is specifically designated by law as a means of providing permanency where other means, such as adoption, are not feasible. §§ 43-246(6) and 43-1312(3). We therefore conclude that where a guardianship is established under the Nebraska Juvenile Code as a means of providing permanency for adjudicated children who have been in the temporary custody of DHHS, custody is necessarily transferred from DHHS to the appointed guardian(s) by operation of law.

CONCLUSION

For the reasons discussed, we conclude that the county court for Franklin County, sitting as a juvenile court, did not err in ordering that Marlin and Sharon, as duly appointed guardians, shall have the care and custody of Priscilla and Antonio and in further ordering that DHHS should be relieved of custody, case management, and supervision of the children. We affirm.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
LIONEL C. BEEDER, APPELLANT.
707 N.W.2d 790

Filed January 6, 2006. Nos. S-03-1205, S-04-1115.

1. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent an abuse of discretion.
2. **Motions for Mistrial.** A mistrial is generally granted when a fundamental failure prevents a fair trial. Some examples are an egregiously prejudicial statement by counsel, the improper admission of prejudicial evidence, or the introduction of incompetent matters to the jury.
3. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.

4. **Prosecuting Attorneys: Appeal and Error.** Whether a prosecutor's inflammatory remarks are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case.
5. **Prosecutorial Misconduct.** When a prosecutor persists after the court advises that an action is not permitted, the prosecutor commits misconduct.
6. **Prosecutorial Misconduct: Motions for Mistrial.** When a prosecutor's misconduct is so inflammatory that no admonition will remove the contamination, a mistrial is warranted.
7. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain the conviction before the cause is remanded for a new trial.
8. **Double Jeopardy: Appeal and Error.** Although the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction.
9. **Medical Assistance: Hearsay.** The medical diagnosis or treatment hearsay exception is bottomed on the notion that a person seeking medical treatment will give a truthful account of the history and current status of his or her condition in order to ensure proper treatment.

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

Peter K. Blakeslee, and, on brief, James R. Mowbray, Jeffery A. Pickens, and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

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

CONNOLLY, J.

A jury convicted appellant, Lionel C. Beeder, of third degree assault, witness tampering, and first degree false imprisonment. The district court enhanced the last two convictions under the habitual criminal statute. We determine that the court erred by not declaring a mistrial for prosecutorial misconduct during the prosecutor's closing argument, and we reverse Beeder's convictions and remand the cause for a new trial.

BACKGROUND

The State charged Beeder with third degree assault on his ex-wife, Deidre Beeder; first degree false imprisonment of Deidre; making terroristic threats to both Deidre and Doris Allington; tampering with a witness, Allington; and being a habitual criminal. He pleaded not guilty to all charges.

Beeder and Deidre are divorced, but have intermittently reconciled. On June 2, 2002, the two, along with their son, were living with Beeder's mother. Deidre testified that sometime after noon, Beeder called her back to a bedroom and hit her. After hitting her, Beeder started arguing with the son in the bedroom across the hall. While Beeder was arguing with the son, Deidre called the 911 emergency dispatch service.

Allington, a friend of Beeder's mother, visited that day. She testified that she observed bruises on Deidre's arm and offered to take her to get help. Allington also heard Beeder call Deidre into the bedroom and tell her repeatedly to "get in that bed." Allington followed Deidre "to make sure nothing was going to happen." Beeder then came out of the bedroom and told Allington that she should mind her own business and that Deidre "had too many black and blue marks" to go to the hospital.

While Beeder and Deidre were in the bedroom, the 911 dispatch operator called back and Beeder's mother told the operator there was no problem. Beeder's mother then told Beeder that Deidre had called the police. A few minutes later, police officers arrived at the house in response to the 911 emergency call. Beeder's mother answered the door and told them nothing was wrong. When the officers were at the door, Deidre screamed "help" from the bedroom. The officers followed the direction of the scream and found Deidre. They helped her into the living room, but she became combative, rejecting their assistance.

The responding officers testified that the scene at the house was "chaotic." Deidre argued with the officers until an emergency unit took her to the hospital. After calming her down, hospital staff photographed her bruises. The photographs show that she had large bruises on her arms, legs, and back.

Allington testified that about a month later, Beeder called her on the telephone and told her, " 'Anybody who testifies in [Deidre's] behalf will be going down, and that means the county

attorney, the sheriff's department, or the police department.'" Allington asked if that included her, and Beeder repeated the same statement. Allington stated that she took this statement as a threat to her.

The jury acquitted Beeder on the charge of terroristic threats to Allington and convicted him of third degree assault, first degree false imprisonment, and witness tampering. Before sentencing, Beeder filed a motion challenging the constitutionality of the habitual offender statute. The trial court overruled that motion and found sufficient evidence that Beeder had at least two prior valid convictions, and thus, the court sentenced him as a habitual criminal. With the enhancements, he was sentenced to concurrent prison terms of 1 year for the third degree assault conviction and from 10 to 15 years each for both the false imprisonment and the witness tampering convictions. He was given 123 days' credit for time served.

ASSIGNMENTS OF ERROR

Beeder assigns, rephrased, that the trial court erred by (1) overruling Beeder's motions for mistrial based on prosecutorial misconduct, (2) receiving inadmissible hearsay testimony, (3) not defining in its jury instructions all of the essential elements of the crime of first degree false imprisonment, and (4) not directing a verdict of acquittal on the habitual criminal charge and not ruling that Neb. Rev. Stat. § 29-2221 (Reissue 1995) is unconstitutional. Beeder also assigns numerous other errors that need not be addressed in light of our decision.

STANDARD OF REVIEW

[1] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent an abuse of discretion. See, *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002); *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

ANALYSIS

Prosecutorial Misconduct

Beeder contends that the trial court erred by not granting his motion for mistrial because of the prosecutor's misconduct.

Defense counsel made two specific motions for mistrial based on prosecutorial misconduct. We deal only with the second, made at the end of closing arguments. During closing arguments, Beeder's counsel twice stated, "I'm not going to argue Count I to you, the assault. You can make a determination from the evidence in the case on Count I. The prosecutor didn't bother arguing it either."

On rebuttal, the prosecutor referred to the defense's statement, characterizing the assault charge as "*the third degree assault that is so absolutely clear that* [*the defense does not*] *even have to put on a defense to it* [*and*] *admits third degree assault happened.*" (Emphasis supplied.) The defense objected to the prosecutor's statement as mischaracterizing his argument and asked the court to instruct the jurors to disregard the statement. The court sustained the objection and said the "jurors will make up their mind[s] on the guilt or innocence. Any representations by Counsel, no matter how construed, are not binding on you, and you should disregard Counsel's statement regarding their representations."

Immediately after the judge's admonition, the prosecutor said, "*I recall* [*defense counsel's*] *saying in his closing argument to you that the evidence is clear enough on that that he's not even putting on a defense.*" (Emphasis supplied.) Defense counsel again objected, and the court sustained the objection, this time directly telling the jury to disregard the prosecutor's "last comment." The prosecutor finished her closing argument, and the defense moved for a mistrial, arguing that the prosecutor had behaved inappropriately throughout the trial and particularly throughout closing argument. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998) (finding that objection at end of closing arguments sufficiently preserves for appeal opponent's misconduct during closing arguments). The motion was overruled.

[2] A mistrial is generally granted when a fundamental failure prevents a fair trial. See *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). Some examples are an egregiously prejudicial statement by counsel, the improper admission of prejudicial evidence, or the introduction of incompetent matters to the jury. See *id.*

[3,4] However, before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *State v. Harris, supra.* Whether a prosecutor's inflammatory remarks are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case. See *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

[5] But when a prosecutor persists after the court advises that an action is not permitted, the prosecutor commits misconduct. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (repeating improper question even though court sustained defendant's objection). Here, not once, but twice, the prosecutor said that Beeder's counsel agreed that the evidence clearly showed he was guilty of third degree assault. Although the court sustained Beeder's objection, its admonition to the jury did not reprimand the prosecutor; instead, the court told the jurors they could make up their own minds. This emboldened the prosecutor, who repeated the misrepresentation.

[6] Nevertheless, the State argues that the court's admonition and jury instructions sufficiently cured any prejudicial effect. But when a prosecutor's misconduct is so inflammatory that no admonition will remove the contamination, a mistrial is warranted. See *State v. Pierce, supra.* In other words, a mistrial is appropriate when "'"'after the thrust of the saber it is difficult to say forget the wound' . . . ."'" See *id.* at 977, 439 N.W.2d at 443 (quoting *Dunn v. United States*, 307 F.2d 883 (5th Cir. 1962)).

We cannot ignore the wound inflicted by the prosecutor's misconduct. The prosecutor's repeated misrepresentation misled the jury, leaving the false impression that Beeder admitted he was guilty of third degree assault. Having made the statement on rebuttal, Beeder's counsel had to sit silently without an opportunity to correct that impression. Further, the trial court's admonition left the jurors to ponder why they were free to make up their minds about the first statement, but not the second.

By repeatedly misrepresenting Beeder's argument, the prosecution signaled to the jury that Beeder's own lawyers believed him guilty, eroding their credibility with the jury and compromising Beeder's defense on all charges. As was stated in *Berger*

v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935):

> He [the prosecutor] may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The prosecutor's misrepresentations struck a foul blow. " 'If we treat violations indulgently, we shall soon — in the words of [Alexander] Pope — "first endure, then pity, then embrace." ' " *Pierce v. State*, 173 Neb. 319, 330, 113 N.W.2d 333, 341 (1962). See, also, *State v. Golter*, 216 Neb. 36, 342 N.W.2d 650 (1983). The trial court abused its discretion by overruling Beeder's motion for mistrial.

NEW TRIAL

[7,8] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain the conviction before the cause is remanded for a new trial. See *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). See, also, *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005). Although the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). We conclude that Beeder can be retried without violating double jeopardy because the evidence admitted was sufficient to sustain his convictions. Because some of the remaining assignments of error are likely to recur during retrial, we address those issues.

HEARSAY TESTIMONY

While at the hospital, Dr. Gary Settje, Deidre's family practitioner, interviewed her. He testified that he "asked her if she had been struck by [Beeder], and she nodded her head yes." Defense

counsel objected both before this testimony was elicited and after, but the trial court overruled the objections. Beeder argues that Settje's recitation should be excluded as hearsay testimony not made for the purpose of medical diagnosis or treatment.

Before Settje's recitation, he testified that when treating or diagnosing bruises, it is necessary to determine the mechanism of injury—how the injury occurred—because "different types of injury will have other impacts on the patient that affect things that affect the patient's care. . . . So you have to know the mechanism to make a determination of what to look for and how deep to look in order to proceed." Later, as part of the prosecution's offer of proof, Settje testified that in reference to who had caused the injury, "it wasn't really necessary [to Deidre's treatment] to know who it was."

[9] Neb. Rev. Stat. § 27-803 (Cum. Supp. 2004) provides in pertinent part:

> Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment[.]

This rule is " 'bottomed on the notion that a person seeking medical attention will give a truthful account of the history and current status of his condition in order to ensure proper treatment.' " *State v. Hardin*, 212 Neb. 774, 781, 326 N.W.2d 38, 42 (1982).

We addressed a similar situation in *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). There, the emergency room doctor asked a victim of domestic violence " 'how the altercation occurred.' " *Id.* at 395, 513 N.W.2d at 324. He then relayed the victim's response: " ' "I don't know. I don't know. It's been awhile. I don't know. It feels just like it is bruised. It's not broken. My left breast hurts a lot — a lot. My right arm hurts." ' " *Id.* at 396, 513 N.W.2d 324. We said that the doctor's testimony "relate[d] more to fault than to what would be considered 'reasonably pertinent to diagnosis or treatment,' " but found that

because the testimony was inconclusive and did not assign fault, any error was harmless. *Id.* By contrast, Settje's question referred directly to the individual responsible and invited a conclusive response.

The State, however, points us to *State v. Max*, 1 Neb. App. 257, 492 N.W.2d 887 (1992), which it argues allows a " 'victim's out-of-court statements identifying [the defendant] as the individual who had abused her.' " Brief for appellee at 9. In *Max*, the Nebraska Court of Appeals relied on *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992). Both *Max* and *Roenfeldt* dealt with the sexual abuse of children by a father figure. When a child is sexually abused, and especially when the child has a familial relationship with the child's abuser, the identity of the perpetrator is reasonably pertinent to diagnosis and treatment because the victim cannot be effectively treated if sent right back into the abuser's clutches. *Max* and *Roenfeldt* are inapposite.

Because the State provided no reason why the defendant's identity would be reasonably pertinent to Deidre's diagnosis and treatment and because Settje suggested that it was not, we conclude that Settje's recitation contained inadmissible hearsay. If this testimony is introduced on retrial, it should be excluded as hearsay, not within an exception, unless the defendant's identity is redacted or the State demonstrates that the defendant's identity is reasonably pertinent to Deidre's diagnosis and treatment.

JURY INSTRUCTIONS

Beeder also argued that the jury instructions regarding first degree false imprisonment failed to state all of the essential elements of the crime because they omitted part of the statutory definition of restraint. The instructions given provided:

> **The elements of False Imprisonment First Degree are:**
>
> 1. That the defendant Lionel C. Beeder restrained Deidre Beeder.
>
> 2. That the defendant did so knowingly.
>
> 3. That the defendant did so under terrorizing circumstances or under circumstances which exposed her to the risk of serious bodily injury.

4. That the defendant did so on or about June 2, 2002, in Hall County, Nebraska.

OR

The elements of False Imprisonment Second Degree are:

1. That the defendant Lionel C. Beeder restrained Deidre Beeder without legal authority.

2. That the defendant did so knowingly.

3. That the defendant did so on or about June 2, 2002, in Hall County, Nebraska.

A definitions instruction was later given, which stated, "**Restrain** means to restrict a person's movement in such a manner as to interfere substantially with his liberty."

Neb. Rev. Stat. §§ 28-314 (Cum. Supp. 2004) and 28-315 (Reissue 1995) provide the elements of first and second degree false imprisonment. The jury instructions given generally comport with the basic statutory elements. But Neb. Rev. Stat. § 28-312 (Reissue 1995) defines restraint in the false imprisonment statutes. It provides:

> (1) Restrain shall mean to restrict a person's movement in such a manner as to interfere substantially with his liberty:
>
> (a) By means of force, threat, or deception; or
>
> (b) If the person is under the age of eighteen or incompetent, without the consent of the relative, person, or institution having lawful custody of him[.]

Neither subsection was included in the trial court's instruction defining restraint.

Here, Deidre is well over the age of 18 and no evidence of incompetence was presented, so it was proper for the trial court to exclude § 28-312(1)(b) from the instructions. However, § 28-312(1)(a) describes the means by which the restriction must be carried out and limits the behavior that is made criminal under this statute.

Because the Legislature has made restraint a legal term of art, the court should instruct the jury, on retrial, using the applicable subsection from the restraint definition in § 28-312. See *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

CONSTITUTIONALITY OF HABITUAL CRIMINAL STATUTE

Beeder also argues that the trial court erred by not directing a verdict of acquittal on the habitual criminal charge and invites us to overrule *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003). We decline his invitation.

CONCLUSION

We conclude that the trial court abused its discretion by overruling Beeder's second motion for mistrial. We thus reverse Beeder's convictions and remand the cause for new trial.

REVERSED AND REMANDED.

ROBERT BLINN, APPELLANT, V. BEATRICE COMMUNITY HOSPITAL AND HEALTH CENTER, INC., APPELLEE.

708 N.W.2d 235

Filed January 6, 2006. No. S-04-079.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Rules of the Supreme Court: Pleadings.** Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in interpreting similar Nebraska civil pleading rules.
3. **Courts: Pleadings.** Even when a party does not move for leave to amend pleadings, a court may constructively amend pleadings on unpleaded issues in order to render a decision consistent with the trial.
4. **Courts: Pleadings: Appeal and Error.** Constructive amendment of pleadings on appeal is permitted when the effect will be to acknowledge that certain issues upon which the lower court's decision has been based or issues consistent with the trial court's judgment have been litigated.
5. **Rules of the Supreme Court: Pleadings.** The key inquiry of Neb. Ct. R. of Pldg. in Civ. Actions 15(b) (rev. 2003) for "express or implied consent" to trial of an issue not presented by the pleadings is whether the parties recognized that an issue not presented by the pleadings entered the case at trial.
6. **Courts: Pleadings.** In determining whether to allow amendment of pleadings to conform to the evidence, a court initially should consider whether the opposing party expressly or impliedly consented to the introduction of the evidence.
7. **Pretrial Procedure: Pleadings.** Express consent to trial of an issue not presented by the pleadings may be found when a party has stipulated to an issue or the issue is set forth in a pretrial order.
8. **Pleadings.** Implied consent to trial of an issue not presented by the pleadings may arise in two situations. First, the claim may be introduced outside of the complaint—

in another pleading or document—and then treated by the opposing party as if pleaded. Second, consent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to that issue.

9. **Pleadings: Proof.** Implied consent to trial of an issue not presented by the pleadings may not be found if the opposing party did not recognize that new matters were at issue during the trial. The pleader must demonstrate that the opposing party understood that the evidence in question was introduced to prove new issues.
10. **Courts: Pleadings.** A court will not imply consent to try a claim merely because evidence relevant to a properly pleaded issue incidentally tends to establish an unpleaded claim.
11. **Employer and Employee: Termination of Employment.** When employment is not for a definite term and there are no contractual, statutory, or constitutional restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses.
12. **Employment Contracts.** Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which can modify the at-will status of an employee.
13. **Employment Contracts: Breach of Contract: Proof.** In an action for breach of an employment contract, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract.
14. **Employment Contracts.** The language which forms the basis of an alleged employment contract, whether oral or written, must constitute an offer definite in form which is communicated to the employee, and the offer must be accepted and consideration furnished for its enforceability.
15. ____. When a definite offer of employment is communicated to an employee, the employee's retention of employment constitutes acceptance of the offer of a unilateral contract because by continuing to stay on the job although free to leave, the employee supplies the necessary consideration for the job.
16. **Employment Contracts: Intent.** For a unilateral contract of employment to exist, the employer must manifest a clear intent to make a promise as an offer of employment other than employment at will, and to be bound by it, so as to justify an employee in understanding that a commitment has been made.
17. ____: ____. Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions.
18. **Contracts: Estoppel.** Recovery on a theory of promissory estoppel is based upon the principle that injustice can be avoided only by enforcement of a promise.
19. **Forbearance: Estoppel.** Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
20. **Estoppel.** Under Nebraska law, the doctrine of promissory estoppel does not require that the promise giving rise to the cause of action must meet the requirements of an offer that would ripen into a contract if accepted by the promisee.
21. ____. There is no requirement of definiteness in an action based upon promissory estoppel.
22. ____. Instead of requiring reasonable definiteness, promissory estoppel requires only that reliance be reasonable and foreseeable.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and SIEVERS, Judges, on appeal thereto from the District Court for Gage County, PAUL W. KORSLUND, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Nancy R. Wynner and Danielle M. Koonce and Erin R. Harris, Senior Certified Law Students, of DeMars, Gordon, Olson & Zalewski, for appellant.

Nicole B. Theophilus, Michaelle L. Baumert, and Angela M. Lisec, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellee.

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

GERRARD, J.

I. NATURE OF CASE

The plaintiff in this case, Robert Blinn, was fired by his employer, Beatrice Community Hospital and Health Center, Inc. (Beatrice). Blinn sued Beatrice for breach of contract and promissory estoppel. The district court entered summary judgment against Blinn, but the Nebraska Court of Appeals reversed the judgment, based in part on its determination that although certain evidence was not directly relevant to Blinn's breach of contract claim as pleaded, it nonetheless gave rise to a genuine issue of material fact because Blinn's complaint had been constructively amended by implied consent pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 15(b) (rev. 2003). Beatrice petitioned for further review, which we granted. For the reasons that follow, we find insufficient evidence in the record to support the Court of Appeals' finding that an issue not raised by the pleadings was tried by implied consent of the parties.

II. BACKGROUND

1. FACTS

The following facts are taken from Blinn's deposition testimony, received into evidence at the hearing on Beatrice's motion for summary judgment. As pertinent, Blinn testified that in June 2002, he had received a job offer from a Kansas hospital. The

Kansas job would have been at a larger hospital and would have offered more responsibility and income potential than Blinn's job of executive director, medical staff development, at Beatrice. It was Blinn's understanding that the Kansas offer was for a position that Blinn could keep until he retired. Blinn was 67 years old at the time he received the offer. Blinn then went to the Beatrice administrator, Larry Emerson, seeking assurances about the permanency of Blinn's position with Beatrice, and drafted a resignation letter he intended to submit to Beatrice unless he received full assurances that Beatrice wanted him to stay. Blinn said:

> Well, I went in and asked him if I could visit, and I shut the door in his office and handed him this letter, and he read it, and he told me that he did not want me to leave. He assured me that I was doing a good job, and most importantly, he said, "Bob, we've got at least five more years of work to do." And I left his office feeling fully assured and fully confident that he had no negatives, 'cause I gave him total opportunity here to tell me.
>
> I left his office feeling he wanted me there, that he wanted me to stay there and that I should stay there and that we had plenty of work to do and that I could get the job done.

Blinn also asked for Emerson's permission to talk to the chairman of Beatrice's board of directors to seek similar assurances. Blinn testified that the chairman of the board said:

> "We want you to stay," and I said, "Well, it's really important to me, because whether I stay here or whether I go to [the Kansas hospital], I want it to be the last job I ever have," and [the chairman] assured me he wanted me to stay there and I could stay there until I retired.

However, Blinn was asked to resign by Beatrice in January 2003, and his employment with Beatrice was terminated in February.

2. Procedural History

Blinn sued Beatrice, alleging several theories of recovery based upon the termination of his employment. Blinn had been hired by Beatrice as an at-will employee, but alleged that his at-will employment status had been modified by oral agreement

to a term of employment of "at least five more years," which was not completed before Blinn's termination. The substance of Blinn's petition in the district court was that his at-will employment status had been modified by representations of Beatrice promising Blinn would be employed for a period of at least 5 years, that the representations induced Blinn to forgo another employment opportunity, and that Beatrice then terminated Blinn's employment approximately 6 months after the alleged representations. As pertinent, Blinn alleged theories of recovery based upon breach of an oral contract and promissory estoppel. Beatrice denied the allegations and additionally alleged Blinn's claims were barred by the statute of frauds. See Neb. Rev. Stat. § 36-202 (Reissue 2004) (oral agreement that, by its terms, is not to be performed within 1 year from its making, is void).

Beatrice filed a motion for summary judgment. The district court determined the alleged oral modification of Blinn's contract was not definite or specific enough to modify his at-will employment status, and entered summary judgment for Beatrice. The district court did not decide the statute of frauds issue.

The Court of Appeals reversed the district court's summary judgment. *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 13 Neb. App. 459, 696 N.W.2d 149 (2005). The Court of Appeals first recognized that Blinn's pleading did not allege Beatrice made representations that would modify his at-will employment status to anything other than employment for " 'at least five more years.' " *Id.* at 461, 696 N.W.2d at 152. However, the Court of Appeals concluded that Blinn's pleading had been amended by implied consent, pursuant to rule 15(b), which provides, in relevant part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

The Court of Appeals concluded that because there was evidence that Beatrice had assured Blinn he could work there " 'until [he]

retired,'" the alternate theory of employment until retirement could be considered to have been tried by implied consent. *Blinn*, 13 Neb. App. at 466, 696 N.W.2d at 155. The Court of Appeals further reasoned that the evidence created a genuine issue of material fact about whether Beatrice offered to extend Blinn's employment until he chose to retire. *Id.*

Based on that reasoning, the Court of Appeals also concluded that the statute of frauds did not apply, because Blinn could have chosen to retire within 1 year, and that therefore, the amended contract would have been capable of performance within 1 year. *Id.* Finally, the Court of Appeals concluded that the evidence created a genuine issue of material fact on Blinn's theory of recovery for promissory estoppel. *Id.* The Court of Appeals reversed the order granting summary judgment and remanded the cause for further proceedings. *Id.* We granted Beatrice's petition for further review.

III. ASSIGNMENTS OF ERROR

Beatrice assigns that the Court of Appeals erred in (1) reaching issues not specifically assigned and argued as error by Blinn; (2) concluding, sua sponte, that the pleadings had been amended by implied consent pursuant to rule 15(b); and (3) concluding that the "amended" pleadings and evidence created a genuine issue of material fact as to Blinn's claims for breach of an oral contract and promissory estoppel.

IV. STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *New Tek Mfg. v. Beehner, ante* p. 264, 702 N.W.2d 336 (2005).

V. ANALYSIS

1. Rule 15(b)

(a) Use of Rule 15(b) in Appellate Court

Initially, Beatrice argues that the rule 15(b) issue should not have been considered by the Court of Appeals because it was neither assigned as error nor argued in Blinn's appellate brief.

We find this argument to be without merit. The district court's decision on Beatrice's motion for summary judgment was not based on any finding regarding the scope of Blinn's pleadings. Instead, the district court determined that there was no genuine issue of material fact presented by the evidence, and Blinn's appellate brief took issue with that determination. Blinn could not properly have been held to have waived any issue with respect to the scope of the pleadings by not raising that issue in his appellate brief.

[2] In a related argument, Beatrice contends that rule 15(b) requires a party to actually make a motion for amendment and that such amendment cannot occur at the appellate level. Both of these arguments are without merit. We preface this analysis by observing that rule 15(b) is substantially identical to Fed. R. Civ. P. 15(b), and thus, we look to federal decisions interpreting the corresponding federal rule for guidance in interpreting the similar Nebraska rule. See *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

[3] First, no express motion to amend is necessary, by the plain language of the rule. Rule 15(b) states that amendment of the pleadings "*may* be made upon motion of any party at any time, even after judgment; *but failure so to amend does not affect the result of the trial of these issues*." (Emphasis supplied.) "This is so even if there is no motion to amend the pleadings; indeed, that's the point of Rule 15(b)." *Burdett v. Miller*, 957 F.2d 1375, 1380 (7th Cir. 1992). Even when a party does not move for leave to amend pleadings, a court may constructively amend pleadings on unpleaded issues in order to render a decision consistent with the trial. 3 James Wm. Moore et al., Moore's Federal Practice § 15.18[3] (3d ed. 2005). See, e.g., *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168 (1st Cir. 1995); *Walton v. Jennings Community Hosp., Inc.*, 875 F.2d 1317 (7th Cir. 1989).

[4] Second, it is settled in the federal courts that constructive amendment at the appellate level is permissible. As a general rule, constructive amendment of pleadings on appeal is permitted when the effect will be to acknowledge that certain issues upon which the lower court's decision has been based or issues consistent with the trial court's judgment have been litigated. *City of Rome, N.Y. v. Verizon Communications, Inc.*, 362 F.3d

168 (2d Cir. 2004). See, e.g., *Brandon v. Holt*, 469 U.S. 464, 471, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985) (citing rule 15(b) in support of determination that formal amendment of pleadings was unnecessary "even at this late stage of the proceedings" and "proceed[ing] to decide the legal issues without first insisting that such a formal amendment be filed"); *Walton, supra*; *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650 (9th Cir. 1981). See 3 Moore et al., *supra*, § 15.18[1] at 15-74.

We find the federal understanding of rule 15(b) to be persuasive, and we adopt it in this case. It would be inconsistent with the intent of rule 15(b) for us to conclude that when parties agree to try an issue, an appellate court should nonetheless disregard the result of that trial. Beatrice's argument that the Court of Appeals erred in raising rule 15(b) on appeal, sua sponte, is without merit.

(b) Application of Rule 15(b) to Summary Judgment

Next, Beatrice argues that rule 15(b), which by its terms refers to issues "tried" by consent of the parties, does not apply to summary judgment motions, which are by definition not "trials." See Neb. Rev. Stat. § 25-1103 (Reissue 1995). This is a disputed question in federal courts. See *Independent Petroleum Ass'n of America v. Babbitt*, 235 F.3d 588 (D.C. Cir. 2001). Compare *Kulkarni v. Alexander*, 662 F.2d 758 (D.C. Cir. 1978) (general principle of rule 15(b) has been applied to motions for summary judgment), and *Bobrick Corporation v. American Dispenser Co.*, 377 F.2d 334 (9th Cir. 1967) (rule 15 covers motions and factual issues under motions), with *Harris v. Secretary, U.S. Dept. of Veterans Affairs*, 126 F.3d 339 (D.C. Cir. 1997) (rule 15(b) applies where matter has gone to trial, not to motion for summary judgment), and *Crawford v. Gould*, 56 F.3d 1162 (9th Cir. 1995) (rule 15(b) allows court to revise pleadings to conform to case as actually litigated at trial, not summary judgment).

We do not decide this issue in the instant appeal because, as will be explained below, we find the record in this case insufficient to support a finding that an issue not raised by the pleadings was tried by implied consent. Since rule 15(b) is not applicable in any event, for purposes of deciding this appeal, we assume without deciding that rule 15(b) can be properly applied to a summary judgment.

(c) Evidence of Implied Consent

[5-9] Beatrice argues that it never consented, impliedly or otherwise, to trial of the issue raised by the Court of Appeals. The key inquiry of rule 15(b) for "express or implied consent" is whether the parties recognized that an issue not presented by the pleadings entered the case at trial. *Missouri Housing Development Com'n v. Brice*, 919 F.2d 1306 (8th Cir. 1990). See 3 James Wm. Moore et al., Moore's Federal Practice § 15.18[1] at 15-76 (3d ed. 2005).

> In determining whether to allow amendments to conform to the evidence, a court initially should consider whether the opposing party expressly or impliedly consented to the introduction of the evidence. Express consent may be found when a party has stipulated to an issue or the issue is set forth in a pretrial order.
>
> Implied consent may arise in two situations. First, the claim may be introduced outside of the complaint — in another pleading or document — and then treated by the opposing party as if pleaded. Second, consent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to that issue.
>
> *Implied consent may not be found if the opposing party did not recognize that new matters were at issue during the trial. The pleader must demonstrate that the opposing party understood that the evidence in question was introduced to prove new issues.*

(Emphasis supplied.) *Id.*, § 15.18[1] at 15-75 to 15-76.

Here, the Court of Appeals found that the issue of Beatrice's offer of employment until retirement was tried by implied consent, because evidence was presented on the issue and Beatrice did not object to such evidence. *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 13 Neb. App. 459, 696 N.W.2d 149 (2005). This is the situation in which courts most often find that parties implicitly consented to the trial of an issue. See 3 James Wm. Moore et al., *supra*, § 15.18[1]. But an opposing party's recognition of a new issue

> would not be shown, for example, if the new issue was merely raised inferentially by evidence that was relevant to

> the issues that were pleaded, and that the opposing party directly addressed only the pleaded issues at trial. A court may not find consent when evidence supporting an issue allegedly tried by implied consent is also relevant to other issues actually pleaded and tried.

Id., § 15.18[1] at 15-76 to 15-77.

[10] If the evidence overlaps in this fashion, it does not equate to implied consent absent a clear indication that the party who introduced the evidence was attempting to raise a new issue. *Portis v. First Nat. Bank of New Albany, MS*, 34 F.3d 325 (5th Cir. 1994). A court will not imply consent to try a claim merely because evidence relevant to a properly pleaded issue incidentally tends to establish an unpleaded claim. *Elmore v. Corcoran*, 913 F.2d 170 (4th Cir. 1990).

> In general, a finding of implied consent "depends on whether the parties recognized that an issue not presented by the pleadings entered the case at trial." . . . "Where a party does not recognize the significance of evidence and so fails to contest it, he cannot realistically be said to have given his implied consent to the trial of unpled issues suggested by it, always assuming that his failure to grasp its significance was reasonable." . . . When evidence is introduced that is relevant to a pleaded issue and the party against whom the amendment is urged has no reason to believe a new issue is being injected into the case, that party cannot be said to have impliedly consented to trial of that issue.

(Citations omitted.) *Domar Ocean Transp. v. Independent Refining Co.*, 783 F.2d 1185, 1188 (5th Cir. 1986). Accord, e.g., *Prieto v. Paul Revere Life Ins. Co.*, 354 F.3d 1005 (9th Cir. 2004); *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168 (1st Cir. 1995); *Burdett v. Miller*, 957 F.2d 1375 (7th Cir. 1992). See, e.g., *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988).

In this case, Beatrice argues, persuasively, that the evidence relied upon by the Court of Appeals was not objected to because it was pertinent to the issues that were properly pleaded in the case, such as Blinn's alleged reliance on Beatrice's representations and Blinn's performance at the hospital. In particular,

Blinn's testimony that the chairman of the board said Blinn "could stay [at Beatrice] until [he] retired" was relevant to Blinn's promissory estoppel claim, and such testimony cannot be said to have notified Beatrice that Blinn's claim of breach of an oral contract had been expanded to include a claim that Blinn's employment-at-will relationship with Beatrice had been modified to a contract of employment until retirement.

To satisfy rule 15(b), evidence to which no objection is raised must be directed solely at the unpleaded issue, in order to provide a clear indication that the opposing party would or should have recognized that a new issue was being injected into the case. The record here simply fails to satisfy that standard. The Court of Appeals erred in concluding that the pleadings in this case had been constructively amended by implied consent pursuant to rule 15(b).

2. Genuine Issues of Material Fact

Beatrice argues that the Court of Appeals erred in determining that the record presented genuine issues of material fact with respect to Blinn's breach of contract and promissory estoppel claims. We agree with Beatrice with respect to the breach of contract, but conclude that when the evidence is taken in the light most favorable to Blinn, there is a genuine issue of material fact with respect to Blinn's promissory estoppel claim.

(a) Breach of Contract

[11-13] We turn first to Blinn's breach of contract claim, which rests on Blinn's contention that the representations made to him by his superiors were sufficient to modify his status as an at-will employee. When employment is not for a definite term and there are no contractual, statutory, or constitutional restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses. *Goff-Hamel v. Obstetricians & Gyns., P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999). Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which can modify the at-will status of an employee. *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995). However, the burden of proving the existence of an employment contract and all the facts essential to the cause of

action is upon the person who asserts the contract. *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993).

[14,15] The question is whether the assurances allegedly given to Blinn were sufficiently definite in form to constitute an offer of a unilateral contract. The language which forms the basis of an alleged employment contract, whether oral or written, must constitute an offer definite in form which is communicated to the employee, and the offer must be accepted and consideration furnished for its enforceability. See *Walpus, supra.* Under those circumstances, the employee's retention of employment constitutes acceptance of the offer of a unilateral contract because by continuing to stay on the job although free to leave, the employee supplies the necessary consideration for the job. See *Overmier v. Parks*, 242 Neb. 458, 495 N.W.2d 620 (1993). Accord *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994).

[16,17] The question under such circumstances is whether the employer manifests a clear intent to make a promise as an offer of employment other than employment at will, and to be bound by it, so as to justify an employee in understanding that a commitment has been made. See, *Prescott v. Farmers Telephone Co-op.*, 335 S.C. 330, 516 S.E.2d 923 (1999); *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997 (Utah 1991); *Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 117 N.W.2d 213 (1962). Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions. *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987); *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983). There must be a meeting of the minds or a binding mutual understanding between the parties to the contract. *Overmier, supra.*

Here, even viewed in the light most favorable to Blinn, the assurances offered to him were not sufficiently definite in form to constitute an offer of a unilateral contract. The statement that "we've got at least five more years of work to do" is not a clear offer of definite employment and does not manifest an intent to create a unilateral contract. See *Foreman v. AS Mid-America*, 255 Neb. 323, 343, 586 N.W.2d 290, 304 (1998) (rule of

employee conduct "contain[ed] no clear offer of definite employment" where there was "no evidence in the record that either party understood the rules of conduct as creating an implied contract"). See, also, *Walpus, supra*; *Hamersky, supra*; *Overmier, supra*; *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), *disapproved on other grounds, Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987).

> "[U]nless the [plaintiff's] theory has some relation to the reality, calling something a contract that is in no sense a contract cannot advance respect for the law. . . . [W]e seek a resolution which is consistent with contract law relative to the employment setting while minimizing the possibility of abuse by either party to the employment relationship."

Walpus v. Milwaukee Elec. Tool Corp., 248 Neb. 145, 155-56, 532 N.W.2d 316, 323 (1995), quoting *Rowe v Montgomery Ward*, 437 Mich. 627, 473 N.W.2d 268 (1991). An employee's subjective understanding of job security is insufficient to establish an implied contract of employment to that effect, see *Hamersky, supra*, and the record here does not establish sufficient evidence to conclude that any employee of Beatrice intended to offer a contract of employment on terms other than employment at will.

For that reason, the Court of Appeals erred in concluding that there was a genuine issue of material fact with respect to Blinn's breach of contract claim.

(b) Promissory Estoppel

[18,19] Recovery on a theory of promissory estoppel is based upon the principle that injustice can be avoided only by enforcement of a promise. *Folgers Architects v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (2001). Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994).

[20-22] Under Nebraska law, the doctrine of promissory estoppel does not require that the promise giving rise to the cause of action must meet the requirements of an offer that would ripen into a contract if accepted by the promisee. See, *id.*; *Hawkins Constr. Co. v. Reiman Corp.*, 245 Neb. 131,

511 N.W.2d 113 (1994); *Whorley v. First Westside Bank*, 240 Neb. 975, 485 N.W.2d 578 (1992). Simply stated, there is no requirement of "definiteness" in an action based upon promissory estoppel. *Hawkins Constr. Co., supra*; *Whorley, supra*; *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990). Instead of requiring reasonable definiteness, promissory estoppel requires only that reliance be reasonable and foreseeable. See *id.*

Here, we agree with the determination made by the Court of Appeals that there is a genuine issue of material fact with respect to Blinn's promissory estoppel claim. While the statements allegedly made by Blinn's superiors were insufficiently definite to offer a contract of employment on terms other than employment at will, there is a genuine issue of material fact as to whether Blinn was promised terms of employment that could reasonably have been expected to induce Blinn to forgo the job opportunity in Kansas of which he had informed Beatrice. Under the circumstances, when considering the lesser requirement that Nebraska law imposes on a promise that forms the basis of a promissory estoppel cause of action, we conclude that the district court erred in not finding a genuine issue of material fact.

The dissent contends that we have extended our decision in *Goff-Hamel v. Obstetricians & Gyns., P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999), by concluding that there is a genuine issue of material fact with respect to Blinn's promissory estoppel claim. But our decision not to rely on *Goff-Hamel* was not inadvertent; while *Goff-Hamel* remains the law, its holding is simply not applicable to this case.

In *Goff-Hamel*, as the dissent observes, we held that a cause of action for promissory estoppel can be alleged in connection with detrimental reliance on a promise of at-will employment. The dissent asserts that our decision in the instant case extends that rule. But the distinguishing feature is that here, Blinn is not claiming to have relied upon a promise of at-will employment. Rather, Blinn alleges that he was employed at will, and relied on a promise of more than that.

In *Goff-Hamel*, an employee had resigned her employment in order to accept another offer of at-will employment, but before she began her new job, she was told not to report to work. We

concluded that the unfulfilled promise of at-will employment was sufficient to support an action for promissory estoppel. In the instant case, by contrast, Blinn was already employed by Beatrice at will and alleged that he declined another opportunity because he was promised that he would be employed for at least 5 more years or, in the alternative, until he retired. In other words, Blinn alleged that he was promised a fixed term of employment, instead of at-will employment. The question in this case is not whether reliance upon a promise of at-will employment is actionable. Rather, the question here is whether the evidence is sufficient to create a genuine issue of material fact as to whether Beatrice is estopped from claiming that Blinn's employment was at will by Blinn's reliance on the promises Beatrice made. Aside from reiterating some basic propositions of promissory estoppel, *Goff-Hamel* simply does not help answer this question, by application or extension.

The dissent seems to conclude that because we did not find Beatrice's assurances of continued employment to be sufficiently definite to constitute an offer of a unilateral contract, "they can be regarded as nothing more than a promise of continued at-will employment." This conclusion is inconsistent with the requirements of promissory estoppel in Nebraska, because we have rejected the Restatement view of promissory estoppel for a less demanding standard.

Under the Restatement view, a "promise" for purposes of promissory estoppel must meet the same requirements as a "promise" for purposes of contract formation. Compare Restatement (Second) of Contracts §§ 2 and 90 (1981). Generally speaking, under the Restatement, when a promise is made, but a contract is not formed because of a lack of consideration, reasonable reliance by the promisee can still render the promisor liable for breach of the promise. See *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976). In short, analysis of the promise is the same as that for a contract, except that the promisee's reliance on the promise replaces the missing consideration. See, generally, Restatement, *supra*, § 90, comment *a*.

But in Nebraska, we have rejected that view. As noted earlier, we have held that there is no requirement of "definiteness" in an

action based upon promissory estoppel. *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990). In *Rosnick*, we departed from the Restatement view that a promise for estoppel purposes requires the same definiteness as a promise for contract purposes. In *Whorley v. First Westside Bank*, 240 Neb. 975, 485 N.W.2d 578 (1992), we expressly considered the Restatement view, cited conflicting authority, and reaffirmed our holding in *Rosnick*. Contrary to the Restatement view, the law in Nebraska is that a promissory estoppel action may be based on an alleged promise that is insufficiently definite to form a contract, but upon which the promisee's reliance is reasonable and foreseeable. *Whorley, supra*. The difference between contract and promissory estoppel, then, is that a contract requires that the promisor intend to make a binding promise—a binding mutual understanding or "meeting of the minds"—while promissory estoppel requires only that the promisee's reliance on the promise be reasonable and foreseeable, even if the promisor did not intend to be bound. A promisor need not intend a promise to be binding in order to foresee that a promisee may reasonably rely on it.

Contrary to that jurisprudence, the dissent mistakenly concludes that since Beatrice did not make a sufficiently definite promise for an offer of a unilateral contract, the promise must have been for, at best, continued at-will employment. Because promissory estoppel does not require definiteness, an employer need not intend to contractually modify an employee's at-will employment in order for an employee to reasonably and foreseeably believe that his or her terms of employment have been changed and, therefore, act in reliance on that belief. Here, there is insufficient evidence to conclude that Beatrice intended to offer Blinn a unilateral contract. But there is sufficient evidence, if believed by the trier of fact, to conclude that Blinn reasonably and foreseeably relied on Beatrice's assurances of a fixed term of employment, and Beatrice breached that promise. There is a genuine issue of material fact to be decided, and the Court of Appeals correctly reversed the district court's judgment on this issue.

(c) Statute of Frauds

The Court of Appeals determined, premised upon its rule 15(b) analysis, that there was a genuine issue of fact with respect to

Beatrice's statute of frauds defense. However, the district court made no determination on this issue, and Beatrice conceded, in its appellate brief, that in light of the district court's conclusion that no oral contract existed, the statute of frauds issue was moot. Beatrice has not suggested that the statute of frauds defense applies to a promissory estoppel cause of action where there is no otherwise valid contract. Compare, *Rosnick, supra*; *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976) (where otherwise binding contract is barred by statute of frauds, promissory estoppel will not lie to circumvent statute of frauds).

Because the Court of Appeals' statute of frauds determination was premised on its faulty rule 15(b) analysis, it must also be reversed. In light of our determination that the district court correctly entered summary judgment on Blinn's breach of contract claim, and Beatrice's concession in its appellate brief that the statute of frauds issue is therefore moot, we decline to address the matter further.

VI. CONCLUSION

We conclude that the district court correctly entered summary judgment on Blinn's breach of oral contract claim, but erred in finding no genuine issue of material fact with respect to Blinn's promissory estoppel claim. The Court of Appeals erred in its application of rule 15(b), as the evidence is insufficient to show implied consent to the trial of an issue not raised by the pleadings. The Court of Appeals further erred in reversing the district court's judgment on the breach of contract claim, but correctly reversed the court's judgment on the promissory estoppel claim. The judgment of the Court of Appeals is affirmed in part and in part reversed, and this cause is remanded to the Court of Appeals with directions to affirm the district court's judgment in part, and in part reverse the court's judgment, in a manner consistent with this opinion.

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

MILLER-LERMAN, J., participating on briefs.

STEPHAN, J., dissenting.

I agree with the majority that the Court of Appeals erred in concluding that the pleadings were constructively amended by

implied consent pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 15(b) (rev. 2003). I also agree that there is no genuine issue of material fact with respect to Blinn's breach of contract claim. However, I respectfully dissent from the judgment reached by the majority because it has extended what I believe to be an incorrect rule that promissory estoppel may form the basis for claims involving at-will employment. See *Goff-Hamel v. Obstetricians & Gyns., P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999) (Stephan, J., dissenting).

Until today, the clear rule in Nebraska has been that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003); *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). This rule is subject to an exception that an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. *Id.* Oral representations may constitute a promise sufficient to create contractual terms which could modify the at-will status of the employee. *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995); *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994). However, such oral representations must be sufficiently definite to meet the prerequisites of a contract in order to modify an employee's at-will status. As noted in the majority opinion, the employee's subjective understanding of job security is insufficient to establish an implied contract of employment to that effect. See, *Hamersky, supra*; *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. 219, 512 N.W.2d 358 (1994). In *Hamersky*, we held that oral assurances of employment in a specific position until retirement were insufficient as a matter of law to contractually modify the at-will status of an employee.

In this case, it is undisputed that Blinn was an at-will employee. There is no claim that he was terminated in violation of any constitution, statute, or public policy. The majority thus correctly determines that the record "does not establish sufficient evidence to conclude that any employee of Beatrice intended to offer a contract of employment on terms other than

employment at will." In my view, this should end the analysis because the evidence does not fall within any of the previously recognized exceptions to our "clear rule" regarding the employer's right to discharge an at-will employee "at any time with or without reason." *Jackson*, 265 Neb. at 425-26, 657 N.W.2d at 636.

However, the majority goes on to conclude that under the doctrine of promissory estoppel, an at-will employment relationship may be transformed into employment for a specific duration by the employee's reliance upon oral statements made by the employer which are too indefinite to constitute a contractual meeting of the minds. This is new law in Nebraska. I agree with the majority that *Goff-Hamel v. Obstetricians & Gyns., P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999), does not directly compel this holding if it is limited to its facts, which involved the withdrawal of an offer of at-will employment before the employment relationship began. But I respectfully submit that if the majority has not extended the holding of *Goff-Hamel* by design, it has done so by necessary implication, because there is no other precedent for the application of principles of promissory estoppel to the facts presented in this case.

Of the cases cited by the majority in its analysis of the promissory estoppel issue, only *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994), involved an at-will employment relationship. In that case, a deputy sheriff was discharged after working for approximately 4 months. She asserted a wrongful discharge claim on an alternative theory of promissory estoppel, alleging that she left her previous employment in reliance upon the offer of employment in the sheriff's office. Noting that the plaintiff was an at-will employee and that she worked for a short time prior to her discharge, the court concluded that "the situation which we find is that the promise was one to offer at-will employment, which promise was kept, and estoppel is not available." *Id.* at 665, 522 N.W.2d at 408. *Merrick* was distinguished but not overruled in *Goff-Hamel*. In my view, *Merrick* should control the resolution of this case. Because the alleged oral statements are insufficient as a matter of law to modify Blinn's at-will status, they can be regarded as nothing more than a promise of continued at-will employment.

Goff-Hamel is the only case in which this court has recognized promissory estoppel as the legal basis for a claim alleging wrongful withdrawal of an offer of at-will employment. The instant case is the first in which this court has recognized promissory estoppel as the basis for a claim of wrongful termination of at-will employment. As a result of today's decision by the majority, our "clear rule" regarding termination of at-will employment has become quite murky. Now, as I understand the majority opinion, (1) an employer may lawfully discharge an at-will employee whenever and for whatever reason it chooses, so long as that reason does not contravene a constitution, statute, contract, or public policy; (2) one is an at-will employee unless there is a contract for employment for a specific duration; and (3) general oral assurances of continued employment which create a subjective understanding of job security are insufficient as a matter of law to create such a contract; but (4) a legally enforceable entitlement to employment for a specific duration can be implied on the basis of the employee's subjective understanding of and detrimental reliance upon oral assurances which are too indefinite to constitute a contractual modification of the employee's at-will status.

In my dissent in *Goff-Hamel*, I expressed the view that where parties to an employment relationship have not chosen to impose contractual obligations upon themselves, a court should not utilize the principle of promissory estoppel to impose the subjective expectations of either party upon the other. My view has not changed. I would reverse the judgment of the Court of Appeals and affirm the judgment of the district court.

CONNOLLY, J., joins in this dissent.

IN RE INTEREST OF JAGGER L., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JUSTIN C., APPELLANT.

708 N.W.2d 802

Filed January 13, 2006. No. S-05-153.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of

the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.

2. **Parental Rights: Evidence: Proof.** For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Reissue 2004), it must find that termination is in the child's best interests and that one or more of the statutory grounds listed in this section have been satisfied. The State must prove these facts by clear and convincing evidence.
3. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
4. **Parental Rights: Evidence: Appeal and Error.** If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in Neb. Rev. Stat. § 43-292 (Reissue 2004), the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground.
5. **Parental Rights: Proof.** In order to terminate parental rights under Neb. Rev. Stat. § 43-292(7) (Reissue 2004), the State must prove by clear and convincing evidence that the child has been in out-of-home placement for 15 or more of the most recent 22 months and that termination of parental rights is in the best interests of the child.
6. ____: ____. Along with proof of best interests, Neb. Rev. Stat. § 43-292(7) (Reissue 2004) is satisfied if the evidence shows the requisite number of months of out-of-home placement and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent.

Appeal from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Affirmed.

Norman Langemach for appellant.

Lori Maret, Deputy Lancaster County Attorney, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Justin C. appeals from an order of the separate juvenile court of Lancaster County adjudicating his son, Jagger L., as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) and terminating his parental rights as to Jagger pursuant to Neb. Rev. Stat. § 43-292 (Reissue 2004), subsections (1) (abandonment), (2) (neglect), and (7) (out-of-home placement). On appeal, Justin asserts, in summary, that there was insufficient

evidence to adjudicate Jagger and to terminate Justin's parental rights and that the evidence failed to prove termination was in the best interests of Jagger. Finding no merit to these assigned errors, we affirm.

STATEMENT OF FACTS

Sonya L. and Justin are the natural parents of Jagger. Jagger was born October 31, 2001. The proceedings in this case began on October 1, 2002, when a supplemental petition was filed in the juvenile court concerning Jagger, alleging that he was a child within the meaning of § 43-247(3)(a) by reason of the fault and habits of Sonya. On that same date, the juvenile court entered an order for temporary custody, removing Jagger from Sonya's custody and placing him in the custody of the Nebraska Department of Health and Human Services (DHHS). Jagger was placed in foster care on October 1, and he has remained in foster care during the entirety of these proceedings. Sonya's parental rights to Jagger were terminated by the juvenile court on March 31, 2005. The order terminating Sonya's parental rights to Jagger was affirmed by this court in *In re Interest of Phoenix L., post* p. 870, 708 N.W.2d 786 (2005). Sonya is not part of this present appeal.

Justin is a noncustodial parent. At all times during the pendency of these proceedings, Justin has been a resident of the State of Florida. On October 22, 2002, Justin was served with a copy of the supplemental petition. On May 15, 2003, Justin moved to have counsel appointed to represent him in the pending juvenile court proceedings. The motion was granted on May 16. On May 3, 2004, a second supplemental petition and motion to terminate parental rights was filed with the juvenile court alleging that Jagger lacked proper parental care by reason of the fault or habits of Justin, and further alleging that Justin's parental rights to Jagger should be terminated pursuant to § 43-292(1), (2), and (7), because Justin had abandoned Jagger 6 or more months immediately prior to the filing of the petition, Justin had substantially and continuously or repeatedly neglected and refused to give Jagger necessary parental care and protection, and Jagger had been in out-of-home placement for 15 or more of the most recent 22 months.

On December 28, 2004, an evidentiary hearing was held on the second supplemental petition. Four witnesses, including Justin, testified, and a total of 26 exhibits was admitted into evidence. Diana Meadors, a protection and safety worker with DHHS, testified on behalf of the State. She testified that she had been assigned to the case since Jagger was removed from Sonya's home. She further testified that on November 18, 2002, pursuant to DHHS' request, a home study was conducted on Justin's residence in Florida to determine whether it might be appropriate to place Jagger with Justin. A copy of the home study report was admitted into evidence. The report listed several "concerns" and did not recommend placement of Jagger with Justin. Among the concerns noted by the home study was the fact that Justin was "a Florida registered sexual predator currently on probation." A second concern noted in the report was that Justin's home, described as a "shell of a mobile home," lacked plumbing, running water, and electricity. A third concern noted was Justin's "lack of stability" in "domestic relationships." For these reasons, the Florida home study recommended against placing Jagger with Justin and Jagger was not placed in Justin's custody. Meadors testified that based upon the home study, Justin was unable to provide a stable or secure home for Jagger. Meadors also testified that from October 2002 to May 2004, when she left employment with DHHS, she was not aware of Justin's having any face-to-face contact with Jagger. Meadors opined during her testimony that it would be in Jagger's best interests for Justin's parental rights to be terminated because of the length of time that Jagger had been in out-of-home placement. She stated that Jagger was "attached and bonded to [his foster] family [and that] I would just suggest [the juvenile court proceedings] go to termination and [Jagger] be able to live a happy, healthy life where he's been for the last two years or 18 months."

Kathryn Rogers, another DHHS protection and safety worker, also testified on behalf of the State. She stated that she had been Jagger's caseworker since September 14, 2004, and that she had reviewed Jagger's case file prior to the hearing. She testified that Jagger was, at the time of the hearing, approximately 38 months old and that he had been in out-of-home placement since he was

11 months old. She further testified that it would be in Jagger's best interests for Justin's parental rights to be terminated, "so that [Jagger] can be adopted and have permanency with [his foster family]." She testified that maintaining the status quo in foster care would be detrimental to Jagger, because "[i]t's not permanency for him."

As noted above, Justin appeared and testified as a witness in his own behalf. He testified that he was living in Florida at the time Jagger was born and that Sonya had called him on October 31, 2001, to advise him of Jagger's birth. He further testified that prior to and after Jagger's birth, he had sent money to Sonya to assist with Jagger's needs, and records introduced into evidence indicated that during the 32-month time period from November 2001 to June 2004, Justin had sent approximately $3,600 to Sonya. He also testified that he was aware of Jagger's placement in foster care at least "two or three days after he was taken" from Sonya's custody. During cross-examination, Justin admitted that he had not had any face-to-face visits with Jagger from approximately March 2002 until approximately September 2004, when he began having monthly visits with Jagger. He stated that while Jagger was in foster care, he had never sent any gifts or cards to Jagger. Justin further acknowledged that he had not provided health insurance for Jagger, despite the availability of that insurance while Justin was in the U.S. Navy. He testified that he had received an "[o]ther than honorable" discharge from the Navy in September 2002.

Justin, who at the time of the hearing was 30 years of age, also testified that he had had sexual relations with a 14-year-old girl in July 2001 and that as a result, he was placed on probation by the State of Florida in July 2002. A copy of the probation order was entered into evidence, and it provided, inter alia, that Justin had entered a no contest plea to the offense of "Lewd or Lascivious Battery – Child Under 16" and had been placed on probation for a period of 5 years.

In an order filed January 3, 2005, the juvenile court found by a preponderance of the evidence that pursuant to § 43-247(3)(a), Jagger lacked proper parental care by reason of the fault or habits of Justin, in that Justin had been aware since October 22, 2002, of the juvenile court proceedings involving Jagger, but that

Justin had "failed to put himself in a position to safely assume the parental care, support, or protection of Jagger." The juvenile court found that the allegations of the motion to terminate parental rights pursuant to § 42-292(1), (2), and (7) were shown by clear and convincing evidence and that the motion should be granted. Specifically, the juvenile court found that Justin had "abandoned Jagger . . . for six months or more immediately prior to the filing of" the second supplemental petition, that Justin had "substantially and continuously or repeatedly neglected and refused to give Jagger . . . necessary parental care and protection," and that Jagger had "been in an out-of-home placement for fifteen or months [sic] of the most recent twenty-two months." The juvenile court further found that termination of Justin's parental rights to Jagger was in Jagger's best interests. Justin appealed from this order.

ASSIGNMENTS OF ERROR

On appeal, Justin has assigned five errors that can be restated as three errors. Justin claims, restated, that the juvenile court erred in finding (1) that as to the adjudication, the allegations made pursuant to § 43-247(3)(a) were proved by a preponderance of the evidence; (2) that as to the termination, there was clear and convincing evidence to terminate his parental rights under § 43-292(1), (2), and (7); and (3) that the termination of Justin's parental rights was in the best interests of Jagger.

STANDARDS OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

ANALYSIS

On appeal, Justin first asserts that the juvenile court erred in finding that Jagger was a juvenile within the meaning of § 43-247(3)(a). Following our de novo review of the record, we conclude that the juvenile court did not err in finding that the

State had proved by a preponderance of the evidence that Jagger lacked proper parental care by reason of the fault or habits of Justin for purposes of § 43-247(3)(a). Accordingly, we affirm the adjudication portion of the juvenile court's order.

In the second supplemental petition filed on May 3, 2004, the State alleged that Jagger came within the meaning of § 43-247(3)(a) because Justin had been aware of the juvenile court proceedings involving Jagger since October 22, 2002, but had failed to put himself in a position to safely assume the parental care, support, or protection of Jagger.

Section 43-247 provides:

> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> . . . .
>
> (3) Any juvenile (a) . . . who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile . . . .

The evidence adduced at the hearing indicated that notwithstanding the fact that Justin was aware since October 2002 that Jagger had been removed from Sonya's custody and was in foster care, prior to these juvenile proceedings Justin had not had any face-to-face contact with Jagger since approximately March 2002. The record further reflects that Justin was unable to provide a safe and secure home for Jagger. In this regard, the home study indicated that Justin lived in a "shell of a mobile home" and that the mobile home lacked plumbing, running water, and electricity. The evidence further shows that, notwithstanding the availability of health insurance for Jagger, Justin had failed to provide health insurance for him. Finally, we note that the record shows the troubling fact that Justin was on probation for the offense of "Lewd or Lascivious Battery – Child Under 16." Although we recognize that Justin testified that since Jagger's birth, he had provided an average of approximately $100 a month for his son's care, such contribution does not preclude a finding that Jagger lacked proper care under § 43-247(3)(a). We

conclude, based on our de novo review, that the preponderance of the evidence indicates that Jagger is a juvenile within the meaning of § 43-247(3)(a). Accordingly, we conclude that the portion of the juvenile court's order that adjudicated Jagger to be a child within the meaning of § 43-247(3)(a) should be affirmed and that the assignment of error challenging this ruling is without merit.

Justin also claims on appeal that the evidence was insufficient to terminate Justin's parental rights. In this case, the juvenile court found that three statutory grounds for termination had been proved, § 43-292(1), (2), and (7). Because we determine that the evidence clearly and convincingly demonstrates that Jagger was in an out-of-home placement for at least 15 of the most recent 22 months, we affirm the juvenile court's order under § 43-292(7) and need not, and do not, further specifically address the sufficiency of the evidence under § 43-292(1) and (2).

[2-4] For a juvenile court to terminate parental rights under § 43-292, it must find that termination is in the child's best interests and that one or more of the statutory grounds listed in this section have been satisfied. *In re Interest of Shelby L., ante* p. 150, 699 N.W.2d 392 (2005). The State must prove these facts by clear and convincing evidence. *Id.* Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. See *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

[5,6] Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." Thus, in order to terminate parental rights under § 43-292(7), the State must prove by clear and convincing evidence that the child has been in out-of-home placement for 15 or more of the most recent 22 months and that termination of parental rights is in the best interests of the child. See *In re*

Interest of Aaron D., supra. Along with proof of best interests, § 43-292(7) is satisfied if the evidence shows the requisite number of months of out-of-home placement and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. *In re Interest of Aaron D., supra.*

In the present case, there is no dispute that Jagger has been in an out-of-home placement continuously since October 2002, which was more than 19 months at the time the motion to terminate was filed, and which was more than 27 months at the time of the juvenile court's termination order in this case was entered. Thus, there is clear and convincing evidence that Jagger had been in out-of-home placement for 15 of the most recent 22 months pursuant to § 43-292(7). Accordingly, the assignment of error challenging the basis for termination under § 43-292(7) is without merit.

Justin also contends that the State did not prove by clear and convincing evidence that termination of his parental rights was in Jagger's best interests. The evidence in this case establishes that at the time the termination hearing occurred, Jagger had been in out-of-home placement for more than 70 percent of his life. Justin knew Jagger was in out-of-home placement since October 2002 but had no face-to-face contact with him until September 2004, 4 months after the motion to terminate parental rights was filed and 24 months after Jagger was placed in foster care. There was evidence that adoption and permanency with his foster family with whom he had bonded would provide Jagger with a happy and healthy life. Given these circumstances and the entire record in this case, which we have reviewed de novo, we conclude that there exists clear and convincing evidence that terminating Justin's parental rights is in Jagger's best interests. This assigned error is without merit.

CONCLUSION

We conclude that the juvenile court's order adjudicating Jagger to be a child within the meaning of § 43-247(3)(a) was supported by a preponderance of the evidence, and such order is affirmed. We further conclude that there was clear and convincing evidence to support a finding that Justin's parental rights

should be terminated pursuant to § 43-292(7) and that termination is in the best interests of Jagger. Since termination was proper under § 43-292(7), we do not consider the propriety of terminating Justin's parental rights pursuant to § 43-292(1) and (2). The judgment of the juvenile court terminating Justin's parental rights to Jagger is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF EVERETT D. LARSON, AN ALLEGED INCAPACITATED PERSON. BARBARA L. PROKUPEK AND WILFRED HENRY LOOBY, TEMPORARY GUARDIAN AND CONSERVATOR, APPELLEES, V. EVERETT D. LARSON, APPELLEE, AND JOSEPH TOMAN, APPELLANT.

708 N.W.2d 262

Filed January 13, 2006. No. S-05-257.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law in which an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
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 tribunal from which the appeal is taken.
3. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
4. **Actions: Statutes.** Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action.
5. **Actions: Words and Phrases.** An action consists of any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by statute and ending in a final judgment.
6. **Actions: Guardians and Conservators.** Proceedings initiated pursuant to Neb. Rev. Stat. § 30-2619 (Cum. Supp. 2004), to appoint a guardian, and Neb. Rev. Stat. § 30-2633 (Cum. Supp. 2004), to appoint a conservator, are special proceedings.
7. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
8. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable

interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.

9. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
10. **Rules of the Supreme Court: Appeal and Error.** The appellate courts of this state will not consider a prayer for affirmative relief where such a claim is raised in a brief designated as that of an "appellee," and a cross-appeal must be properly designated, pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 2001), if affirmative relief is to be obtained.
11. **Guardians and Conservators: Pleadings.** An evidentiary hearing should be held expediently on a guardianship or conservatorship petition, and temporary guardians and conservators are intended to exercise their powers in a limited manner and for a limited period of time.

Appeal from the County Court for Douglas County: JANE H. PROCHASKA, Judge. Remanded with directions.

D.C. Bradford, John P. Ellis, and Justin D. Eichmann, of Bradford & Coenen, for appellant.

Susan J. Spahn and Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellee Wilfred Henry Looby.

David J. Cullan and Margaret A. Badura, of David J. Cullan & Associates, and Kirk L. Meisinger, of Ginsburg & Meisinger, for appellee Everett D. Larson.

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

MCCORMACK, J.

I. NATURE OF CASE

This case presents an appeal from an interlocutory order made by the county court during guardianship and conservatorship proceedings for an alleged incapacitated person.

II. BACKGROUND

On August 3, 2004, Barbara L. Prokupek, a child of Everett D. Larson, filed a petition for the appointment of a temporary guardian and conservator and a permanent guardian and conservator in the county court. The petition alleged that Larson was suffering from dementia and early onset Alzheimer's disease and

was no longer able to make appropriate medical and financial decisions for himself. The petition alleged that Larson presently had no guardian or conservator, that an emergency existed because his doctors needed someone in place to make appropriate medical decisions, and that Larson needed someone to take care of his financial dealings. The petition suggested Wilfred Henry Looby as a suitable and proper person to act as the temporary guardian.

That same date, the county court issued an order appointing Looby as the temporary guardian of Larson, authorized and empowered to take possession of and have the care and management of the estate, subject only to the limitation that Looby not pay compensation to himself or his attorney from Larson's assets or sell real property of the estate without a court order. The appointment was to continue until further order of the court. Larson was sent a notice of hearing for the petition for appointment of a guardian and conservator, stating that a temporary guardian had been appointed for Larson and that a hearing was to be held as to the appointment of a permanent guardian on September 22. The notice set forth, inter alia, Larson's right to have an attorney appointed to represent him, right to present evidence on his behalf and compel the attendance of witnesses; right to have the powers of the guardian and/or conservator limited by the court; and right to appeal any final order.

No hearing was held on September 22, 2004, as to the appointment of a permanent guardian. On September 22, Larson, by and through his attorney, Mary L. Wilson, filed an objection to the petition. The objection stated that Larson objected to the proposed appointment of any guardian and conservator but that if such a guardian and conservator were required by the court, he requested he be allowed to choose the person so appointed. This objection was apparently never ruled upon or pursued by Wilson for a ruling.

That same date, Looby filed with the county court an application for appointment of a guardian ad litem (GAL) and motion for continuance, referring to Larson's objection and stating that all interested parties appeared to agree to the necessity of a GAL. There does not appear on the record any stipulation as to a continuance of the hearing on the petition.

The county court issued an order appointing a GAL for Larson. The GAL was ordered to investigate the matter and file a report with the court no later than 48 hours prior to the next hearing regarding the appointment of a permanent guardian and conservator for Larson. Without any specific findings, the court also ordered that the authority of the temporary guardian and conservator should continue until further order.

In the GAL's report, she stated that the medical records showed a diagnosis of dementia and Larson's inability to care for himself. The GAL described that about 1½ years before the current petition to appoint a guardian and conservator, a petition for the appointment of a guardian and conservator was filed in Cass County, pursuant to the recommendation of Larson's doctor at that time. Prokupek was assigned as the temporary guardian and conservator for approximately 2 months, but there was an objection to the petition, and the matter was resolved when Looby was appointed, as per Larson's agreement, as Larson's attorney in fact pursuant to a durable power of attorney. This power of attorney was apparently revoked by Larson without notice to anyone, and another attorney in fact was named, Joseph Toman. In approximately November 2003, around the time that Larson appointed Toman as his attorney in fact, Larson deeded 100 acres of his farmland to Toman.

The GAL stated that during her interview with Larson, it appeared at first that he knew what was going on and that he remembered a lot about the general state of his resources and farming; however, she stated that after talking with him longer, he repeated the same things over and over again. Larson expressed anger toward his son and Prokupek, accusing them of being "greedy" and ignoring him. Larson explained that he gave the 100 acres to Toman to keep it from his greedy children.

The GAL reported that Larson was aware that the guardianship action was occurring and admitted he could no longer live alone and had no objection to the appointment of a guardian. However, Larson wished to choose one of his friends as his guardian and conservator. Larson described Looby as a "crook." However, the GAL stated her opinion that Looby was carrying out his fiduciary duties according to the law and consistent with what was in Larson's best interests. Wilson was also interviewed

by the GAL, and Wilson allegedly stated that she believed that Prokupek, as a beneficiary, should have a say in the management of Larson's affairs and that Prokupek wished Looby to continue as guardian.

The GAL concluded that Larson lacked the capacity to make any intelligent recommendation as to his choice for a guardian and conservator. The GAL recommended that Looby be appointed as a permanent guardian and conservator, remaining as temporary guardian and conservator until that time; that Toman and the friend Larson had suggested as guardian be restricted from any contact with Larson; and that further investigation be carried out concerning the validity of the transfer of 100 acres to Toman.

On December 3, 2004, an entry of appearance as attorney for Larson was filed by Margaret A. Badura of the law firm David J. Cullan & Associates. On December 14, a motion to show cause, to recognize counsel, and to schedule hearing was filed with the county court by Badura and David J. Cullan of the law firm David J. Cullan & Associates, as well as by Kirk L. Meisinger of the law firm Ginsburg & Meisinger. Badura, Cullan, and Meisinger alleged that Larson had terminated the employment of Wilson as his attorney, but despite a stated intention of doing so, Wilson had failed to withdraw; that Badura and Meisinger were his current attorneys of choice; and that it was in the best interests of Larson and the efficient administration of justice that Larson's choice of attorneys be honored. Badura, Cullan, and Meisinger requested that Wilson show cause why she should not be directed by the court to withdraw. Meisinger filed an entry of appearance on December 17. On December 22, Wilson filed an application for a court order allowing her to withdraw as attorney of record.

On December 22, 2004, Larson, by and through his attorneys Badura, Cullan, and Meisinger, filed an application for findings and order. The application alleged that under Neb. Rev. Stat. § 30-2626(e) (Cum. Supp. 2004), a temporary order for guardianship shall terminate at the end of 90 days unless a request is filed within the 90-day period and the court extends the temporary guardianship for good cause shown. Similar restrictions for a temporary conservatorship were set forth, citing Neb. Rev. Stat.

§ 30-2630.01(e) (Cum. Supp. 2004). The application alleged that more than 90 days had elapsed without a request or good cause shown for extending the temporary guardianship or conservatorship. Larson thus prayed for a court order stating that the temporary guardianship and conservatorship had expired and ordering that Looby "cease and desist from acting as or representing himself" to be Larson's temporary guardian and conservator.

The court filed an order on December 22, 2004, scheduling a hearing for January 27, 2005, on Wilson's motion and stating that as Wilson was presently still attorney of record for Larson, it declined to hear Badura, Cullan, and Meisinger's application for findings and order. The court stated that it additionally declined to hear Badura, Cullan, and Meisinger's December 22, 2004, application for findings and order because the record did not reflect the required written notice of hearing to all attorneys of record. The court therefore ordered that no hearing would be held on the application for findings and order unless or until (1) Wilson was allowed leave to withdraw, (2) the application was set for hearing, and (3) notice of such hearing was provided to all attorneys of record.

Looby later filed a motion to restrict assets of the ward wherein Looby asserted that he had reason to believe Larson might withdraw funds in the immediate future in a manner contrary to his best interests. The court granted Looby's motion on December 29, 2004.

That same date, in the district court for Cass County, Looby filed an action against Toman and the Cass County Bank seeking a declaratory judgment that the warranty deed transferring 100 acres of Larson's farmland to Toman was null, void, and wholly without effect. The complaint alleged that the deed was a result of undue influence over Larson, who, at the time of the execution of the deed, was "so weak and unbalanced that he could not understand or comprehend the purport and effect of the execution of the deed."

On January 7, 2005, Wilson filed an application for direction and notice of hearing stating that she had received written notice from Larson requesting that she resign and had prepared the application for withdrawal; however, she subsequently came to question whether her withdrawal would be permissible under the

Code of Professional Responsibility. Looby filed a response to this motion and Wilson's original application to withdraw, questioning Larson's mental capacity to dismiss counsel.

Toman entered his first motion with the court on January 10, 2005, by way of a motion to terminate temporary guardianship and dismiss the petition for appointment of temporary guardian and conservator and permanent guardian and conservator. Attached thereto was an alleged power of attorney for health care signed by Larson on November 5, 2003, and appointing Toman. The health care power of attorney stated that Larson authorized Toman "to make health care decisions for me when I am determined to be incapable of making my own health care decisions." Also attached was a durable power of attorney document dated November 5, 2003, designating Douglas Duey as true and lawful attorney in fact and authorizing Duey to handle Larson's financial affairs in numerous respects and to do all other things necessary in connection with a general power to act on Larson's behalf. The document further stated that in the event Larson should become incapacitated to the extent that he were unable to make or communicate responsible decisions concerning his person, then his attorney in fact would have all the power and authority of a guardian as specified in the Nebraska Probate Code. Toman alleged that pursuant to Neb. Rev. Stat. § 30-2620 (Cum. Supp. 2004), the attached powers of attorney showed that the appointment of a temporary guardian and conservator and permanent guardian and conservator for Larson was not the least restrictive alternative available for Larson's continuing care or supervision.

Looby later filed an objection to the motion to terminate temporary guardianship and dismiss the petition for appointment of temporary guardian and conservator and permanent guardian and conservator. Looby asserted that Toman was not an "interested person" as defined by Neb. Rev. Stat. § 30-2209(21) (Cum. Supp. 2004) and furthermore, that Toman had a conflict of interest in serving as a fiduciary for Larson as evidenced by the 100-acre land transfer to Toman.

Badura and Meisinger filed a request for expedited hearing regarding entry of appearance of counsel for Larson. The request set forth the allegations previously made in the motion to show

cause and recognize counsel and made the further allegation that Larson had stated he felt like he was "in prison" and wished to be allowed to communicate fully and freely with Badura and Meisinger, as his attorneys. Attached to the request were two affidavits. First, the affidavit of Ronald D. Svoboda, attorney at law, was presented, wherein Svoboda testified that he had first met Larson on September 30, 2003, to discuss estate planning. Svoboda stated that after "several telephone calls and office consultations," in November 2003, he prepared on Larson's behalf a last will and testament, durable power of attorney, revocation of a prior durable power of attorney, and other documents. Svoboda stated that during all the discussions he had with Larson between September 30 and November 11, Larson appeared competent to execute all the documents that he had signed at that time. The other affidavit attached to Badura and Meisinger's request was that of a man who testified that he had known Larson for many years as a neighbor; that Larson appeared competent; and that as of December 2 or 3, 2004, Larson had been moved to a different room at a nursing home where his new roommate was nonconversant and where no one was allowed to visit Larson without being first cleared by Prokupek. The request asked that the court enter Badura and Meisinger as attorneys for Larson forthwith and that they be allowed as his attorneys to freely communicate with Larson without interference or impediment.

On January 11, 2005, there was a hearing in the county court on Badura, Cullan, and Meisinger's motion to show cause and recognize counsel. Also discussed was Toman's motion to terminate temporary guardianship and dismiss the petition for appointment of temporary guardian and conservator and permanent guardian and conservator. Present at court were Larson, Looby and his two attorneys, the GAL, Badura, Cullan, Meisinger, Toman's attorney, Prokupek, the ombudsman with the Eastern Nebraska Office on Aging, and the state's long-term care ombudsman. Wilson left early due to a scheduling conflict and was not present during the hearing. Neither Duey nor counsel representing him was present.

At this nonevidentiary hearing, Prokupek described the "appalling" amount of money being expended from Larson's estate to support eight attorneys and the fact that Badura, Cullan, and

Meisinger had, for 24 hours, without notifying her where he was, removed Larson from the nursing home where he was staying. Speaking half to the court and half to Larson, she described that Larson was being dragged in and out of nursing homes and to court hearings and that he did not even know why he was there. Larson responded directly to Prokupek that he did "know what they're trying to do." Larson was then asked by the court why he thought he was there, to which Larson responded that he was trying to protect his property and that it was his and not Prokupek's. Larson was able to identify Badura and Meisinger by name as two out of the three lawyers he stated that he wished to have represent him, explaining that he had known Meisinger "about all of [Meisinger's] life."

The court repeatedly refused to address any concerns expressed by Badura, Cullan, or Meisinger as to Larson's care, directing them to report any concerns to the GAL and to Looby. When Cullan stated that he wished Larson to be assessed by a health care professional, the court responded that Cullan had no standing because he was not an attorney of record and that he would need Looby's permission for any assessment.

When Cullan expressed his concern that Looby's 90-day tenure as temporary guardian had not validly been extended, the court summarily stated that Looby should continue as temporary guardian and conservator because it was in Larson's best interests that he so continue. Cullan interjected that he did not believe that good cause had been properly shown, to which the court summarily replied that in the court's opinion, it had.

In an order filed January 18, 2005, the county court specifically overruled Badura, Cullan, and Meisinger's motion to show cause and recognize counsel. The court stated that it had no authority to direct Wilson to withdraw as Larson's attorney, that Wilson would remain as Larson's attorney until further court order, that Looby would remain as temporary guardian and conservator until further court order, and that Larson was to remain a resident at his present nursing home until further court order.

On January 14, 2005, Toman filed a motion to recuse the county court judge for the reason that a conflict of interest existed. The attached affidavit of D.C. Bradford, attorney for Toman, stated therein that Bradford represented the plaintiff in

an action against a partnership in which the judge's husband held a partnership interest and was the managing partner. Bradford also testified that he represented the Omaha Housing Authority in an ongoing dispute with a company of which the judge's husband was the president, treasurer, director, and a shareholder.

The GAL filed another interim report, wherein she stated that she "absolutely and vehemently" opposed Badura, Cullan, and Meisinger's request to be appointed as counsel and describing various actions by these attorneys which she believed were contrary to Larson's best interests. Attached to the report were numerous medical reports and evaluations of Larson to support her conclusion that Larson was incapacitated. Badura, Cullan, and Meisinger filed an objection to the interim report and updated report of the GAL and a motion, praying that the interim report and updated report be struck from the record.

Another nonevidentiary hearing was held on January 27, 2005, on Wilson's motion to withdraw and her later motion for direction, on Looby's motion insofar as it related to the request to permanently restrict funds, on Toman's motion to terminate temporary guardianship, and on Toman's motion to recuse. Also addressed was Badura, Cullan, and Meisinger's request for expedited hearing and entry of appearance. While the court first opined that its prior ruling as to the motion to recognize counsel had rendered the request moot, Cullan interjected that it was his understanding that the request had been held in abeyance until a determination as to Wilson's request to withdraw was made. The court, upon finding no ruling in its records, stated that perhaps it still needed to rule on the motion.

The court concluded that Toman was not an interested party, because regardless of any power of attorney which may or may not exist, the potential conflict of interest resulting from the litigation filed by Looby was "an overriding factor which would substantially overrule any reason why this Court should find . . . Toman to be an interested party." The court also noted the fact that Larson did not remember giving the powers of attorney. To this, Bradford responded that Larson's competency at the time of the grant was relevant and he sought to submit the affidavit of Svoboda, the attorney who prepared the powers of attorney at

Larson's request, into evidence. The court rejected the offer for lack of foundation to the effect that Svoboda was an expert in determining mental competency. The court similarly rejected the offer of the affidavit of Bradford regarding the motion to recuse, stating that it did not need to reach this issue due to the determination that Toman lacked standing.

The court was presented with an updated report of the GAL. The court stated:

> I'm marking it as Exhibit 2. Exhibit 2 is received, however for limited purposes of the hearings being heard today not for purposes of — because obviously if this thing goes to trial eventually on the issue of competency and such then you would need to be calling in other witnesses, but for limited purposes of today's hearing . . . .

The court explicitly affirmed that the hearing was not an evidentiary hearing. This updated report largely restated the contents of the other reports outlined above, with more recent observations of Larson's further mental decline and opinions as to how the court should rule on the various motions before it. Attached to this updated report were the two previous reports and all the exhibits attached thereto. The court overruled objections, apparently made by Badura, Cullan, and Meisinger, that the reports were pejorative and inaccurate.

The court overruled Wilson's request to withdraw. The court stated that regardless of what Larson wanted, it was the court's decision whether to allow counsel of record to withdraw. The court explained that if Larson were mentally competent, then he was "playing games with this Court by going through a succession of various attorneys," having spoken to no fewer than four lawyers, which caused delays and increased costs. The court stated that sometimes the court needed to "put the clamps on a client who wants to keep changing lawyers simply to delay matters." If, the court explained, on the other hand, Larson was not competent, then "these lawyers are playing games with . . . Larson and I need to look at . . . Larson's best interest."

At this point, Badura, Cullan, and Meisinger made an oral motion asking the court to allow them to join Wilson as cocounsel. The GAL and counsel for Looby objected, and the court overruled Badura, Cullan, and Meisinger's motion to join as

cocounsel. Badura, Cullan, and Meisinger's request for an expedited hearing was summarily overruled because of the court's refusal to allow those parties to be recognized as interested parties. The court's order reflecting these rulings was file stamped February 8, 2005.

A petition by Looby to revoke Toman's medical care power of attorney was filed February 9, 2005. On February 24, Toman filed a notice of appeal from what he described as the court's February 7 order.

On February 25, 2005, a notice of appeal was filed on behalf of Larson "by and through the counsel of his choice," Badura, Cullan, and Meisinger. The notice stated that Larson was appealing from the county court's January 22 order refusing to allow Larson's attorneys to represent him. On March 1, Badura, Cullan, and Meisinger filed a "Corrected Notice of Intention to Prosecute Appeal," stating that they were appealing from the county court's January 27 order refusing to allow them to appear as attorneys of record.

On April 1, 2005, the county court issued an order suspending Toman and Duey's powers of attorney pending an evidentiary hearing and ordering that Looby was to make all medical and health care decisions for Larson as part of his duties as temporary guardian. The court noted that an emergency existed because those providing medical care to Larson needed to know the proper person to make decisions on his behalf. On April 28, the county court scheduled an evidentiary hearing to be held on July 12 on the petition to revoke medical care power of attorney and on the petition for appointment of a permanent guardian and conservator. The order specifically found that Toman and Duey were interested persons in the guardianship proceedings and petition to revoke medical care power of attorney. It did not list Toman as an interested person in the conservatorship.

III. ASSIGNMENTS OF ERROR

Toman assigns that the county court erred in (1) determining that Toman has no standing, (2) overruling Toman's motion to recuse, (3) overruling Toman's motion to terminate temporary guardianship and dismiss the petition for appointment of temporary guardian and conservator and permanent guardian and

conservator, and (4) failing to receive into evidence the affidavits of Bradford and Svoboda.

Badura, Cullan, and Meisinger filed an appellees' brief on behalf of Larson, assigning that the county court erred in (1) not allowing them to enter their appearance and represent Larson and (2) not allowing them to represent Larson as cocounsel with Wilson.

IV. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law in which an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. See *Hall v. City of Omaha*, 266 Neb. 127, 663 N.W.2d 97 (2003).

V. ANALYSIS

1. TOMAN

(a) Standing

[2,3] Toman first assigns that the county court erred in determining that he lacked standing. Before addressing the county court's decision to dismiss Toman for lack of standing, we first must determine that the order was in fact a final, appealable order. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *Saunders County v. City of Lincoln*, 263 Neb. 170, 638 N.W.2d 824 (2002). The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005).

[4-6] The court's order of dismissal was made in a special proceeding. Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action. See *id.* We have described an action as any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the

pleadings, process, and procedure provided by statute and ending in a final judgment. See *id.* Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding. *Id.* Proceedings initiated pursuant to Neb. Rev. Stat. § 30-2619 (Cum. Supp. 2004), to appoint a guardian, and Neb. Rev. Stat. § 30-2633 (Cum. Supp. 2004), to appoint a conservator, are special proceedings. See *Hall v. Hall*, 122 Neb. 228, 239 N.W. 825 (1932).

[7] Having determined that there was a special proceeding, we next consider whether a substantial right was affected. We have stated that a substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999). Looby asserts that the court's order did not affect a substantial right because under Neb. Rev. Stat. § 30-3420(5)(b) (Reissue 1995), a power of attorney supersedes any guardianship proceedings to the extent that the proceedings involve the right to make health care decisions.

A peremptory denial of permission to file a claim is a final, appealable order. *In re Estate of Emery*, 258 Neb. 789, 606 N.W.2d 750 (2000). In *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989), we held that a right conferred by statute upon persons interested in a decedent's estate to petition the county court to remove the personal representative was a substantial right. Clearly, Toman's *asserted* right under the probate code to intervene in guardianship and conservatorship proceedings is a substantial right. Toman need not demonstrate the underlying merits as to how he actually falls within the grant of this substantial right in order for its denial to be reviewable as a final, appealable order. Similarly, he need not, as Looby suggests, show that his powers pursuant to the health care power of attorney are in jeopardy.

However, although Toman appealed from a final, appealable order, we ultimately do not address Toman's standing in the guardianship and conservatorship proceedings, because this issue is moot. During oral arguments, Toman explicitly stated that he was not an interested party with regard to the conservatorship. Rather, his only assertion as to standing was with regard

to the guardianship. Accordingly, the merits of Toman's standing as to the conservatorship are not before us, as they have been waived. As to the guardianship proceedings, we note that the court issued a later order specifically stating that Toman was an "interested person" as to both the guardianship proceedings and the petition to revoke his medical power of attorney.

[8] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004). Because, after Toman's appeal was perfected, the court issued an order finding that Toman did have standing as to the guardianship proceedings, any dispute in Toman's appeal as to his standing in the guardianship proceedings no longer exists.

(b) Recusal

[9] Toman next asserts that the court erred in denying his motion to recuse. The record reflects, however, that the court never ruled on Toman's motion to recuse. Instead, the court stated that it need not decide the issue because it was rendered moot by its decision as to Toman's lack of standing. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004). While the record reflects that the court later determined Toman to have standing, there is no evidence that Toman renewed his motion to recuse. Had he done so, presumably, in accordance with the court's prior rationale, the court would have addressed the merits of Toman's recusal motion. In short, Toman assigns error to a ruling that the court never actually made, having refused to rule on a ground that is no longer pertinent. Under such circumstances, we do not address Toman's assignment of error that the court erred in denying his motion to recuse.

(c) Motion to Dismiss and Svoboda Affidavit

Finally, Toman asserts that the county court erred in failing to grant his motion to dismiss the guardianship and conservatorship

proceedings and in failing to receive into evidence the affidavit of Svoboda, the drafting lawyer for Toman's health care power of attorney. These issues were never ruled upon because of the court's determination that Toman lacked standing, nor do they bear upon the correctness of the court's order from which this appeal was taken, the dismissal of Toman for lack of standing. See *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005) (our jurisdiction over final, appealable order extends to issues that bear on correctness of that order). As such, these issues are not properly before us in this appeal.

2. BADURA, CULLAN, AND MEISINGER

[10] We next address Badura, Cullan, and Meisinger's purported cross-appeal. Badura, Cullan, and Meisinger filed a "Brief of Appellee Everett D. Larson" with this court. While assignments of error are made, there is no designation of a cross-appeal. In *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999), we refused to address assignments of error in an appellee's brief not designating a cross-appeal. We explained that "the appellate courts of this state have always refused to consider a prayer for affirmative relief where such a claim is raised in a brief designated as that of an appellee" and "have repeatedly indicated that a cross-appeal must be properly designated, pursuant to rule 9D(4), if affirmative relief is to be obtained." *Id.* at 145-46, 602 N.W.2d at 450-51. Neb. Ct. R. of Prac. 9D(4) (rev. 2001) 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.

Parties wishing to secure appellate review of their claims for relief must be aware of, and abide by, the rules of this court and the Nebraska Court of Appeals in presenting such claims. *In re Interest of Natasha H. & Sierra H., supra.* Any party who fails to properly identify and present its claim does so at its peril. *Id.* Badura, Cullan, and Meisinger have not complied with the rules of this court, and we therefore do not address their assignments of error.

3. Plain Error

The issues properly presented by the parties have thus been addressed. However, we note that the record before us raises many concerns with regard to the manner in which the court has conducted its proceedings. Most egregious is the court's failure to hold an evidentiary hearing on Larson's competency during the approximately 8 months of proceedings which took place under a temporary guardianship and conservatorship.

Section 30-2619(b) states that upon the filing of a petition for a finding of incapacity and appointment of a guardian, the court "shall set a date for hearing on the issues of incapacity." Section 30-2619(d) provides:

> The person alleged to be incapacitated is entitled to be present at the hearing in person and to see and hear all evidence bearing upon his or her condition. He or she is entitled to be present by counsel, to compel the attendance of witnesses, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor appointed by the court pursuant to sections 30-2619.01 and 30-2624, and to appeal any final orders or judgments. The issue may be determined at a closed hearing only if the person alleged to be incapacitated or his or her counsel so requests.

Under § 30-2626(a), if an emergency exists, a temporary guardian "to address the emergency" may be appointed by ex parte order of the court "pending notice and hearing." Under § 30-2626(e), the temporary guardianship shall terminate at the end of the 90-day period in which the temporary guardianship is valid, or at any time prior thereto, if the court deems the circumstances leading to the order for temporary guardianship no longer exist, or if an order has been entered as a result of a hearing pursuant to § 30-2619 which has been held during the 90-day period. Provision is made for the extension of the 90-day period "[f]or good cause shown." § 30-2626(d).

[11] Read together, these statutes provide that an evidentiary hearing should be held expediently on a guardianship or conservatorship petition and that temporary guardians and conservators are intended to exercise their powers in a limited manner and for a limited period of time. We have recognized in guardianship proceedings that a true evidentiary hearing is required to support

a finding of incompetency. See, *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005); *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004). This rule cannot be circumvented by continuous extensions of a temporary guardianship, nor are numerous reports by a GAL a substitute for an evidentiary hearing.

While § 30-2626(d) does provide that the 90-day temporary guardianship period may be extended for good cause shown, it is hard to imagine what "good cause" could justify a delay of 8 months. Regardless, it cannot be said that the court's summary conclusions as to good cause and its orders extending the temporary guardianship and conservatorship until further court order qualify as a showing of good cause sufficient to circumvent the alleged incapacitated person's right to a speedy resolution of whether, in fact, a need exists to restrict his or her independence to the extent exercised by a temporary guardianship or conservatorship.

Here, Larson has clearly asserted that he is not incapacitated, at least not to the extent asserted by the petition for the appointment of a guardian and conservator. Yet the court, under the advice primarily of the GAL, appears to treat Larson's complete incompetence as a foregone conclusion. Without giving Larson the benefit of an evidentiary hearing to determine competency, the court ignored Larson's expressed wishes regarding Looby's not being his guardian and conservator. The court ignored Larson's expressed wishes as to who his attorneys of record should be. The court refused to allow Larson to dismiss Wilson, despite the fact that Wilson had long since ceased to advocate for her client's expressed desires or to pursue Larson's right to an evidentiary hearing. Instead, the court allowed Looby, for an extended period of time, almost unlimited powers as temporary guardian and conservator over Larson's personal liberty and his financial affairs.

The fact of Looby's extensive powers as temporary guardian and conservator also makes plain the fact that Looby's powers were not, as the statutory scheme mandates, limited to those powers necessary to address an emergency. Under § 30-2626(a), an ex parte order appointing a temporary guardian is allowed only in order to address an emergency, and "[t]he order and

letters of temporary guardianship shall specify the powers and duties of the temporary guardian *limiting the powers and duties to those necessary to address the emergency*." (Emphasis supplied.) Likewise, § 30-2630.01(a) states that a temporary conservator may be appointed "to address the emergency." Here, the reference made to an "emergency" in Prokupek's petition was the need for the doctors to have someone in place to make appropriate medical decisions. The petition also stated that Larson needed someone to take care of his financial dealings, although it failed to describe to what extent such dealings constituted an emergency.

In *Becker v. Rogers*, 235 Ark. 603, 361 S.W.2d 262 (1962), the court, addressing language similar to that found in the Nebraska statutes, noted that a temporary guardian was designed, under the probate code, to take care of emergencies. The court explained that "[t]he principal purpose of a temporary appointment is to take care of urgent and emergent matters that have arisen, and where prompt action is essential before the legal requirements for the appointment of a permanent guardian can be met." *Id.* at 608, 361 S.W.2d at 265. Thus, the court illustrated that, for example, instances could arise where a delay would cause irreparable damage to the estate of an alleged incapacitated person.

Here, while certain actions of the temporary guardian concerning Larson's medical care and financial dealings were arguably necessary, it is hard to imagine that other actions, such as the separate suit against Toman to set aside the 100-acre land transfer, were essential to any urgent matter. Of course, the court did not make any specific findings as to emergency matters, nor did it make any attempt to limit the temporary guardian and conservator to such matters. Accordingly, we have little to review.

It is clear that the failure of the court to follow the statutory mandates with regard to the limited nature of the powers and duties of the temporary guardian and conservator, as well as its failure to follow the mandate of a timely evidentiary hearing on competency, constitutes plain error. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

We determine that the appropriate disposition of this appeal is to remand the cause to the trial court with directions to expedite an evidentiary hearing on Larson's competency and what permanent arrangements, if any, are necessary to protect Larson if he is shown to be incapacitated. In the meantime, the court is directed to limit Looby's authority as guardian and conservator to those powers necessary to address the emergency alleged to exist in the petition that resulted in his appointment. Until Larson is determined to be incapacitated, we further direct the court to honor his election as to whom he wishes to represent him.

VI. CONCLUSION

We decline to address the parties' assignments of error, as none of the issues raised are properly before us. We remand the cause with directions for the court to conduct an immediate evidentiary hearing as set forth above.

REMANDED WITH DIRECTIONS.

IN RE PETITION OF SANITARY AND IMPROVEMENT DISTRICT NO. 1 OF GOSPER COUNTY (AND DAWSON COUNTY), NEBRASKA. EVALD AND MARY LOU ABRAMSON ET AL., APPELLEES, V. COSMO CLUB ET AL., APPELLANTS.

708 N.W.2d 809

Filed January 13, 2006. No. S-05-533.

1. **Sanitary and Improvement Districts: Equity.** The hearing before a trial court provided for in Neb. Rev. Stat. § 31-730 (Reissue 2004) concerning the organization of sanitary and improvement districts is one in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
4. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
5. **Judgments: Service of Process.** In order to set aside a judgment or order based on service by publication, a party must affirmatively assert a lack of actual notice.
6. **Statutes.** The meaning of a statute is a question of law.

7. ____. In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject.
8. **Statutes: Legislature: Intent.** A collection of statutes in pari materia may be considered and construed together to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible.
9. **Statutes: Appeal and Error.** When 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.
10. **Trial: Evidence: Appeal and Error.** To preserve a claimed error in the admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence.
11. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
12. **Sanitary and Improvement Districts: Trusts.** Initial trustees of a sanitary and improvement district must own real estate within the proposed district.
13. **Appeal and Error.** In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.

Appeal from the District Court for Gosper County: JAMES E. DOYLE IV, Judge. Affirmed.

Steve Windrum for appellants.

Robert J. Huck, Martin P. Pelster, and David J. Skalka, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellees.

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

WRIGHT, J.

I. NATURE OF CASE

Owners of real property around Johnson Lake associated to form a sanitary and improvement district (SID) under Neb. Rev. Stat. § 31-727 (Reissue 1998) for the purpose of installing a sewer or water system. After notifying real property owners within the proposed district and obtaining signatures on the articles of association, the petitioners asked the district court to establish the proposed SID. Some residents (referred to herein as "the objectors") filed objections to the formation of the SID. The district court found that the petitioners had satisfied the statutory requirements for forming an SID and granted the petitioners' request. The objectors appealed.

II. SCOPE OF REVIEW

[1,2] The hearing before a trial court provided for in Neb. Rev. Stat. § 31-730 (Reissue 2004) concerning the organization of sanitary and improvement districts is one in equity. See *Zwink v. Ahlman*, 177 Neb. 15, 128 N.W.2d 121 (1964). 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. *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003); Neb. Rev. Stat. § 25-1925 (Reissue 1995).

III. FACTS

Johnson Lake is a recreational lake and residential community located between Lexington and Elwood, Nebraska. Parts of Johnson Lake are located in both Gosper and Dawson Counties. The lake serves the irrigation, power, and recreational needs of the area. Central Nebraska Public Power and Irrigation District (Central) owns and operates Johnson Lake, the supply canals that enter and exit the lake, all the shoreline, and nearly all the property adjacent to the lake. The majority of residential homes, weekend and seasonal cabins, and businesses around the lake are located on land owned by Central; the principal exceptions are three residential areas located along the lake's northwest shoreline, which contain 227 privately owned lots.

As of February 2002, a total of 920 residential lots, 28 active businesses, and 2 recreational areas maintained by Nebraska's Game and Parks Commission made up the Johnson Lake community. Nearly all of the residences, cabins, businesses, and Game and Parks Commission facilities have their own septic tanks and absorption fields for waste disposal.

Estimates indicate that as many as 5,200 people are at the lake on holiday weekends during the summer. The Game and Parks Commission has estimated that as many as 43,250 campers use its sites during the year and that 196,150 " 'day-use visitors' " frequent the lake every year. Because of increased occupancy and development, wastewater volumes are increasing yearly at Johnson Lake. This increase has created wastewater treatment and disposal problems. Since 1998, some of the septic systems of Central's lessees have failed and cannot be

repaired or replaced because the systems cannot comply with state setback regulations.

Setback requirements for septic systems and water wells are regulated by the Department of Environmental Quality (DEQ) and the Department of Health and Human Services (DHHS). The record indicates that more than half of the existing septic systems around Johnson Lake do not comply with state setback requirements. Septic systems generally have a lifespan of 20 to 40 years, and when owners attempt to repair or replace failed systems, install new water wells, or build new structures on their property, the setback requirements are enforced by state agencies. DHHS has delayed issuing administrative compliance orders because of efforts in the community to achieve a long-term solution through the establishment of a sanitary sewer system.

DEQ monitors water quality in Nebraska. It has found fecal coliform (i.e., bacteria found in human and animal waste) in the water of Johnson Lake at levels exceeding DEQ's water quality standards. Based on data collected between 2001 and 2003, DEQ designated Johnson Lake an impaired water body under the federal Clean Water Act in 2004 due to excessive fecal coliform. The record indicates that waste from septic systems has contributed to this contamination.

In 2001, area residents asked Central to commission a study to determine the severity of the wastewater problem and to recommend possible solutions to the problem. A feasibility study was completed in February 2002 by a civil engineering consulting firm specializing in water and sewer design. The firm concluded that "on-site treatment systems such as septic tanks and drain fields can no longer be relied upon as being adequate treatment systems at Johnson Lake" and that "present and future conditions at Johnson Lake will require other collection and treatment technologies." The "construct[ion of] a centralized collection and treatment system to serve all of the lots and residents at Johnson Lake" was recommended.

Based on research and a poll taken of area property owners and lessees, concerned residents determined that an SID would be the best governing vehicle to facilitate the development and operation of a centralized wastewater system. Thereafter, many of the residents associated themselves for the purpose of forming

an SID under the provisions of Neb. Rev. Stat. §§ 31-727 to 31-780 (Reissue 1998 & Supp. 2003) and adopted articles of association. Signatories to the articles filed a petition in the Gosper County District Court asking that SID No. 1 of Gosper County (and Dawson County), Nebraska, be formed. According to the articles, the purposes of the district would be to "acquire, install, repair, maintain, renew, reconstruct, and replace a sanitary sewer system, disposal plants, [and] a water system; and to provide for collection and disposal of waste and sewage in a satisfactory manner." The proposed SID encompassed all the property abutting Johnson Lake situated between the lake and the centerline of the paved road surrounding the lake. Some persons holding land within the proposed SID opposed its formation and filed objections.

The district court found that the petitioners had fulfilled all the requirements for forming an SID; thus, SID No. 1 of Gosper County (and Dawson County), Nebraska, was established. Various objectors filed a motion for new trial, which the district court overruled. The objectors appealed, and this court moved the case from the docket of the Nebraska Court of Appeals to its own docket.

IV. ASSIGNMENTS OF ERROR

The objectors claim, renumbered and rephrased, that the district court erred in (1) determining that it had personal jurisdiction over the proceedings; (2) determining that the petitioners had satisfied the requirements of § 31-727 for the formation of an SID; (3) finding that the establishment of the SID was conducive to the public health, convenience, or welfare; (4) appointing the five nominated trustees for the SID; (5) determining that the petitioners established a prima facie case on their petition at the hearing thereon under § 31-730; (6) determining that their objections were insufficient to prevent the establishment of the SID under § 31-729; and (7) overruling their motion for a new trial.

V. ANALYSIS

1. Personal Jurisdiction

[3] The objectors claim the district court lacked personal jurisdiction over the proceedings because the petitioners allegedly

failed to properly serve notice of the proceedings to many owners of real estate within the proposed SID. Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004). We reject the objectors' argument for the following reasons.

The objectors assert that "numerous" certified mail return-of-service receipts indicate that service of process was insufficiently made. See brief for appellants at 12. However, their brief does not allege that the service of process on any objector was defective. They offer three examples of return-of-service receipts allegedly demonstrating improper service, but it is unclear whether the examples in fact represent defective service of process. Nevertheless, none of the examples involved the objectors.

[4] The objectors cannot assert a claim based on defective service to other parties. In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Cornhusker Pub. Power Dist. v. City of Schuyler*, 269 Neb. 972, 699 N.W.2d 352 (2005). Cf. *Bailey v. Mahr*, 199 Neb. 29, 255 N.W.2d 866 (1977) (defendants, whose sole interest in partition proceeding concerned two tracts, who were properly served, who filed voluntary appearance, and over whom district court had competent jurisdiction, had no standing to challenge sufficiency of service by publication as to unknown defendants in connection with another tract and failed to demonstrate how they might have been prejudiced by alleged error in service by publication).

[5] The objectors also claim that the petitioners' attempted service by publication failed to notify "[n]umerous" persons or entities with an interest in the action. See brief for appellants at 11. In order to set aside a judgment or order based on service by publication, a party must affirmatively assert a lack of actual notice. *Pilot Investment Group v. Hofarth*, 250 Neb. 475, 550 N.W.2d 27 (1996). The objectors fail to provide any examples of parties who received no actual notice; thus, we reject the objectors' argument concerning service by publication.

In addition, the objectors have waived their personal jurisdiction argument based on defective service of process because they participated in the proceedings beyond objecting to the

sufficiency of process. Under Neb. Rev. Stat. § 25-516.01 (Cum. Supp. 2004), if a defense of "lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process" is asserted

> either by motion or in a responsive pleading and the court overrules the defense, an objection that the court erred in its ruling on any issue, except the objection that the party is not amenable to process issued by a court of this state, will be waived and not preserved for appellate review if the party asserting the defense thereafter participates in proceedings on any issue other than those defenses.

Therefore, the objectors have waived their personal jurisdiction objection.

2. Requirements of § 31-727

Section 31-727 sets forth the requirements for the formation of an SID. The objectors claim the district court erred in determining that the petitioners satisfied these requirements. We address their arguments below and conclude that the district court did not err in determining that the petitioners satisfied the § 31-727 requirements.

(a) Majority of Owners Requirement

In order for an SID to be established, a "majority of the owners having an interest in the real property within the limits of a proposed . . . district" must support its formation by signing the articles of association. See § 31-727(1). The objectors claim that the petitioners failed to satisfy § 31-727 because less than a "majority of the owners" signed the articles. Thus, we must address whether § 31-727 requires a majority of the owners *by name* or a majority of the owners *by area*.

The record in this case indicates that Central owns a majority of the real estate in the proposed SID. With the exception of three residential areas that contain 227 privately owned lots, Central owns the greatest number of lots around Johnson Lake used for residences, seasonal cabins, and businesses. The objectors contend that Central should be counted only once as an owner in support of the SID, whereas the petitioners contend that Central should be counted in proportion to the amount of real estate it owns within the proposed district.

[6] The meaning of a statute is a question of law. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004). We conclude that the phrase "majority of the owners" in § 31-727(1) refers to owners representing a majority of the area of real estate within the district.

[7,8] In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject. *Cox Nebraska Telecom v. Qwest Corp., supra.* A collection of statutes in pari materia may be considered and construed together to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible. See *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998).

Considering other SID provisions, we find that under § 31-740.01, trustees may amend the articles of association unless "the owners representing a majority of the front footage of real estate within the district" oppose the amendment. Under § 31-767, trustees may dissolve an SID unless "the owners representing a majority of the area of real estate within the district" object. Under § 31-769, trustees may detach property from an SID unless "the owners representing a majority of the area of real estate within the district" object.

[9] When 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. *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002). Section 31-727 was "designed to benefit and improve real property and ameliorate the sanitary conditions" in the proposed district. *Zwink v. Ahlman*, 177 Neb. 15, 20, 128 N.W.2d 121, 124 (1964). If this court were to construe the phrase "majority of the owners" in the manner advocated by the objectors, owners representing only a small fraction of the affected area could defeat the will of the owners representing the majority of the area who wished to address pressing sanitary needs. Such an interpretation of § 31-727(1) would defeat the purpose of the SID statutes.

To establish other types of improvement districts, both in this state and elsewhere, proponents are usually required to obtain the approval of a substantial percentage of landowners by area.

For example, the formation of an irrigation district requires the approval of property owners or leaseholders representing a majority of the acreage within the proposed district. Neb. Rev. Stat. § 46-103 (Reissue 2004). Public utility districts may be created by petition if consent is given by the owners of a majority of the front footage of real estate within the proposed district. Neb. Rev. Stat. § 18-407 (Reissue 1997). Petitions to establish drainage districts ordinarily must be signed by landowners representing a substantial portion of property within the area that will be affected by the improvement. 25 Am. Jur. 2d *Drains and Drainage Districts* § 8 (2004).

SID-formation proceedings are proceedings in equity. See *Zwink v. Ahlman, supra*. Equity is best served by a requirement that a majority of the owners by area must sign the articles of association. By signing the articles, "the owners of real estate so forming the district for such purposes . . . obligate themselves to pay the tax or taxes which may be levied against all the property in the district and special assessments against the real property benefited which may be assessed against them to pay" for the installation of a sewer or water system. § 31-727(2). SIDs are authorized to levy "a tax on the taxable value of the taxable property in the district" sufficient to pay interest on borrowed money and to make repairs to the sewer or water system. § 31-739(1).

The district court correctly noted that Central is not exempt or relieved in part from paying its share of the costs of improvements in the SID. Central, like all other benefited property owners in the district, will be taxed by the SID on the taxable value of its property. See § 31-739. To interpret the "majority of the owners" requirement in § 31-727(1) differently would lead to an inequitable result: Central, as the owner of a majority of the taxable real estate in the proposed SID, would receive less than a one-half-percent vote in forming it.

Therefore, we hold that under § 31-727(1), owners representing a majority of the area within a proposed SID must sign the articles of association. Based on our de novo review of the record, it is clear the petitioners established that owners representing a majority of the area within the proposed SID voted to form the district.

(b) Identification of Persons, Parties, Lands, and Lots Within Proposed SID

Under § 31-727(1)(a) and (f), petitioners must identify the owners of real property within the proposed SID to establish that a majority of the owners support its formation. The objectors claim the petitioners failed to properly identify all persons, parties, lands, and lots within the proposed SID. Neither the SID statutes nor relevant case law specify the manner in which the identity of owners is to be established. Petitioners seeking to form an SID must establish by a preponderance of the evidence that a majority of owners within the proposed SID have joined in the effort to form the SID. Cf. *Zwink v. Ahlman*, 177 Neb. 15, 128 N.W.2d 121 (1964) (concluding preponderance of evidence demonstrated that creation of SID would benefit land in proposed district). We conclude the petitioners satisfied the requirements of § 31-727 regarding the identification of real property owners.

We have determined the petitioners established that a majority of the owners within the district voted to form the SID. This determination leaves unnecessary a detailed discussion of the objectors' claim regarding the identification of real property owners within the district, so we summarize below our review of the record concerning this issue.

[10] The objectors claim that attorney-certified title reports offered by the petitioners did not prove the title and ownership of real estate within the SID because (1) they did not explain how the described lands related to land embraced within the SID and (2) the preparers of such reports made errors when the reports were assembled. These are evidentiary arguments. To preserve a claimed error in the admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence. *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996). At trial, the objectors expressly waived any foundation and hearsay objections to the title report exhibits, and they raised no other objections to these exhibits. Consequently, the objectors have not preserved their ability to contest the title reports before this court.

The objectors also argue that several exhibits admitted at trial demonstrate that the petitioners either added names of persons

who did not own property within the district or omitted names of some who did. Our de novo review of the record reveals that the objectors' arguments are without merit, and we summarize our findings here.

In several instances, the objectors point to one piece of evidence by itself and claim it demonstrates that the petitioners either added an improper name or omitted a proper name. However, the petitioners showed the identity of owners through a combination of evidence, including legal descriptions and maps of the district, title searches, and testimony at trial. From such evidence and the signature pages attached to the articles of association, the petitioners compiled a list of owners who supported the SID and another list of owners who did not support it. We conclude that the petitioners satisfactorily identified the owners within the district.

Several of the objectors' arguments concern property that had been transferred from one owner to another. For example, Central's signature page and an accompanying document from the register of deeds identified certain property within the district not owned by Central. The objectors point out that these documents refer to two owners whose names were not included in either of the petitioners' lists of owners. The record indicates that the property in question was included in the title reports offered by the petitioners, but the property was recorded under a different name because the property had been transferred to another owner. The new owner signed the articles of association.

The objectors challenge the validity of several names on the signature pages attached to the articles of association. We reject these claims. Some of the objectors' claims are based on the false premise that all the names of persons who signed as owners were in fact counted by the petitioners in their final tally of owners; they were not. Furthermore, some of the signatory names contested by the objectors did not appear on older title search reports, but the names did appear on more current title search reports.

[11] The objectors argue that a number of signers to the articles of association failed to include the date of signing and, thus, the petitioners failed to meet their burden of proof to identify real property owners within the district. We reject this argument because § 31-727 contains no requirement that the signature of

each owner supporting the SID be accompanied by a date. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005).

The record shows that a substantial majority of owners on Johnson Lake associated to form the SID. The district court found that even if the alleged omissions or additions were proved to be meritorious (which they were not) and the corrections were made as requested by the objectors, the petitioners would still have a majority of the owners. We agree. We have reviewed the record before us de novo, and we conclude the district court correctly found that the petitioners had adequately identified the owners within the district pursuant to § 31-727.

(c) Requirement That Trustees Be Owners of Real Estate Within Proposed District

The objectors claim the petitioners failed to designate five or more trustees who are "owners of real estate located in the proposed district," as required by § 31-727(3). The objectors' argument is without merit.

[12] "Initial trustees of a sanitary and improvement district must own real estate within the proposed district." *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 621, 386 N.W.2d 433, 435 (1986). See §§ 31-727(3) and 31-730. In the present case, the objectors argue that the five trustees selected were unqualified because they owned only an undivided two-fifths interest in a nonresidential lot within the district. The trustees had been granted their ownership interest as joint tenants by a warranty deed in July 2003. This transfer was made so as to ensure that the proposed trustees met the statutory qualification of ownership.

No particular amount of land or percentage of interest in such land is required by the SID statutes. The district court correctly noted that

> [u]nder Nebraska law an undivided interest in real property is ownership in fee and the owner of such an interest is seized of the ". . . whole estate; he has an undivided [share of the whole] estate rather than the whole of an undivided share." *Hein v. W.T. Rawleigh Co.*, 167 Neb. 176, 190[, 92 N.W.2d 185, 193] (1958). [Section 31-727(3)] does not

require that any of the owners own any particular quantum of fee ownership, but instead they must be "owners of real estate located in the proposed district."

The objectors also take issue with the fact that the lot in which the trustees are interested has no structures or improvements on it other than a septic system. Section 31-727(3) does not require that the trustees own *developed* real estate within the district—only that they own "real estate." The record does not indicate that the trustees' qualifying interest was a sham or was obtained fraudulently. Therefore, we affirm the district court's finding that the petitioners satisfied their burden under § 31-727(3) to propose trustees who were "owners of real estate located in the proposed district." See *id.*

3. Conducive to Public Health, Convenience, or Welfare

Section 31-730 authorizes the district court to establish an SID if the court determines that "the formation of such district will be conducive to the public health, convenience, or welfare." The objectors claim the district court erred in finding that the establishment of the SID would meet this requirement. They argue that the alleged benefit to be derived from the SID is based on speculation and conjecture. We conclude the district court did not err in finding the petitioners had proved by the greater weight of the evidence that the SID would be conducive to the public health, convenience, or welfare of the Johnson Lake community.

The record indicates that the water in Johnson Lake has been polluted with fecal coliform. As a result, lake users have faced an increased risk of contracting diseases or viruses. DEQ has declared Johnson Lake an impaired water body. Waste from septic systems has contributed to the contamination.

Heavy use of the Johnson Lake area by permanent residents and seasonal and recreational users has created wastewater treatment and disposal problems. More than half of the existing septic systems around Johnson Lake are out of compliance with state setback requirements, which have been implemented in the interest of public health to ensure that waste materials do not seep into water wells and surface water. Civil engineers specializing in

sewer and water matters have concluded that septic systems can no longer be relied upon to provide adequate wastewater treatment at Johnson Lake.

The objectors further argue that the proposed SID does not meet the "public health, convenience, or welfare" criterion because less expensive alternatives exist to address the Johnson Lake waste system needs. See § 31-730. The SID statutes do not require the petitioners to prove that the formation of an SID to install a sanitary sewer system is the only, the cheapest, or even the best means of tackling their waste system problems. Under § 31-730, petitioners must show only that the SID will benefit the public health, convenience, or welfare.

4. Remaining Assignments of Error

[13] The objectors did not provide argument for their remaining assignments of error. In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed. *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998). Therefore, we do not consider the additional assignments of error.

VI. CONCLUSION

This court has reviewed de novo the record, and we conclude that the district court did not err in finding that it had personal jurisdiction, the petitioners satisfied the statutory requirements to form an SID, and the SID would be conducive to the public health, convenience, or welfare. Therefore, we affirm the district court's establishment of SID No. 1 of Gosper County (and Dawson County), Nebraska.

Affirmed.

IN RE INTEREST OF PHOENIX L., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SONYA L., APPELLANT.

IN RE INTEREST OF HUNTER T. AND JAGGER L., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SONYA L., APPELLANT.

708 N.W.2d 786

Filed January 13, 2006. Nos. S-05-536, S-05-537.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is a matter of law that requires an appellate court to reach an independent conclusion irrespective of the determination made by the court below.
3. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
4. **Proof: Words and Phrases.** Clear and convincing is a lower standard of proof than proof beyond a reasonable doubt.
5. **Constitutional Law: Equal Protection.** The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.
6. **Equal Protection: Statutes.** The principle of equal protection guarantees that similar persons will be dealt with similarly by the state, but it does not foreclose the state from classifying persons or from differentiating one class from another when enacting legislation.
7. **Equal Protection.** The Equal Protection Clause keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.
8. **Equal Protection: Statutes: Proof.** The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the principle of equal protection.
9. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim.
10. **Equal Protection: Parental Rights: Statutes: Indian Child Welfare Act: Proof.** The lower standard of proof under Neb. Rev. Stat. § 43-279.01(3) (Reissue 2004) for the termination of parental rights to non-Indian children, as opposed to the higher standard of proof under the Nebraska Indian Child Welfare Act, Neb. Rev. Stat. § 43-1501 et seq. (Reissue 2004), does not violate the equal protection rights of parents of non-Indian children.

11. **Equal Protection.** The dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.
12. **Parental Rights: Evidence: Proof.** For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Reissue 2004), it must find that termination is in the child's best interests and that one or more of the statutory grounds listed in this section have been satisfied. The State must prove these facts by clear and convincing evidence.
13. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
14. **Parental Rights: Evidence: Appeal and Error.** If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in Neb. Rev. Stat. § 43-292 (Reissue 2004), the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground.
15. **Parental Rights: Proof.** In order to terminate parental rights under Neb. Rev. Stat. § 43-292(7) (Reissue 2004), the State must prove by clear and convincing evidence that the child has been in out-of-home placement for 15 or more of the most recent 22 months and that termination of parental rights is in the best interests of the child.
16. **Parental Rights.** When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.
17. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
18. ____. When there is no reasonable expectation that a natural parent will fulfill his or her responsibility to a child, the child should be given an opportunity to live with an adult who has demonstrated a willingness and ability to assume that responsibility and has a permanent legal obligation to do so.

Appeals from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Matthew G. Graff for appellant.

Gary E. Lacey, Lancaster County Attorney, and Lori Maret for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Sonya L. appeals from two orders of the separate juvenile court of Lancaster County. In case No. S-05-537, Sonya appeals

from the juvenile court's order terminating her parental rights to her daughter Hunter T. and her son, Jagger L., pursuant to Neb. Rev. Stat. § 43-292 (Reissue 2004), subsections (2) (neglect), (6) (failure to correct conditions leading to adjudication), and (7) (out-of-home placement). In case No. S-05-536, Sonya appeals from the juvenile court's order adjudicating Sonya's daughter Phoenix L. as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) and terminating Sonya's parental rights to Phoenix pursuant to § 43-292(2). The two cases were consolidated on appeal for purposes of oral argument, and we consolidate these cases for purposes of opinion and disposition.

In both cases, Sonya, a mother of non-Indian children, argues that the clear and convincing standard of proof required to terminate parental rights set forth in Neb. Rev. Stat. § 43-279.01(3) (Reissue 2004), to which she is subject, violates equal protection, because the standard of proof is less than that required to terminate the parental rights of parents of Indian children under the Nebraska Indian Child Welfare Act (NICWA), Neb. Rev. Stat. § 43-1501 et seq. (Reissue 2004). Under the NICWA, the standard of proof is beyond a reasonable doubt. In case No. S-05-537, Sonya claims that the juvenile court lacked subject matter jurisdiction to rule on the State's motion to terminate Sonya's parental rights. In case No. S-05-536, Sonya claims that there was insufficient evidence to adjudicate Phoenix. In cases Nos. S-05-536 and S-05-537, Sonya claims that there was insufficient evidence to terminate Sonya's parental rights to Hunter, Jagger, and Phoenix and that the evidence failed to prove termination of those rights was in the best interests of the children. Finding no merit to Sonya's assigned errors, we affirm.

II. STATEMENT OF FACTS

Sonya is the natural mother of the following three minor, non-Indian children: Hunter, born on March 9, 1999; Jagger, born on October 31, 2001; and Phoenix, born on August 5, 2004. The record reflects that Sonya is also the natural mother of Angel L. On November 20, 1997, Sonya's parental rights to Angel were terminated pursuant to § 43-292(2), (6), and (7). Hunter's father is James T. James relinquished his parental rights to Hunter prior

to March 10, 2005. Jagger's father is Justin C. Justin's parental rights to Jagger were terminated by the juvenile court on January 3, 2005. Justin filed a separate appeal challenging the order terminating his parental rights to Jagger, and that order was affirmed by this court in *In re Interest of Jagger L., ante* p. 828, 708 N.W.2d 802 (2005). The record reflects that Jason G. alleges he is the father of Phoenix. There is no indication in the record as to the status of Jason's purported parental rights to Phoenix. None of the children's fathers are parties to appellate cases Nos. S-05-536 and S-05-537, which are the subject of this opinion.

The proceedings in case No. S-05-537 began on August 15, 2000, when a petition was filed in the juvenile court alleging that Hunter was a child within the meaning of § 43-247(3)(a) by reason of the fault and habits of Sonya. According to the record, Hunter, who at the time was approximately 17 months old, had been left by Sonya unattended or without proper supervision. On that same date, the juvenile court entered an order for temporary custody, removing Hunter from Sonya's custody and placing her in the custody of the Nebraska Department of Health and Human Services (DHHS). Hunter was placed in foster care on August 15. She has remained in foster care during the entirety of these proceedings.

On October 17, 2000, the juvenile court adjudicated Hunter under § 43-247(3)(a). Sonya did not appeal the adjudication order. On January 19, 2001, the juvenile court entered a rehabilitative plan, which, in summary, directed Sonya to obtain a psychological evaluation, participate in a drug and alcohol evaluation, participate and successfully complete a parenting program, and have reasonable visitation with Hunter. The primary permanency objective was reunification. Sonya did not appeal the disposition order establishing the rehabilitative plan. Periodic dispositional hearings were held. In orders filed on July 18, 2001, February 2 and December 27, 2002, and March 20, 2003, the court continued the original plan, with minor changes.

On October 1, 2002, a supplemental petition was filed in the juvenile court concerning Jagger. The supplemental petition alleged that he was a child within the meaning of § 43-247(3)(a) by reason of the fault and habits of Sonya. According to the record, a child protection worker had come to Sonya's apartment to

see Sonya and had heard Jagger crying. Jagger was approximately 11 months old at the time. The worker had knocked on the apartment door for 15 minutes, and although the worker continued to hear Jagger crying, no response was received from anyone in the apartment. The worker called the police, who also knocked on the door for a period of time and also received no response. Thereafter, the police contacted the building manager and gained access to the apartment. Jagger was found alone behind a closed bedroom door, which bedroom the record reflects was filthy. Sonya was located asleep in a separate bedroom, with the door also closed. On October 1, the juvenile court entered an order for temporary custody, removing Jagger from Sonya's custody and placing him in the custody of DHHS. Jagger was placed in foster care on October 1. He has remained in foster care during the entirety of these proceedings.

Jagger was adjudicated on April 4, 2003. Sonya did not appeal the adjudication order. On May 2, the juvenile court entered a rehabilitative plan, which noted that poor progress had been made to alleviate the causes of out-of-home placement. This rehabilitative plan directed Sonya to complete a full psychological evaluation, participate in individual counseling sessions, supply DHHS with the names of all adults in her residence, obtain and maintain employment, maintain suitable housing to provide a safe and secure living environment, and have reasonable monitored visitation with Jagger. Sonya did not appeal the dispositional order setting forth the rehabilitative plan.

Periodic dispositional hearings were held involving both Hunter and Jagger. In orders filed October 1, 2003; March 17, May 14, and June 18, 2004; and January 3, 2005, the court continued the rehabilitation plan adopted on May 2, 2003, with minor changes. These orders noted that the primary permanency objective was reunification, but that an alternative permanency objective was adoption.

On May 3, 2004, in case No. S-05-537, the State filed a motion to terminate Sonya's parental rights to Hunter and Jagger pursuant to § 43-292(2), (6), and (7). On August 6, a petition was filed in a separate case in the juvenile court, concerning Phoenix, case No. S-05-536, alleging that she was a child within the meaning of § 43-247(3)(a) by reason of the fault and habits of Sonya.

In summary, this petition alleged that siblings of Phoenix had been adjudicated and were in state custody and that Sonya had failed to correct the conditions that had led to adjudication of those children. Following the filing of the State's petition, the juvenile court entered an order for temporary custody, placing Phoenix in the custody of DHHS. On August 12, the juvenile court entered an order continuing Phoenix's custody with DHHS. Phoenix was placed in foster care in August 2004. She has remained in foster care during the entirety of these proceedings. On August 12, the State filed a motion to terminate Sonya's parental rights to Phoenix pursuant to § 43-292(2).

On March 10, 2005, an evidentiary hearing was held on the August 6, 2004, petition seeking to adjudicate Phoenix and on the motions to terminate Sonya's parental rights as to Hunter, Jagger, and Phoenix. At the start of the hearing, the court heard argument on several motions filed by Sonya. One of these motions was a motion to dismiss the juvenile proceedings, in which motion Sonya claimed that the differing standards of proof between the NICWA, § 43-1501 et seq., which requires that the termination of parental rights to an Indian child be supported by evidence beyond a reasonable doubt, and § 43-279.01, which requires that the termination of parental rights to children not covered by the NICWA be supported by clear and convincing evidence, violated the equal protection guarantees under the U.S. and Nebraska Constitutions. Sonya argued that she was being discriminated against on the basis of race, because as the mother of non-Indian children, her parental rights could be terminated by a showing of clear and convincing evidence—a lower standard of proof. Sonya had also filed a motion to continue the proceedings in the juvenile case involving Jagger, because Jagger's father, Justin, who had had his parental rights terminated by an order entered on January 3, 2005, was appealing that decision. Sonya argued that the father's separate appeal divested the juvenile court of jurisdiction of the motion to terminate the mother's parental rights. Finally, Sonya had filed a motion seeking visitation in the event the court terminated her parental rights.

The juvenile court overruled each of Sonya's motions. The juvenile court determined there was no merit to Sonya's motions

to dismiss and to continue. As for the motion for visitation, the juvenile court determined it was premature, because, at the time it was filed, a decision had not been rendered on the motions to terminate parental rights.

Thereafter, the court heard testimony in both cases and received documentary evidence on the adjudication petition and the motions to terminate Sonya's parental rights. A total of five witnesses, including Sonya, testified, and multiple exhibits were admitted into evidence.

Kathryn Rogers, a protection and safety worker with DHHS, testified on behalf of the State. She stated that she had been assigned to the case since September 2004. She testified that Hunter had been in out-of-home placement since August 15, 2000, that Jagger had been in out-of-home placement since October 1, 2002, and that Phoenix had been in out-of-home placement since August 2004. She also testified concerning the children's current foster placement, in which all three children were living together with one family who planned on adopting the children in the event Sonya's parental rights were terminated. When asked if "there [had] been an ongoing problem regarding [Sonya's] being able to obtain and maintain safe and suitable housing for her children," Rogers answered, "Yes, there has." Rogers testified as to visits she had made to Sonya's home and stated that the kitchen "was dirty" and that the bathroom "was unsanitary." She testified that it had been documented that there were open alcohol bottles and ashtrays on the floor within reach of the children. Rogers also testified that despite provisions in the rehabilitation plans that required Sonya to receive individual therapy, Sonya had missed several appointments with her therapist and, in fact, had not met with her therapist during the 5 weeks prior to the termination hearing. Rogers also testified that Sonya had only "recently" obtained employment and that prior to her recent employment, "she had not had employment" since at least September 2004. Rogers testified as to Sonya's inconsistency in visiting her children and as to Sonya's failure to comply with the rehabilitation plan requirement that she advise DHHS of all third persons who were living with her. In response to the question as to whether Sonya had "followed the court orders in this case and participated in court ordered services to the point

where the children could be returned to her care," Rogers testified, "No, she has not." Rogers also testified that she did not believe that Sonya had corrected the conditions that had led to the juvenile court's adjudication of Hunter and Jagger.

Dr. Karen Sharer-Mohatt, a clinical psychologist, testified concerning the psychological evaluation she performed on Sonya in May 2004. Sharer-Mohatt testified that "Sonya [had] a lifelong pattern of unhealthy relationships" which had led to violence and personal instability in Sonya's life. Sharer-Mohatt testified that this pattern "appeared to be generational [a]nd ha[d] now extended to [Sonya's] children as well." Sharer-Mohatt testified that Sonya had undergone a number of therapeutic interventions "with minimal success in re-establishing stability in her life." Sharer-Mohatt also testified as to a number of "barriers" to Sonya's being able to effectively parent her children, including "her pattern of instability . . . her difficulty in maintaining adequate housing, her difficulty in providing consistent, healthy parenting to her children on a long term . . . basis, her . . . history with depression and anger issues[, and] the inconsistency with which she had offered parenting to her . . . children." A copy of Sharer-Mohatt's May 2004 psychological evaluation report was introduced into evidence. The report states that "[i]t does not appear at this time that Sonya is prepared to have full responsibility and custody of her children. . . . Sonya's problems in attachment makes [sic] it difficult for her to fully connect with her children and understand and appreciate the impact of her behaviors on her children."

As stated above, Sonya appeared and testified during the termination hearing. Sonya stated that she had been employed as a cabdriver since January 2005. She also testified that prior to her employment as a cabdriver, the last time she had been employed was in 2003. On cross-examination, she agreed that she had missed almost 30 of the weekly therapy sessions for which she had been scheduled in 2004. Sonya nevertheless testified that she was, at the time of the hearing, interested in being reunited with her children.

On March 30 and 31, 2005, the juvenile court entered separate orders in the juvenile case involving Hunter and Jagger and in the juvenile case involving Phoenix. With regard to the

State's petition seeking to adjudicate Phoenix, the juvenile court found by a preponderance of the evidence that pursuant to § 43-247(3)(a), Phoenix lacked proper parental care by reason of the fault and habits of Sonya in that Hunter and Jagger, siblings of Phoenix, had previously been adjudicated under § 43-247(3)(a) and that Sonya had failed to correct the conditions leading to those adjudications. With regard to the State's motions to terminate Sonya's parental rights, the juvenile court found that the allegations in those motions had been proved by clear and convincing evidence and that the motions should be granted. Specifically, in its order filed in case No. S-05-537, the juvenile court found that with regard to Hunter and Jagger, Sonya's parental rights should be terminated pursuant to § 43-292(2), (6), and (7), because Sonya had "substantially and continuously or repeatedly neglected and refused to give [Hunter and Jagger] necessary parental care and protection; [and had] failed to correct the conditions leading to the determination that [Hunter and Jagger were] children as defined by [§ 43-247(3)(a)]." The juvenile court further found that Hunter and Jagger had been in an out-of-home placement for 15 or more of the most recent 22 months. In its separate order filed in case No. S-05-536, the juvenile court found that Sonya's parental rights to Phoenix should be terminated pursuant to § 43-292(2), because Sonya had "substantially and continuously or repeatedly neglected and refused to give [Phoenix or Phoenix's siblings] necessary parental care and protection." In its orders, the juvenile court further found that termination of Sonya's parental rights to Hunter, Jagger, and Phoenix was in the children's best interests. Sonya appeals from these orders.

III. ASSIGNMENTS OF ERROR

On appeal, Sonya has assigned numerous errors, the primary ones of which we restate and summarize below. Sonya claims, restated, that the juvenile court erred in (1) failing to find that § 43-279.01(3) was unconstitutional because it violated Sonya's right to equal protection pursuant to the 14th Amendment to the U.S. Constitution and article I, § 3, of the Nebraska Constitution; (2) overruling Sonya's motion to continue due to the juvenile court's lack of jurisdiction; (3) finding that as to the adjudication

of Phoenix, the allegations made pursuant to § 43-247(3)(a) were proved by a preponderance of the evidence; (4) finding that as to all three children, there was clear and convincing evidence to terminate her parental rights; and (5) finding that as to all three children, the termination of Sonya's parental rights was in the children's best interests.

IV. STANDARDS OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Polikov v. Neth, ante* p. 29, 699 N.W.2d 802 (2005).

[2] A jurisdictional question that does not involve a factual dispute is a matter of law that requires an appellate court to reach an independent conclusion irrespective of the determination made by the court below. See *In re Application of Metropolitan Util. Dist., ante* p. 494, 704 N.W.2d 237 (2005).

[3] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

V. ANALYSIS

1. The Burden of Proof Required to Terminate Parental Rights of Parents of Non-Indian Children in § 43-279.01(3) Does Not Violate Equal Protection

Sonya claims that § 43-279.01(3) is unconstitutional and that the juvenile court erred when it concluded that § 43-279.01(3) did not violate equal protection guarantees. Sonya asserts that the juvenile court erred in failing to find that the differing standards of proof required to terminate parental rights found in the NICWA and § 43-279.01(3) violated her right to equal protection pursuant to the 14th Amendment to the U.S. Constitution and article I, § 3, of the Nebraska Constitution. Sonya argues that because the burden of proof required to terminate parental rights to non-Indian children under § 43-279.01(3), to which

she was subject, is a lesser standard of proof than that required to terminate parental rights to Indian children under the NICWA, § 43-1505(6), parents subject to § 43-279.01(3) are discriminated against on the basis of race. We conclude that Sonya has failed to establish § 43-279.01(3) violates equal protection guarantees and further conclude that the juvenile court did not err when it rejected Sonya's constitutional challenge to § 43-279.01(3).

With reference to the burden of proof required to terminate the parental rights of a non-Indian child, § 43-279.01(3) provides as follows: "After hearing the evidence, the court shall make a finding . . . by clear and convincing evidence in proceedings to terminate parental rights." Section 43-279.01(3) continues: "If an Indian child is involved, the standard of proof shall be in compliance with the Nebraska Indian Child Welfare Act, if applicable." With reference to the burden of proof required to terminate the parental rights of an Indian child, the NICWA at § 43-1505(6) provides: "No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the [Indian] child by the parent . . . is likely to result in serious emotional or physical damage to the child."

[4] The amount of proof under the clear and convincing standard has been described as that amount of evidence that produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved, *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005), whereas the amount of evidence required to satisfy proof beyond a reasonable doubt has been described as "proof so convincing that one would rely and act upon it without hesitation in the more serious and important transactions of life," *In re Interest of Phoebe S. & Rebekah S.*, 11 Neb. App. 919, 935, 664 N.W.2d 470, 483 (2003). Clear and convincing is a lower standard of proof than proof beyond a reasonable doubt. See *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003).

[5-7] Sonya brings an equal protection challenge in this case. The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges. *Mach v. County of Douglas*, 259 Neb. 787, 612 N.W.2d 237 (2000).

Therefore, we do not distinguish between the two constitutions in our analysis of this issue. The principle of equal protection guarantees that similar persons will be dealt with similarly by the state, but it does not foreclose the state from classifying persons or from differentiating one class from another when enacting legislation. *Waste Connections of Neb. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005). The Equal Protection Clause simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike. *Id.*

[8,9] The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the principle of equal protection. See *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). As explained below, as to the termination of parental rights legislation at issue, the parents of non-Indian children are not similarly situated to the parents of Indian children and, therefore, the parents of non-Indian children lack a viable equal protection claim.

Pursuant to its federal constitutional authority, Congress enacted the Indian Child Welfare Act of 1978 (ICWA)

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.

25 U.S.C. § 1902 (2000). See *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989).

By its terms, Nebraska's statute regarding Indian children, § 43-1502, states:

> The purpose of the [NICWA] is to clarify state policies and procedures regarding the implementation by the State of Nebraska of the federal Indian Child Welfare Act, 25 U.S.C. 1901 et seq. It shall be the policy of this state to

> cooperate fully with Indian tribes in Nebraska in order to ensure that the intent and provisions of the [ICWA] are enforced.

The intent of the ICWA is evident in the statute itself. In its findings recited at 25 U.S.C. § 1901 (2000), Congress recognized the special relationship between the United States and the Indian tribes and the federal responsibility to Indian people. Congress explicitly found, inter alia,

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901.

Sonya characterizes her challenge to § 43-279.01(3) as one implicating racial discrimination. Contrary to her characterization, the difference in the statutes implicated in this case between the parents of non-Indian as distinguished from Indian children is attributable not to race but is attributable to and is an incident of the historical sovereignty of Indian tribes. The U.S. Supreme Court long ago noted that Indian tribes are unique aggregations possessing "attributes of sovereignty" over both their members and their territory, see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832), and has further noted that federal legislation that differentiates between Indian and non-Indian individuals is not based upon a racial classification, but instead is based upon the Indians' status "as members of

quasi-sovereign tribal entities." *Morton v. Mancari*, 417 U.S. 535, 554, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).

The U.S. Supreme Court has observed that "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians." *United States v. Antelope*, 430 U.S. 641, 645 & n.6, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977) (stating "Article I, § 8, of the Constitution gives Congress power '[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes' "). Given the foregoing, federal laws regulating Indian affairs are not based upon racial classifications, but, rather, are "rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a ' "racial" group consisting of "Indians" . . . .' " *United States v. Antelope*, 430 U.S. at 646 (quoting *Morton v. Mancari, supra*). The U.S. Supreme Court has observed that "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment." *Morton v. Mancari*, 417 U.S. at 554-55. The U.S. Supreme Court has further noted:

> Literally every piece of [federal] legislation dealing with Indian tribes . . . single[s] out for special treatment a constituency of tribal Indians . . . . If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire title of the United States Code (25 U. S. C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

417 U.S. at 552.

[10] In summary, in reviewing its own jurisprudence, the U.S. Supreme Court has stated that its decisions "leave no doubt that federal legislation with regard to Indian tribes, although relating to Indian tribes as such, is not based upon impermissible racial classifications" and does not violate equal protection. *United States v. Antelope*, 430 U.S. at 645. We logically extend this reasoning to the instant case and conclude that Nebraska

legislation that differentiates between the parents of Indian and non-Indian children relative to the burden of proof for termination of parental rights is not due to racial discrimination. Given the United States' history in dealing with Indians and the U.S. Supreme Court's decisions with regard to legislation pertaining thereto, we conclude as a matter of law that the lower standard of proof under § 43-279.01(3) for the termination of parental rights to non-Indian children, as opposed to the higher standard of proof under the NICWA, does not violate the equal protection rights of parents of non-Indian children.

[11] The initial inquiry in an equal protection analysis focuses on whether one has demonstrated that one was treated differently from others similarly situated; absent this threshold showing, one lacks a viable equal protection claim. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). It follows that the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996).

On this record, no one claims that Hunter, Jagger, and Phoenix are Indian children for the purposes of the NICWA, and it is therefore undisputed that Sonya is the parent of non-Indian children for purposes of our analysis. "The Indian's special status, stemming from the historical relationship between the United States and a sovereign indigenous people, as well as the legislative goal of the ICWA, to keep Indian families from disruption," situates the parent of an Indian child differently from the parent of a non-Indian child. *In re Marcus S.*, 638 A.2d 1158, 1159 (Me. 1994). Thus, contrary to the assertion raised by Sonya, she is not similarly situated to a parent of an Indian child, and in view of the differing circumstances, Sonya has not brought a viable equal protection claim.

In reaching our conclusion that the standard of proof in § 43-279.01(3) does not violate equal protection guarantees, we note that other state courts have reached a similar result. See, *Ruby A. v. State, Dept. of Health and Social Services*, Nos. S-10921, S-10933, 2003 WL 23018276 at *4 (Alaska Dec. 29, 2003) (unpublished opinion) (rejecting claim that lower court violated non-Indian father's equal protection rights by failing to apply ICWA's "beyond a reasonable doubt" standard of proof);

In re Marcus S., supra (concluding that state law did not violate Equal Protection Clause by requiring lesser burden of proof than ICWA in proceedings to terminate parental rights); *Matter of M.K.*, 964 P.2d 241 (Okla. Civ. App. 1998) (concluding that trial court's refusal to apply to non-Indian father ICWA's heightened standard of proof for termination of parental rights did not violate father's right to equal protection); *State ex rel. CSD v. Graves*, 118 Or. App. 488, 848 P.2d 133 (1993) (determining that different treatment of Indians and of non-Indians resulting from proof beyond reasonable doubt requirement under ICWA as opposed to state law which permitted parental rights to be terminated on clear and convincing evidence does not violate equal protection). Compare *Application of Angus*, 60 Or. App. 546, 655 P.2d 208 (1982) (concluding that provisions of ICWA do not deny equal protection to non-Indians), *review denied* 294 Or. 569, 660 P.2d 683, *cert. denied sub nom. Woodruff et ux. v. Angus, Next Friend of Angus, et al.*, 464 U.S. 830, 104 S. Ct. 107, 78 L. Ed. 2d 109 (1983).

In summary, Sonya, as the parent of non-Indian children, is not similarly situated to an Indian parent, and thus, Sonya has failed to make a threshold showing demonstrating that as to the burden of proof for the termination of parental rights, she was treated differently from others similarly situated. Sonya lacks a viable equal protection claim. The trial court did not err when it rejected Sonya's claim that § 43-279.01(3) was unconstitutional because it violated the equal protection rights of non-Indian parents.

2. The Procedural and Substantive Rulings of the Juvenile Court Were Not in Error

(a) The Juvenile Court Had Jurisdiction to Terminate Sonya's Parental Rights

Sonya claims that the juvenile court was without jurisdiction in case No. S-05-537 when it terminated her parental rights. Sonya claims that the juvenile court was divested of jurisdiction because Justin, the biological father of Jagger, was appealing a separate order terminating his parental rights when Sonya's parental rights in case No. S-05-537 were considered. Sonya misperceives the law in this area. In *In re Interest of Joshua M.*

et al., 251 Neb. 614, 558 N.W.2d 548 (1997), we stated that a juvenile court does not have jurisdiction to terminate a juvenile's relationship with his or her parent while an appeal by that parent is pending in that juvenile case. However, that decision was limited to a circumstance where the mother was appealing an order removing her children, and we concluded that the pendency of that appeal precluded consideration of the State's petition to terminate the mother's parental rights. The record in this appeal shows that Justin's case is essentially separate from Sonya's case and is based upon different facts. Given these circumstances, we conclude the juvenile court was not divested of jurisdiction to terminate Sonya's parental rights in case No. S-05-537 during the pendency of the appeal of the order terminating Justin's parental rights to Jagger. Accordingly, this assignment of error is without merit.

(b) The Juvenile Court Did Not Err in Adjudicating Phoenix as a Child Under § 43-247(3)(a)

Sonya claims in case No. S-05-536 that the juvenile court erred in finding that Phoenix was a juvenile within the meaning of § 43-247(3)(a). Following our de novo review of the record, we conclude that the juvenile court did not err in finding that the State had proved by a preponderance of the evidence that Phoenix lacked proper parental care by reason of the fault or habits of Sonya for purposes of § 43-247(3)(a). Accordingly, we affirm the adjudication portion of the juvenile court's order.

In the State's petition filed on August 6, 2004, in case No. S-05-536, it alleged that Phoenix came within the meaning of § 43-247(3)(a) because siblings of Phoenix had been previously adjudicated and Sonya had failed to correct the conditions that had led to those adjudications. The evidence adduced at the hearing indicated that notwithstanding the fact that Hunter had been removed from Sonya's care in August 2000 and adjudicated in October 2000 due to Sonya's inability to provide proper care and support, and the fact that Jagger had been removed from Sonya's care in October 2002 and adjudicated in April 2003, also due to Sonya's inability to provide proper care and support, Sonya had failed to correct the conditions that led to these adjudications. These conditions included failing to maintain safe and suitable

housing for the children and failing, until January 2005, to obtain employment that would enable her to financially support the children. Based on the foregoing, we conclude that the portion of the juvenile court's order that adjudicated Phoenix to be a child within the meaning of § 43-247(3)(a) should be affirmed.

(c) The Juvenile Court Did Not Err in Terminating Sonya's Parental Rights

Sonya claims on appeal that the evidence in cases Nos. S-05-536 and S-05-537 was insufficient to terminate her parental rights to Hunter, Jagger, and Phoenix. In case No. S-05-537, the juvenile court found that termination had been proved as to Hunter and Jagger under § 43-292(2), (6), and (7). In case No. S-05-536, the juvenile court found that one statutory ground had been proved as to Phoenix under § 43-292(2). Because we determine that the evidence clearly and convincingly demonstrates that Hunter and Jagger were in an out-of-home placement for at least 15 of the most recent 22 months, we affirm the juvenile court's order terminating Sonya's parental rights to Hunter and Jagger under § 43-292(7), and we need not, and do not, further specifically address the sufficiency of the evidence under § 43-292(2) and (6). Because we determine that the evidence clearly and convincingly demonstrates that Sonya has substantially and continuously or repeatedly neglected and refused to give Phoenix and her siblings necessary parental care and protection, we affirm the juvenile court's order terminating Sonya's parental rights to Phoenix under § 43-292(2).

[12-14] For a juvenile court to terminate parental rights under § 43-292, it must find that termination is in the child's best interests and that one or more of the statutory grounds listed in this section have been satisfied. *In re Interest of Shelby L., ante* p. 150, 699 N.W.2d 392 (2005). The State must prove these facts by clear and convincing evidence. *Id.* Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need

not further address the sufficiency of the evidence to support termination under any other statutory ground. See *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

[15] Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." Thus, in order to terminate parental rights under § 43-292(7), the State must prove by clear and convincing evidence that the child has been in out-of-home placement for 15 or more of the most recent 22 months and that termination of parental rights is in the best interests of the child. See *In re Interest of Aaron D., supra*. Along with proof of best interests, § 43-292(7) is satisfied if the evidence shows the requisite number of months of out-of-home placement. *In re Interest of Aaron D., supra*.

In the present case, there is no dispute that Hunter has been in an out-of-home placement continuously since August 2000, which was more than 44 months prior to the time the motion to terminate was filed and more than 55 months at the time of the juvenile court's termination order as to Hunter was entered. There is also no dispute that Jagger has been in an out-of-home placement continuously since October 2002, which was more than 19 months prior to the time the motion to terminate was filed and more than 29 months at the time the juvenile court's termination order as to Jagger was entered. Thus, there is clear and convincing evidence that Hunter and Jagger had been in out-of-home placement for 15 of the most recent 22 months pursuant to § 43-292(7). Accordingly, because we also conclude *infra* that termination is in their best interests, Sonya's assignment of error challenging the basis for termination of her parental rights to Hunter and Jagger under § 43-292(7) is without merit.

We also determine that the juvenile court did not err in terminating Sonya's parental rights as to Phoenix under § 43-292(2), which provides for termination of parental rights when "[t]he parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection" and the termination is in the child's best interests. As stated above, at the time of the termination hearing, Hunter had been in foster care for

more than 4 years and Jagger had been in foster care for more that 2 years. It is clear from the record that Sonya was unable or unwilling to provide necessary parental care and protection for these children. The record reflects that Sonya has failed to demonstrate that she can provide adequate, safe housing. Rogers testified that she had found conditions in Sonya's apartment "very dirty" and "unsanitary." Moreover, Sonya has failed to comply with the juvenile court's rehabilitation plans entered in Hunter and Jagger's case requiring that she participate in individual counseling and inform DHHS of third persons living with her. Despite the requirement in the juvenile court's rehabilitation plans since 2003 that Sonya obtain and maintain suitable employment, Sonya was unemployed during the entirety of 2004 and did not obtain full-time employment until January 2005, less than 3 months prior to the termination hearing and more than 9 months after the motion to terminate her parental rights to Hunter and Jagger was filed. Additionally, according to Sharer-Mohatt's psychological evaluation, Sonya has engaged in a "lifelong pattern of unhealthy relationships" and, although she had participated in a "number of different types of therapeutic interventions," Sonya has achieved only "minimal success." According to Sharer-Mohatt's evaluation, Sonya's "problems in attachment" make it "difficult" for her to connect with her children "and understand and appreciate the impact of her behaviors on her children." In summary, the record reflects that Sonya had been given more than 4 years to demonstrate that she was capable of caring for her children and has continuously and repeatedly failed to do so. Thus, there is clear and convincing evidence that Sonya has substantially and continuously or repeatedly neglected and refused to give Phoenix and Phoenix's siblings necessary parental care and protection. Accordingly, the assignment of error challenging the basis for termination of Sonya's parental rights to Phoenix under § 43-292(2) is without merit.

(d) The Termination of Sonya's Parental Rights Is in the Children's Best Interests

[16-18] Sonya contends that the State did not prove by clear and convincing evidence that termination of her parental rights was in the best interests of Hunter, Jagger, and Phoenix. This

court has stated that when "a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights." *In re Interest of Joshua M. et al.*, 251 Neb. 614, 636, 558 N.W.2d 548, 563 (1997). We have further recognized that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.* The concept of permanency in the life of a child is a recognition that when

> there is no reasonable expectation that a natural parent will fulfill his or her responsibility to a child, the child should be given an opportunity to live with an adult who has demonstrated a willingness and ability to assume that responsibility and has a permanent legal obligation to do so.

(Emphasis omitted.) *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 158, 602 N.W.2d 452, 460 (1999). These propositions of law have direct application to Hunter, Jagger, and Phoenix. The record reflects that despite 4 years of rehabilitation plans, Sonya has been unable or unwilling to rehabilitate herself. There is evidence in the record that the foster family with whom the children live wish to adopt all three of the children. There is also evidence from which it could be determined that adoption and permanency with this foster family would provide the children with secure and healthy lives. Given these circumstances and the entire record in this case, which we have reviewed de novo, we conclude that there exists clear and convincing evidence that terminating Sonya's parental rights is in the best interests of Hunter, Jagger, and Phoenix. This assigned error is without merit.

(d) Sonya's Additional Assignments of Error Are Without Merit

We have considered Sonya's remaining assignments of error, and we conclude they are without merit.

VI. CONCLUSION

For the reasons stated above, we conclude the trial court did not err in failing to find that § 43-279.01(3) was unconstitutional as violative of equal protection because Sonya failed to make a threshold showing demonstrating that she was similarly situated to another group for the purpose of the challenged governmental

action. Specifically, she failed to show that as the parent of non-Indian children, she was situated similarly to parents of Indian children for purposes of the termination of parental rights and the statutory proof relative thereto. We further conclude that contrary to Sonya's claim, the juvenile court did not lack jurisdiction to rule on the State's motions to terminate Sonya's parental rights during the pendency of Justin's appeal in an essentially separate proceeding. We conclude that the juvenile court's order adjudicating Phoenix to be a child within the meaning of § 43-247(3)(a) was supported by a preponderance of the evidence. We further conclude that there was clear and convincing evidence to support a finding that Sonya's parental rights to Hunter and Jagger should be terminated pursuant to § 43-292(7) and that Sonya's parental rights to Phoenix should be terminated pursuant to § 43-292(2). We further conclude that termination is in the best interests of Hunter, Jagger, and Phoenix. The orders of the juvenile court terminating Sonya's parental rights to Hunter, Jagger, and Phoenix are affirmed.

AFFIRMED.

IN RE APPLICATION OF DAVID MATTHEW ZARITZKY BROWN FOR ADMISSION TO THE NEBRASKA STATE BAR.

708 N.W.2d 251

Filed January 13, 2006. No. S-34-050002.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. **Rules of the Supreme Court: Attorneys at Law: Waiver: Proof.** When requesting a waiver of Neb. Ct. R. for Adm. of Attys. 5C (2005), an applicant must show that the education received at any particular school was functionally equivalent to the education provided at schools approved by the American Bar Association.
4. **Rules of the Supreme Court: Attorneys at Law: Waiver: Proof: Appeal and Error.** Following the denial of an application and a hearing before the Nebraska State Bar Commission, the Nebraska Supreme Court will consider a waiver of Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005) to allow a graduate of a foreign law school based

on the English common law to take the Nebraska bar examination upon proof that the education he or she received was equivalent to that for a juris doctor degree available at a law school approved by the American Bar Association.

5. **Rules of the Supreme Court: Attorneys at Law: Waiver: Proof: Costs.** When a foreign-educated attorney seeks a waiver of the educational qualifications requirement of Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005), the burden is on the applicant to affirmatively show that his or her education, considered as a whole, was functionally equivalent to that of a law school approved by the American Bar Association, and the applicant will be responsible for the costs of providing such information.

Original action. Application granted.

David Zaritzky Brown, pro se.

Mark A. Fahleson and Glen Th. Parks, of Rembolt Ludtke, L.L.P., for Nebraska State Bar Commission.

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

PER CURIAM.

I. INTRODUCTION

David Matthew Zaritzky Brown is a Canadian attorney seeking admission to the Nebraska bar. He filed an application with the Nebraska State Bar Commission (Commission) seeking admission without examination as a Class I-A applicant. See Neb. Ct. R. for Adm. of Attys. 5A(1) (rev. 2005). The Commission denied Brown's application on the basis that he did not possess a first professional degree from a law school approved by the American Bar Association (ABA) as required by rule 5C. Thereafter, at Brown's request, a hearing was held before the Commission, and Brown presented evidence regarding his educational qualifications. The Commission again denied Brown's request, and he appeals.

II. FACTS

Brown is a citizen of Canada and has been granted permanent resident status to work in the United States. He received a bachelor of arts degree from the University of Toronto in 1993 and a bachelor of laws degree (LL.B.) from the University of Windsor in 1996.

Brown earned his LL.B. after successfully completing 3 years of legal studies at the University of Windsor Faculty of

Law (Windsor) in Ontario, Canada. Windsor is 1 of 16 English-speaking, common-law Canadian law schools. Its LL.B. program is approved by the Ontario Ministry of Education, and an LL.B. from Windsor is recognized by all the provincial law societies, as well as the Federation of Law Societies of Canada, as providing the prerequisite degree for admission to the bar in all the provinces and territories except Quebec, where the law is based on civil code.

Mary Gold, an associate dean and associate professor at Windsor who holds both an ABA-approved juris doctor degree (J.D.) and a Canadian LL.B., opined that based on her studies at an ABA-accredited law school and her experience at Windsor, the legal education at Windsor is equivalent to that available at an ABA-accredited institution. She stated that many Windsor graduates apply for admission into various state bars in the United States and are successful on their bar examinations.

Brown successfully completed the required core courses at Windsor, including administrative law, contracts, civil procedure, constitutional law, criminal law and procedure, legal process (introduction to common-law legal system), legal writing and research, property, and torts. Brown's course of study also involved classes in business associations, corporate law/secured transactions, debtor-creditor relations, environmental law, evidence, family law, legal history, municipal law, public international law, and remedies. Additionally, Brown participated in the clinical law and advocacy program at Windsor, where he gained practical experience in interviewing clients, negotiating, handling appeals on an administrative level, and representing clients.

Windsor is ineligible for ABA accreditation because it is a Canadian law school; however, its education has been ABA-approved for inclusion in a joint American-Canadian law degree program with the University of Detroit Mercy School of Law (Detroit Mercy), an ABA-approved school located 15 minutes from Windsor. At the end of 3 years of concurrent study at Windsor and Detroit Mercy, successful students earn both a J.D. from Detroit Mercy and an LL.B. from Windsor. Associate Dean Gold stated she believes the educational experiences at Windsor and the ABA-accredited Detroit Mercy are similar enough to permit students to study seamlessly at both. Brown

did not participate in the joint program because he could not afford the additional cost of the program.

To gain admission to the Law Society of Upper Canada (Ontario's bar association), Brown completed three required phases of the bar admissions process. Phase One was a 1-month skills program in which Brown learned to draft motions, affidavits, and memoranda; interview clients; and negotiate contracts. Phase Two (known as the period of articles) was a 1-year apprenticeship in the practice of law with a law society-approved law firm. During Brown's period of articles, he rotated through several of the firm's practice groups, including civil litigation, corporate and commercial, labor and employment, real estate, and tax and estate planning. Phase Three was a 3½-month period composed of nine modules. Eight modules consisted of instruction and examinations in core legal areas, including business law, family law, civil litigation, professional responsibility and practice management, real estate, estate planning, criminal law, and public law. The ninth module involved instruction and an examination in accounting.

Brown was admitted to the Ontario bar in February 1998. Thereafter, he was hired as an associate by the Canadian law firm where he had completed his articling requirement. He worked there for about a year practicing labor and employment law. He then joined another Canadian firm, where he practiced business immigration law for about 2 years. In particular, he assisted business clients with U.S. green card and H-1B (specialty occupation visa) applications.

Brown passed the California bar examination and was admitted to the California bar in December 2000. Brown joined a California law firm in January 2001. He practiced there for about 4 years in the areas of U.S. and Canadian business immigration law, facilitating the international movement of corporate professionals.

Brown decided to move to Nebraska because, among other reasons, his in-laws live here and a Nebraska law firm has hired him. Brown is currently in good standing with both the Law Society of Upper Canada and the California bar. No complaints have been filed against him in either jurisdiction.

In October 2004, Brown applied to be admitted to the Nebraska bar without examination. On December 16, the Commission denied Brown's application because he did not receive his law degree from an ABA-approved law school. Brown appealed the Commission's denial, and a hearing was held on January 21, 2005. Brown testified and presented evidence at the hearing. The Commission again denied Brown's application on the basis that he lacked a first professional degree from an ABA-approved law school. Brown now appeals to this court.

III. ASSIGNMENTS OF ERROR

Brown argues that the Commission erred in (1) determining that a Class I-A applicant is required to possess a first professional degree from an ABA-approved law school; (2) determining that it lacked discretion to examine whether Brown's Canadian educational credentials were "at least equal to" those required for admission by examination under rule 5A(1)(b); (3) determining that the only available option for Brown to gain admission was through a Nebraska Supreme Court waiver of the educational requirement; and (4) not applying the functional-equivalent test set forth in *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998).

IV. STANDARD OF REVIEW

[1] The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission. *In re Application of Gluckselig*, 269 Neb. 995, 697 N.W.2d 686 (2005); Neb. Ct. R. for Adm. of Attys. 15 (rev. 2000).

V. ANALYSIS

[2] The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. *In re Application of Gluckselig, supra*; *In re Application of Collins-Bazant, supra.* See Neb. Const. art. II, § 1, and art. V, §§ 1 and 25.

For purposes of bar admission, Class I-A applicants are those who (1) have been admitted to the bar of another state, (2) possess educational qualifications at least equal to those required at

the time of application for admission by examination to the Nebraska bar, and (3) have passed an examination equivalent to the Nebraska bar examination and have passed the Multistate Professional Responsibility Examination with a score of at least 85. See, rule 5A(1); Neb. Ct. R. for Adm. of Attys. 16 (rev. 2004).

The primary issues in this appeal are (1) whether a Class I-A applicant must possess a first professional degree from an ABA-approved law school and (2) if so, whether a waiver of that requirement is appropriate in this case.

1. Educational Qualifications for Class I-A Applicants

The Commission denied Brown's application because he lacked a first professional degree from an ABA-approved law school. Rule 5A(1)(b) requires a Class I-A applicant to have attained "educational qualifications at least equal to those required" of Class II applicants (i.e., those required to take the written examination). At the time of examination, Class II applicants must possess a J.D. from an ABA-approved law school. See, *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996); rule 5C. The issue is whether a Class I-A applicant must also possess a J.D. from an ABA-approved law school. In other words, Does the phrase "at least equal to" in rule 5A(1)(b) mean "at least *the same as*" for purposes of determining educational qualifications for bar admission?

Brown denies that the educational requirement of rule 5C (i.e., an ABA-approved J.D.) must directly govern Commission decisions regarding the educational qualifications of Class I-A applicants under rule 5A. Instead, applying dictionary definitions, Brown argues that the phrase "at least equal to" should be interpreted as requiring a Class I-A applicant's educational qualifications to be at a minimum " 'like in quality, nature, or status' " to the qualifications required of Class II applicants. See brief for appellant at 12. Under this rendering, Brown contends that the Commission should have conducted a formal review of his LL.B. to determine if it is " 'at least like in quality/nature/status' " to a J.D. from an ABA-approved law school. *Id.*

The Commission asserts that educational qualifications "at least equal to" the rule 5C educational requirement mean that a

Class I-A applicant must at least possess an ABA-approved J.D. The Commission argues that a straightforward reading of rule 5A indicates that any education that does not meet the minimum requirement of rule 5C is not "at least equal to" an education that does so qualify. The Commission also argues that our precedents imply that Class I applicants must possess a J.D. from an ABA-approved law school.

The Commission encourages us to impose a strict ABA-approved J.D. requirement because the Commission lacks sufficient standards by which to judge the equivalence of programs not approved by the ABA on a case-by-case basis. There is little case law and no regulatory basis upon which the Commission might assess whether another academic degree qualifies as "at least equal to" an ABA-approved J.D. Finally, the Commission points out that a denied applicant may petition this court to waive the educational requirement; thus, the Commission believes no harm would follow if we were to set forth a clear standard by interpreting rule 5A as requiring exactly the same educational qualifications as required by rule 5C. The Commission asks this court either to hold that the educational standards for Class I applicants are identical to those for Class II applicants or to give the Commission sufficient standards to apply when making equivalence determinations regarding educational qualifications.

Although none of our previous cases are exactly on point, they do provide helpful guidance. In *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996), an out-of-state attorney applied for admission to the bar without examination as a Class I-B applicant under rule 5A(2). Class I-B applicants must have been licensed to practice law in another state for 5 of the 7 years immediately preceding application, and they must possess "educational qualifications at least equal to those required" of applicants required to take the bar examination. See rule 5A(2). The applicant in *In re Appeal of Dundee* held a J.D. from a law school not approved by the ABA and a master of laws degree from a law school approved by the ABA.

In *In re Appeal of Dundee*, we held that the term "professional degree" in rule 5C contemplates only a J.D. We reasoned that by requiring applicants to possess a J.D. from an ABA-approved

law school, we "ensure that all Nebraska lawyers receive their basic, 'core' legal education according to the minimum standards promulgated by the ABA." 249 Neb. at 810, 545 N.W.2d at 759. Although we did not precisely address the issue of whether Class I applicants under rule 5A must have the same educational qualifications as Class II applicants under rule 5C, we did apply the rule 5C requirement to a Class I-B applicant and stated that the "[e]ducational qualifications are contained in rule 5C. . . ." 249 Neb. at 809, 545 N.W.2d at 758. Moreover, as a result of our holding, we denied admission to a Class I-B applicant because he had not received a J.D. from an ABA-approved law school. Therefore, under the "at least equal to" language of rule 5A(2)(b), we have required a Class I-B applicant to have the same educational qualifications as a Class II applicant.

In *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998), the Commission denied a Canadian attorney's request to sit for the bar examination because she had not received a J.D. from an ABA-approved law school. Based on the clear language of rule 5C, this court concluded that "rule 5 cannot be interpreted in a way that would allow [the applicant], a graduate of a law school not approved by the ABA, to be admitted to the bar upon examination." 254 Neb. at 619, 578 N.W.2d at 42.

In summary, our precedents show that we have interpreted rule 5C strictly to mean that those applying for admission by examination must possess a J.D. from an ABA-approved law school. See, *In re Application of Gluckselig*, 269 Neb. 995, 697 N.W.2d 686 (2005); *In re Application of Collins-Bazant, supra*; *In re Appeal of Dundee, supra*. We have also applied the rule 5C educational requirement for Class II applicants to a Class I-B applicant. See *In re Appeal of Dundee, supra*.

We hold that the educational qualifications required of a Class I-A applicant are the same as the requirement found in rule 5C (i.e., a first professional degree from an ABA-approved law school). We conclude that Brown's LL.B. attained at a Canadian law school does not satisfy the requirements of rule 5A. We therefore turn to the issue of whether a waiver is appropriate in this case.

2. WAIVER

Brown contends that if rule 5A(1) cannot be interpreted in a manner that would allow him to be admitted to the Nebraska bar, then this court should waive the educational qualifications requirement in his case.

(a) Commission's Role in Waiver Cases

The Commission found that Brown's Canadian LL.B. did not satisfy the educational qualifications requirement for Class I-A applicants. The Commission lacks the authority to waive this requirement. See *In re Application of Gluckselig, supra.* In *In re Application of Gluckselig*, we asked the Commission to submit a recommendation concerning waiver in cases where the Commission has denied an application. The Commission did not take a position on the question of waiver in this case, however, because it denied Brown's application prior to our decision in *In re Application of Gluckselig*.

Rule 5C requires that Class II applicants possess at the time of the examination a first professional degree (i.e., J.D.) from a law school approved by the ABA. See *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996). Class I applicants (those requesting admission without examination) are required to possess "educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska." See rules 5A(1)(b) and (2)(b).

Before we discuss whether waiver is appropriate in this case, we shall review circumstances we have considered when determining whether to grant a waiver of the educational qualifications requirement. These considerations have been gathered from our three principal waiver cases: *In re Application of Gluckselig*, 269 Neb. 995, 697 N.W.2d 686 (2005); *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998); and *In re Appeal of Dundee, supra.* These considerations "should not be read as a 'bright line' determination" of what educational qualifications an applicant must possess to obtain a waiver. See *In re Application of Gluckselig*, 269 Neb. at 1003, 697 N.W.2d at 693. Furthermore, we have made a distinction between graduates of U.S. law schools not approved by the ABA and graduates of foreign law schools, because the ABA does not

accredit foreign law schools. See *In re Application of Collins-Bazant, supra*. Thus, these considerations apply only to cases in which the Commission has denied admission to applicants educated at foreign law schools.

(i) Educational Background

A threshold requirement for this court's waiving of rule 5C has been that the applicant must possess a professional legal degree from a foreign law school. In *In re Application of Collins-Bazant*, the applicant held a Canadian LL.B., a graduate degree earned after 3 years of legal studies. In *In re Application of Gluckselig*, the applicant held a master's degree in law and legal science, which he had earned at a law school in the Czech Republic. We have held that a master of laws degree from a U.S. law school is not a viable substitute for an ABA-approved J.D. required under rule 5C. See *In re Appeal of Dundee, supra*.

[3] When requesting a waiver, the applicant must "show that the education received at any particular school was functionally equivalent to the education provided at ABA-approved schools." *In re Application of Collins-Bazant*, 254 Neb. at 622, 578 N.W.2d at 43. Our waiver cases indicate that foreign-educated applicants provided extensive information regarding their academic background, including, among other aspects, the accreditation status of their law school, transcripts, official course descriptions, letters of recommendation from professors, and affidavits from law school officials describing the education offered at their schools.

This court has found significant whether the applicant has received education based on the English common law. In *In re Application of Collins-Bazant*, we waived rule 5C for an applicant who graduated from a foreign law school based on English common law. In *In re Application of Gluckselig*, we waived rule 5C for an applicant who graduated from a foreign law school based not on English common law, but on Roman civil law; however, we took into account that the applicant's extensive legal education included significant studies based on the common law. He spent a year of study at the University of Nebraska College of Law and the University of Michigan Law School, earning a total of 44 credit hours.

Although we have refused to make a bright-line determination regarding the legal courses required as prerequisites to a waiver, see *In re Application of Gluckselig, supra*, we have recognized certain legal courses as examples of basic, core courses deemed " 'minimally necessary to be a properly-trained attorney,' " *In re Appeal of Dundee*, 249 Neb. 807, 811, 545 N.W.2d 756, 759 (1996). These courses include civil procedure, contracts, constitutional law, criminal law, evidence, family law, torts, professional responsibility, property, and trusts and estates. The Commission should not construe this listing of courses as a "checklist," but it should consider whether an applicant's education includes exposure to a range of foundational substantive areas of law.

(ii) Exposure to U.S. Law

We have also considered the extent to which an applicant had been exposed to U.S. law. In granting a waiver to a Canadian-educated attorney in *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998), we noted the applicant's efforts to become acquainted with U.S. and Nebraska law. The Commission may consider similar aspects of a foreign-educated applicant's background when making a waiver recommendation to this court.

The applicant in *In re Application of Gluckselig*, 269 Neb. 995, 697 N.W.2d 686 (2005), while enrolled in a law school in the Czech Republic, took several international law classes focusing in part on U.S. law, and he also completed a 112-page thesis which involved a comprehensive comparison of the European Union and U.S. laws on the topic of choice-of-law and forum clauses in Internet-based transactions. Further, while still enrolled in the foreign law school, the applicant studied at the University of Nebraska College of Law, earning 19 credit hours. In addition to his academic credentials, the applicant had spent several months as a clerk for two law firms in Lincoln. He had also sat for and passed the New York bar examination, and he had taken and passed the Multistate Professional Responsibility Examination. Thus, our de novo review of the record indicated that the applicant had received "significant exposure to U.S. law." *Id.* at 1002, 697 N.W.2d at 692.

(b) Waiver in Present Case

[4] Following the denial of an application and a hearing before the Commission, this court will consider a waiver of rule 5C to allow a graduate of a foreign law school based on the English common law to take the Nebraska bar examination upon proof that the education he or she received was equivalent to that for a J.D. available at an ABA-approved law school. *In re Application of Collins-Bazant, supra.* Although this pronouncement was made in a case involving an applicant seeking admission by examination, the principle remains the same for a foreign-educated applicant seeking admission without examination, because the issue is whether to waive the *educational qualifications* requirement not the *bar examination* requirement.

We are guided by certain principles when considering whether waiver of the educational qualifications requirement is appropriate. The "admission rules [are] intended to 'weed' out unqualified applicants, not to prevent qualified applicants from taking the bar." *In re Application of Gluckselig*, 269 Neb. at 1001, 697 N.W.2d at 691. See *In re Application of Collins-Bazant, supra.* Also,

> while the use of ABA approval as a criterion allows courts to evaluate an applicant's legal education effectively and expeditiously without imposing a burden on the court's resources, a court must also ensure that applicants are treated fairly, because any qualification for admission to the bar " 'must have a rational connection with the applicant's fitness or capacity to practice law.' "

254 Neb. at 621, 578 N.W.2d at 43, quoting *Bennett v. State Bar*, 103 Nev. 519, 746 P.2d 143 (1987).

This court will not apply a strict application of rule 5C if in doing so, it would operate in such a manner as to deny admission to a qualified graduate of a foreign law school arbitrarily and for a reason unrelated to the essential purpose of the rule. *In re Application of Gluckselig*, 269 Neb. 995, 697 N.W.2d 686 (2005); *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998).

[5] When a foreign-educated attorney seeks a waiver of the educational qualifications requirement, the burden is on the

applicant to affirmatively show that his or her education, considered as a whole, was functionally equivalent to that of an ABA-approved law school, and the applicant will be responsible for the costs of providing such information. See, *In re Application of Gluckselig, supra*; *In re Application of Collins-Bazant, supra*. We now consider whether Brown has met this burden.

Our de novo review of the record before us indicates that Brown obtained a well-rounded legal education from Windsor, where he earned an LL.B. based on common-law principles. Windsor is not ABA-approved because it is a Canadian school, but its courses have been approved as part of a joint J.D.-LL.B. program with Detroit Mercy, which is an ABA-approved school.

In *In re Appeal of Dundee*, 249 Neb. 807, 811, 545 N.W.2d 756, 759 (1996), we recognized that by requiring a J.D. of bar applicants, we ensure that Nebraska lawyers have taken basic, core legal courses deemed " 'minimally necessary to be a properly-trained attorney.' " We listed as examples of such core legal courses the following: civil procedure, contracts, constitutional law, criminal law, evidence, family law, torts, professional responsibility, property, and trusts and estates. The record reveals that Brown successfully completed courses in all but two of those subjects: professional responsibility and trusts and estates. Brown's background is not completely devoid of those areas, however. The third phase of the bar admissions process in Ontario included instruction and an examination on professional responsibility and practice management, and Brown has taken and passed the Multistate Professional Responsibility Examination. Furthermore, Brown spent time in an estate planning practice group during his period of articles.

In addition to the core courses listed above, Brown successfully completed other law school staples such as administrative law, business associations, corporate law/secured transactions, debtor-creditor relations, international law, and legal writing and research. The education at Windsor also provided Brown with practical legal experience through his participation in the clinical law and advocacy program, community legal aid, and moot court. Furthermore, to gain admission to the Law Society of Upper Canada (i.e., Ontario's bar), Brown completed a mandatory 16½-month admissions process consisting of a 1-month

skills program, a 12-month apprenticeship, and a 3½-month period of instruction and examinations in core legal subjects.

Brown has educated himself on U.S. law and has demonstrated his ability as an attorney. He familiarized himself with U.S. immigration law and practiced in that field for about 2 years in Canada. He then passed the California bar examination and was admitted to the California bar in 2000. He practiced law in California for 4 years, specializing in business immigration law. Brown has practiced law as a licensed attorney for a total of approximately 7 years (3 years in Canada and 4 years in California). He is in good standing with the Ontario and California bars.

In our de novo review, we determine that Brown's education as a whole is functionally equivalent to an education received at an ABA-approved law school. When Brown's education is combined with his work experience, efforts to become acquainted with U.S. law, passing of the California bar examination, and admission to the California bar, a waiver is appropriate.

VI. CONCLUSION

Based on a de novo review of the record, we conclude that Brown has met his burden of proving that his law school education was functionally equivalent to the education received at an ABA-approved law school. As a result, a waiver of the educational qualifications requirement is appropriate. Accordingly, we waive this requirement as it applies to Brown and will allow him to be admitted to the Nebraska State Bar Association. Having determined that a waiver is appropriate, we need not address Brown's remaining assignments of error.

APPLICATION GRANTED.

STATE OF NEBRASKA, APPELLEE, V.
DAVID W. RIEGER, JR., APPELLANT.
708 N.W.2d 630

Filed January 20, 2006. No. S-03-670.

1. **Federal Acts: Extradition and Detainer.** Nebraska is a contracting party to the Interstate Agreement on Detainers Act, a congressionally sanctioned interstate

compact, codified in Nebraska as the Agreement on Detainers at Neb. Rev. Stat. § 29-759 (Reissue 1995).

2. **Extradition and Detainer: Words and Phrases.** A detainer is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he or she is wanted to face criminal charges pending in another jurisdiction.
3. **Extradition and Detainer.** In order to avoid prolonged interference with rehabilitation programs, the interstate Agreement on Detainers provides the procedure whereby persons who are imprisoned in one state or by the United States, and who are also charged with crimes in another state or by the United States, can be tried expeditiously for the pending charges while they are serving their current sentences.
4. **Extradition and Detainer: Time.** Article III of the Agreement on Detainers, Neb. Rev. Stat. § 29-759 (Reissue 1995), prescribes the procedure by which a prisoner against whom a detainer has been lodged may demand a speedy disposition of outstanding charges.
5. ____: ____. Upon receipt of a prisoner's proper request for disposition of untried charges under article III of the Agreement on Detainers, authorities in the state where a charge is pending must bring the prisoner to trial within 180 days.
6. ____: ____. The 180-day trial limitation under article III(a) of the Agreement on Detainers begins to run on the day a prisoner's request for disposition of untried charges is received by the prosecutor and court of jurisdiction.
7. ____: ____. If an action is not brought to trial within the time periods authorized by articles III and IV of the Agreement on Detainers, the action shall be dismissed with prejudice under article V(c) of the agreement.
8. **Speedy Trial.** Speedy trial time under Neb. Rev. Stat. § 29-1207 (Reissue 1995) is calculated by excluding the date the information was filed, counting forward 6 calendar months, backing up 1 day, and then adding the excludable time periods to that date.
9. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
10. **Extradition and Detainer: Pretrial Procedure: Motions to Dismiss: Appeal and Error.** In a ruling on a motion to dismiss with prejudice based on alleged violations of the interstate Agreement on Detainers, a trial court's pretrial factual findings regarding the application of provisions of the agreement will not be disturbed on appeal unless clearly wrong.
11. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
12. **Statutes: Legislature: Appeal and Error.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
13. **Speedy Trial: Extradition and Detainer.** A court may not apply Nebraska's 6-month speedy trial rule under Neb. Rev. Stat. § 29-1207 (Reissue 1995) to determine whether a prisoner is timely brought to trial under article III(a) of the Agreement on Detainers.
14. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.

15. **Speedy Trial: Extradition and Detainer: Effectiveness of Counsel.** When seeking a discharge on speedy trial grounds under article III(a) of the Agreement on Detainers, defense counsel's performance is deficient when he or she fails to present evidence showing the time limitation for trial under article III(a) has been triggered.
16. **Postconviction: Effectiveness of Counsel: Speedy Trial.** In a postconviction action, when a prisoner in custody under sentence alleges he or she was prejudiced by counsel's failure to properly assert the prisoner's speedy trial rights on appeal, the court must adjudicate the merits of the prisoner's speedy trial rights under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
17. **Effectiveness of Counsel: Proof: Words and Phrases.** To prove prejudice for a claim of ineffective assistance of counsel, the defendant must show 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.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and SIEVERS, Judges, on appeal thereto from the District Court for Douglas County, SANDRA L. DOUGHERTY, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jason E. Troia and Jill A. Daley, of Gallup & Schaefer, for appellant.

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

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

HENDRY, C.J.

INTRODUCTION

This is a petition for further review from the Nebraska Court of Appeals' opinion in *State v. Rieger*, 13 Neb. App. 444, 695 N.W.2d 678 (2005). The Court of Appeals affirmed the district court's denial of the motion for postconviction relief of David W. Rieger, Jr. Rieger generally assigns that the Court of Appeals erred in computing the time limitation for trial under article III of Nebraska's Agreement on Detainers.

STATUTORY SCHEME OF AGREEMENT ON DETAINERS

[1-3] Before discussing the facts, it is helpful to review the statutory scheme around which this action revolves. Nebraska is

a contracting party to the Interstate Agreement on Detainers Act, a congressionally sanctioned interstate compact, codified in Nebraska as the Agreement on Detainers (Agreement) at Neb. Rev. Stat. § 29-759 (Reissue 1995). See, *State v. Reed*, 266 Neb. 641, 668 N.W.2d 245 (2003); *Wickline v. Gunter*, 233 Neb. 878, 448 N.W.2d 584 (1989); *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984). See, also, 18 U.S.C. app. §§ 1 and 2 (2000). Although the Agreement does not define "detainer," we have stated that a detainer is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he or she is wanted to face criminal charges pending in another jurisdiction. *Reed, supra.* In order to avoid prolonged interference with rehabilitation programs, the Agreement provides the procedure whereby persons who are imprisoned in one state or by the United States, and who are also charged with crimes in another state or by the United States, can be tried expeditiously for the pending charges while they are serving their current sentences. *Reed, supra.*

[4,5] The Agreement has separate speedy trial provisions depending upon whether its procedures are initiated by the prisoner or authorities in the jurisdiction where the charge is pending. See *id.* Article III of the Agreement prescribes the procedure by which a prisoner against whom a detainer has been lodged may demand a speedy disposition of outstanding charges. *Reed, supra.* Upon receipt of a prisoner's proper request for disposition under article III, authorities in the state where a charge is pending must bring the prisoner to trial within 180 days. *Reed, supra.*

[6] "[F]or a prisoner's demand for disposition of charges to trigger the 180-day period, it must be made in the manner therein required." *Reynolds*, 218 Neb. at 758, 359 N.W.2d at 97. The 180-day trial limitation under article III(a) of the Agreement begins to run on the day the request is received by the prosecutor and court of jurisdiction. *Reed, supra*, citing *Fex v. Michigan*, 507 U.S. 43, 113 S. Ct. 1085, 122 L. Ed. 2d 406 (1993).

[7] In determining the deadline for trial, article III(a) allows the court with jurisdiction to "grant any necessary or reasonable continuance" for good cause shown in open court, with the prisoner or counsel present. In addition, article VI(a) of the Agreement allows the court with jurisdiction to determine

whether the expiration of the 180-day time period pursuant to article III is tolled because "the prisoner is unable to stand trial." If the appropriate authority of the receiving state refuses to accept temporary custody or if an action is not brought to trial within the time periods authorized by articles III and IV, the action shall be dismissed with prejudice. *Reed, supra*, citing § 29-759, art. V(c). With this statutory scheme as a backdrop, we turn to the facts of this appeal.

FACTUAL BACKGROUND

On July 10, 1995, the State filed a complaint charging Rieger with a robbery in Omaha, Nebraska. On May 31, 1996, while Rieger was incarcerated at the federal penitentiary in Leavenworth, Kansas, the State lodged a detainer against him. On July 23, federal officials at Leavenworth sent by certified mail Rieger's notice of his place of imprisonment, inmate status certificate, and request for disposition of the robbery charge to the Douglas County Attorney and the Douglas County District Court. Return receipts were signed on July 29, showing the documents were received by the prosecutor and the clerk's office.

After Rieger was bound over to the Douglas County District Court, an information was filed on September 26, 1996, charging him with robbery. Rieger filed a plea in abatement on October 1, which was overruled on April 3, 1997. On May 7, at Rieger's request, his attorney, Jeffrey Thomas, filed a motion to withdraw. At the hearing on May 12, the court granted Thomas' motion to withdraw due to a conflict of interest. The court then set trial for August 25. Neither Rieger nor Thomas objected to the trial date. The court next stated that it intended to appoint James Regan to represent Rieger and that the trial would be moved up to an earlier date if possible. Regan was appointed on the same day, May 12, after which time, the trial date was moved up to August 18.

On August 5, 1997, Regan, on behalf of Rieger, filed a motion to discharge. At the August 18 hearing on Rieger's motion to discharge, the trial court overruled Rieger's motion, stating from the bench:

> I don't remember the exact reason, but, in any case, I guess it was a conflict or whatever, but . . . Thomas had to withdraw and we appointed counsel immediately. And I think,

> in fairness to counsel, there would had [sic] to have been some delay, [sic] I don't say it was initiated necessarily by . . . Regan, but I know that we were ready to go to trial and the Court was ready to go to trial . . . .
>
> . . . I think that good cause has been shown, that this case has been moved along, and any delays have been those of the defendant rather than the State.

The case proceeded to trial on the same day as the hearing, August 18, and the jury convicted Rieger of robbery.

Rieger appealed the denial of his motion to discharge to the Court of Appeals. In a memorandum opinion filed on May 15, 1998, the Court of Appeals affirmed the district court's judgment based upon the absence of an inmate status certificate in the record to support Rieger's motion to discharge. This certificate is a necessary component of a proper request for disposition under § 29-759, article III(a). Thus, the Court of Appeals concluded that Rieger had failed to trigger the running of the 180-day time limitation. *State v. Rieger*, 13 Neb. App. 444, 695 N.W.2d 678 (2005) (discussing its earlier memorandum opinion).

In Rieger's motion for postconviction relief, he alleged that Regan provided ineffective assistance of counsel in failing to offer the inmate status certificate as part of Rieger's motion to discharge, thereby "supporting the assumption that the defendant had not met his burden of proof as required under State v. Reynolds." The district court granted Rieger's motions for appointment of postconviction counsel and for an evidentiary hearing.

At the evidentiary hearing, Regan testified that although he possessed the inmate status certificate when he filed the motion to discharge, he did not offer it into evidence because he believed the only issue was the computation of the trial limitation period, not whether a proper request for disposition had been made. Regan further testified that he had never requested a continuance.

After the evidentiary hearing, the postconviction court found that Rieger had waived his right to a dismissal by acquiescing to a trial date set beyond the 180-day time limitation, relying on *New York v. Hill*, 528 U.S. 110, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000) (holding that defense counsel could waive defendant's

right to be brought to trial within 180-day time limitation of article III(a) by agreeing to trial date outside that time period, even without express consent of defendant). The postconviction court also concluded that, even without the waiver, the State had provided evidence to support a good cause delay under article III(a) of the Agreement because the defense was not ready to proceed in May. It therefore determined that the period from May 12, 1997, when Rieger's counsel was allowed to withdraw, to August 18, the date trial began, was excludable. Rieger appealed to the Court of Appeals.

The Court of Appeals affirmed, but for reasons different from those of the postconviction court. *Rieger, supra.* Although acknowledging that the record now demonstrated Rieger had properly triggered the 180-day period, it nonetheless concluded that Rieger was not prejudiced by his counsel's failure to offer the inmate status certificate. In so determining, the Court of Appeals rejected the postconviction court's reasoning that Rieger had waived his right to have trial within the 180-day period by failing to object to the later trial date, noting that before Thomas was allowed to withdraw, the record showed Thomas had said nothing that could be construed as a waiver of Rieger's speedy trial rights. The Court of Appeals further determined that the postconviction court's finding of a waiver was also improper to the extent it was based on Rieger's silence after Thomas withdrew. *Id.*, citing *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978) (holding that defendant's failure to object when court sets date for trial after 6-month speedy period does not constitute waiver of speedy trial rights), *overruled on other grounds, State v. Petty*, 269 Neb. 205, 691 N.W.2d 101 (2005).

[8] In concluding Rieger suffered no prejudice, however, the Court of Appeals began its analysis by determining that because article VI(a) provides that the court with jurisdiction determines the "tolling" periods, Nebraska's speedy trial jurisprudence should apply to determine when the count begins or is tolled. The Court of Appeals therefore calculated the expiration of the 180-day time limitation by applying the 6-month rule applicable to Nebraska's speedy trial statute, Neb. Rev. Stat. § 29-1207 (Reissue 1995). Speedy trial time under § 29-1207

is calculated by excluding the date the information was filed, counting forward 6 calendar months, backing up 1 day, and then adding the excludable time periods to that date. See, *State v. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001); *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981). See, also, *State v. Hayes*, 10 Neb. App. 833, 639 N.W.2d 418 (2002).

Applying Nebraska's 6-month speedy trial rule, the Court of Appeals determined that the count began on July 30, 1996, 1 day after Rieger's disposition request was received. It thereafter calculated an initial trial date of January 29, 1997, by counting forward 6 months and backing up 1 day. The Court of Appeals then extended that date by 189 days of excludable time: It attributed 184 days for the time that Rieger's plea in abatement was pending and 5 days for the time that Thomas' motion to withdraw was pending. The Court of Appeals declined to attribute additional time to the motion to withdraw, reasoning that because the trial date had been set over 3 months in the future, Regan had sufficient time to prepare for trial.

Adding 189 excludable days to the initial trial date of January 29, 1997, produced a trial deadline of August 6, which the Court of Appeals observed "had not yet run when the motion to discharge was filed on August 5." *State v. Rieger*, 13 Neb. App. 444, 455, 695 N.W.2d 678, 688 (2005). Treating the motion to discharge as yet another pretrial delay attributable to Rieger, the Court of Appeals then added the time that this motion was pending until August 18, or 13 days. Adding 13 days to August 6 produced a final trial deadline, according to the Court of Appeals' calculations, of August 19. Because trial began on August 18, the Court of Appeals affirmed, finding that Rieger was not prejudiced by Regan's failure to offer the inmate status certificate. We granted Rieger's petition for further review.

ASSIGNMENTS OF ERROR

Rieger assigns, restated, that the Court of Appeals erred in (1) calculating the expiration of the time period for trial by applying the 6-month speedy trial rule under § 29-1207, "as opposed to the 180-day rule" under article III(a) of the Agreement, and (2) finding that the motion to withdraw tolled the running of the 180-day time period by 5 days.

STANDARD OF REVIEW

[9] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[10] In a ruling on a motion to dismiss with prejudice based on alleged violations of the Agreement, a trial court's pretrial factual findings regarding the application of provisions of the Agreement will not be disturbed on appeal unless clearly wrong. *State v. Reed*, 266 Neb. 641, 668 N.W.2d 245 (2003), citing *State v. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997).

[11] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Washington*, 269 Neb. 728, 695 N.W.2d 438 (2005).

ANALYSIS

Rieger contends that under the Agreement, a court must count forward 180 days from the triggering date, and that Nebraska's 6-month rule produces a different trial date. Rieger argues that if the Court of Appeals had counted forward 180 days from the date his request for disposition was received, instead of applying the 6-month speedy trial rule under § 29-1207, his motion for discharge would have been timely.

The State has not filed a brief in response to Rieger's petition for further review. Finding no plain error in the Court of Appeals' determinations of excludable time periods, or its determination that Rieger did not waive his right to trial within 180 days, we limit our review of the Court of Appeals' decision to Rieger's assignments of error. Compare *State v. Dreimanis*, 258 Neb. 239, 603 N.W.2d 17 (1999) (absent plain error, Nebraska Supreme Court's review on petition for further review is restricted to matters assigned and argued in briefs).

Counting forward 180 days from July 29, 1996, the date the State received Rieger's request for disposition, produces an initial trial date of January 25, 1997. Counting forward 6 months from July 30, 1996, and backing up 1 day, pursuant to the 6-month speedy trial rule, produces an initial trial date of January 29,

1997. This 4-day difference in initial trial dates is crucial in determining whether Rieger was timely tried. As noted, the Court of Appeals relied on article VI of the Agreement to conclude that Nebraska's 6-month speedy trial rule should be applied to determine the expiration of the 180-day time limitation for trial. Thus, the issue presented is whether the language of the Agreement supports that interpretation.

[12] 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. *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004). Article III(a) of the Agreement provides that a prisoner "shall be brought to trial within *one hundred eighty days*" after the prosecutor and court with jurisdiction receive the prisoner's proper request for disposition of untried charges. (Emphasis supplied.) Article VI(a) then provides:

> In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

Although article VI(a) allows the court with jurisdiction to determine whether the 180-day time period in article III has been tolled, it does not authorize a court to alter the time period from days to months. The plain language of article III(a) requires the receiving state to bring a prisoner to trial within *180 days* of receiving the prisoner's proper request for final disposition. In contrast, § 29-1207 requires the State to bring a defendant to trial within *6 months*. Compare *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981) (rejecting as contrary to plain language of § 29-1207 defendant's contention that Nebraska's 6-month speedy trial rule should be calculated by counting forward 180 days plus any excludable days).

Applying Nebraska's 6-month speedy trial rule to the 180-day time limit under the Agreement is also not supported by our case law. In *State v. Soule*, 221 Neb. 619, 623, 379 N.W.2d 762, 764 (1986), this court disagreed with the defendant's argument that the "law and decisions under the 'speedy trial' requirements" should apply to determine whether he was timely tried under the

180-day time limit of Nebraska's disposition of untried charges statutes. See Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Reissue 1995). In response, we stated that "§§ 29-3801 et seq. are much more akin to Neb. Rev. Stat. §§ 29-729 to 29-765 (Reissue 1979), referring to interstate detainers," and set out "a different timeframe from that set out in Neb. Rev. Stat. § 29-1207(2)." 221 Neb. at 622-23, 379 N.W.2d at 764.

In *Soule*, we determined that in the absence of a continuance, the 180-day time limit under § 29-3805 would have expired on November 20, 1984, since the prisoner's request for disposition was received on May 24, 1984. That calculation was derived by counting forward 180 days from November 20, not by applying Nebraska's 6-month speedy trial rule. See, also, *Fex v. Michigan*, 507 U.S. 43, 46, 113 S. Ct. 1085, 122 L. Ed. 2d 406 (1993) (affirming Michigan Supreme Court's conclusion that prisoner's trial was timely under article III(a) when it "began on March 22, 1989, 177 days after his request was delivered to the Michigan officials" on September 26, 1988); *U.S. v. Johnson*, 953 F.2d 1167 (9th Cir. 1992) (concluding that prisoner stated valid claim under Interstate Detainers Act when request for final disposition was received on December 26, 1989, and trial did not begin until July 10, 1990, 196 days later).

[13] We conclude that the Court of Appeals erred in applying Nebraska's 6-month speedy trial rule under § 29-1207 to determine whether Rieger was timely brought to trial. Counting forward 180 days from July 29, 1996, the initial trial date should have been January 25, 1997, not January 29. We now turn to the effect of the excludable days.

The Court of Appeals determined that 184 days were excludable for the time that Rieger's plea in abatement was pending and that 5 days were excludable for the time Thomas' motion to withdraw was pending. Adding the total excludable time period of 189 days to the initial trial date of January 25, 1997, results in a trial deadline of August 2, a Saturday. Rieger correctly contends that the trial deadline was therefore Monday, August 4. See Neb. Rev. Stat. § 25-2221 (Reissue 1995) (providing general rules for computing time). Thus, we conclude that the Court of Appeals erred in determining that "the time [for trial] had not yet run

when the motion to discharge was filed on August 5." *State v. Rieger*, 13 Neb. App. 444, 455, 695 N.W.2d 678, 688 (2005).

Rieger also assigns that the Court of Appeals erred in excluding any time due to Thomas' motion to withdraw. We find it unnecessary to reach this assignment of error because of our determination that Rieger was not timely tried even excluding the 5 days that the motion to withdraw was pending.

Ineffective Assistance of Counsel

[14] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

[15] Our decision in *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984), established the necessity of proving that a prisoner's request for disposition complied with article III(a) when seeking a discharge on speedy trial grounds under this article. See, also, *State v. Nearhood*, 2 Neb. App. 915, 518 N.W.2d 165 (1994) (holding that prisoner's failure to include inmate status certificate with request for disposition rendered request ineffective to trigger 180-day period). Thus, Regan's failure to present evidence showing the time limitation for trial under article III had been triggered was deficient. The Court of Appeals, however, determined Rieger could not show he was prejudiced by Regan's failure to present the certificate. As noted previously, such determination was based principally upon the application of Nebraska's 6-month speedy trial rule. Obviously, our determination that the Court of Appeals erred in applying that rule alters the analysis of whether Rieger was prejudiced by his counsel's deficient performance.

[16] In a postconviction action, when a prisoner in custody under sentence alleges he or she was prejudiced by counsel's failure to properly assert the prisoner's speedy trial rights on appeal, the court must adjudicate the merits of the prisoner's speedy trial rights under *Strickland*. See *State v. Meers*, 267 Neb. 27, 671 N.W.2d 234 (2003) (reversing postconviction order granting new direct appeal when petitioner claimed that counsel

failed to timely appeal order denying discharge on speedy trial grounds; remanding with directions to determine whether speedy trial claim was meritorious and required discharge).

[17] To prove prejudice for a claim of ineffective assistance of counsel, the defendant must show 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. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

The failure of Regan to create a proper record for appeal from the denial of Rieger's motion to discharge resulted in the Court of Appeals' failure to consider when the time limitation for trial expired. As discussed, a calculation based on 180 days, as extended by the Court of Appeals' excludable time periods, results in a trial deadline of August 4, 1997, and Rieger's trial did not begin until August 18. Under article V(c), Rieger was entitled to an order dismissing the action with prejudice. Given our holding that Rieger's trial was not timely, we conclude that if Regan had shown the 180-day time limitation was triggered, a reasonable probability existed that an appeal or petition for further review from the denial of Rieger's motion to discharge would have resulted in a reversal.

CONCLUSION

We conclude that the Court of Appeals erred in applying Nebraska's 6-month speedy trial rule to determine the expiration of the 180-day time limitation for trial under article III(a) of the Agreement. Counting forward 180 days and adding 189 excludable days, we determine Rieger's trial was not conducted within the time limitation specified in article III(a) of the Agreement. Thus, we determine the Court of Appeals' decision must be reversed and the cause remanded with directions to the Court of Appeals to remand the cause to the district court with instructions to vacate Rieger's conviction and enter an order for absolute discharge on speedy trial grounds pursuant to the Agreement.

REVERSED AND REMANDED WITH DIRECTIONS.

GRANT J. STRUNK, APPELLEE AND CROSS-APPELLANT, V. KIM CHROMY-STRUNK, APPELLANT AND CROSS-APPELLEE.

708 N.W.2d 821

Filed January 20, 2006. No. S-04-879.

1. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Courts: Jurisdiction: Divorce: Property Settlement Agreements.** A district court, in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all terms of approved property settlement agreements.
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. **Appeal and Error: Words and Phrases.** A cross-appeal must ask for affirmative relief, which means a reversal, vacation, or modification of a lower court's judgment, decree, or final order.
6. **Rules of Evidence: Judicial Notice.** Judicial notice of adjudicative facts is governed by Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 1995).
7. **Rules of Evidence: Words and Phrases.** Adjudicative facts within the meaning of Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 1995), are simply the facts developed in a particular case, as distinguished from legislative facts, which are established truths, facts, or pronouncements that do not change from case to case but apply universally. In other words, the adjudicative facts are those to which the law is applied in the process of adjudication.
8. **Rules of Evidence: Judicial Notice.** A court may take judicial notice of adjudicative facts which are not subject to reasonable dispute, either because they are (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
9. **Actions: Judicial Notice.** When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Nevertheless, care should be taken by the court to identify the fact it is noticing, and its justification for doing so.
10. **Divorce: Modification of Decree: Property Settlement Agreements.** Where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, its provisions will not thereafter be vacated or modified in the absence of fraud or gross inequity.

11. **Judgments: Collateral Attack.** A void judgment may generally be attacked at any time in any proceeding.
12. **Contracts.** Absent contrary public policy, it is established that a contract may be conditioned upon the occurrence or nonoccurrence of an act or event.
13. **Judgments: Divorce: Property Settlement Agreements: Alimony: Child Support.** A dissolution decree which approves and incorporates into the decree the parties' property settlement, alimony, or child support agreement is a judgment of the court itself.
14. **Judgments: Final Orders: Words and Phrases.** A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. Thus, orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not operate as "judgments" and are wholly ineffective and void as such.
15. **Judgments: Final Orders.** Conditional orders are not void as interlocutory orders, but are void only insofar as they purport to be final judgments.
16. **Courts: Equity.** Courts of equity are not always restricted by the same rules as courts of law.
17. ____: ____. 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.
18. **Judgments: Final Orders.** Generally, final judgments must not be conditional, and unless there is an equitable phase of the action wherein it is necessary to protect the interests of defendants, a conditional judgment is wholly void.
19. **Judgments: Equity.** The void conditional judgment rule does not extend to actions in equity or to equitable relief granted within an action at law. Rather, where it is necessary and equitable to do so, a court of equitable jurisdiction may enter a conditional judgment and such judgment will not be deemed void simply by virtue of its conditional nature.
20. **Judgments: Equity: Collateral Attack.** Simply because a conditional judgment in an action at equity is not automatically void, it does not follow that all conditional judgments are acceptable on direct review or that judgments in equity cannot, for different reasons, be void and therefore subject to collateral attack.
21. **Judgments: Equity.** Conditional judgments in equity are required to determine the rights and obligations of the parties with reasonable certainty.
22. **Property Settlement Agreements.** Where the property division is made pursuant to a voluntary agreement by the parties, a further equitable consideration arises as to the need to protect the parties' bargaining power and the benefit of a bargain once made.
23. **Property Settlement Agreements: Intent.** Where the language used in a property settlement agreement is unambiguous, a court is bound to consider such language from the four corners of the agreement itself, and what the parties thought the agreement meant is irrelevant.
24. **Contracts.** Ambiguity exists in a document when a word, phrase, or provision therein has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. In other words, a document is ambiguous if, after application of the pertinent rules of construction, there is uncertainty concerning which of two or more reasonable meanings represents the intention of the parties. The fact that parties to a

document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Affirmed.

Richard T. Seckman, of Karel & Seckman, for appellant.

Sally A. Rasmussen, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Kim Chromy-Strunk, now known as Kim Svatora, and her former husband, Grant J. Strunk, were divorced in 2001. The decree contained a settlement agreement providing Grant with an additional $75,000 judgment if, during Grant's lifetime, Kim voluntarily or involuntarily sold, transferred, gifted, conveyed, or foreclosed upon the marital property granted to her. It is under this provision that Grant sought to determine the $75,000 due and to garnish Kim's checking account, after Kim had "conveyed" the property by issuing a warranty deed to herself and her second husband, Roger A. Svatora, in joint tenancy.

The district court held that the provision was a valid condition precedent in a contract, and not a void conditional judgment, and that the condition had been satisfied by the warranty deed. It therefore overruled Kim's motion to quash the garnishment, determined that $75,000 plus accrued interest from the time of the conveyance was due and owing in full, and directed the garnishee to pay into the court. The primary issue presented in this case is whether the provision is a void conditional judgment, and, if not, whether the condition for the provision was satisfied.

II. BACKGROUND

Kim and Grant were divorced by the district court on April 18, 2001. Pursuant to the property settlement agreement (the Settlement) attached to the decree, Kim, in addition to a vehicle and other personal property, was awarded all right, title, and

interest in the marital residence subject to any encumbrances on the property, including a mortgage balance of approximately $90,000. Grant, in addition to a vehicle and other personal property, was awarded $50,000 to be paid by Kim on or before April 1, 2004, said sum accruing interest at 6 percent per annum until paid in full. Furthermore, the Settlement provided:

> [I]f at any time said real property is sold, transferred, gifted, conveyed, foreclosed upon, or for any other reason or in any other manner conveyed, whether voluntarily or involuntarily by the Respondent [(Kim)] to any third party, Petitioner [(Grant)] shall receive the additional sum of $75,000 which shall accrue no interest until due. This additional sum of $75,000 shall only be due to the Petitioner by the Respondent if said property is sold or conveyed as described above, during the Petitioner's lifetime. If said real property is sold or transferred as described above, after the Petitioner's death, Petitioner shall not be entitled to the additional sum of $75,000, but the initial sum of $50,000, together with interest, shall be due to the Petitioner or his estate.
>
> Both the $50,000 judgment and the $75,000 judgment shall be liens against said property and shall remain liens against said property until said sums are paid or otherwise extinguished.

The Settlement set forth that Kim and Grant acknowledged that its terms and provisions were "fair, reasonable, equitable and not unconscionable"; that it had been "carefully examined and entered into freely and voluntarily by each of them"; and that they had both received legal advice in connection with the negotiation and execution of the Settlement from attorneys of their choosing. The district court, in the dissolution decree, found the Settlement to be reasonable and equitable and not unconscionable, and ordered compliance therewith.

On February 18, 2004, Kim filed an application for subordination of judgment lien and notice of hearing with the district court. The application described the $50,000 judgment and the $75,000 contingent amount. Kim explained that she desired to pay Grant the $50,000 sum plus interest on or before the April 1, 2004, due date set forth in the Settlement, but that she did not

have sufficient liquid assets to do so. As a result, she was trying to refinance the first lien mortgage on the marital residence in order to procure sufficient funds. However, the finance company refused to loan the required funds unless its loan was in first position ahead of Grant's lien attached to the $75,000 contingent payment. Because Grant had refused Kim's request to voluntarily subordinate his contingent payment lien, Kim asked the district court to order such subordination. Grant objected to the subordination on the grounds that it would effectuate an improper modification of the Settlement, it was requested for the purpose of avoiding payment, and it would unduly reduce the security for his $75,000 lien.

The district court granted the request for subordination of Grant's $75,000 lien and issued a corresponding order requiring Kim to use the proceeds of the refinancing to pay Grant's $50,000 lien. On March 15, 2004, Grant appealed to the Nebraska Court of Appeals. See *Strunk v. Chromy-Strunk*, No. A-04-351, 2004 WL 2216508 (Oct. 5, 2004) (not designated for permanent publication) (*Strunk I*). Relying on *Hall v. Hall*, 176 Neb. 555, 126 N.W.2d 839 (1964), the district court denied Grant's motion for a supersedeas bond, reasoning that the bond was not expressly provided for under Neb. Rev. Stat. § 25-1916 (Cum. Supp. 2002), and was therefore discretionary with the court. The record reflects that no cash in lieu of cost bond or supersedeas bond was filed in *Strunk I*. Because of the disallowance of the supersedeas bond, the district court's order approving subordination of the $75,000 contingent lien remained in full force and effect and was not stayed pending any appeal.

On October 5, 2004, the Court of Appeals released an unpublished opinion reversing the district court's decision granting subordination of the $75,000 lien to the new lien of the refinancing institution. The Court of Appeals reasoned that there were insufficient facts to support Kim's burden of showing that the subordination would not unduly reduce the security for the payment of the lien. Kim did not request further review of that decision.

While *Strunk I* was pending, Kim refinanced the residence, and on April 1, 2004, a joint tenancy warranty deed was filed

wherein the residence was "convey[ed]" to Kim and her second husband, Roger, as follows:

> **KIM P. SVATORA, formerly known as KIM P. CHROMY, and ROGER A. SVATORA, Wife and Husband,** Grantor, whether one or more, in consideration of **$1.00 and other valuable consideration,** receipt of which is hereby acknowledged, conveys to **KIM P. SVATORA and ROGER A. SVATORA, Wife and Husband,** Grantees, as joint tenants and not as tenants in common
>
> . . . .

That same date, Kim tendered a check to Grant in the amount of $58,860.27 by depositing it with the clerk of the district court. Grant returned the check to Kim explaining that he could not accept such funds without jeopardizing his appeal.

On May 26, 2004, Grant's attorney filed with the Colfax County District Court an affidavit and praecipe for summons in garnishment. The attorney stated that Grant had recovered a judgment against Kim on April 18, 2001, which judgment became due and payable on April 1, 2004, and that there was due on the judgment the sum of $75,000 plus $614.90 interest as of May 25, and $13.10 costs, for a total of $75,628. Pursuant to the aforementioned "judgment," interrogatories were sent to financial institutions where Kim was thought to hold funds.

Attached to at least one of these interrogatories was a "Request for Hearing" form, which Kim signed and filed with the district court, contesting the propriety of the garnishment. Kim also filed a motion to quash the garnishment and supporting affidavit and praecipe for summons. In her motion to quash, she alleged that the district court lacked jurisdiction, that the pleadings and records of the district court did not reflect a $75,000 judgment in Grant's favor because the conditions or contingencies had not been satisfied, and that the judgment upon which Grant wished to garnish was a void conditional judgment.

Grant responded with a "Motion to Determine Amounts Due and Notice of Hearing," wherein Grant alleged that the condition for his $75,000 lien had been satisfied by way of the April 1, 2004, joint tenancy warranty deed, and asked the court to determine the amounts due to him by virtue of the dissolution

settlement and decree. Grant also filed the garnishee bank's response to the garnishment interrogatories, wherein it admitted being in possession of $4,315.97 in a demand account belonging to Kim. Grant requested that the court order this amount be paid into the court. Kim objected.

A hearing was held on Kim's request for a hearing on the garnishment and motion to quash and on Grant's motion to determine amounts due. During the hearing, Kim asked the court to mark the court file in its entirety and enter it as an exhibit. Grant objected to the court's taking judicial notice of the entire file. After some discussion about whether the file could be judicially noticed and whether it needed to be marked with an exhibit sticker, the court granted Kim's request and entered the file as exhibit 4. That exhibit contains 83 unnumbered pages, some double-sided, and includes the praecipe for bill of exceptions, notice of appeal, and other documents related to *Strunk I* that are found in the transcript for that case.

The district court held that the transfer of Kim's interest in the property to herself and Roger in joint tenancy created in a third party an undivided share of the whole property, thus fulfilling the condition under the Settlement and causing the $75,000 amount to be due and owing. The court rejected Kim's argument that the provision for $75,000 was void because it was a conditional judgment, deciding instead that the provision was a permissible condition precedent in a contract. The court thus overruled Kim's objection to the garnishment and ordered the garnishee to pay the $4,315.97 amount into the court for payment to Grant, the judgment creditor.

Kim filed her appeal from the July 2004 orders, filing a supersedeas bond in the amount of $79,000. We moved the case to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

III. ASSIGNMENTS OF ERROR

Kim assigns, restated, that the district court erred in (1) overruling her objections to the garnishment because Grant did not first seek a declaratory judgment interpreting the decree; (2) finding that there was a valid and enforceable condition precedent for

the payment of money contained in the Settlement, rather than finding that approving the $75,000 judgment was a conditional judgment, void as a matter of law; and (3) determining that the transfer of Kim's interest in the real estate to herself and Roger by joint tenancy warranty deed fulfilled the condition for the payment of the judgment.

Grant assigns on cross-appeal that the district court erred in taking judicial notice of the entire court file without specifying which facts or documents it was judicially noticing.

IV. STANDARD OF REVIEW

[1] In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider 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. *Parker v. Parker*, 268 Neb. 187, 681 N.W.2d 735 (2004).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Holm v. Holm*, 267 Neb. 867, 678 N.W.2d 499 (2004).

V. ANALYSIS

1. Procedural Infirmity

We first address Kim's argument that the lower court pleadings suffer from procedural infirmities. Specifically, Kim argues that Grant was required to establish satisfaction of the condition to the $75,000 judgment before attempting to execute thereon and that the proper method for doing so was by a separate action for declaratory relief. In arguing that Grant should have first resolved the controversy by bringing a separate action for declaratory relief, Kim relies on the prior statement of this court that "[w]here there is a genuine controversy between the parties as to the meaning of language in a decree of dissolution, and the appeal period has passed, a proper method to resolve the controversy is by a separate action for declaratory relief." See *Buhrmann v. Buhrmann*, 231 Neb. 831, 835, 438 N.W.2d 481,

484 (1989), citing *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986), and *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 401 N.W.2d 679 (1987).

In *Buhrmann v. Buhrmann, supra*, we concluded that since the issue of the division of certain leasehold improvements was not placed in issue or adjudicated upon in the original dissolution decree, it was a proper subject for determination in the husband's declaratory judgment action. We did not state that such an action was the only acceptable means to obtain such a determination.

In *Neujahr v. Neujahr*, 233 Neb. at 728, 393 N.W.2d at 51, we noted that there are instances when a decree is ambiguous and "parties are left at their peril to know what they are authorized to do." In such situations, "the parties must bring some form of action which raises the issue and thereby requires the court before whom the matter is then pending to resolve the issue as a matter of law in light of the evidence and the meaning of the decree as it appears." *Id.* We did not specify what form of action parties "left at their peril" should bring. Only the dissent, in the course of arguing that the remand unnecessarily occasioned further expenditure of judicial time and energy, stated that where there "appears to be a genuine controversy between the parties as to the meaning of some of the language of the decree," the "better rule is that such a controversy can be resolved by declaratory relief." *Id.* at 729, 393 N.W.2d at 51 (Boslaugh, J., dissenting).

[3,4] A district court, in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all terms of approved property settlement agreements. See *Zetterman v. Zetterman*, 245 Neb. 255, 512 N.W.2d 622 (1994). 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). Grant's motion to determine amounts due was proper under the circumstances in this case. See *Spencer v. Spencer*, 126 S.W.3d 770 (Mo. App. 2004) (affirming trial court's order sustaining mother's motion to determine amounts due and owing under

previously entered dissolution decree). Therefore, we reject Kim's first assignment of error.

2. Cross-Appeal

[5] We next address Grant's argument, improperly presented as a cross-appeal, that the "trial court erred in taking judicial notice of the entire court file without specifying which facts or documents it was judicially noticing." Brief for appellee at 33. See *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002) (cross-appeal must ask for affirmative relief, which means reversal, vacation, or modification of lower court's judgment, decree, or final order). He asks us, in our review of the case, to disregard this court file, marked in its entirety as exhibit 4.

[6,7] Judicial notice of adjudicative facts is governed by Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 1995). *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001). Adjudicative facts within the meaning of § 27-201 are simply the facts developed in a particular case, as distinguished from legislative facts, which are established truths, facts, or pronouncements that do not change from case to case but apply universally. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). In other words, the adjudicative facts are those to which the law is applied in the process of adjudication. *Id.*

[8] We have further stated that a court may take judicial notice of adjudicative facts which are not subject to reasonable dispute, either because they are (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997); *In re Interest of C.K., L.K., and G.K.*, 240 Neb. 700, 484 N.W.2d 68 (1992). See § 27-201. Grant acknowledges that exhibit 4 would contain facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. He argues, however, that these facts must be individually marked, identified, and made a part of the record, and that an entire file cannot exist as a judicially noted *fact* as contemplated by § 27-201.

[9] When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *J.B. Contracting Servs. v. Universal Surety Co., supra.* Nevertheless, in *In re Interest of C.K., L.K., and G.K.*, 240 Neb. at 709, 484 N.W.2d at 73, we stated that " '[c]are should be taken by the court to identify the fact it is noticing, and its justification for doing so.' " (Quoting *Colonial Leasing etc. v. Logistics Control G.I.*, 762 F.2d 454 (5th Cir. 1985).) Thus, we disapproved of the trial court's simply taking notice of all pleadings, adjudication, and records that were admissible in two prior proceedings involving the parties before the court. Those proceedings involved 36 exhibits and 490 pages of transcription, and we explained that "[w]ithout cryptesthesia or telepathy, we are unable to ascertain just what fact or facts were judicially noticed by the trial court." *In re Interest of C.K., L.K., and G.K.*, 240 Neb. at 710, 484 N.W.2d at 73. Consequently, we conducted our de novo review exclusive of the material which "may have been" the subject of the trial court's "judicial notice." *Id.* at 711, 484 N.W.2d at 74. See, also, *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989) (entire trial record cannot be said to fall within definition of judicially noted fact as set out in § 27-201(2)).

Here, the district court was correct in formally introducing its prior proceedings into evidence and making such evidence a part of the record. See, *In re Interest of C.K., L.K., and G.K., supra*; *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). It should have done so, however, by individually noticing those elements considered relevant and competent for the issues presented. Still, any error committed by the district court is clearly harmless because our review, as will be seen below, presents only questions of law. See *Husen v. Husen*, 241 Neb. 10, 487 N.W.2d 269 (1992). We need not decide in a de novo review whether to disregard the entire file presented in this case, because the facts contained therein are irrelevant to our analysis.

3. Settlement Provision

[10] Having addressed the preliminary issues, we now address the merits of the dispute before us. Kim did not appeal the dissolution decree providing for the $75,000 conditional judgment, and Grant argues that Kim is attempting an impermissible collateral attack on the judgment. Where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, its provisions will not thereafter be vacated or modified in the absence of fraud or gross inequity. See, *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002); *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001).

[11] Nevertheless, a void judgment may generally be attacked at any time in any proceeding. See *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999). Certainly, if the provision in question were void, there would be nothing upon which could lie the current determination of amounts due and garnishment. See, e.g., *J.K. v. Kolbeck*, 257 Neb. 107, 595 N.W.2d 875 (1999) (by plain language of Neb. Rev. Stat. § 25-1056 (Cum. Supp. 2004), garnishment in aid of execution is only available when judgment has been entered). See, also, *State v. Wessels and Cheek*, 232 Neb. 56, 439 N.W.2d 484 (1989) (using void conditional judgment doctrine in collateral attack).

(a) Contract or Judgment

[12] In arguing that the $75,000 provision is a void conditional judgment, Kim first rejects the district court's characterization of the provision as being a provision in a contract and not of a judgment. If the provision were part of a contract and not a judgment, it would not be void under the void conditional judgment rule. Absent contrary public policy, it is established that a contract may be conditioned upon the occurrence or nonoccurrence of an act or event. See *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002).

[13] In *Chamberlin v. Chamberlin*, 206 Neb. 808, 818, 295 N.W.2d 391, 397 (1980), we held that a dissolution decree which approved and incorporated into the decree the parties' property settlement, alimony, and child support agreement was

a "judgment of the court itself." We accordingly rejected the wife's argument that the decree was a consent judgment and that as such, the court was without power to modify the decree over the objection of one of the parties. We noted that consent judgments constituted the agreement of the parties and were simply made a matter of the record by the court at their request. In consent judgments, the court does not inquire into the merits or equities of the case, and the only questions to be determined are whether the parties are capable of binding themselves by consent and whether they have actually done so.

In contrast, we noted that before issuing a dissolution decree, the court is required to approve the provisions of the settlement agreement and to examine into the merits of the matter before it, including the question of whether the marriage is irretrievably broken. See *Chamberlin v. Chamberlin, supra.* See, also, *Jones v. Hubbard*, 356 Md. 513, 740 A.2d 1004 (1999) (even consent judgment is "judgment" or "judicial act" by court because critical element of judicial conclusiveness is added to contractual act, and its only distinction is that it is entered at request of parties); *Henderson v. Henderson*, 307 N.C. 401, 407, 298 S.E.2d 345, 350 (1983) (contractual character of settlement agreement is "subsumed into the court-ordered judgment"). We conclude that the $75,000 provision in question is part of a judgment, and we thus consider the applicability of the void conditional judgment rule and whether the $75,000 provision is void.

(b) Void Conditional Judgment Rule

[14] Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004), defines a judgment as "the final determination of the rights of the parties in an action." We have elaborated that a "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995). Thus, we have held that orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not operate as "judgments" and are wholly ineffective and void as such. See *Kroll v. Department of Motor Vehicles*, 256 Neb. 548, 590 N.W.2d 861 (1999). These "conditional judgments" are not final

determinations of the rights and obligations of the parties as they presently exist, but, rather, look to the future in an attempt to judge the unknown. *Village of Orleans v. Dietz, supra.* We have held that a conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. *Id.*

[15] While conditional orders will not automatically become final judgments upon the occurrence of the specified conditions, see *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987), they can operate in conjunction with a further consideration of the court as to whether the conditions have been met, at which time a final judgment may be made. See *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000). In *Lenarduzzi*, we attempted to resolve any confusion arising from the use of the term "wholly void," explaining that conditional orders are not void as *interlocutory* orders, but are void only insofar as they purport to be final judgments. We stated that conditional interlocutory orders do not perform in praesenti and do not have force and effect *as a final order or judgment from which an appeal can be taken.* Nevertheless, they can operate, for instance, as an order properly scheduling the completion of pretrial tasks, the failure of which to meet subjecting the parties to possible sanction as the facts may warrant. Such orders cannot operate as final, appealable judgments without further court consideration regarding the task or obligation that was purportedly not met, however, "because parties should not be left to guess or speculate as to the final effect of a conditional interlocutory order." *Id.* at 461, 610 N.W.2d at 397. See, generally, *2-H Ranch Co., Inc. v. Simmons*, 658 P.2d 68 (Wyo. 1983) (explaining that conditional judgments are more properly termed "nonexistent," but that law governing execution on void judgments is still applicable because, like judgment void for lack of jurisdiction or voidable as erroneous, such judgments are entitled to no force or effect).

Traditionally, cases decided under our void conditional judgment rule have been actions at law purporting to make a final judgment of dismissal, contempt, suspension, injunction, or other, but expressly conditioning said "judgment" upon a specified future action or inaction of one of the parties. See, e.g.,

Village of Orleans v. Dietz, 248 Neb. 806, 539 N.W.2d 440 (1995); *County of Sherman v. Evans*, 247 Neb. 288, 526 N.W.2d 232 (1995); *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992); *W & K Farms v. Hi-Line Farms*, 226 Neb. 895, 416 N.W.2d 10 (1987); *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987); *Fritch v. Fritch*, 191 Neb. 29, 213 N.W.2d 445 (1973). But we have not expressly addressed the applicability of the void conditional judgment rule to actions in equity. Since the dissolution decree before us was entered by a court acting in equity, we consider that issue now.

(c) Are Conditional Judgments Void in Actions at Equity?

[16,17] We have explained that courts of equity are not always restricted by the same rules as courts of law. See, *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004); *Drake v. Morrow*, 140 Neb. 258, 299 N.W. 545 (1941). 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. *Trieweiler v. Sears, supra*. An action in equity vests the trial court with broad powers authorizing any judgment under the pleadings. *Ludwig v. Matter*, 210 Neb. 87, 313 N.W.2d 234 (1981); *Lippire v. Eckel*, 178 Neb. 643, 134 N.W.2d 802 (1965).

In *Gerow v. Covill*, 192 Ariz. 9, 960 P.2d 55 (Ariz. App. 1998), the court explained that equitable judgments constitute an exception to the general rule that conditional judgments are void. The court accordingly upheld a dissolution judgment ordering that ownership of stock for a company fraudulently conveyed "shall" be changed to reflect the former wife's one-half interest "upon" resolution against the registered owner that the stock ostensibly in her name was in fact owned by the former husband. The court rejected the husband's contention that such an order was void because it was conditional, explaining that the trial court was merely using its power as an equity court to adapt its relief and mold its decree to satisfy the requirements of the case and to conserve the equities of the parties. *Id.* The court stated: " 'When a court of equity renders a conditional decree . . . [i]t is simply adjusting the equities between the parties and granting to one or the other certain relief to which the litigants may be entitled.' "

Id. at 13-14, 960 P.2d at 59-60 (quoting *Mason v. Ellison*, 63 Ariz. 196, 160 P.2d 326 (1945)).

The weight of authority in other jurisdictions has either explicitly or implicitly refused to extend the void conditional judgment rule into the realm of equity. See, e.g., *County of Tulare v. Ybarra*, 143 Cal. App. 3d 580, 192 Cal. Rptr. 49 (1983); *Hull v. Bowest Corp.*, 649 P.2d 334 (Colo. App. 1982); *Valley Builders, Inc. vs. Stein, et ux.*, 41 Del. Ch. 259, 193 A.2d 793 (1963); *Kessler v. Tortoise Development, Inc.*, 134 Idaho 264, 1 P.3d 292 (2000) (court of equity, being court of conscience, is capable of rendering conditional decree in action for specific performance); *Lewis et al. v. Romine et al.*, 128 Ind. App. 564, 151 N.E.2d 156 (1958); *Scheldrup v. Gaffney*, 243 Iowa 1297, 1303, 55 N.W.2d 272, 275 (1952) (stating that "[t]his court has held in many cases that the rule that conditional judgments are wrong has no application to decrees in equity"); *Pepperell Trust Co. vs. Mehlman et al.*, 155 Me. 318, 154 A.2d 161 (1959); *Rymland v. Berger*, 242 Md. 260, 219 A.2d 7 (1966); *Southern Four v. Parker*, 81 Md. App. 85, 566 A.2d 808 (1989); *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. App. 2000) (conditional custody awards not precluded when in child's best interests); *Hayes v. Gallacher*, 115 Nev. 1, 972 P.2d 1138 (1999); *Singer v. New Belfort Apts.*, 79 N.Y.S.2d 464 (1948) (court of equity is court of conscience capable of rendering conditional decree); *Whedon v. Whedon*, 58 N.C. App. 524, 294 S.E.2d 29 (1982); *McEntire v. McEntire*, 107 Ohio St. 510, 140 N.E. 328 (1923); *Stephen v. Stephen*, 937 P.2d 92 (Okla. 1997) (in its powers to equitably settle conflicting rights, court may attach such reasonable conditions to custody orders as seem proper); *Phila. Marine T. A. v. Longshoremen*, 453 Pa. 43, 308 A.2d 98 (1973); *DeCoria v. Red's Trailer Mart*, 5 Wash. App. 892, 491 P.2d 241 (1971) (in action for rescission in equity, court had power to see that substantial justice was effected by making decree of rescission conditional if need be); *In re Marriage of Schwantes v. Schwantes*, 121 Wis. 2d 607, 360 N.W.2d 69 (Wis. App. 1984). But see, *Hero v. Hero*, 714 So. 2d 868 (La. App. 1998); *Reynolds v. Reynolds*, 109 S.W.3d 258 (Mo. App. 2003).

[18] In iterating the conditional judgments rule in *Lemburg v. Adams County*, 225 Neb. 289, 292, 404 N.W.2d 429, 431 (1987), we stated that "generally, final judgments must not be

conditional, and *unless there is an equitable phase of the action wherein it is necessary to protect the interests of defendants*, a conditional judgment is wholly void." (Emphasis supplied.) See, also, *State v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999); *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992); *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991). This statement by our court has at its crux the inapplicability of the void conditional judgment rule either to actions at equity or to equitable relief granted within an action at law. It was originally derived from *Benton v. Alcazar Hotel Co.*, 354 Mo. 1222, 194 S.W.2d 20 (1946), and *Seeger v. Odell*, 18 Cal. 2d 409, 115 P.2d 977 (1941), both cases explicitly allowing conditionality in equity. In *Seeger*, the court noted: "It is well established . . . that a court granting equitable relief has the power to make its decrees contingent upon compliance . . . with certain conditions." 18 Cal. 2d at 417-18, 115 P.2d at 982.

Consistent with that principle, we have approved of equitable judgments that otherwise would have been considered conditional and void. See, *Wood v. Wood*, 266 Neb. 580, 581, 667 N.W.2d 235, 238 (2003) (affirming district court's judgment enforcing decree's provision, through settlement agreement, that " '[i]n the event' " any children were to elect to pursue further education after graduation from high school, including college or vocational training, husband agreed to be responsible for one-half of such expenses for each child, including tuition, books, and room and board); *Simons v. Simons*, 261 Neb. 570, 624 N.W.2d 36 (2001) (upholding decree that stated that former husband's support obligation was to begin on day he was released from prison).

In *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002), we held to be void the conditional provisions of a dissolution decree, although we did so without considering the general propriety of applying such a rule in equity. In *Vogel*, the trial court's modification order set forth certain alternative custody arrangements contingent upon the event that either (1) the parents return to living within 50 miles of one another or (2) the mother's husband, who worked for the military, were transferred outside the United States. We concluded that these further orders were conditional. They did not "perform in praesenti," but, rather, would become

effective only upon the happening of certain future events which may or may not occur. After finding the void conditional provisions severable from the valid portion of the trial court's order, we ordered such portions vacated. See *id.*

However, our reasoning in *Vogel* was premised on considerations other than the conditional nature of the order. Instead of simply concluding that the provisions of the order were void because they failed to perform in praesenti, we stated, in effect, that the conditional order was not appropriate because it was unnecessary and unwise to speculate as to the best interests of the child under changed circumstances. The contingent provisions presented in *Vogel* were contrary to a proper assessment of the best interests of the child, which is paramount in custody determinations. We stated: "The impact of such potential events on the children's best interests and the proper judicial response to the potential events identified in the orders complained of are better assessed at the time of their occurrence." 262 Neb. at 1039, 610 N.W.2d at 619-20. In other words, because there is a statutory allowance for modification in the future upon changed circumstances, the conditional judgment in *Vogel* was not only unnecessary to resolve the equities presented, but was contrary to an equitable resolution. See, also, *Burch v. Burch*, 805 S.W.2d 341 (Mo. App. 1991) (provisions of dissolution decrees which order automatic change in child custody upon happening of some future event have consistently been held unenforceable because of failure to provide for consideration of circumstances existing at time of automatic change).

[19] We now expressly hold that the void conditional judgment rule does not extend to actions in equity or to equitable relief granted within an action at law. Rather, where it is necessary and equitable to do so, a court of equitable jurisdiction may enter a conditional judgment and such judgment will not be deemed void simply by virtue of its conditional nature. Conditional judgments are a fundamental tool with which courts sitting in equity have traditionally been privileged in order to properly devise a remedy to meet the situation. We will not take away that tool by extending our void conditional judgment rule into the realm of equity. Rather, we follow the numerous decisions from other jurisdictions, set forth above, and precedent by

this court that recognizes that a strict prohibition against conditional judgments is inappropriate to equitable relief.

[20] That having been established, we accordingly conclude that the provision at issue in this case is not per se void due to its conditional nature. We note, however, that simply because a conditional judgment in an action at equity is not automatically void, it does not follow that all conditional judgments are acceptable on direct review or that judgments in equity cannot, for different reasons, be void and therefore subject to collateral attack. Certain conditional judgments may still be considered erroneous or an abuse of discretion, be set aside where procured by fraud, or be considered void as contrary to statute or public policy.

[21] Perhaps most relevant, conditional judgments in equity are required to determine the rights and obligations of the parties with reasonable certainty. Thus, in *Breiner v. Breiner*, 195 Neb. 143, 236 N.W.2d 846 (1975), we found a child support modification to be insufficiently definite and certain where the court ordered child support with amounts for subsequent years based on a formula to be applied to whatever the amount of the father's bonus would be in any given year. While we recognized that other jurisdictions have permitted this type of decree, we explained that the decree should be more definite and certain in order to facilitate proper enforcement. While the need for computation itself was not objectionable, "an extraneous fact unknown until the end of the year" was necessary to compute the amount of child support. *Id.* at 146, 236 N.W.2d at 848. We were concerned that "[u]nnecessary administrative difficulties would be created," because the proceedings involving the particular parties before us had been "acrimonious, to say the least," and that it seemed possible the parties would end up in court every year litigating differences as to the amount of the bonus. *Id.* See, also, *Castonguay v. Plourde*, 46 Conn. App. 251, 699 A.2d 226 (1997) (judgment must so dispose of matters in issue that parties will be able to determine with reasonable certainty and clarity what is prohibited or required); *Wolf v. Murrane*, 199 N.W.2d 90 (Iowa 1972) (judgment must be certain and in intelligible form so that parties understand adjudication); *Pearson v. Pearson*, 369 S.W.2d 272 (Mo. App. 1963); *Morrow v. Morrow*, 94 N.C. App. 187, 379 S.E.2d 705 (1989)

(judgment must not be so vague and uncertain as to be unenforceable); *Kimsey v. Kimsey*, 965 S.W.2d 690 (Tex. App. 1998) (divorce decree must delineate terms of compliance in clear, specific, and unambiguous terms so that parties will readily know exactly what duties are imposed on them).

[22] However, such limitations on an equity court's usage of conditional provisions in its judgments are unlikely to arise in the variety of conditional terms that parties regularly draft in the process of reaching a mutually satisfactory settlement agreement. Generally, the division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). Where the property division is made pursuant to a voluntary agreement by the parties, a further equitable consideration arises as to the need to protect the parties' bargaining power and the benefit of a bargain once made. As the court in *McInnis v. McInnis*, 199 Or. App. 223, 231, 110 P.3d 639, 643 (2005), described: " 'Where parties have foregone [sic] their opportunity to litigate disputes and have chosen instead to enter into an agreement, their reliance on the agreement can be presumed. Inequity may result if this court adopts a policy of less than full enforcement of mutually agreed upon property and support agreements.' " (Quoting *McDonnal and McDonnal*, 293 Or. 772, 652 P.2d 1247 (1982).) Similarly, the court in *Marriage of Coyle*, 61 Wash. App. 653, 811 P.2d 244 (1991), after finding voidable the alimony provision, upheld a property settlement condition providing the wife with a new car every year for 15 years unless she remarried or the husband sold his car dealership before that time, at which point, the wife would be entitled to a lifetime award of the car she was then driving. The court explained that unlike alimony, a property division "simply disposes of the property of the parties . . . presumably upon an equitable basis" and that a "property division cannot always be conveniently effected by a present allocation of property to each party." *Id.* at 660-61, 811 P.2d at 248.

Byrne v. Ackerlund, 108 Wash. 2d 445, 739 P.2d 1138 (1987), presents a conditional provision somewhat similar to the case at bar. In *Byrne*, the court addressed an appeal from a declaratory judgment action seeking enforcement of liens on the husband's

portion of the marital property which were payable only upon the voluntary or involuntary sale or transfer of the property. Although no sale or transfer had occurred, the wife argued for an immediate accounting and partition on the ground that not to do so violated the governing statute providing that parties to a dissolution action had the right to have their respective interests in property "'definitely and finally determined,' without the prospect of future litigation." *Id.* at 449, 739 P.2d at 1140. The superior court had granted summary judgment in the wife's favor, but the Supreme Court of Washington reversed, finding that the necessity under applicable law for a definite and final determination was "satisfied by a specific disposition of each asset which informs the parties of what is going to happen to the asset and upon what operative events, *e.g.*, that a set sum or formula of money will be paid upon the sale of certain property." *Id.* at 451, 739 P.2d at 1141. It was not necessary that such operative events be certain to occur.

In so concluding, the court pointed out that the lien in issue arose out of a voluntary and mutually beneficial property settlement agreement which was incorporated by the court into the dissolution decree. The court noted that under the governing statute specifying that the rights be determined without the prospect of future litigation, it might have been inappropriate for the dissolution court to order such a division of property if the parties had not agreed to it, increasing the possibility of future strife. However, the court found that such heightened prospects for future litigation were not present where the agreement was entered into voluntarily and that the dollar amount was fixed and enforceable only upon the occurrence of a particular event.

Moreover, the court noted that to hold such a provision insufficiently definite would have "dangerous implications." *Byrne v. Ackerlund*, 108 Wash. 2d at 450, 739 P.2d at 1141. "It would severely impede spouses' freedom to contract for mutually advantageous property settlements and would effectively require dissolution courts to order the sale of principal assets by some particular date, a practice this court has previously frowned upon." *Id.* at 450-51, 739 P.2d at 1141.

The $75,000 provision at issue in the instant case was the product of negotiations and agreement by the parties, and was

found by the court to be part of a fair and reasonable settlement agreement. No appeal was taken from that determination. Even assuming that a provision can be subject to collateral attack as insufficiently definite to be enforceable, the provision at issue here was an appropriate exercise of the court's equitable powers. We can find no reason to now consider that provision void. We accordingly reject Kim's second assignment of error.

4. WHETHER CONDITION WAS SATISFIED

Having determined that the $75,000 conditional judgment is not void, we must now determine whether the conditions have, in fact, been satisfied. The provision in issue states:

> [I]f at any time said real property is sold, transferred, gifted, conveyed, foreclosed upon, or for any other reason or in any other manner conveyed, whether voluntarily or involuntarily by the Respondent [(Kim)] to any third party, Petitioner [(Grant)] shall receive the additional sum of $75,000 which shall accrue no interest until due. This additional sum of $75,000 shall only be due to the Petitioner by the Respondent if said property is sold or conveyed as described above, during the Petitioner's lifetime. If said real property is sold or transferred as described above, after the Petitioner's death, Petitioner shall not be entitled to the additional sum of $75,000, but the initial sum of $50,000, together with interest, shall be due to the Petitioner or his estate.

Grant contends, and the district court found, that by executing a deed from herself as sole owner of the subject property to herself and to Roger as joint tenants, Kim "transferred" or "conveyed" the property under the unambiguous language of the agreement, and the condition underlying the $75,000 judgment was thus met.

Kim argues that the provision is unambiguous, but that a "reasonable interpretation" of the provision "would require an understanding that the parties agree that Kim did not have adequate assets from which to pay an additional $75,000.00 judgment and that this would only be paid if she sold the property" or if she predeceased Grant. Brief for appellant at 17. Additional language was added merely to prevent Kim from being able to gift the property to a third party to avoid triggering the $75,000

judgment. Kim reads into the terms "convey," "transfer," and "gift" the need for a complete divestiture of her ownership interest. Since the deed in joint tenancy did not divest Kim of her interest to the property, she asserts that the condition to the $75,000 judgment was not met.

The meaning of the decree presents a question of law, in connection with which we reach a conclusion independent of the determination reached by the court below. See *Holm v. Holm*, 267 Neb. 867, 678 N.W.2d 499 (2004). We conclude that the term "convey" is unambiguous and that it describes the joint tenancy warranty deed in question.

Kim does not argue that the deed was not strictly a "conveyance," but, rather, that the parties meant to further limit this term. While it may be that the terms of the agreement do not reflect her subjective intent at that time, and her subsequent actions would indicate that she did not understand the terms in this way, the language of the agreement itself simply does not limit its conditions precedent to the complete divestiture of Kim's interest in the property.

[23] Where the language used in the agreement is unambiguous, we are bound to consider such language from the four corners of the agreement itself, and what the parties thought the agreement meant is irrelevant. See, *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997) (once decree for dissolution becomes final, its meaning is determined as matter of law from four corners of decree itself); *Schrempp and Salerno v. Gross*, 247 Neb. 685, 529 N.W.2d 764 (1995) (extrinsic facts are allowed only when factual disputes and ambiguities exist regarding meaning of material terms in contract); *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993) (after time for appeal has passed, meaning of dissolution decree is determined as matter of law from its language; neither what parties thought decree meant nor what judge intended is of any relevance); *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979) (if language used in judgment is ambiguous, there is room for construction, but if language employed is plain and unambiguous, there is no room for construction or interpretation, and effect of decree must be declared in light of literal meaning of language used).

[24] Ambiguity exists in a document when a word, phrase, or provision therein has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. See *Husen v. Husen*, 241 Neb. 10, 487 N.W.2d 269 (1992). In other words, a document is ambiguous if, after application of the pertinent rules of construction, there is uncertainty concerning which of two or more reasonable meanings represents the intention of the parties. *Id.* The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Id.*

Black's Law Dictionary 357 (8th ed. 2004) defines "convey" as "[t]o transfer or deliver (something, such as a right or property) to another, esp. by deed or other writing; esp., to perform an act that is intended to create one or more property interests, regardless of whether the act is actually effective to create those interests." It defines a "conveyance" as "[t]he voluntary transfer of a right or of property." *Id.* It also defines a "conveyance" as "[t]he transfer of an interest in real property from one living person to another, by means of an instrument such as a deed." *Id.* at 358.

The Uniform Property Act, Neb. Rev. Stat. § 76-101 et seq. (Reissue 2003), defines the term "conveyance" as "an act by which it is intended to create one or more property interests, irrespective of whether the act is effective to create such interests, and irrespective of whether the act is intended to have inter vivos or testamentary operation." § 76-101. Section 76-118 of the Uniform Property Act states:

> (1) Any person or persons owning property which he, she, or they have power to convey, may effectively convey such property by a conveyance naming himself, herself, or themselves and another person or persons, as grantees, and the conveyance has the same effect as to whether it creates a joint tenancy, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property to the persons named as grantees in the conveyance. . . . (3) Any person mentioned in this section may be a married person, and any persons so mentioned may be persons married to each other.

When the well-understood legal meaning of the term "convey" is considered, along with the definitions contained in Nebraska statutes, it is apparent that the language of the Settlement is not ambiguous and is not limited to circumstances in which Kim is completely divested of her interest in the property. Clearly, the joint tenancy warranty deed "conveyed" an interest "by" Kim to a third party, Roger. It is hard to imagine that Kim was unaware of this effect when even the deed itself describes that Kim therein "conveys" the property. Kim could have expressly limited the condition triggering the $75,000 judgment to conveyances wherein she completely divested herself of her ownership interest to the property in question; however, she did not do so, and we are bound by the unambiguous language of the agreement as it is written. Kim's third and final assignment of error is without merit.

VI. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment.

AFFIRMED.

IN RE ESTATE OF EDWARD LAMPLAUGH, DECEASED. DEBORAH CARTER, APPELLEE, V. CHARLES PERCY, SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF EDWARD LAMPLAUGH, DECEASED, APPELLANT.

708 N.W.2d 645

Filed January 20, 2006. No. S-04-959.

1. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Appeal and Error.** An appeal from the county court's allowance or disallowance of a claim in probate will be heard as an appeal from an action at law. In reviewing a judgment of the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the

successful party, who is entitled to every reasonable inference deducible from the evidence. The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.

4. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Gifts: Intent.** To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee.
6. ____: ____. One of the essential elements of a gift is the intention to make it.
7. ____: ____. A clear and unmistakable intention on the part of the donor to make a gift of his or her property is an essential element of the gift, and this contention must be inconsistent with any other theory.
8. ____: ____. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained.
9. **Gifts.** Ordinarily, actual delivery is necessary where the subject of a gift is capable of manual delivery, but where actual manual delivery cannot be made, the donor may do that which, under the circumstances, will in reason be considered equivalent to actual delivery.
10. **Decedents' Estates: Time.** Neb. Rev. Stat. § 30-2723(d) (Reissue 1995) requires that unpaid checks written on a party's account before the party's death be paid by the beneficiary of the sums on deposit in the decedent's account.
11. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
12. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Appeal from the County Court for Lincoln County: KENT D. TURNBULL, Judge. Affirmed.

Michael L. Nozicka, of Baskins, Pederson & Troshnyski, for appellant.

James J. Paloucek, of Norman, Paloucek & Herman Law Offices, for appellee.

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

GERRARD, J.

After the death of Edward Lamplaugh, Deborah Carter deposited two checks written to her on Lamplaugh's account at Adams Bank & Trust (the Bank). Upon learning of

Lamplaugh's death and contacting the pay-on-death beneficiary of Lamplaugh's account, the Bank reversed the transaction and placed a hold on Lamplaugh's account. Carter filed a claim against the estate of Lamplaugh for the amount of the checks, and the county court granted the claim in full. The successor personal representative of the estate appeals the judgment of the county court. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

During the 10 years prior to Lamplaugh's death, Carter performed housekeeping and other household duties for him. Among other tasks, Carter paid Lamplaugh's bills, cleaned his home, dispensed his medicine, mowed his yard, did his laundry, took him on errands, and accompanied him to the doctor. On the morning of June 10, 2002, Carter arrived at Lamplaugh's home and discovered Lamplaugh on the floor, deceased. Carter notified the authorities and traveled to the hospital, where Lamplaugh was pronounced dead. When Carter left the hospital, she stopped at the Bank to deposit two checks written to her on Lamplaugh's account. One check, dated June 6, 2002, was in the amount of $50 for cleaning services Carter had performed the previous week. The other check, dated June 9, 2002, was in the amount of $80,000. According to Carter, Lamplaugh gave her the check to enable her to buy a liquor store located in North Platte that was for sale at the time of Lamplaugh's death.

When Carter returned to Lamplaugh's home after depositing the checks into her account, an employee of the Bank called the residence to speak with Lamplaugh. After learning of Lamplaugh's death and subsequently contacting Lamplaugh's sister, the pay-on-death beneficiary of the account, the Bank reversed the transaction, placed a hold on the account, and notified Carter accordingly. Carter was never able to gain access to the funds.

Lamplaugh's sister was appointed as personal representative of Lamplaugh's estate. After her health deteriorated, Charles Percy was appointed as successor personal representative (hereinafter personal representative).

Carter filed a petition for allowance of claim against the estate for $80,098, including the amount of the two checks and

an additional $48 that Carter spent to change the locks at Lamplaugh's home on the day he died. The amended inventory of Lamplaugh's estate shows under schedule F (as personal property) the disputed $80,000 which is being held in the Bank and under schedule C (as cash) the remaining amount contained in Lamplaugh's checking account with Lamplaugh's sister as the pay-on-death beneficiary. A trial was held, and the county court granted Carter's claim. No fraud had been alleged by the estate, and the court found that Carter acted out of "genuine fondness or love" for Lamplaugh and found no evidence of fraudulent intent or action on Carter's part. The court concluded that the check showed sufficient indicia of donative intent to be a valid gift and rejected the personal representative's argument that Lamplaugh's death before redemption of the check nullified the gift. The court also granted payment of $50 for Carter's cleaning services and $48 expended in changing the locks at Lamplaugh's residence, and those findings are not at issue here.

The personal representative appealed the judgment of the county court.

ASSIGNMENTS OF ERROR

The personal representative assigns, summarized and restated, that the county court erred in (1) finding donative intent on the part of Lamplaugh in transferring the $80,000 check to Carter, (2) finding effective delivery of the purported gift, and (3) failing to find that the purported gift was revoked by Lamplaugh's death.

The personal representative also assigns but does not argue that the county court erred in (1) finding acceptance of the purported gift by Carter and (2) awarding Carter the full value of her claim. Errors that are assigned but not argued will not be addressed by an appellate court. *Genthon v. Kratville, ante* p. 74, 701 N.W.2d 334 (2005).

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record. *In re Estate of Rosso, ante* p. 323, 701 N.W.2d 355 (2005). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported

by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3,4] An appeal from the county court's allowance or disallowance of a claim in probate will be heard as an appeal from an action at law. See *In re Estate of Matteson*, 267 Neb. 497, 675 N.W.2d 366 (2004). In reviewing a judgment of the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002). The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. See *id.* On a question of law, however, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

[5] The personal representative assigns that the county court erred in finding the $80,000 check to be a valid gift from Lamplaugh to Carter. To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee. *Guardian State Bank & Trust Co. v. Jacobson*, 220 Neb. 235, 369 N.W.2d 80 (1985). The personal representative first challenges the county court's finding of donative intent, arguing that the court was presented with conflicting evidence as to Lamplaugh's intent in giving the check to Carter and that, thus, Carter failed to prove the requisite donative intent. The personal representative also argues that Carter failed to prove that Lamplaugh effectively delivered the $80,000 to Carter. As a result, the personal representative asserts that the gift was incomplete and, consequently, revoked upon Lamplaugh's death.

Sufficient Evidence Was Presented at Trial to Support County Court's Finding of Donative Intent.

[6,7] One of the essential elements of a gift is the intention to make it. *Masonic Temple Craft v. Stamm*, 152 Neb. 604, 42 N.W.2d 178 (1950). A clear and unmistakable intention on the

part of the donor to make a gift of his or her property is an essential element of the gift, and this contention must be inconsistent with any other theory. *Id.*

The personal representative argues that Carter did not present clear evidence at trial to show that Lamplaugh intended to make a gift of $80,000 to Carter. Carter argues that the county court's finding of donative intent was supported by competent evidence, and based on the evidence offered at trial and the applicable standard of review, we agree.

At trial, Carter testified that on many occasions, Lamplaugh expressed a desire that Carter have all his money upon his death. Carter testified that Lamplaugh gave her money as gifts, paid her sick leave, paid for her "car tags," and expressed his desire to take care of her. Carter testified that she and Lamplaugh discussed the purchase of the liquor store on multiple occasions and that Lamplaugh offered to assist her with the investment.

Carter described the usual process in which she would assist Lamplaugh in paying his bills—filling out the checks according to his instructions for him to then review and sign, one at a time. Carter testified that the same process was used at the time Lamplaugh signed the $80,000 check at issue. She testified that after spending the day cleaning and doing laundry at Lamplaugh's residence on June 9, 2002, Lamplaugh told her that she "needed to slow down and take time and get that — that liquor store bought." Carter testified that Lamplaugh instructed her to write "to pay bills" on the "memo" line of the check, explaining that it was not his family's business how he spent his money. Further, Carter testified that Lamplaugh did not mention anything about repayment terms and that she understood the check to be a gift from him. At the end of the evening, Carter placed the check in her purse and went home, after making arrangements to stop at Lamplaugh's residence the following morning.

Debby Baker, Carter's close friend and former employer, also testified at trial. Baker testified that due to Carter's multiple jobs and hectic schedule, Baker served as an answering service for Carter and kept track of her whereabouts in case anyone needed to reach her. Baker testified that she spoke to Lamplaugh on the telephone on multiple occasions while Carter was working for

him. Baker explained that on the day before Lamplaugh's death, she called Lamplaugh's residence to speak to Carter. Lamplaugh answered the telephone, explained that Carter was busy cleaning, and expressed to Baker his desire to give Carter a check for $80,000. Lamplaugh told Baker that he hoped owning her own business would allow Carter to spend more time assisting him. Baker testified that Lamplaugh had also expressed his intent to give Carter the check on a prior occasion.

Finally, the deposition of Janet Spencer, a former business development officer and personal banker at the Bank, was received into evidence at trial. Spencer testified that she first met Lamplaugh when he came to the Bank, along with Carter, to open a personal checking account. Spencer was already acquainted with Carter at that time, having served as her banker. In discussing with Lamplaugh the ways in which to title the new account, Spencer testified that Lamplaugh wanted Carter on the account. Spencer testified that when Carter discouraged the idea, Lamplaugh told Spencer that he wanted Carter to have all of his money and that, although he kept asking her to marry him, she repeatedly declined. Carter acknowledged Lamplaugh's marriage proposals during her testimony but described Lamplaugh's substantial role in her life as more like a father-daughter relationship.

In her deposition, Spencer stated that, ultimately, Lamplaugh agreed to place his sister on the account. Spencer testified about other occasions in which Lamplaugh would visit the Bank. During such visits, Lamplaugh was very vocal about his appreciation for Carter and the assistance she provided to him and, on approximately six occasions, expressed his desire that Carter have his money upon his death.

The evidence offered by Carter is sufficient to support the county court's conclusion that Lamplaugh intended the check to be a gift to Carter, and the estate offered no contradictory evidence. When considering the evidence in the light most favorable to Carter, the county court's factual finding of donative intent on the part of Lamplaugh is neither arbitrary nor unreasonable and is supported by competent evidence. The personal representative's first assignment of error is without merit.

Delivery of Gift of $80,000 Was Accomplished by Operation of Law at Time of Lamplaugh's Death.

[8,9] Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained. *Lewis v. Poduska*, 240 Neb. 312, 481 N.W.2d 898 (1992). Ordinarily, actual delivery is necessary where the subject of the gift is capable of manual delivery, but where actual manual delivery cannot be made, the donor may do that which, under the circumstances, will in reason be considered equivalent to actual delivery. *Guardian State Bank & Trust Co. v. Jacobson*, 220 Neb. 235, 369 N.W.2d 80 (1985).

In the present case, the personal representative asserts that delivery of the purported gift was not accomplished by Lamplaugh's transfer of the check to Carter, because a check is not itself a transfer of funds. Rather, the personal representative argues that delivery of the amount of the check is not effectuated until it is cashed or deposited, placing the funds beyond the dominion and control of the donor. Furthermore, the personal representative argues that Carter's failure to cash the $80,000 check prior to Lamplaugh's death rendered the gift incomplete and that as a result, the gift was automatically revoked upon Lamplaugh's death.

In support of his position, the personal representative cites *Matter of Estate of Bolton*, 444 N.W.2d 482 (Iowa 1989). In *Matter of Estate of Bolton*, 444 N.W.2d at 483, the Iowa Supreme Court discussed the general rule with respect to gifts by check, as recognized in Iowa:

> "[T]he donor's check, prior to acceptance or payment by the bank, is not the subject of a valid gift either inter vivos or causa mortis. . . . The difficulty with respect to a gift of the donor's check . . . is that mere delivery of the check to the donee or to some other person for him does not place the gift beyond the donor's power of revocation, prior to payment or acceptance. Moreover, there is the further consideration . . . that the death of the drawer works a revocation of the check, so that where the check is intended as a gift causa mortis and the donor dies before payment or

> acceptance, the death revokes the gift. Thus, the death of the drawer effects a revocation of the alleged gift of a check not presented for payment until after such death . . . ."

(Quoting 38 Am. Jur. 2d *Gifts* § 65 (1968).) Based on these principles, the personal representative asserts that Lamplaugh's death revoked the purported gift to Carter.

In contrast, Carter argues that Lamplaugh's transfer of the check itself was sufficient to accomplish delivery of the gift prior to Lamplaugh's death. Carter asserts that delivery is accomplished when all that can be done to effectuate delivery under the circumstances is done; Carter argues that Lamplaugh's transfer of the check on the evening before his death was sufficient to complete delivery under that standard. Furthermore, Carter asserts that even jurisdictions that take the position urged by the personal representative recognize an exception in which the transfer of a check constitutes constructive delivery of the funds where (1) the donor's intent is clear, (2) creditors are not prejudiced, (3) no fraud or undue influence is at issue, and (4) the check is not cashed prior to the donor's death due to circumstances beyond the control of the donor and donee. See, e.g., *Sinclair v. Fleischman*, 54 Wash. App. 204, 773 P.2d 101 (1989). Such an exception, Carter argues, would apply in the present case.

But the parties fail to cite § 30-2723(d), which states in part that

> [t]he ownership right of a surviving party or beneficiary, or of the decedent's estate, in sums on deposit is subject to requests for payment made by a party before the party's death, whether paid by the financial institution before or after death, or unpaid. The surviving party or beneficiary, or the decedent's estate, is liable to the payee of an unpaid request for payment.

The comments accompanying article VI of the Uniform Probate Code, upon which § 30-2723(d) is based, discuss the effect of amendments made to article VI, stating, in part, "[t]he changes include recognition of checks issued by an account owner before death and presented for payment after death . . . ." Prefatory Note, Unif. Probate Code, 8 U.L.A. 426 (1998). Such a rule is a departure from common-law rules pertaining to gift and agency law providing that a drawee bank must honor a check before the

donor's death. See Ronald R. Volkmer, *Legislative Bill 250: The New Nonprobate Transfers Article of the Nebraska Probate Code*, 27 Creighton L. Rev. 239 (1993). See, also, William M. McGovern, Jr., *Nonprobate Transfers Under the Revised Uniform Probate Code*, 55 Alb. L. Rev. 1329 (1992).

[10] The plain language of § 30-2723(d) does not distinguish between checks intended as gifts, checks transferred in satisfaction of debts, or otherwise. Rather, the statute requires, without limitation, that unpaid checks written on a party's account before the party's death be paid by the beneficiary of the sums on deposit in the decedent's account.

[11] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Tyson Fresh Meats v. State, ante* p. 535, 704 N.W.2d 788 (2005). Here, the Legislature made a clear policy decision to enact statutory language that supplants any common-law rules regarding presentment of checks after the death of the drafter. Thus, although the parties focus their arguments on the question whether delivery of a gift by check is complete at the time the check is transferred or, alternatively, at the time the check is cashed or deposited, we conclude that regardless of whatever common-law rule would have been applicable, the gift was completed by operation of law upon Lamplaugh's death pursuant to § 30-2723(d).

Pursuant to § 30-2723(d), the check given to Carter under the circumstances became irrevocable upon Lamplaugh's death, and the check remains payable by Lamplaugh's estate from the funds being held in the Bank. Such a result is consistent with the requirements for a valid gift—the donor's dominion and control of the funds represented by the check are surrendered upon the donor's death, and delivery is thereby completed.

[12] We conclude that Lamplaugh's gift of $80,000 was complete upon his death and is payable pursuant to § 30-2723(d). Although, upon our independent review on this question of law, our reasoning differs from that of the county court, the court did not err in finding the check was payable. Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason

different from that assigned by the trial court, an appellate court will affirm. *Troshynski v. Nebraska State Bd. of Pub. Accountancy, ante* p. 347, 701 N.W.2d 379 (2005).

CONCLUSION

Having reviewed the proceedings for error on the record, we conclude that sufficient evidence was presented at trial to support the county court's finding of donative intent on the part of Lamplaugh. In addition, delivery of the gift was accomplished, at the latest, at the time of Lamplaugh's death. Under § 30-2723(d), Lamplaugh's estate is liable to Carter for the amount of the check. The county court's decision conforms to the law and is supported by competent evidence. The remainder of the claim against the estate is not at issue on appeal; we, therefore, affirm the judgment of the county court.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. ALICE S. HORNEBER, RESPONDENT.

708 N.W.2d 620

Filed January 20, 2006. No. S-04-1139.

1. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence.
2. **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.
3. **Disciplinary Proceedings: States.** The Nebraska Supreme Court has the authority to discipline attorneys for conduct committed in another state.
4. **Disciplinary Proceedings.** Only those matters which are specifically charged in the complaint in a disciplinary proceeding can be considered.
5. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.

6. ____. To determine the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.

Original action. Judgment of suspension.

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

William Horneber, of Horneber Law Firm, for respondent.

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

PER CURIAM.

INTRODUCTION

Alice S. Horneber was admitted to the practice of law in the State of Nebraska on February 3, 1983. At all times relevant hereto, she was engaged in private practice in Sioux City, Iowa. On October 12, 2004, formal charges were filed against Horneber. After a formal hearing, the referee concluded that Horneber had violated the Nebraska Code of Professional Responsibility and recommended a 1-year suspension. Horneber filed exceptions to the referee's findings and recommended sanction.

BACKGROUND

Ronnie Thornton and Lonnie Thornton, brothers, owned Thornton Plumbing & Heating, a partnership, and Thornton Plumbing & Heating, Inc. The partnership owned certain real estate in Woodbury County, Iowa, described as the East 75 feet of Lot 12, Block 40, of Sioux City (the Woodbury property).

On August 29, 2000, Ronnie and Barbara J. Thornton were divorced in the district court for Dakota County, Nebraska. Horneber represented Ronnie in these proceedings. Among other interests, the dissolution decree granted to Barbara the following:

> All of [Ronnie's] interest, real or personal, in and to Thornton Plumbing & Heating, a partnership . . . including, but not limited to, [Ronnie's] interest in and to [the Woodbury property] as well as any interest in any other real estate held by [Ronnie] in Dakota County constituting an asset in this partnership and all shares (assumed to be

> 500 common shares) or other interests held by [Ronnie] in and to Thornton Plumbing & Heating, Incorporated . . . subject to debt of $9,908.00.

The decree ordered that Ronnie was, within 30 days, to "execute and deliver to [Barbara] any deed or other documents that may be reasonably required to accomplish the intent of this Decree." The decree provided that in the event either party failed to comply within 30 days with the provisions of the decree concerning the division of marital assets, then "this Decree shall constitute an actual grant, assignment and conveyance of the title to the property and rights in such manner and with such force and effect as shall be necessary to effectuate the terms of the Decree." No appeal was taken from the decree.

Upon Horneber's advice, no affirmative steps were taken by Ronnie to convey any interest in the partnership or its real or personal property, nor did Ronnie affirmatively transfer his shares in Thornton Plumbing & Heating, Inc. On December 29, 2000, Barbara filed a motion for contempt, claiming that Ronnie had failed to provide the necessary deeds or documentation to effectuate the terms of the decree with regard to Thornton Plumbing & Heating. Specifically, the motion alleged that Ronnie had failed to transfer his stock and had failed to provide Barbara with information pertaining to the partnership. Barbara was unable to serve Ronnie with the summons, and the court sustained a motion for substitute service. The required documents were mailed to Ronnie's last known address via certified mail, and on November 19, 2002, Ronnie, having never appeared, was found in contempt and ordered to be placed in custody.

Ronnie filed a special appearance, which was overruled by the trial court. On September 9, 2003, a hearing was held as to whether Ronnie had complied with the dissolution decree. Horneber attempted to present evidence that the business bylaws of the corporation did not allow Ronnie to transfer his stock and that the automatic attempted transfer by virtue of the decree resulted in a forfeiture of Ronnie's stock interest to Lonnie. Evidence was also presented as to due-on-sale clauses that would be triggered upon the transfer of any partnership property. The court found that Ronnie had failed to show cause why he should be

released from custody. Horneber requested specific direction as to how to purge the contempt, to which request the court responded that Ronnie needed to "transfer whatever interest is provided by — in the decree." The court stated that if Ronnie wished, he could have further opportunity to show by way of hearing that it was impossible to comply with the decree.

Horneber filed a notice of compliance on Ronnie's behalf on September 9, 2003. Attached thereto was a stock certificate for Thornton Plumbing & Heating, Inc., transferring 500 shares of stock in the name of Ronnie to Barbara as of September 9. Also attached was an "Assignment of Partnership Interest" wherein, on September 9, Ronnie, a general partner in Thornton Plumbing & Heating, assigned "all his interest in partnership property both real and personal and wheresoever situated to Barbara." A September 9 quitclaim deed was also attached to the notice whereby Ronnie quitclaimed to Barbara "all our right, title, interest, estate, claim and demand" in the Woodbury property. The court issued an order that same date releasing Ronnie from custody on bond, conditioned upon his appearance at a hearing on September 12.

At the September 12, 2003, hearing, Barbara contested whether the decree had been complied with. She offered a quitclaim deed, which Horneber had drafted, wherein Ronnie had quitclaimed to Lonnie "all our right, title, interest, estate, claim and demand" in the Woodbury property on January 14, 2003. Barbara also offered as evidence a warranty deed conveying, on January 14, the Woodbury property from Lonnie to Thomas Joe Schatz and Lisa L. Schatz. This deed was also drafted by Horneber.

The court questioned Horneber as to how Ronnie's deed to Barbara complied with the decree when at the time of the deed, Ronnie no longer had any interest to convey, having already conveyed all his interest to Lonnie by virtue of the January 14, 2003, quitclaim deed. Horneber agreed with the court that on September 9, Ronnie purported to convey to Barbara an interest in real estate in which he had no interest, but she attempted to explain that the prior conveyance to Lonnie was necessary. She stated that the conveyance to Lonnie was effectuated because Ronnie was a personal guarantor on the numerous debts owed by

the partnership and that Barbara had refused to sign off to be a personal guarantor of those debts. Therefore, deeds to Lonnie and, ultimately, to the Schatzes, were necessary to pay some of the debts. The court rejected this as an acceptable reason to convey to Barbara what it described as "a sham deed" and remanded Ronnie back into custody. In response, Horneber attempted to present the testimony of an accountant to explain the fact that the real estate was owned by the partnership, and not by any individuals, and attempted to retract her prior admission that Ronnie had no interest in the real estate on September 9. Upon the court's further questioning, however, she agreed that the Schatzes owned the property at the time of the September 9 deed to Barbara. The court then stated that this fact was enough to show noncompliance and reiterated its remand of Ronnie into custody.

After the court entered an order awarding Barbara attorney fees, Ronnie appealed the order and the underlying findings of personal service and contempt to the Nebraska Court of Appeals. Horneber argued on Ronnie's behalf to the Court of Appeals that any transfer of the business assets did nothing to eliminate Barbara's "interest" awarded by the decree, but only changed the nature of that interest. Horneber argued that the decree never granted Barbara ownership in the Woodbury property itself. She argued that an interest in the partnership was automatically transferred to Barbara by virtue of the decree 30 days after its issuance. In other words, she contended to the Court of Appeals that it was actually at the time of the quitclaim deed to Lonnie that Ronnie had nothing to convey, since his interest had already been automatically transferred by the decree. The later quitclaim deed to Barbara, then, was only repetition of that automatic effect of the decree.

The Court of Appeals, in *Thornton v. Thornton*, 13 Neb. App. 912, 704 N.W.2d 243 (2005), held that there had been no effective substitute service upon Ronnie. Because there was no effective service at the time Ronnie was found in contempt and he had not yet voluntarily submitted to the court's jurisdiction, the Court of Appeals held that the trial court lacked jurisdiction over Ronnie. It accordingly vacated the trial court's finding of contempt, its bench warrant, and its award of attorney fees to Barbara and remanded the matter to the trial court for further

proceedings consistent with its opinion. It did not address any of the underlying merits of the finding of contempt.

FORMAL CHARGES

The formal charges against Horneber were filed in this court on October 12, 2004. The charges set forth general facts concerning the Thornton business and the award to Barbara in the dissolution decree. The charges asserted that upon Horneber's advice, Ronnie refused to provide Barbara with any deeds, stock certificates, or other documents to accomplish the transfer of Ronnie's interest in the plumbing business to Barbara. The charges then described the quitclaim deed given to Barbara on September 9, 2003, transferring any interest Ronnie had in the Woodbury property, and stated that prior thereto, a quitclaim deed had been executed giving that same interest to Lonnie. The charges also described that prior to the quitclaim deed to Barbara, a warranty deed had transferred the Woodbury property from Lonnie to the Schatzes.

The charges alleged that through these acts, Horneber had violated the following provisions found in Canons 1 and 7 of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> . . . .
>
> DR 7-102 Representing a Client Within the Bounds of the Law.
>
> (A) In his or her representation of a client, a lawyer shall not:
>
> . . . .
>
> (3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.
>
> (4) Knowingly use perjured testimony or false evidence.
>
> . . . .

(6) Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.

(7) Counsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent.

DISCIPLINARY HEARING

At the disciplinary hearing, Horneber presented evidence that under controlling Iowa law, because the partnership owned the Woodbury property and Ronnie did not own the property personally, Ronnie could not transfer the real estate itself to Barbara. Under Iowa Code Ann. § 486A.501 (West 1999), "[a] partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily." Rather, Ronnie could transfer only his share of the profits and losses of the partnership. Horneber argued that such interest was what the dissolution decree granted Barbara and that any conveyance of the Woodbury property to third parties by the partnership was in no way contrary to the decree.

Horneber argued that at the time of the January 14, 2003, quitclaim deed, Ronnie's interest had already been taken away by virtue of the automatic conveyance language of the dissolution decree. However, because she was at a loss for what else she could do to purge Ronnie of contempt, Horneber testified that she prepared the later quitclaim deed to Barbara "to make sure that if there was any possible interest anybody could claim he had, then Barb had it."

With regard to the quitclaim deed from Ronnie to Lonnie, Horneber reiterated that Ronnie's interest in the business had already been taken away by the automatic effect of the decree. However, Ronnie remained personally liable under a personal guarantee for some $200,000 in debt, and the lender institution had allegedly requested such a deed as "just an initial thing so that the lending institution could be talking with this particular person who was willing to maybe take on and shoulder some of these debts." Upon examination by the referee, Horneber indicated that the quitclaim deed to Lonnie was some means of allowing the lending institution to share information with the

Schatzes about the business. She admitted that a consent form would have been "a more clean way of doing" that.

Horneber testified that the warranty deed from Lonnie to the Schatzes had not been prepared to convey or attempt to convey the partnership interest in the Woodbury property, but was simply part of ongoing negotiations. In fact, she pointed out that since the warranty deed was issued by Lonnie as an individual and not by the partnership, under Iowa law, it could not be effective as a real estate transfer. Rather, like the deed to Lonnie, she claimed this deed was simply to allow the Schatzes to have the "ability to review information and get whatever information" they wanted.

Horneber claimed that there was an oral agreement with the Schatzes that had never been finalized and that she did not believe the Schatzes understood the deed to have conveyed any actual title to the Woodbury property. However, the contention that the Schatzes did not understand the real estate to have been transferred was challenged with the admission of a letter wherein the Schatzes offered to sell back the Woodbury property for a purchase price something above what they paid for it, but at a reasonable price. To the question as to what the Schatzes had paid for the property, Horneber responded that they had been discussing what might be an appropriate total price, but that "there had been no assignment of any price to any particular thing." Several letters were then entered into evidence, apparently to show that the Schatzes were still negotiating with Lonnie as to "a final resolution of the performance necessary under [the] draft real estate contract/asset transfer agreement." While these letters describe the fact that a purchase price for "the business" had not yet been determined, they do not support the idea that the Schatzes did not understand the warranty deed to have conveyed the Woodbury property.

Referee's Findings

The referee appointed to conduct a hearing on this matter noted:

> During the September 12, 2003 hearing before [the] Judge . . . Horneber acknowledged to the Court that [the Schatzes] owned the Iowa real estate because of the

> January, 2003, deed. . . . Horneber offered a Quit Claim Deed on September 9, 2003, in order to get Ronnie Thornton out of jail, but knew full well that the real estate had already been transferred to [the Schatzes]. Yet, in testimony at the hearing before this Referee . . . Horneber claimed that the January 2003 deeds from Ronnie Thornton to Lonnie Thornton and from Lonnie Thornton to the Schatz[e]s were of no effect.

The referee noted the evidence gave the appearance that, in order to purge Ronnie of contempt, Horneber had been attempting to convince the Schatzes to reconvey the Woodbury property to Lonnie, presumably so that interest could be transferred back to Ronnie, and then to Barbara, to be in compliance with the decree.

The referee found that there was clear and convincing evidence that because of the prior deeds to Lonnie and the Schatzes, the quitclaim deed to Barbara for the Woodbury property submitted to the trial court on September 9, 2003, was a fraud on the trial court. The referee found any argument that under Iowa law, an individual cannot convey partnership real estate was irrelevant to the conclusion that the quitclaim deed to Barbara as to the Woodbury property was a nullity. The referee did not find Horneber's explanation that the quitclaim deed to Lonnie was simply to permit some third party to obtain information about the Thornton business was credible, stating: "This Referee cannot fathom how a Quit Claim Deed from Ronnie Thornton to Lonnie Thornton (partners in the plumbing business) would authorize a bank to deliver information to a third party concerning the partnership business and its debts."

The referee found that Horneber's conduct involved dishonesty, fraud, deceit, or misrepresentation in violation of DR 1-102(A)(4). It further found Horneber's actions to be in violation of DR 7-102(A)(7) in that she counseled and assisted her client, Ronnie, in conduct she knew to be illegal or fraudulent. The referee also found that Horneber had engaged in conduct prejudicial to the administration of justice and, therefore, in violation of DR 1-102(A)(5).

In its recommendation, the referee concluded that no attorney should be permitted to present fraudulent and deceitful evidence to a court in order to purge her client of contempt. It further

noted that Horneber's "attitude in these disciplinary proceedings was one of denial and less than credible explanations for her conduct." The referee recommended that Horneber be suspended from the practice of law for a period not less than 1 year.

STANDARD OF REVIEW

[1] To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005).

[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).

ANALYSIS

[3,4] We first note Horneber's contentions that this court lacks jurisdiction to consider the quitclaim deed to Lonnie and that this subject is beyond the scope of the formal charges and contrary to the Counsel for Discipline's prior representations as to the subject of the disciplinary proceedings. Horneber's jurisdictional claim is based on the fact that the deed occurred outside of Nebraska and lacks any nexus with Nebraska. However, it is clear that this court has the authority to discipline attorneys for conduct committed in another state. See *State ex rel. Counsel for Dis. v. Rokahr*, 267 Neb. 436, 675 N.W.2d 117 (2004). Therefore, we find no merit to Horneber's objection in this regard. As to the Counsel for Discipline's prior representations, we do not find those relevant except insofar as they concern what is or is not found in the formal charges against Horneber. Only those matters which are specifically charged in the complaint in a disciplinary proceeding can be considered. *State ex rel. Counsel for Dis. v. Petersen*, 264 Neb. 790, 652 N.W.2d 91 (2002). The complaint clearly referenced the quitclaim deed to Ronnie in its iteration of the "acts and omissions"

which were alleged to have constituted violations of Horneber's oath of office as an attorney and provisions of the Code of Professional Responsibility. Thus, the quitclaim deed to Lonnie is within the scope of the formal charges.

Horneber also contests various representations of fact made in the Counsel for Discipline's trial brief and the alleged incorporation of some of those facts in the referee's report, which facts Horneber states are not properly before the referee, irrelevant, and beyond the scope of the charges. Our findings in our de novo review regarding Horneber's breach of the disciplinary rules do not touch on these allegedly improper issues, and therefore Horneber has suffered no prejudice from any of the alleged misstatements in the brief or referee's report. Horneber also discusses various issues regarding her failure to advise Ronnie to affirmatively convey his stock to Barbara. We do not base our current findings on any issue as to the stock conveyance, since that issue was specifically excluded by the referee from consideration on the formal charges currently before us.

Upon our de novo review of the record, we find by clear and convincing evidence that Horneber violated DR 1-102(A)(4) and (5) and DR 7-102(A)(7). The numerous deeds prepared by Horneber since the dissolution decree, and her continuously changing explanations about her intent in preparing these documents, make it difficult to decipher exactly which documents Horneber knew to be fraudulent. However, it is clear that Horneber's inconsistency is in no small part an attempt to placate the court before which she stands at any given moment. Nor can we avoid the conclusion that in this series of deeds before us, Horneber's conduct in drafting some of the deeds involved dishonesty, fraud, deceit, or misrepresentation; that she counseled and assisted Ronnie in conduct she knew to be illegal or fraudulent; and that she engaged in conduct prejudicial to the administration of justice.

Horneber first attempts to explain the various deeds by focusing on the fact that under Iowa law, a partner cannot transfer ownership in partnership property. Iowa Code § 486A.501 states that "[a] partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily." Iowa Code Ann.

§ 486A.502 (West 1999) states in part that "[t]he only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions." Horneber asserts that the trial court, in finding Ronnie in contempt, misunderstood that the dissolution decree granted to Barbara only Ronnie's entitlement to any profits related to the Woodbury property, but did not grant her an ownership right to the property itself. Even assuming this to be true, we still conclude that Horneber conducted herself in a manner inconsistent with the Code of Professional Responsibility. It is clear that either the quitclaim deed to Lonnie or the subsequent quitclaim deed to Barbara, purporting to convey any interest Ronnie had in the Woodbury property, failed to convey anything at all. On their face, two consecutive deeds conveying the same interest to two different parties would render the later of those two deeds meaningless. That the deed was a quitclaim deed, which only purports to convey "any interest" owned, does not make it immune from being deceptive. Where "any interest" has already been conveyed to someone else, the second deed is completely vacuous. We find completely untenable Horneber's explanation that the quitclaim deed was never intended to be deceptive because it was effectuated only to allow the dissemination of financial information about the business to third parties.

The warranty deed wherein it is stated that Lonnie "sell[s] and convey[s]" the Woodbury property to the Schatzes is equally deceptive. Horneber attempted to show at the disciplinary hearing that the warranty deed did not make Ronnie's quitclaim deed to Barbara deceptive because the warranty deed did not, in fact, convey the property. Rather, similar to Horneber's explanation of the quitclaim deed to Lonnie, Horneber asserted that the warranty deed was some sort of consent for the sharing of information. She attempted to bolster her point by stating that under Iowa law, since the conveyor in the deed was Lonnie as an individual, not the partnership, it could not have operated to convey the Woodbury property. But even accepting Horneber's contention that she never intended the deed to convey the property to the Schatzes, it is clearly a deceptive deed. A warranty deed is not a necessary or appropriate means to make a simple consent

for the sharing of information to third parties. Before the warranty deed was effectuated, Horneber took the step of having Ronnie quitclaim any interest he might have in the Woodbury property to Lonnie, the only remaining partner. Whether or not this step was effective in allowing Lonnie to convey the property as an individual, it is certainly indicative of an attempt to make the warranty deed seem legitimate. The evidence further shows that the Schatzes understood the deed to have been an effective warranty deed.

Simply stated, we are unpersuaded by Horneber's various explanations for conduct that is self-evidently deceptive. From our review of the record, it is apparent that Horneber assisted her client, Ronnie, in an attempt to frustrate his divorce decree and that when that attempt failed, she engaged in a prolonged series of misleading transactions intended to extricate herself and Ronnie from the consequences of her actions. Not only was her conduct deceitful and prejudicial to the administration of justice, but it was a poor discharge of her ethical responsibility to Ronnie, who landed in jail as a result of Horneber's counsel.

[5,6] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005). To determine the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding. See *State ex rel. Counsel for Dis. v. Simmons, ante* p. 429, 703 N.W.2d 598 (2005).

We find *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003), analogous to the case at bar. In *Mills*, the attorney, in the course of handling an estate case, (1) notarized certain renunciations and deeds without witnessing the signatures, (2) directed his secretary to alter the dates the renunciations were actually signed, (3) personally altered the dates of certain deeds from the dates they were actually signed, (4)

registered these altered documents with the county court and the register of deeds, (5) told an Internal Revenue Service investigator that he had no recollection of why the original documents contained "white out," and (6) filed a federal tax return form that he knew to be false. Many of these actions were arguably attempts to salvage his client's interests after the attorney had made several mistakes as to the correct course of action for his client.

We found most egregious the fact that the attorney told his client to lie to the Internal Revenue Service investigator and state that her children were actually present in town on the dates they allegedly signed their renunciations in the attorney's presence. We did, however, consider it a mitigating factor that the attorney eventually fully cooperated with the Counsel for Discipline's investigation and admitted his wrongdoing. We found the attorney violated, inter alia, DR 1-102(A)(4) and (5) and DR 7-102(A)(7), and suspended him for a period of 2 years, despite the referee's conclusion that the attorney be suspended for only 5 months.

Here, Horneber shows a similar pattern of deception. Moreover, she directed her client to participate in deceptive actions by having him sign the various deeds described above. Horneber has failed to recognize her wrongdoing, but instead continued in her attempts to confuse and deceive in her testimony at the disciplinary hearing. Considering the gravity of Horneber's actions, we hereby suspend Horneber from the practice of law for a period of 2 years, effective immediately. Horneber shall comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, she shall be subject to punishment for contempt of this court. Horneber is further 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.

STATE OF NEBRASKA, APPELLEE, V. KENNETH FURREY, APPELLANT.

708 N.W.2d 654

Filed January 20, 2006. No. S-04-1158.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protects an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
4. **Double Jeopardy: Juries.** Under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt or innocence of the defendant.
5. **Constitutional Law: Double Jeopardy.** The double jeopardy provision of the Fifth Amendment does not mean that every time a defendant is put to trial before a competent tribunal, he or she is entitled to go free if the trial fails to end in a final judgment.
6. ____: ____. In a given case, the constitutional Double Jeopardy Clause bars retrial in a criminal prosecution only where (1) jeopardy has attached in a prior criminal proceeding, (2) the defendant is being retried for the same offense prosecuted in that prior proceeding, and (3) the prior proceeding has terminated jeopardy.
7. **Double Jeopardy.** The concept of double jeopardy applies only in successive prosecution cases and does not apply to a single trial where the defendant has been put in jeopardy only once.
8. **Indictments and Informations: Complaints.** Whether an amended complaint or information constitutes a continuation of a single trial depends on the nature of the amendment.
9. **Indictments and Informations.** The trial court, at its discretion, may permit an amendment of the information before the verdict or findings, provided no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.
10. **Indictments and Informations: Complaints.** An amended complaint or information which charges a different crime, without charging the original crime, constitutes an abandonment of the first complaint or information and acts as a dismissal of the same.
11. **Indictments and Informations.** The purpose of an information is to advise the defendant of the nature and cause of the accusation against him or her in order that the defendant may meet the accusation and prepare for trial and that, after judgment, the defendant may be able to plead the record and judgment in bar of further prosecution for the same offense.
12. ____. Correcting an erroneous statutory reference in an amended information does not amount to a change in the offense charged, where the body of the information in both the original and amended information remains essentially the same.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and CARLSON and MOORE, Judges, on appeal thereto from the District Court for Scotts Bluff County, ROBERT O. HIPPE, Judge, on appeal thereto from the County Court for Scotts Bluff County, JAMES L. MACKEN, Judge. Judgment of Court of Appeals affirmed.

Bell Island, of Island, Huff & Nichols, for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, Kenneth Furrey, filed a plea in bar to an amended complaint, claiming that the amendment constituted a dismissal of the prior proceedings in which jeopardy had allegedly attached. Furrey claimed the amended complaint was an attempt to retry him in violation of the principles of double jeopardy. The county court overruled the plea in bar, and that determination was summarily affirmed by the district court and the Nebraska Court of Appeals. See *State v. Furrey*, 13 Neb. App. xl (No. A-04-1158, July 27, 2005). For the reasons that follow, we affirm the judgment of the Court of Appeals.

BACKGROUND

On July 9, 2003, Furrey was charged in Scotts Bluff County Court with driving under the influence. The complaint was filed by the special city attorney for the city of Scottsbluff, Nebraska, and asserted that Furrey was within the corporate limits of the city of Scottsbluff at the time of his unlawful operation of the vehicle and was in violation of Scottsbluff ordinance No. 3674, § 22-5-1, a Class W misdemeanor. The complaint also alleged that the unlawful operation occurred on June 29, 2003, and that Furrey did operate or have actual physical control of a motor vehicle upon a highway or anywhere throughout the state, except private property not open to public access, while under

the influence of drugs or alcohol or when he had a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his breath.

Furrey appeared for a bench trial on October 7, 2003. The State called its first witness, who was duly sworn. However, prior to any examination of the witness, the prosecutor looked at the file and noticed that the complaint charged Furrey's conduct as having occurred in the city of Scottsbluff. Since Furrey had actually been stopped in Terrytown, Nebraska, which is not in the city limits of Scottsbluff, the prosecutor asked for leave to file an amended complaint. Furrey objected to the filing of an amended complaint, explaining that if the prosecution wanted, it could dismiss the original complaint with prejudice. The court granted leave to amend, and it also granted Furrey a continuance and leave to withdraw his previous plea. The amended complaint was identical to the original complaint except that it was brought by the Deputy Scotts Bluff County Attorney, it replaced "within the corporate limits of the City of Scottsbluff" with "in Scotts Bluff County," and its heading replaced the reference to the city ordinance with a citation to Neb. Rev. Stat. § 60-6,196(2)(a) (Cum. Supp. 2002).

Furrey filed a plea in bar to the amended complaint, which was overruled by the county court. Furrey appealed to the district court, which affirmed the county court's ruling. The Court of Appeals summarily affirmed the district court's ruling, and we granted Furrey's petition for further review.

ASSIGNMENT OF ERROR

In his petition for further review, Furrey assigns that the Court of Appeals erred in sustaining the State's motion for summary affirmance.

STANDARD OF REVIEW

[1] Issues regarding the grant or denial of a plea in bar are questions of law. *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004).

ANALYSIS

[3] The crux of Furrey's argument is that the amended complaint against him violated the principles of double jeopardy. The 5th Amendment to the U.S. Constitution, which is made applicable to the states through the 14th Amendment, provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Neb. Const. art. I, § 12, provides: "No person shall . . . be twice put in jeopardy for the same offense." The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protects an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[4-6] Under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt or innocence of the defendant. *State v. Contreras, supra*. However, the double jeopardy provision of the Fifth Amendment does not mean that every time a defendant is put to trial before a competent tribunal, he or she is entitled to go free if the trial fails to end in a final judgment. *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986). In a given case, the constitutional Double Jeopardy Clause bars retrial in a criminal prosecution only where (1) jeopardy has attached in a prior criminal proceeding, (2) the defendant is being retried for the same offense prosecuted in that prior proceeding, and (3) the prior proceeding has terminated jeopardy. *Id.* Furrey argues that jeopardy attached under the first complaint when the first witness was sworn; that the amendment of the complaint effectuated a dismissal of the first proceeding, thereby terminating the jeopardy; and that the amended complaint was an attempt to retry Furrey for the same offense prosecuted in the prior proceeding.

[7,8] We conclude that the amended complaint did not violate the principles of double jeopardy because the case presents a single proceeding. In other words, jeopardy was not terminated in a prior proceeding, nor was there a retrial. It is clear that the concept of double jeopardy applies only in successive prosecution cases and does not apply to a single trial where the defendant has been put in jeopardy only once. See *State v. Nesbitt*, 264 Neb.

612, 650 N.W.2d 766 (2002). As explained below, whether an amended complaint or information constitutes a continuation of a single trial depends on the nature of the amendment.

[9-11] We have held on numerous occasions that the trial court, at its discretion, may permit an amendment of the information before the verdict or findings, provided no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. See, *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005); *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001); *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000); *State v. Aldrich*, 226 Neb. 645, 413 N.W.2d 639 (1987). In contrast, we have held that an amended complaint or information which charges a different crime, without charging the original crime, constitutes an abandonment of the first complaint or information and acts as a dismissal of the same. *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002). The purpose of an information is to advise the defendant of the nature and cause of the accusation against him or her in order that the defendant may meet the accusation and prepare for trial and that, after judgment, the defendant may be able to plead the record and judgment in bar of further prosecution for the same offense. *State v. Martinez*, 250 Neb. 597, 550 N.W.2d 655 (1996).

[12] In *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983), we held that it was not error for the trial court to allow amendment of a criminal information by changing the statute number under which the defendant was charged. While the first information set forth the incorrect statute number, the language of the information otherwise set out a violation of the statutory provision later inserted by the amendment. We concluded that the information did not change the offense charged and that the defendant was never misled as to the charge against him. We reasoned that where the language clearly set out the elements of the crime charged, the actual language of the crime charged in the information controlled over a reference to an incorrect statute number.

Applying these principles, courts in other jurisdictions have commonly permitted amendments to complaints to correct an error with respect to the location of the alleged offense. In *Holcomb v. State*, 858 So. 2d 1112 (Fla. App. 2003), the court

rejected the argument that an amendment of the information after trial was commenced, changing the year of the alleged crime and the amount of the property involved, acted as a nolle prosequi of the prior information. Therefore, the principles of double jeopardy did not prohibit trial on the amended information's new charges and new criminal acts. The court found that the amended information did not add a new charge or change a substantive element of the offense charged. Nor did the court find any prejudice in allowing the amendment when the trial court had granted a continuance to afford the defendant an adequate opportunity to investigate and prepare any applicable defense. *Id.*

In *Felchlin v. State*, 159 Ga. App. 120, 282 S.E.2d 743 (1981), the court upheld the trial court's allowance, after the jury had been sworn, of an amendment to a driving under the influence of alcohol charge to correct the name of the street in which the offense was alleged to have occurred. The court noted that the amendment was not a matter of substance because the exact location was not a material element of the offense. Rather, the court found that the accusation was sufficiently certain if it charged the statutory elements of the offense and charged that the offense was committed in a particular county. The amendment was thus likewise concluded to not be of a kind as would have prejudiced the defendant. *Id.* See, also, *Johnson v. State*, 55 Ark. App. 117, 932 S.W.2d 347 (1996) (nature or degree of driving while intoxicated offense was not changed by amendment changing name of county where committed); *Morris v. State*, 273 Ind. 614, 406 N.E.2d 1187 (1980) (changing location in information was merely amendment to immaterial defect); *Markoff v. State*, 553 N.E.2d 194 (Ind. App. 1990) (amending information to change name of building that burglary defendant had allegedly entered unlawfully was merely one of form and was not error where defendant had failed to specify any way in which he was prejudiced by amendment); *State v. Hyder*, 100 N.C. App. 270, 396 S.E.2d 86 (1990) (substituting name of county from which indictment was issued did not substantially alter charge); *State v. Brean*, 136 Vt. 147, 385 A.2d 1085 (1978) (amendment of information during trial changing state and county of offense did not change nature of offense or prejudice defendant's substantial rights).

Here, the first complaint correctly stated all of the statutory elements of the offense. It was brought before the judge of the county in which the offense was allegedly committed, and it described the offense as a Class W misdemeanor. In fact, other than the correction that Furrey was simply within the county and not within the city limits; the setting forth that the deputy county attorney, rather than the special city attorney, was bringing forth the complaint; and the citation to § 60-6,196(2)(a) as the offense, rather than the city ordinance, the two complaints are identical. Despite the fact that Furrey never alleged that he had been prejudiced or misled by the errors of the original complaint, the county court granted Furrey a continuance and allowed him to withdraw his prior plea. Under these circumstances, it cannot be said that the amended complaint either changed the offense charged or prejudiced Furrey's substantial rights. Thus, there was no error in allowing the amended complaint, and the amendment was simply a continuation of a single trial. It did not effectuate a dismissal of the prior proceedings or an attempt to place Furrey in jeopardy twice for the same offense. Thus, the county court correctly overruled Furrey's plea in bar, and the district court and Court of Appeals did not err in affirming the county court's ruling.

Furrey has argued that the district court erred in relying on Neb. Rev. Stat. § 29-2018 (Reissue 1995) as allowing the amendment to the complaint against him. Furrey asserts that § 29-2018 is either inapplicable or unconstitutional. We have already concluded, independent of § 29-2018, that the court was correct in permitting the amended complaint and that the amendment did not violate the principles of double jeopardy. Accordingly, we need not address Furrey's argument that the district court erred in its reasoning.

CONCLUSION

The judgment of the Court of Appeals is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JARON DEAN, APPELLANT.
708 N.W.2d 640

Filed January 20, 2006. No. S-05-626.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. ____: ____. In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
3. **Records: Affidavits: Appeal and Error.** An affidavit used as evidence with respect to a motion before a district court cannot be considered on appeal unless it has been offered and received in evidence and preserved in and made a part of the bill of exceptions.
4. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
5. **Trial: Waiver.** A party who fails to insist upon a ruling to a proffered objection waives that objection.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

JaRon Dean, pro se.

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

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

STEPHAN, J.

JaRon Dean appeals from the denial of his motion for postconviction DNA testing pursuant to the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2004). We affirm the judgment of the district court for Lancaster County.

BACKGROUND

Dean was charged with first degree murder and the use of a firearm to commit a felony in connection with the 1992 shooting death of Deron Haynes. Following a bench trial in 1993, Dean was found guilty of second degree murder and use of a firearm to commit a felony and was sentenced to life imprisonment. Dean's convictions and sentences were affirmed in *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other*

grounds, State v. Burlison, 255 Neb. 190, 583 N.W.2d 31 (1998). His motion for postconviction relief was denied by the district court, and that judgment was affirmed by this court in *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

Appearing pro se, Dean initiated this proceeding in March 2004. In his operative motion for postconviction DNA testing filed on December 29, 2004, Dean requested that DNA testing be conducted on numerous exhibits received in evidence at his trial, including bullet fragments, bullet casings, ammunition, and the AK-47 rifle Dean was alleged to have used in the shooting. Dean alleged that such testing was not available at the time of his trial and that if conducted, it would "not produce any biological material associated with him" and thus would prove that he was "not the shooter and had nothing whatsoever to do with the charge [sic] crime." Attached to Dean's motion were his affidavit and those of two persons who had testified at his trial as witnesses for the State. Dean also filed a motion for discovery and a request for appointment of counsel pursuant to § 29-4122.

The State filed a motion and brief to deny Dean's requests. Attached to the State's motion were two affidavits: an affidavit of a medical doctor who was an assistant professor at the University of Nebraska Medical Center and director of the human DNA identity laboratory located there and an affidavit of the chief deputy county attorney in Lancaster County who was one of the prosecutors in the three trials associated with the murder of Haynes. At a hearing held on March 14, 2005, in which Dean participated by telephone, the State reoffered portions of the trial record which were received over Dean's objection. None of the affidavits filed by Dean in support of his motion or by the State in support of its resistance were offered or received into evidence. In an order entered on April 26, the district court denied Dean's motion for DNA testing and his request for appointment of counsel. The court concluded that because many persons had handled the evidence in question after the commission of the crime, Dean had not established that "the evidence has been retained under circumstances likely to safeguard the integrity of its original condition." The court also found that because there was no question as to whether Dean handled the AK-47 rifle involved in the shooting, DNA testing of the items

would not produce noncumulative, exculpatory evidence relevant to Dean's claim of wrongful conviction. The record does not include any ruling on Dean's discovery motion.

ASSIGNMENTS OF ERROR

Dean asserts nine assignments of error which can be grouped and restated as three. Dean contends that the district court erred (1) by denying his motion for DNA testing, (2) by denying his request for appointment of counsel, and (3) by ruling on those motions without first ruling on his motion for discovery.

STANDARD OF REVIEW

[1,2] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. McDonald*, 269 Neb. 604, 694 N.W.2d 204 (2005); *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003). In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Lotter, supra*; *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003).

ANALYSIS

The DNA Testing Act provides in relevant part:

> (1) Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material that:
>
> (a) Is related to the investigation or prosecution that resulted in such judgment;
>
> (b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and
>
> (c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.

. . . .

(5) Upon consideration of affidavits or after a hearing, the court shall order DNA testing pursuant to a motion filed under subsection (1) of this section upon a determination that such testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

§ 29-4120.

[3] We note that both parties rely on information included in affidavits which they filed in the district court. The affidavits are included in the transcript, but they do not appear in the bill of exceptions because they were never offered or received in evidence. An affidavit used as evidence with respect to a motion before a district court cannot be considered on appeal unless it has been offered and received in evidence and preserved in and made a part of the bill of exceptions. See, *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002); *Rodriguez v. Nielsen*, 259 Neb. 264, 609 N.W.2d 368 (2000). Because none of the affidavits filed in this case were received in evidence or included in the bill of exceptions, we do not consider them in resolving this appeal.

Thus, the only evidentiary materials before us are those portions of the trial record which were marked and received in evidence at the hearing on Dean's motion for DNA testing. Summarized, this evidence reflects that while Dean initially denied participation in the shooting, he subsequently requested a meeting with a Lincoln police sergeant and, after being advised of his *Miranda* rights, admitted that he had fired the AK-47 assault rifle to which the fatal shot was traced. In his confession, Dean specifically stated that he thought the weapon was semiautomatic because he had to "pull the trigger." A witness testified at Dean's trial that Dean was in possession of the AK-47 rifle when the shooting began. At trial, Dean's counsel did not dispute that Dean had fired the rifle, but, rather, argued that Dean had little knowledge of firearms and intended no harm, but only sought to scare the victim. Defense counsel did

not challenge either the testimony of witnesses who stated that they saw Dean handling the AK-47 rifle or the testimony concerning Dean's confession to the police.

We turn to the dispositive question of whether the district court abused its discretion in concluding that DNA testing would not produce noncumulative, exculpatory evidence relevant to Dean's claim that he was wrongfully convicted. See § 29-4120. The DNA Testing Act defines exculpatory evidence as evidence "which is favorable to the person in custody and material to the issue of the guilt of the person in custody." § 29-4119. Dean asserts in his motion that the requested testing "will not produce any biological material associated with him" and thus "will stand as sufficient evidence" that he "was not the shooter." However, even if Dean is correct and DNA testing would not detect the presence of his DNA on the objects in question, the result would be at best inconclusive, and certainly not exculpatory.

As an initial matter, DNA testing presupposes at least two samples of biological material. See *State v. Lotter*, 266 Neb. 758, 770, 669 N.W.2d 438, 447 (2003) (stating that "function of testing DNA evidence is to determine whether the sample being examined contains genetic characteristics similar to a sample from a known individual"). Dean has not identified or made any showing regarding the circumstances, if any, under which the handling or discharge of a firearm or ammunition would yield a comparative sample of any residual biological material containing DNA years after the crime was committed. The presence of such a sample is an essential premise of Dean's claim regarding the import of the absence of his own DNA.

Furthermore, even assuming a biological sample did exist and that Dean's DNA was absent from that sample, on the record before us, it would be mere speculation to conclude that the absence of Dean's DNA on the firearm and ammunition would exclude him as being the person who fired the fatal shot. This is particularly so in view of the persuasive and undisputed trial evidence to the contrary. See *State v. Lotter*, 266 Neb. at 770, 669 N.W.2d at 448 (holding that "mere speculation" to conclude that absence of murder victim's blood on defendant's clothing and presence on accomplice's clothing would establish

that accomplice and not defendant had fired fatal shots). We conclude that the trial court did not abuse its discretion in refusing DNA testing because even if such tests produced the result that Dean predicts, the result would not be exculpatory.

Dean also assigns error in the district court's denial of his request for appointment of counsel. Under the DNA Testing Act, upon a showing that that DNA testing may be relevant to a claim of wrongful conviction, the court shall appoint counsel for an indigent person. § 29-4122. For the reasons discussed above, Dean did not make the requisite showing that DNA testing may be relevant to his claim of wrongful conviction, and the district court therefore did not abuse its discretion in denying his request for appointment of counsel.

[4,5] Finally, Dean assigns that the district court erred by ruling on the previous motions without first ruling on his motion for discovery. The record reflects that the district court took Dean's discovery motion under advisement but never ruled on it. In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003). We have long held that a party who fails to insist upon a ruling to a proffered objection waives that objection. See *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995) (party in civil action failed to insist on ruling on motion to compel production); *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992) (defendant in criminal action failed to insist on ruling on challenge of juror for cause). See, also, *State v. Rodriguez*, 6 Neb. App. 67, 569 N.W.2d 686 (1997) (defendant in criminal action failed to insist on ruling on motion for directed verdict). Because there was no ruling on Dean's motion, and because Dean did not insist upon a ruling, any questions regarding his motion are not properly before us.

CONCLUSION

For the reasons discussed, we conclude that Dean's assignments of error are without merit, and we affirm the judgment of the district court.

AFFIRMED.

PINNACLE BANK, APPELLEE, V. DARLAND CONSTRUCTION CO. AND COMMERCIAL MASONRY, INC., APPELLEES, AND WATKINS CONCRETE BLOCK COMPANY, INC., APPELLANT.

709 N.W.2d 635

Filed January 27, 2006. No. S-04-1062.

1. **Complaints: Appeal and Error.** Whether a complaint states a claim is reviewed de novo.
2. **Replevin.** The object of a replevin action is to recover specific personal property.
3. ____. Money cannot be subject to an action for replevin unless it is specifically identified.

Appeal from the District Court for Douglas County, PETER C. BATAILLON, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Judgment of District Court reversed, and cause remanded with directions to dismiss.

Shannon L. Doering for appellant.

Joel M. Carney, of Walentine, O'Toole, McQuillan & Gordon, for appellee Pinnacle Bank.

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

CONNOLLY, J.

This appeal requires us to decide whether a party can replevy money that has been paid out in a garnishment proceeding. Watkins Concrete Block Company, Inc. (Watkins), a creditor of Commercial Masonry, Inc. (Commercial), garnished funds from Darland Construction Co. (Darland), which owed money to Commercial. Pinnacle Bank (Pinnacle) held a perfected security interest in all property, proceeds, products, and accounts of Commercial. After the garnishment order, but before Darland released the funds to Watkins, Pinnacle declared Commercial in default. Pinnacle later filed this replevin action seeking a return of the funds obtained by Watkins. The Douglas County Court determined that under Neb. U.C.C. § 9-315 (Reissue 2001), Pinnacle held a security interest in the money because it was identifiable cash proceeds of collateral and entered judgment for Pinnacle. The district court for Douglas County affirmed, and Watkins appeals.

We determine that a writ of replevin cannot be issued for the return of funds that are not specifically set aside or identified. We reverse, and remand with directions to dismiss.

STIPULATED FACTS

The parties tried the case on stipulated facts. In June 1999, Commercial obtained a loan from Pinnacle. Pinnacle obtained and perfected a security interest in inventory and in accounts, instruments, documents, chattel paper, and other rights to payment. In 2001, Pinnacle obtained another security agreement from Commercial and perfected the security interest in February 2002. On December 5, Watkins obtained a judgment against Commercial in the district court for Lancaster County for $68,007.99.

On December 23, 2002, Pinnacle loaned $10,000 to Commercial, and on January 1, 2003, it renewed Commercial's operating line of credit of $50,000 by a promissory note. Pinnacle secured the note with the 2001 security agreement.

Darland had subcontracted with Commercial for masonry work on a grocery store. Commercial provided services under the subcontract and invoiced Darland for its services. As of February 20, 2003, Darland owed Commercial about $22,282.20.

In February 2003, Watkins filed a garnishment proceeding against Darland in the district court for Lancaster County to attempt to collect on the judgment against Commercial. The court ordered Darland to pay the amount it owed Commercial to the court as partial satisfaction of the judgment.

Before Darland paid the funds into the district court for Lancaster County, Pinnacle declared Commercial in default of the promissory note, accelerated amounts due, and demanded immediate payment. Pinnacle also notified Watkins and Darland of its security interest in Commercial's accounts receivable and demanded that Watkins cease its garnishment of Commercial's accounts. But other than the notification and demand, Pinnacle did not commence legal action to obtain property from Darland or Watkins until it filed its claim.

Hearings were held in county court on Commercial's objection to the garnishment, and the objections were overruled. Darland initially disregarded the order to pay, but later paid the amount garnished to the Lancaster County District Court after an order to

show cause was filed. The Lancaster County District Court issued a check for the funds, which Watkins cashed the same day. Three days later, Pinnacle filed a "Petition at Law in Replevin" in the Douglas County Court, specifically seeking a writ of replevin to obtain the funds. Watkins filed an answer which included the defense that Pinnacle failed to state a claim.

The Douglas County Court found that Pinnacle could recover the funds under § 9-315. Without discussing whether Pinnacle could use a writ of replevin to recover the funds, the court entered judgment against Watkins. The district court for Douglas County affirmed. Watkins appeals.

ASSIGNMENTS OF ERROR

Watkins assigns, consolidated and rephrased, that the district court erred by (1) concluding that an action for replevin was proper, (2) applying superseded sections of the Nebraska Uniform Commercial Code, (3) determining that Watkins was not a transferee and that the money was subject to Pinnacle's security interest under § 9-315, and (4) concluding that Pinnacle did not waive its claim to the garnished money.

STANDARD OF REVIEW

[1] Whether a complaint states a claim is reviewed de novo. See, generally, *Grey v. Wilburn*, 270 F.3d 607 (8th Cir. 2001); *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

ANALYSIS

REPLEVIN

Watkins contends that the garnished money was not the proper subject of a replevin action because it is not " '*specific* personal property.' " Brief for appellant at 10. It further argues that the courts improperly treated the action as an action for conversion.

[2] We have never addressed whether money is subject to replevin. We have held, however, that the object of a replevin action is to recover specific personal property. *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986). A writ of replevin is a specialized writ that allows specialized remedies for the protection and return of specific property. See Neb. Rev.

Stat. §§ 25-1093 and 25-10,110 (Reissue 1995 & Supp. 2005). Thus, it has been held that an action for replevin requires that the property at issue be capable of identification and delivery. *Walther v. Central Trust Co., N.A.*, 70 Ohio App. 3d 26, 590 N.E.2d 375 (1990). In addition, courts from other jurisdictions unanimously agree that unless money is marked or otherwise labeled for identification, it is not subject to replevin because it is not specifically identifiable. *Walther v. Central Trust Co., N.A., supra*; *Williams Management Enterprises v. Buonauro*, 489 So. 2d 160 (Fla. App. 1986); *Matter of Equitable Life Assur. Soc. of U. S. v. Branch*, 32 A.D.2d 959, 302 N.Y.S.2d 958 (1969); *1967 Senior Class of Pekin H.S. v. Tharp*, 261 Iowa 539, 154 N.W.2d 874 (1967); *Spear v. Arkansas National Bank*, 111 Ark. 29, 163 S.W. 508 (1914); *Lovell, Trustee, v. Hammond Co.*, 66 Conn. 500, 34 A. 511 (1895).

[3] The reasoning behind the rule requiring money to be specifically identified is that money is intangible property, and thus, a bank account cannot be physically possessed. See, e.g., *Walther v. Central Trust Co., N.A., supra*. So, unless currency has been specifically marked for identification or specifically set aside in a separate package, it is not specific personal property. *Id.* In addition, money that has become commingled with the circulating currency cannot be the subject of replevin. *Lovell, Trustee v. Hammond Co., supra*. We agree and hold that money cannot be subject to an action for replevin unless it is specifically identified.

Here, Pinnacle consistently sought a writ of replevin, stood on its pleading, and proceeded to trial solely on a theory of replevin. But the money consisted of a check that was cashed. Thus, the funds are—or were—either held as cash or in Watkins' bank account. The specific funds were not marked or set aside in a manner that would allow them to be specifically identified. Therefore, the funds were not subject to an action for replevin. Accordingly, the county court should have dismissed Pinnacle's complaint as requested by Watkins in its answer.

CONCLUSION

We determine that Pinnacle cannot seek a writ of replevin for money that was not specifically identified. Accordingly, we

reverse, and remand with directions to the district court to order the county court to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STEPHAN and MCCORMACK, JJ., not participating.

DOUGLAS COUNTY BY AND THROUGH DOUGLAS COUNTY ASSESSOR'S OFFICE, APPELLEE, V. DENA F. KOWAL, APPELLANT, AND DOUGLAS COUNTY CIVIL SERVICE COMMISSION, APPELLEE.

708 N.W.2d 668

Filed January 27, 2006. No. S-04-1306.

1. **Contempt: Final Orders: Appeal and Error.** An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Contempt: Appeal and Error.** A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous.
4. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
5. **Contempt: Words and Phrases.** When a party to an action fails to comply with an order of the court made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. "Willful" in this context means the violation was committed intentionally, with knowledge that the act was in violation of the court order.
6. **Contempt: Proof.** A party's civil contempt must be established by proof beyond a reasonable doubt.

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

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellant.

Stuart J. Dornan, Douglas County Attorney, Diane M. Carlson, and Brent M. Bloom for appellee Douglas County Assessor's Office.

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

STEPHAN, J.

The district court for Douglas County affirmed a decision of the Douglas County Civil Service Commission (the Commission) reinstating Dena F. Kowal to her position as office manager/information coordinator in the Douglas County assessor's office. Subsequently, Kowal sought to have Roger Morrissey, the Douglas County assessor, held in civil contempt for refusing to abide by this order. After an evidentiary hearing, the district court granted Morrissey's motion to dismiss the contempt proceeding, reasoning that Morrissey complied with the order because Kowal was restored to her job title and paid back wages. The court further found that although Kowal was not performing all of her former duties, she was performing other duties within her job description. We affirm.

FACTS

Kowal began employment as the office manager/information coordinator with the Douglas County assessor's office in September 1997. In January 2003, Morrissey reorganized the department and eliminated her position. Kowal's position was included within a collective bargaining unit agreement.

Kowal subsequently appealed her layoff to the Commission. After conducting an evidentiary hearing, the Commission determined that Kowal should be reinstated to her former position. The Commission's decision was based upon terms of the collective bargaining agreement which prohibited the layoff of a regular full-time employee until all probationary, seasonal, and temporary employees had first been released. The Commission's order specifically held that Kowal "be re-instated to her previous position of Office Manager/Information Coordinator effective March 3, 2003, and have all wages restored as of that date."

In response to the order, Morrissey informed Kowal by a letter dated September 17, 2003, that she had been reinstated to the position of office manager/information coordinator. The letter stated that Kowal's immediate duty and responsibility would be to direct and execute a program to comply with certain property

tax statutes, but that she "may be assigned other duties in the future." After reinstating Kowal, Morrissey filed a petition in error seeking review by the district court of the Commission's order. On July 15, 2004, the district court affirmed the Commission's reinstatement order.

On September 17, 2004, Kowal filed a motion to show cause why Morrissey should not be found in civil contempt for violating the district court's order affirming her reinstatement. An evidentiary hearing was held on September 23. At the hearing, Kowal testified that although she was given her job title upon reinstatement, she was not returned to the actual position of office manager/information coordinator. She offered into evidence the Commission's job description for the office manager/information coordinator position and testified that upon reinstatement, she was not performing the duties set forth in the job description. Instead, Kowal testified that she was performing the separate job of supervisor of leased public property and real estate on leased land. Kowal testified that prior to her layoff, she had been performing the duties as described in the office manager/information coordinator job description.

On cross-examination, Kowal admitted that upon her reinstatement, Morrissey assigned her to a special project relating to compliance with state statutes pertaining to property taxes. She testified that this assignment was consistent with the job description for the office manager/information coordinator position, which specifically provided that the county assessor could assign "other related duties." Kowal further admitted on cross-examination that the job duties she was performing after reinstatement were consistent with at least 5 of the 11 primary duties of the office manager/information coordinator as set forth in the job description, even though these duties differed from those she had been performing prior to the layoff.

After Kowal presented her case, Morrissey moved to dismiss for lack of evidence. The district court took the motion under advisement and subsequently dismissed the contempt charge. In its order of dismissal, the court stated:

> This Court cannot find that the County Assessor willfully and intentionally violated the court order in that Kowal has been reassigned to her original job title and has received

> all of her back wages. In addition, she is performing some of the job duties as set forth [in the office manager/information coordinator job description] and other duties as assigned to her.

Kowal filed this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Kowal assigns, consolidated and restated, that the district court erred in sustaining the motion to dismiss.

STANDARD OF REVIEW

[1-4] An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997); *Novak v. Novak*, 245 Neb. 366, 513 N.W.2d 303 (1994). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Klinginsmith, supra*. A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous. *Id.*; *Novak, supra*. On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Klinginsmith, supra*.

ANALYSIS

[5,6] When a party to an action fails to comply with an order of the court made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. *Id.*; *Novak, supra*; Neb. Rev. Stat. § 25-2121 (Reissue 1995). "Willful" in this context means the violation was committed intentionally, with knowledge that the act was in violation of the court order. *Klinginsmith, supra*; *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993). A party's civil contempt must be established by proof beyond a reasonable doubt. See, *Klinginsmith, supra*; *Novak, supra*.

The purpose of the county civil service system is "to guarantee to all citizens a fair and equal opportunity for employment in the county offices." Neb. Rev. Stat. § 23-2501 (Reissue 1997). To effectuate this purpose, department heads are required to supply to the Commission position classification plans, job descriptions, and job specifications. Neb. Rev. Stat. § 23-2507(3) (Reissue 1997). The job description for office manager/information coordinator lists 11 primary duties and responsibilities. The job description expressly provides that the duties are performed "[u]nder the direction of the Douglas County Assessor" and that "other related duties" may be assigned.

In this action, it is clear from the record that although Kowal may not be performing all of the duties of the office manager/information coordinator position, she is performing at least some of those duties. Kowal testified on cross-examination that the work she is performing is consistent with at least 5 of the 11 primary duties listed in the office manager/information coordinator job description. In addition, Kowal admitted that her performance of the special project relating to state property tax statute compliance was a specific "other related" duty authorized by the office manager/information coordinator job description. Kowal's present job duties are thus consistent with the job description of office manager/information coordinator and in keeping with Morrissey's authority to manage the work duties of his employees. See, *Hall Cty. Pub. Defenders v. County of Hall*, 253 Neb. 763, 571 N.W.2d 789 (1998) (elected official determines working hours and assigns work to employees), *disapproved on other grounds, Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb 956, 698 N.W.2d 45 (2005); *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985) (elected official prescribes manner in which work must be done by employees).

Because Kowal has been reinstated to the title of office manager/information coordinator, has received all required backpay, and is performing duties which are included in the job description for that position, we agree with the district court that the record does not support a finding beyond a reasonable doubt that Morrissey is in willful disobedience of the district court's order.

The judgment of the district court thus conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Finding no error appearing on the record, we affirm.

AFFIRMED.

SEAN JOHNSTON, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

709 N.W.2d 321

Filed January 27, 2006. No. S-04-1404.

1. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
2. ____: ____. When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.
3. **Pleadings: Proof.** A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief.
4. **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.
5. **Courts: Jurisdiction.** While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power.
6. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
7. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
8. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
9. ____: ____. An application of the public interest exception to the mootness doctrine is inappropriate when the issue presented on appeal does not inherently evade appellate review.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Appeal dismissed.

Sue Ellen Wall, of Wall Law Office, for appellant.

Jon Bruning, Attorney General, Kimberly Taylor Riley, and Eileen L. McBride for appellee.

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

STEPHAN, J.

The issue presented by this appeal is whether a decision by the Nebraska Department of Correctional Services (DCS) to place a prisoner on administrative confinement status after dismissal of a misconduct report is reviewable under the Administrative Procedure Act pursuant to Neb. Rev. Stat. § 84-917(1) (Reissue 1999). We conclude that the issue has become moot because the prisoner is no longer in administrative confinement and has been returned to the general prison population of another institution. We decline to hear the appeal under the public interest exception to the mootness doctrine.

BACKGROUND

Sean Johnston, a prisoner in the custody of DCS at the Nebraska State Penitentiary, initiated this proceeding pursuant to § 84-917(1) in order to obtain judicial review of a final decision by the DCS director. The decision to be reviewed affirmed Johnston's placement on administrative confinement status for a period of no less than 90 days after a misconduct report against Johnston had been dismissed for lack of evidence. In his petition filed in the district court for Lancaster County, Johnston prayed for reversal of the decision and an order that he be removed from administrative confinement. He alleged, inter alia, that the decision violated the Due Process Clauses of the federal and state Constitutions. He did not allege a loss of good time. DCS filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), asserting that the petition failed to state a claim upon which relief can be granted. Johnston filed a written objection to the motion. Following a telephonic hearing at which Johnston appeared pro

se, the court took the matter under advisement. The court subsequently entered an order granting the motion on the ground that "[a] classification decision is not subject to review under the Administrative Procedures [sic] Act." Johnston perfected a timely appeal to the Nebraska Court of Appeals, and this court granted his petition to bypass.

ASSIGNMENTS OF ERROR

Johnston assigns, restated, that the district court erred (1) in holding that a DCS classification action cannot be appealed through the Administrative Procedure Act; (2) in refusing to allow him to amend his petition to allow review of the DCS decision for a due process violation; and (3) in allowing Johnston to continue to be confined, in violation of his rights under the 1st, 5th, 8th, and 14th Amendments to the U.S. Constitution, under the Nebraska Constitution, and pursuant Neb. Rev. Stat. § 83-4,122 (Reissue 1999).

STANDARD OF REVIEW

[1-3] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. *Pogge v. American Fam. Mut. Ins. Co.*, 13 Neb. App. 63, 688 N.W.2d 634 (2004). When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff. *Id.* A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief. *Id.*

ANALYSIS

After briefing was completed but prior to oral argument, DCS filed a motion to dismiss for mootness, supported by affidavits stating that Johnston was no longer on administrative confinement status because, as of September 14, 2005, he was transferred to the Tecumseh State Correctional Institution, where he was placed in the general prison population. Johnston, who is now represented by counsel, filed an objection acknowledging that he had been released from administrative confinement, but asserting that the case presents "novel questions of law of con-

stitutional magnitude" which "will inevitably arise again." We denied the motion to dismiss without prejudice and ordered the parties to file supplemental briefs on the issue of mootness prior to oral argument.

[4-6] 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. *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000). While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power. *Id.* Thus, we must first determine whether Johnston's transfer to the general population at the correctional facility has rendered this appeal moot. A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004); *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002).

Johnston's claim rested upon his allegation that he was improperly placed on administrative confinement status and was therefore entitled to judicial relief in the form of an order requiring his release from that status. He asserted no claim for damages. Because Johnston is no longer on administrative confinement status, his claim does not rest upon existing facts. Thus, as to him, it is no longer necessary to consider the issue of whether a court can review and countermand the placement of a prisoner in administrative confinement. Johnston has not identified any collateral consequence of the challenged classification decision which would preserve his personal stake in the outcome of this appeal. See, *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998); *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991). Accordingly, we conclude that the case is moot.

[7-9] As a general rule, a moot case is subject to summary dismissal. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005); *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004). However, an appellate court may choose

to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. *Green v. Lore*, 263 Neb. 496, 640 N.W.2d 673 (2002); *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001). This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *Id.* An application of the public interest exception to the mootness doctrine is inappropriate when the issue presented on appeal does not inherently evade appellate review. *Id.*

We decline to apply the public interest exception in this case. Johnston has not demonstrated a reasonable likelihood of future recurrence of administrative confinement while in the custody of DCS, or that the period of any such confinement will necessarily be so short as to evade review. See *Spencer v. Kemna, supra.* Also, to the extent that Johnston seeks a determination that the conditions of his administrative confinement violated his constitutional rights, he has other judicial remedies in which such issues can be reached without regard to whether he remains on administrative confinement status. See, e.g., *Freeman v. Clarke*, No. 4:04CV3266, 2005 WL 1875482 (D. Neb. Aug. 8, 2005).

CONCLUSION

For the reasons discussed, we conclude that this appeal is moot, and we decline to review the judgment of the district court under any exception to the mootness doctrine. The appeal is therefore dismissed.

APPEAL DISMISSED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. THOMAS J. KAWA, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. SEAN A. FLANAGAN, APPELLANT.

708 N.W.2d 662

Filed January 27, 2006. Nos. S-05-768, S-05-769.

1. **Attorneys at Law: Appeal and Error.** In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling.
2. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment to the U.S. Constitution provides that a criminal defendant has a right to have the assistance of counsel for his or her defense. An essential part of that right is the defendant's ability to select the counsel of his or her choice.
3. ____: ____: ____. Because disqualification of a criminal defendant's chosen counsel raises problems of a constitutional dimension, it is a harsh remedy that should be invoked infrequently.
4. **Constitutional Law: Right to Counsel: Presumptions.** The Sixth Amendment recognizes a presumption in favor of the defendant's chosen counsel.
5. **Constitutional Law: Right to Counsel: Conflict of Interest.** The guarantee of the Sixth Amendment encompasses the right to assistance of counsel unhindered by a conflict of interest.
6. **Right to Counsel: Waiver.** A defendant can waive his or her right to assistance of counsel unhindered by a conflict of interest, provided that the waiver is knowing and intelligent, but a court is not required to accept a defendant's waiver in all circumstances.
7. **Right to Counsel: Conflict of Interest: Presumptions.** The right to counsel of choice is not absolute. A trial court must recognize a presumption in favor of a defendant's counsel of choice, but that presumption may be overcome by a demonstration of actual conflict or a showing of a serious potential for conflict, because when a defendant is represented by an attorney who has an actual or potentially serious conflict, the defendant may be deprived of effective assistance of counsel.
8. **Constitutional Law: Right to Counsel: Conflict of Interest.** When determining whether or not to disqualify a defense counsel, the court must balance two Sixth Amendment rights: (1) the defendant's right to be represented by counsel of choice and (2) his or her right to a defense conducted by an attorney who is free of conflicts of interest.
9. **Criminal Law: Courts: Attorneys at Law.** The courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.
10. **Criminal Law: Attorneys at Law: Proof.** When the State brings a motion to disqualify a criminal defendant's privately retained counsel, the State bears the burden of proving that disqualification is necessary.

11. **Attorneys at Law: Conflict of Interest.** It is an actual and serious conflict of interest when a lawyer represents two codefendants, one of whom pleads guilty pursuant to an agreement to testify against the other.

Appeals from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Matthew T. Knoblauch and Stephen L. Smith for appellants.

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

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

GERRARD, J.

The question presented in this appeal is whether an actual and serious conflict of interest is presented in a criminal proceeding when the prosecution offers a favorable plea agreement to one codefendant, conditioned on testimony against another codefendant who is represented by the same attorney. Because there is a conflict of interest in this case requiring disqualification of defense counsel, we affirm the disqualification order entered by the district court.

BACKGROUND

The appellants, Thomas J. Kawa and Sean A. Flanagan, were each charged by information with two counts of conspiracy to commit theft by deception. Kawa was the president of Money Makers, Inc., and Flanagan was Money Makers' office manager. In the information, the State generally alleged that Money Makers had, through the actions of Kawa and Flanagan, engaged in a scheme to repackage and relabel damaged or inoperable automobile parts and fraudulently return those parts to an automobile manufacturer in exchange for the cash value of new parts. The cases against Kawa and Flanagan were joined for trial, and the defendants were both represented by Stephen Smith, who was later joined as defense counsel by Matthew Knoblauch.

The State filed a motion to disqualify defense counsel, based on the State's desire to discuss a plea agreement with Flanagan. The State contended that its indication of an interest in discussing

a plea agreement gave rise to a conflict of interest between the defendants that precluded common representation. The court examined the defendants and overruled the motion, finding that the defendants had freely, knowingly, intelligently, and voluntarily waived any conflict of interest.

The State then officially proffered a "Conditional Non-Prosecution Agreement" to Flanagan, pursuant to which all charges against Flanagan would be dismissed in exchange for his truthful testimony against Kawa. The State filed another motion to disqualify counsel, on the basis of this alleged actual conflict of interest. The court found that an actual conflict of interest existed and that despite the defendants' waiver, it was necessary to disqualify defense counsel from further representation of the defendants. From those orders, Kawa and Flanagan appeal.

ASSIGNMENT OF ERROR

Kawa and Flanagan assign, as restated, that the trial court erred in entering orders to disqualify counsel from representing multiple defendants based upon a proffer of a conditional plea agreement when the defendants had knowingly, intelligently, and voluntarily waived any conflict of interest.

STANDARD OF REVIEW

[1] In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling. *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001).

ANALYSIS

We note, before proceeding to the merits of this appeal, that we have jurisdiction to consider an order disqualifying privately retained counsel in a criminal case and that the State has standing to seek such disqualification. See *id.*

[2,3] We recently considered the principles applicable to the disqualification of privately retained counsel in a criminal case in *Ehlers, supra.* In that case, we stated that the Sixth Amendment to the U.S. Constitution provides that a criminal defendant has a right to have the assistance of counsel for his or her defense. An essential part of that right is the defendant's ability to select the

counsel of his or her choice. *Ehlers, supra.* "'"[I]n general defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice."'" *Id.* at 253, 631 N.W.2d at 479, quoting *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982), *abrogated on other grounds, Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984). Accordingly, because disqualification of a criminal defendant's chosen counsel raises problems of a constitutional dimension, it is a harsh remedy that should be invoked infrequently. *Id.*

[4,5] The Sixth Amendment recognizes a presumption in favor of the defendant's chosen counsel. *Ehlers, supra*, citing *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Among the reasons for this presumption are (1) a historic respect for the defendant's autonomy in crafting a defense, (2) the strategic importance of choice in ensuring vigorous advocacy, and (3) practical considerations of cost to the defendant and the judicial system if counsel of choice were wrongly denied. But the guarantee of the Sixth Amendment also encompasses the right to assistance of counsel unhindered by a conflict of interest. *Ehlers, supra.*

[6,7] A defendant can waive his or her right to assistance of counsel unhindered by a conflict of interest, provided that the waiver is knowing and intelligent. But a court is not required to accept a defendant's waiver in all circumstances. The right to counsel of choice is not absolute. A trial court must recognize a presumption in favor of a defendant's counsel of choice, but that presumption may be overcome by a demonstration of actual conflict or a showing of a serious potential for conflict. Disqualification in such cases is necessary because when a defendant is represented by an attorney who has an actual or potentially serious conflict, the defendant may be deprived of effective assistance of counsel. *Id.*

[8-10] When determining whether or not to disqualify a defense counsel, the court must balance two Sixth Amendment rights: (1) the defendant's right to be represented by counsel of choice and (2) his or her right to a defense conducted by an attorney who is free of conflicts of interest. The U.S. Supreme Court has also recognized an independent interest of the courts

in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001), citing *Wheat, supra*. But when the State brings a motion to disqualify a criminal defendant's privately retained counsel, the State bears the burden of proving that disqualification is necessary. *Id.*

In *Ehlers*, defense counsel was alleged to have a conflict of interest based upon the prior representation of the defendant's ex-wife, in a dissolution action, by an associate of a lawyer subsequently employed by defense counsel. Under those circumstances, we determined that no actual conflict of interest existed. The ex-wife had merely been represented by a Legal Aid Society attorney whose supervisor later left the Legal Aid Society and was employed by defense counsel. Neither defense counsel nor his associate ever actually represented the ex-wife. Since defense counsel had not been imparted with any confidential information regarding the ex-wife, there was no actual or potentially serious conflict that compromised any ethical duty to the ex-wife or deprived the defendant of effective assistance of counsel. Therefore, we reversed the trial court's decision to disqualify counsel. But because there was a remote possibility of a conflict, we remanded the cause with directions to offer the defendant the opportunity to waive any such conflict. *Id.*

[11] The evidence of an actual conflict of interest in the instant case is far more compelling, and based upon that evidence, the district court concluded that an actual conflict of interest does exist. It has generally been found to be an actual and serious conflict of interest when a lawyer represents two codefendants, one of whom pleads guilty pursuant to an agreement to testify against the other. See, e.g., *U.S. v. Shwayder*, 312 F.3d 1109 (9th Cir. 2002), *amended on denial of rehearing* 320 F.3d 889 (9th Cir. 2003); *U.S. v. Cook*, 45 F.3d 388 (10th Cir. 1995); *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978); *Littlejohn v. State*, 593 So. 2d 20 (Miss. 1992). See, also, *U.S. v. Hughes*, 817 F.2d 268 (5th Cir. 1987). Cf., *Lipson v. U.S.*, 233 F.3d 942 (7th Cir. 2000); *Edens v. Hannigan*, 87 F.3d 1109 (10th Cir. 1996); *Ellis v. State*, 272 Ga. 763, 534 S.E.2d 414 (2000)

(finding reversible error where convicted defendants alleged that commonly retained defense counsel had been ineffective in failing to pursue plea agreements that would have required testimony against codefendant).

Here, defense counsel would be precluded, by their duties to Kawa, from objectively advising Flanagan on the consequences of accepting or rejecting the plea agreement. See, *Lipson, supra*; *Edens, supra*; *Ellis, supra*. To complete a plea agreement on Flanagan's behalf, resulting in the dismissal of all charges, would necessarily require Flanagan to offer testimony prejudicial to Kawa. Defense counsels' duty to Flanagan would require the conclusion of a plea agreement so obviously favorable to Flanagan, but that advantage would come at the expense of defense counsels' other client, Kawa. Counsels' responsibility to Kawa would then require an effort to impeach Flanagan's testimony—perhaps even attempting to undermine the very plea agreement that counsel had negotiated on Flanagan's behalf. Compare, e.g., *Shwayder, supra*; *Alvarez, supra*; *Littlejohn, supra*. Under these circumstances, we conclude that the district court did not clearly err in finding that the State's proffered plea agreement gave rise to an actual conflict of interest for defense counsel.

Kawa and Flanagan contend that for the State to prove an actual conflict of interest, there must be some evidence of the substance of the testimony that would be offered in exchange for the dismissal of charges. But the record clearly indicates that the State's proffer was specifically premised on Flanagan's testimony regarding Kawa. Regardless of the substance of that testimony, it is evident that the successful conclusion of a plea agreement for Flanagan will require that Flanagan offer evidence prejudicial to Kawa. This unavoidable prejudice to either one defendant or the other places defense counsel in a conflict between the interests of the two.

Kawa and Flanagan also contend that they validly waived any conflict of interest. But as noted above, a court is not required to accept a defendant's waiver in all circumstances. The presumption in favor of a defendant's counsel of choice may be overcome by a demonstration of actual conflict, and the trial court's conclusion that an actual conflict is present in this case is supported by the evidence and not clearly wrong. Disqualification is

necessary in this case, to protect both the defendants' constitutional rights and the court's independent interest in the fairness of the proceedings and ethical standards of the profession.

We note, for the sake of completeness, that the defendants have neither assigned as error nor argued in their appellate brief that defense counsel should have been permitted to withdraw from representation of one of the defendants, but continue to represent the other defendant. We therefore do not consider whether the conflict of interest present in the instant case would have been resolved by counsels' withdrawal to single representation.

CONCLUSION

The district court's conclusion that defense counsel have an actual conflict of interest is not clearly wrong, and the court did not err in disqualifying counsel from representing Kawa and Flanagan. The court's orders to that effect are affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. W. RANDALL PARAGAS, RESPONDENT.

708 N.W.2d 660

Filed January 27, 2006. No. S-05-772.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, W. Randall Paragas, was admitted to the practice of law in the State of Nebraska on September 17, 1986, and at all times relevant hereto was engaged in the private practice of law in Omaha, Nebraska. On June 22, 2005, formal charges were filed against respondent. The formal charges set forth one count that included charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1,

DR 1-102(A)(1) (violating disciplinary rule); DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); and Canon 7, DR 7-102(A)(3) (failing to disclose that which lawyer is required to reveal), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997).

A referee was appointed and heard evidence. On November 28, 2005, the referee filed his report. With respect to the single count in the formal charges, the referee found that respondent's conduct had breached DR 1-102(A)(1) and (5) and DR 7-102(A)(3), as well as his oath of office as an attorney. The referee recommended that respondent be suspended from the practice of law for 60 days.

On December 13, 2005, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly did not challenge or contest the findings of fact and recommended sanction set forth in the referee's report and waived all proceedings against him in connection herewith in exchange for a stated form of consent judgment of discipline outlined below. Upon due consideration, the court approves the conditional admission.

FACTS

In summary, the referee found that respondent had received over $10,000 in cash from a client and had failed to report the receipt of that cash to the Internal Revenue Service, as required by I.R.C. § 6050I (2000). The referee further found that in a case in which respondent had been hired to probate an estate, respondent had failed to timely comply with a court order directing him to deposit certain sums held by his office and relating to the estate into a money market account. The referee found that respondent's conduct had violated DR 1-102(A)(1) and (5) and DR 7-102(A)(3), as well as his oath of office as an attorney. The referee recommended that respondent be suspended from the practice of law for 60 days.

In the referee's report, he noted that respondent had "fully cooperated" with the Counsel for Discipline's office and was "embarrassed by his actions, and apologetic." The referee also noted that the record from the hearing contained more than 40 letters from members of the legal profession familiar with the

quality of respondent's legal work and service to the bar. According to the referee's report, "[a]ll [of these letters] indicate that respondent enjoys a good reputation in the legal community, is well prepared and zealously represents his clients."

ANALYSIS

Rule 13 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, and given the conditional admission, we find that respondent knowingly does not challenge or contest the findings of the referee, which we now deem to be established facts, and we further find that respondent violated DR 1-102(A)(1) and (5) and DR 7-102(A)(3), as well as his oath of office as an attorney. Respondent has waived all additional proceedings against him in connection herewith, and upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the 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) and (5) and

DR 7-102(A)(3), as well as his oath of office as an attorney, and that respondent should be and hereby is suspended from the practice of law for a period of 60 days, effective 30 days after the filing of this opinion. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court. At the end of respondent's 60-day suspension period, respondent shall be automatically reinstated to the practice of law, provided that respondent has demonstrated his compliance with rule 16, and further provided that the Counsel for Discipline has not notified this court that respondent has violated any disciplinary rule during his suspension. Respondent is also 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 10(P) (rev. 2005) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

HEADNOTES
Contained in this Volume

Abandonment 123
Accountants 347
Actions 74, 100, 118, 178, 218, 241, 264, 370, 494, 545, 600, 837, 917
Administrative Law 41, 108, 140, 164, 172, 186, 205, 213, 225, 347, 391, 407, 494, 529, 535, 660
Affidavits 706, 972
Agency 414
Alimony 722, 917
Appeal and Error 1, 19, 29, 41, 46, 74, 91, 100, 108, 118, 130, 140, 164, 172, 178, 186, 205, 213, 218, 225, 231, 241, 255, 264, 286, 316, 323, 337, 347, 356, 370, 391, 407, 414, 421, 429, 438, 446, 454, 458, 466, 471, 484, 494, 501, 508, 520, 529, 535, 545, 559, 578, 587, 600, 607, 628, 640, 656, 660, 669, 682, 685, 693, 706, 713, 722, 733, 752, 757, 773, 787, 792, 799, 809, 828, 837, 856, 870, 891, 904, 917, 941, 951, 965, 972, 978, 982, 987, 992
Attorney and Client 264
Attorney Fees 370
Attorneys at Law 454, 508, 628, 891, 992

Battery 501
Breach of Contract 438, 809

Case Disapproved 607, 682
Child Custody 792
Child Support 917
Civil Rights 225
Claims 545, 856
Collateral Attack 917
Collateral Estoppel 370
Complaints 241, 965, 978
Comprehensive Development Plans 607
Conflict of Interest 992
Conspiracy 370
Constitutional Law 19, 29, 118, 446, 559, 722, 752, 870, 965, 992
Contempt 982
Contractors and Subcontractors 241, 733
Contracts 218, 241, 286, 323, 370, 421, 484, 545, 809, 917
Conveyances 323
Convictions 225, 660
Corporations 323, 370, 484
Costs 891
Courts 1, 19, 264, 391, 578, 809, 917, 987, 992
Criminal Law 29, 559, 578, 752, 773, 799, 992

Damages 74, 241, 264, 370, 438, 520, 587
Death 600
Debtors and Creditors 484
Decedents' Estates 91, 323, 941
Declaratory Judgments 140, 607
Demurrer 130, 600
Directed Verdict 520, 545
Disciplinary Proceedings 339, 429, 471, 749, 768, 951
Divorce 1, 178, 917
DNA Testing 972
Double Jeopardy 799, 965
Due Process 19, 347
Duress 559

Easements 520
Effectiveness of Counsel 559, 904
Eminent Domain 587
Employer and Employee 118, 809
Employment Contracts 809
Employment Security 213
Equal Protection 19, 870
Equity 231, 414, 607, 856, 917
Estates 231
Estoppel 91, 733, 809
Evidence 74, 150, 255, 323, 414, 520, 545, 559, 578, 600, 669, 685, 773, 799, 828, 856, 870
Executors and Administrators 323
Expert Witnesses 255, 587, 706
Extradition and Detainer 904

Federal Acts 1, 693, 904
Fees 466
Final Orders 91, 231, 454, 458, 607, 713, 837, 917, 982
Forbearance 809
Fraud 370, 733

Gifts 91, 941
Guaranty 484
Guardians and Conservators 792, 837

Health Care Providers 685, 693, 706
Hearsay 799
Homicide 559
Immunity 316, 693

Indian Child Welfare Act 870
Indictments and Informations 965
Informed Consent 706
Injunction 607

Insanity 559
Insurance 1, 74, 218, 421, 545
Intent 1, 19, 46, 91, 205, 218, 225, 347, 446, 484, 559, 733, 757, 809, 856, 917, 941
Irrigation 108, 130

Joinder 370
Joint Tenancy 323
Judges 178, 454, 578, 587, 722
Judgments 1, 41, 74, 100, 164, 172, 186, 205, 213, 225, 286, 316, 323, 337, 347, 370, 391, 407, 414, 438, 454, 494, 520, 529, 535, 545, 578, 640, 656, 713, 773, 792, 837, 856, 870, 904, 917, 941, 965, 982
Judicial Notice 917
Juries 965
Jurisdiction 100, 140, 164, 264, 454, 458, 466, 494, 607, 640, 685, 837, 856, 870, 917, 987
Jury Instructions 286, 520, 559, 660
Juvenile Courts 640, 685, 792, 828, 870

Labor and Labor Relations 118
Legislature 19, 29, 108, 205, 225, 347, 356, 446, 733, 856, 904
Liability 218, 241, 421, 484, 520, 545
Licenses and Permits 164, 172, 264, 347
Liens 46
Limitations of Actions 74, 241, 356, 733

Malpractice 264, 706
Medical Assistance 685, 799
Mental Distress 600
Mental Health 559
Minors 19, 792
Modification of Decree 722, 917
Moot Question 837, 987
Motions for Mistrial 74, 799
Motions for New Trial 1, 74, 178, 501, 773
Motions to Dismiss 218, 241, 685, 904
Motor Vehicles 164, 172
Municipal Corporations 607

Natural Resources Districts 108
Negligence 130, 218, 241, 264, 421, 520, 706, 733
New Trial 1, 799
Notice 1, 46, 347

Ordinances 607

Parental Rights 150, 640, 792, 828, 870
Parties 46, 74, 100, 494, 856
Partition 231
Physicians and Surgeons 706

Pleadings 1, 74, 130, 218, 241, 316, 370, 600, 809, 837, 965, 987
Police Officers and Sheriffs 164, 172
Postconviction 559, 752, 904
Presumptions 19, 29, 91, 446, 607, 992
Pretrial Procedure 316, 733, 809, 904
Principal and Agent 414
Prior Convictions 669
Probable Cause 29
Probation and Parole 225
Products Liability 356
Proof 19, 29, 118, 150, 172, 178, 264, 286, 323, 370, 414, 471, 484, 508, 520, 545, 559, 607, 628, 660, 669, 685, 706, 733, 752, 773, 792, 799, 809, 828, 870, 891, 904, 951, 982, 987, 992
Property 46, 91, 421
Property Division 178
Property Settlement Agreements 1, 917
Prosecuting Attorneys 29, 799
Prosecutorial Misconduct 799
Proximate Cause 264, 520
Public Health and Welfare 391, 600
Public Officers and Employees 118, 316

Quo Warranto 414

Real Estate 241, 587
Records 46, 587, 669, 972
Recusal 454
Replevin 978
Res Judicata 370
Revocation 164, 172
Right to Counsel 669, 752, 992
Rules of Evidence 587, 660, 669, 685, 917
Rules of the Supreme Court 218, 241, 264, 471, 508, 600, 628, 809, 837, 891

Sales 46
Sanitary and Improvement Districts 856
Schools and School Districts 140
Search and Seizure 559
Sentences 446, 578, 669, 773
Service of Process 856
Speedy Trial 904
Standing 494, 607, 856
States 1, 264, 951
Statutes 19, 29, 74, 91, 172, 186, 205, 225, 316, 347, 356, 391, 446, 494, 535, 578, 600, 640, 682, 713, 722, 787, 792, 837, 856, 870, 904, 941
Stipulations 178
Stock 323
Subrogation 421

Summary Judgment 1, 46, 59, 91, 118, 130, 231, 264, 356, 370, 421, 484, 693, 706, 713, 733, 809

Termination of Employment 809
Time 1, 466, 757, 904, 941
Title 46
Tort-feasors 218
Tort Claims Act 316
Torts 241, 501, 545
Trade Secrets 438
Trial 74, 316, 370, 559, 587, 669, 856, 972
Trusts 231, 856

Verdicts 74, 545, 660

Waiver 1, 74, 316, 559, 669, 685, 891, 972, 992
Warranty 241
Waters 108
Wills 91, 231, 323
Witnesses 370, 559
Words and Phrases 1, 41, 59, 91, 118, 150, 178, 213, 231, 286, 323, 347, 356, 370, 391, 414, 421, 438, 471, 484, 494, 578, 587, 600, 607, 640, 669, 706, 722, 757, 828, 837, 856, 870, 904, 917, 982, 987
Workers' Compensation 255, 682, 757, 787

Zoning 607