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REPORTS OF CASES

DECIDED BETWEEN

JULY 14, 2006 and FEBRUARY 1, 2007

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCLXXII

PEGGY POLACEK

OFFICIAL REPORTER

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By Peggy Polacek, Reporter of the Supreme Court and the Court of Appeals

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

JOHN V. HENDRY, Chief Justice[1]
MICHAEL G. HEAVICAN, Chief Justice[2]
JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

EVERETT O. INBODY, Chief Judge
JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

PEGGY POLACEK ..... Reporter
LANET ASMUSSEN ..... Clerk
JANICE WALKER ..... State Court Administrator

[1]Until September 30, 2006
[2]As of October 2, 2006

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel E. Bryan, Jr.	Auburn
		Vicky L. Johnson	Wilber
Second	Cass, Otoe, and Sarpy	George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	Papillion
Third	Lancaster	Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen B. Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
		Jodi Nelson	Lincoln
Fourth	Douglas	J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Gerald E. Moran	Omaha
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		Sandra L. Dougherty	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha
		J Russell Derr	Omaha
		James T. Gleason	Omaha
		Thomas A. Otepka	Omaha
		Marlon A. Polk	Omaha
		W. Russell Bowie III	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke	Columbus
		Alan G. Gless	Seward
		Michael J. Owens	Aurora
		Mary C. Gilbride	Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist	Blair
		John E. Samson	Fremont
		William Binkard	Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz	Wayne
		Patrick G. Rogers	Norfolk
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Mark D. Kozisek	Ainsworth
		Karin L. Noakes	St. Paul
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James D. Livingston	Grand Island
		Teresa K. Luther	Grand Island
Tenth	Adams, Franklin, Harlan, Kearney, Phelps, and Webster	Stephen R. Illingworth	Hastings
		Terri S. Harder	Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John P. Murphy	North Platte
		Donald E. Rowlands	North Platte
		James E. Doyle IV	Lexington
		David Urbom	McCook
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson	Chadron
		Robert O. Hippe	Gering
		Brian C. Silverman	Alliance
		Randall L. Lippstreu	Gering
		Kristine R. Cecava	Sidney

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven B. Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd J. Hutton	Papillion
		Max Kelch	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Mary L. Doyle	Lincoln
		Laurie Yardley	Lincoln
		Jean A. Lovell	Lincoln
		Susan I. Strong	Lincoln
Fourth	Douglas	Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna Atkins	Omaha
		Lawrence E. Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
		Craig Q. McDermott	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo
		Linda S. Caster Senff	Aurora

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
		Douglas L. Luebe	Hartington
		Kenneth Vampola	Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard W. Krepela	Madison
		Donna F. Taylor	Madison
		Ross A. Stoffer	Pierce
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman	Ainsworth
		Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen, Jr.	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack R. Ott	Hastings
		Robert A. Ide	Holdrege
		Michael Offner	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom	North Platte
		Cloyd Clark	McCook
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
		Edward D. Steenburg	Ogallala
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		G. Glenn Camerer	Gering
		James M. Worden	Gering
		Randin Roland	Sidney

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth Crnkovich	Omaha
	Wadie Thomas	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Linda S. Porter	Lincoln
	Roger J. Heideman	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Ronald L. Brown	Lincoln
J. Michael Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
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DAVID STUART ATKINSON
LUCAS WILLIAM ATKINSON
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AMOL BATRA
DONALD DOUGLAS BEND
BARBARA ANN BIEDERMAN
KIMBERLY PESCHKA BILDER
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JERROLD ROBERT BLACK
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MICHAEL EDWARD BRZICA
COLLEEN MARIE BYELICK
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BRUCE MICHAEL CARDEN
JON RANDALL CARPENTER
JUSTIN FOREST CARTER
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ALLYSON VANSTORY CROSSMAN
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SARAH ELIZABETH EUREK
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KEITH TYLER PETERS
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CHRISTINE MARIE PRILL
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JESSICA SUZANNE WIELAND
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ANDREW RYAN WILLIS
MELANIE MARTHA NEELY WILLIS
ALEXANDER JOHN WOLF
HOLLY RAE WOLF
ELIAS THEODORE XENOS
REBECCA ANN ZAWISKY

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No. S-05-140: **Travelers Indem. Co. v. Paradise Park, Inc**. Affirmed. Stephan, J. Hendry, C.J., not participating.

No. S-05-434: **Meyer v. Koenig**. Affirmed. Stephan, J. Wright, J., participating on briefs.

No. S-05-838: **Rasch v. Remedy Intelligent Staffing**. Petition for further review affirmed. Miller-Lerman, J. Heavican, C.J., not participating.

No. S-05-1087: **State v. Golka**. Affirmed in part, and in part vacated and remanded with directions for resentencing. McCormack, J. Hendry, C.J., not participating.

No. S-05-1252: **State v. Kern**. Affirmed. Wright, J.

No. S-06-699: **State v. Moore**. Sentence vacated, and cause remanded for resentencing. McCormack, J.

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No. S-02-630: **State ex rel. Counsel for Dis. v. Achola**. Application for reinstatement granted, effective immediately.

No. S-05-098: **Frain v. Portsche**. After petition of appellant for further review sustained, letter filed January 5, 2007, received regarding death of appellant; letter treated as motion to dismiss. Motion to dismiss appeal sustained; appeal dismissed.

No. S-05-117: **Riley v. Fremont Cancer Ctr**. Stipulation allowed; appeal dismissed.

No. S-05-614: **Rust v. Leikhus**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-05-640: **Farrakhan v. City of Omaha**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-05-787: **Genoways v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-05-812: **O'Brien v. Department of Motor Vehicles**. Stipulation allowed. Reversed and remanded with directions.

No. S-05-836: **State v. Ryan**. Motion for summary affirmance overruled. Cause remanded to district court for entry of final order on motion for postconviction relief.

No. S-05-836: **State v. Ryan**. Motion to retain jurisdiction sustained. The district court's denial of postconviction relief is summarily affirmed. See rule 7A(1).

No. S-05-965: **Enriquez v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-05-1005: **Lamar Co. v. Kelley**. Motion sustained; appeal dismissed with prejudice; each party to pay own costs.

No. S-05-1059: **Brandon v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-1213: **Richards v. Meeske**. Stipulation allowed; appeal dismissed; each party to pay own costs.

Nos. S-05-1429 through S-05-1437: **In re Estate of Buffett**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-05-1467: **State v. Harris**. Appeal dismissed at the request of appellant.

No. S-06-217: **In re Interest of Jonathan W.** Appeal dismissed as moot. See, rule 7A(2); *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

No. S-06-256: **Rognirhar v. Kinlund**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-06-333: **State v. Garza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-06-459: **Dolezal v. Nebraska Game & Parks Comm.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-06-582: **In re Guardianship & Conservatorship of Larson**. Appeal dismissed. See rule 7A(2).

No. S-06-631: **Waite v. Adams**. Affirmed. See, rule 7A(1); *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006). The appellees are permitted 10 days to file motions for attorney fees and costs and supporting affidavits pursuant to rule 9F and Neb. Rev. Stat. § 25-824 (Reissue 1995).

No. S-06-644: **Pettit v. Committee for Reorg. of Sch. Dist.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1905 (Reissue 1995).

No. S-06-645: **Seifer v. Committee for Reorg. of Sch. Dist.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1905 (Reissue 1995).

No. S-06-793: **State v. Derry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-06-963: **State ex rel. Counsel for Dis. v. Gilner**. Judgment of suspension.

No. S-06-1026: **Henry v. Americans for Limited Government**. Stipulation to dismiss filed in response to November 15, 2006, order to show cause is allowed; appeal dismissed.

No. S-06-1126: **State ex rel. Counsel for Dis. v. Grabinski**. Thomas D. Grabinski is suspended from the practice of law in the State of Nebraska until further order of this court.

No. S-07-075: **State ex rel. Counsel for Dis. v. Smyrak**. Judgment of suspension.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. S-04-715: **Otte v. Neth**. Petition of appellant for further review sustained on November 22, 2006.

No. S-04-835: **Robbins v. Neth**, 15 Neb. App. 67 (2006). Petition of appellant for further review sustained on November 15, 2006.

No. A-04-893: **Peterson v. Peterson**, 14 Neb. App. 778 (2006). Petition of appellant for further review overruled on July 19, 2006.

No. A-04-1016: **Wilmot v. Snelling**. Petition of appellant for further review overruled on August 30, 2006.

No. A-04-1030: **State v. Henderson**. Petition of appellant for further review overruled on September 18, 2006, as untimely filed.

No. A-04-1077: **Anderson v. Christensen**. Petition of appellee for further review overruled on August 30, 2006.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellee Farnam Bank for further review overruled on July 6, 2006.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellee Rupp for further review overruled on July 6, 2006.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellees Franzen and Widick for further review overruled on July 6, 2006.

No. A-04-1191: **Frazier v. Eberspacher**. Petition of appellants for further review overruled on November 29, 2006.

No. A-04-1193: **Eran Indus. v. City of La Vista**. Petition of appellee for further review overruled on January 18, 2007.

No. A-04-1214: **Lenzen v. JG Shopping Ctr. Mgmt.** Petition of appellant for further review overruled on October 12, 2006.

No. A-04-1236: **Berens v. McNeil Company**. Petition of appellee McNeil Company for further review overruled on August 30, 2006.

No. A-04-1238: **Thomas v. Hollinger**. Petition of appellant for further review overruled on August 30, 2006.

No. A-04-1251: **Campagna v. Higday**, 14 Neb. App. 749 (2006). Petition of appellant for further review overruled on July 12, 2006.

No. A-05-035: **Underwood v. Underwood**. Petition of appellant for further review overruled on January 4, 2007.

No. A-05-064: **State on behalf of Snyder-Brandt v. Bartels**. Petition of appellant for further review overruled on December 13, 2006.

No. A-05-106: **Jepsen v. Greenfield Sales**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-126: **State v. Fair**. Petition of appellant for further review overruled on December 13, 2006.

No. A-05-130: **State ex rel. Wagner v. Kay**, 15 Neb. App. 85 (2006). Petition of appellant for further review overruled on January 4, 2007.

No. A-05-289: **Poppe v. City of Lincoln**, 15 Neb. App. 164 (2006). Petition of appellant for further review overruled on January 4, 2007.

No. A-05-365: **In re Estate of Schindler**. Petition of appellant for further review overruled on November 20, 2006.

No. A-05-374: **Conroy v. Columbia Ins. Co**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-463: **B & B Sales v. Union Ins. Co**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-496: **State v. Gray**. Petition of appellant for further review overruled on October 12, 2006.

No. A-05-504: **State v. Buggs**. Petition of appellant for further review overruled on December 13, 2006.

No. S-05-519: **Zink v. Neth**. Petition of appellant for further review sustained on August 30, 2006.

No. S-05-519: **Zink v. Neth**. Petition of appellant for further review dismissed on January 24, 2007, as having been improvidently granted.

No. A-05-669: **In re Estate of Anderson**. Petition of appellant for further review overruled on January 18, 2007.

No. A-05-692: **State v. Koch**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-707: **State v. Rose**. Petition of appellant for further review overruled on November 15, 2006.

No. A-05-881: **State v. Murphy**, 14 Neb. App. 804 (2006). Petition of appellant for further review overruled on July 19, 2006.

No. A-05-885: **Finnegan v. Leslie**. Petition of appellant for further review overruled on August 30, 2006.

No. S-05-947: **State v. Muse**, 15 Neb. App. 13 (2006). Petition of appellant for further review sustained on November 15, 2006.

No. A-05-959: **Salazar v. Baily's Tire & Serv**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-959: **Salazar v. Baily's Tire & Serv**. Petition of appellee for further review overruled on July 6, 2006.

No. A-05-962: **State v. Benish**. Petition of appellant for further review overruled on September 27, 2006.

No. S-05-1033: **In re Interest of Jeffrey K.**, 14 Neb. App. 818 (2006). Petition of appellee for further review sustained on August 30, 2006.

No. A-05-1043: **State v. Hysell**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1096: **Pflepsen v. KC Concrete Placement**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1130: **Velehradsky v. Velehradsky**. Petition of appellant for further review overruled on September 13, 2006.

No. A-05-1131: **State v. Stetz**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1140: **State v. Miner**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-1153: **State v. Agee**. Petition of appellant for further review overruled on October 25, 2006.

No. A-05-1157: **State v. Miner**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-1195: **Hansen v. Vampola**. Petition of appellant for further review overruled on July 14, 2006, as untimely filed. See rule 2F(1).

No. A-05-1201: **In re Interest of Walter W.**, 14 Neb. App. 891 (2006). Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1220: **State v. Devitt**. Petition of appellant for further review overruled on September 13, 2006.

No. A-05-1233: **Arias v. Department of Corr. Servs.** Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1253: **State v. Stevens**. Petition of appellant for further review overruled on January 18, 2007.

No. A-05-1258: **Scheurich v. Drivers Mgmt., Inc**. Petition of appellee for further review overruled on August 30, 2006.

No. A-05-1269: **State v. Dupre**. Petition of appellant for further review overruled on November 15, 2006.

No. A-05-1296: **State v. Zmievski**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1322: **Lynch v. Sparks**. Petition of appellant for further review overruled on August 30, 2006.

Nos. A-05-1324, A-05-1325: **In re Interest of Chynne P. et al.** Petition of appellant for further review overruled on August 8, 2006.

No. A-05-1331: **State v. Cole**. Petition of appellant for further review overruled on September 20, 2006.

No. A-05-1337: **Conn v. Conn**, 15 Neb. App. 77 (2006). Petition of appellant for further review overruled on December 13, 2006.

No. A-05-1375: **State v. Pfeifer**. Petition of appellant for further review overruled on September 13, 2006.

Nos. A-05-1381, A-05-1382: **In re Interest of Vanessa R. & Mario R.** Petitions of appellant for further review overruled on August 30, 2006.

No. A-05-1388: **Backhaus v. Calvert**. Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1397: **In re Interest of Dennis W.**, 14 Neb. App. 827 (2006). Petition of appellant for further review overruled on August 30, 2006.

No. A-05-1407: **In re Interest of Brandon G.** Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1408: **State v. Lohman**. Petition of appellant for further review overruled on December 13, 2006.

No. A-05-1414: **State v. Bussart**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1417: **State v. Brown**. Petition of appellee for further review overruled on November 15, 2006.

No. A-05-1418: **State v. Portsche**. Petition of appellant for further review overruled on October 12, 2006.

No. A-05-1454: **Kuhn v. H&H Chevrolet Co**. Petition of appellant for further review overruled on September 13, 2006.

No. A-05-1455: **State v. McClure**. Petition of appellant for further review overruled on July 12, 2006.

No. A-05-1477: **In re Interest of Maxwell T.**, 15 Neb. App. 47 (2006). Petition of appellant for further review overruled on January 18, 2007.

No. S-05-1525: **In re Interest of Michael U.**, 14 Neb. App. 918 (2006). Petition of appellant for further review sustained on September 13, 2006.

No. A-05-1535: **State v. Rose**. Petition of appellant for further review overruled on October 18, 2006.

No. A-05-1544: **State v. Prater**. Petition of appellee for further review overruled on August 30, 2006.

No. A-05-1559: **In re Adoption of Jessica D**. Petition of appellee for further review overruled on August 30, 2006.

No. A-05-1568: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on July 19, 2006. See rule 2F(3).

No. A-06-007: **State v. Grant**. Petition of appellant for further review overruled on September 20, 2006.

No. A-06-008: **State v. Zephier**. Petition of appellant for further review overruled on November 15, 2006.

No. S-06-015: **Liming v. Liming**. Petition of appellant for further review sustained on May 18, 2006.

No. A-06-029: **Sinsel v. Weinand**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-035: **State v. Segura**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-041: **State v. Perry**. Petition of appellant for further review overruled on October 25, 2006.

No. A-06-059: **State v. Wehr**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-074: **Banks v. Midwest Padding**. Petition of appellant for further review overruled on October 12, 2006.

No. A-06-080: **State v. Mendoza**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-131: **Nocita v. Nocita**. Petition of appellee for further review overruled on September 27, 2006.

No. A-06-154: **State v. Wilson**, 15 Neb. App. 212 (2006). Petition of appellant for further review overruled on January 18, 2007.

No. A-06-165: **State v. Banks**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-167: **Marriott v. SID No. 230**. Petition of appellant for further review overruled on July 6, 2006.

No. A-06-174: **State v. Snyder**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-179: **In re Interest of Ethan M.**, 15 Neb. App. 148 (2006). Petition of appellees and guardian ad litem for further review overruled on January 18, 2007.

Nos. A-06-180, A-06-181: **In re Interest of Chloe H. & Katrina H.**, 15 Neb. App. 148 (2006). Petitions of appellant for further review overruled on January 18, 2007.

No. A-06-184: **Arias v. Department of Corr. Servs**. Petition of appellant for further review overruled on September 27, 2006.

No. S-06-235: **In re Interest of Fedalina G**. Petition of appellant for further review sustained on July 19, 2006.

No. A-06-241: **Clayton v. Warford**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-250: **State v. Hauck**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-253: **Murray v. Department of Motor Vehicles**. Petition of appellant for further review overruled on October 12, 2006.

No. S-06-258: **Foster v. BryanLGH Med. Ctr. East**. Petition of appellant for further review sustained on July 6, 2006.

No. A-06-290: **Dunham v. State Patrol**. Petition of appellant for further review overruled on July 6, 2006.

Nos. A-06-295, A-06-296: **State v. Kenney**. Petitions of appellant for further review overruled on August 30, 2006.

No. A-06-307: **State v. Guajardo**. Petition of appellant for further review overruled on October 12, 2006.

No. A-06-315: **State v. Perez**. Petition of appellant for further review overruled on December 20, 2006.

No. A-06-316: **State v. Perez**. Petition of appellant for further review overruled on December 20, 2006.

No. A-06-331: **State v. Goldsworthy**. Petition of appellant for further review overruled on October 18, 2006.

Nos. A-06-343, A-06-344: **State v. Cisar**. Petitions of appellant for further review overruled on October 18, 2006.

No. A-06-366: **Keup v. Department of Corr. Servs**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-367: **State v. Wiemer**, 15 Neb. App. 260 (2006). Petition of appellant for further review overruled on January 18, 2007.

No. A-06-387: **Schlichtman v. Jacob**. Petition of appellant for further review overruled on October 18, 2006.

No. A-06-402: **In re Interest of Emma B**. Petition of appellant for further review overruled on July 12, 2006.

No. A-06-413: **In re Interest of Savannah S. et al**. Petition of appellant for further review overruled on November 29, 2006.

No. A-06-437: **State v. Warnsing**. Petition of appellant for further review overruled on November 1, 2006.

No. A-06-440: **In re Interest of Joshua A. et al**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-450: **State v. Smith**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-450: **State v. Smith**. Petition of appellant pro se for further review overruled on January 18, 2007.

No. A-06-452: **In re Interest of Thomas Z**. Petitions of appellant for further review overruled on October 18, 2006.

No. A-06-469: **Theis v. Neth**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-470: **Stroh v. Stroh**. Petition of appellant for further review overruled on October 18, 2006.

Nos. A-06-476, A-06-478: **State v. Cooper**. Petitions of appellant for further review overruled on October 12, 2006.

No. A-06-485: **Kaelin v. Neth**. Petition of appellant for further review overruled on January 4, 2007.

No. A-06-516: **State v. Humphrey**. Petition of appellant for further review overruled on December 13, 2006.

No. A-06-539: **State v. Weekly**. Petition of appellant for further review overruled on October 18, 2006.

No. A-06-559: **State v. Rodriguez**. Petition of appellant for further review overruled on January 24, 2007.

No. A-06-571: **Caton v. Clarke**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-602: **State ex rel. Tyler v. Department of Corrections**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-603: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-604: **Tyler v. Houston**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-609: **State on behalf of Luna v. Luna**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-616: **In re Interest of Amanda W.** Petition of appellant for further review overruled on December 20, 2006.

No. A-06-621: **Schlichenmaier v. Whitlock**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-653: **State v. Le**. Petition of appellant for further review overruled on December 13, 2006.

No. A-06-656: **In re Interest of Jason B. & Michael B.** Petition of appellant for further review overruled on December 13, 2006.

No. A-06-667: **State v. Castellanos**. Petition of appellant for further review overruled on December 13, 2006.

No. A-06-670: **Travelers Indemnity Co. v. Heim**. Petition of appellant for further review overruled on August 30, 2006.

No. A-06-671: **State v. Larsen**. Petition of appellant for further review overruled on November 29, 2006.

No. A-06-672: **State v. Larsen**. Petition of appellant for further review overruled on November 29, 2006.

No. A-06-691: **State v. Cramer**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-698: **State v. Tyler**. Petition of appellant for further review overruled on August 14, 2006, as premature. See rule 2F(1).

No. S-06-698: **State v. Tyler**. Petition of appellant for further review sustained on December 13, 2006.

No. A-06-715: **State v. Martin**. Petition of appellant for further review dismissed on November 13, 2006, as moot.

No. A-06-718: **In re Interest of Ciera C.** Petition of appellee State for further review overruled on January 24, 2007.

No. A-06-763: **Barrett v. Fabian**. Petition of appellant for further review overruled on November 1, 2006.

No. A-06-821: **State v. Anderson**. Petition of appellant for further review overruled on November 15, 2006.

No. S-06-889: **Williams v. Baird**. Petition of appellant for further review sustained on November 15, 2006.

No. A-06-901: **Onuachi v. Meylan Enters.** Petition of appellant for further review overruled on November 15, 2006.

No. A-06-903: **City of Blair v. Thompson**. Petition of appellant for further review overruled on November 15, 2006.

No. A-06-984: **First Resolution Investment v. Llanes**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-1003: **Kuhn v. Wells Fargo Bank**. Petition of appellant for further review overruled on January 4, 2007.

No. A-06-1007: **Martin v. Department of Corr. Servs.** Petition of appellant for further review overruled on January 18, 2007.

No. A-06-1101: **State v. Pfitzer**. Petition of appellant for further review overruled on December 20, 2006.

No. A-06-1153: **Steffens v. Steffens**. Petition of appellant for further review overruled on January 18, 2007.

No. A-06-1177: **Spotanski v. Willyard**. Petition of appellant for further review overruled on January 22, 2007, as untimely filed.

No. A-06-1261: **Davis v. Board of Parole**. Petition of appellant for further review dismissed on January 18, 2007, for lack of jurisdiction.

No. A-06-1262: **Davis v. Board of Parole**. Petition of appellant for further review dismissed on January 18, 2007, for lack of jurisdiction.

No. A-06-1263: **Davis v. Board of Parole**. Petition of appellant for further review dismissed on January 18, 2007, for lack of jurisdiction.

Nebraska Supreme Court

In Memoriam

Justice Leslie Boslaugh

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
December 4, 2006
2:00 p.m.

Proceedings before:
SUPREME COURT
Chief Justice Michael G. Heavican
Justice John F. Wright
Justice William M. Connolly
Justice John M. Gerrard
Justice Kenneth C. Stephan
Justice Michael McCormack
Justice Lindsey Miller-Lerman



JUSTICE LESLIE BOSLAUGH

Proceedings

CHIEF JUSTICE HEAVICAN: Good afternoon. The Nebraska Supreme Court is meeting in special ceremonial session on this 4th day of December, 2006, to honor the life and memory of Former Supreme Court Justice Leslie Boslaugh and to note his many contributions to the legal profession.

I would like to take this opportunity to introduce you to my colleagues on the Supreme Court. Beginning to my far left is Justice Lindsey Miller-Lerman. Justice Kenneth Stephan is next to Justice Miller-Lerman, and next to Justice Stephan is Justice William Connolly. To my far right is Justice Michael McCormack. Next to Justice McCormack is Justice John Gerrard, and to my immediate right is Justice John Wright.

The Court further acknowledges the presence of Justice Boslaugh's wife, Betty; son, Paul and his wife Eileen Boslaugh, and their son Max and twin daughters. Justice Boslaugh's daughters and sons-in-law, Sarah Boslaugh and Daniel Peck and Marguerite Boslaugh and David Guadliana were unable to attend today.

The Court also acknowledges the presence of other members of the family and friends of former Supreme Court Justice Boslaugh.

Also present are former members of the Nebraska Supreme Court, members of the Nebraska Court of Appeals, and other members of the judiciary and members of the bar.

At this time the Court recognizes Former Nebraska Supreme Court Chief Justice William C. Hastings, Chairman of the Supreme Court's Memorial Committee, who will conduct these proceedings.

Mr. Chief Justice, good afternoon.

CHIEF JUSTICE HASTINGS: Good afternoon. If it please the Court, William Hastings, Chair of Special Supreme Court Committee, memorializing Judge Leslie Boslaugh.

The members of my committee are C. Thomas White, Chief Justice, Retired, of this Court; John G. Grant, Judge Retired of this Court; James Hewitt, Wesleyan University Professor and attorney; and D. Nick Caporale, Retired Judge of this Court. They will each be called upon to recall their remembrances of Judge Boslaugh.

Leslie Boslaugh was born in Hastings, Nebraska, on September 14, 1916, and died in Lincoln on February 16, 2006. He is survived by his wife, Elizabeth; daughters Marguerite and her husband David Guadliana, Sarah and her husband Daniel Peck; and Paul and wife Eileen, grandson Maxwell Joseph and twin granddaughters Rachael Leslie and Andrea Genevieve.

Judge Boslaugh graduated from the University of Nebraska College of Law, cum laude, was a member of Phi Kappa Psi Fraternity and a 33rd degree Scottish Rite Mason. He served during World War II in the United States Army Field Artillery in Germany. He practiced law in Hastings and later in Lincoln with the Attorney General's Office.

Judge Boslaugh was elected to this Court in 1961. He served until his retirement in 1994, having served on the Court for a total of 33 years, longer than any other judge except for Judges William Rose and Edward Carter. His services were distinct in that he was one of the last judges of this Court to have been elected by open ballot or popular ballot and the only judge to have succeeded his father on the bench.

At this time please permit me to present C. Thomas White, Chief Justice, Retired.

CHIEF JUSTICE HEAVICAN: Thank you.

CHIEF JUSTICE WHITE: May it please the Court, I first met Judge Leslie Boslaugh in 1966 or thereabouts when as a District Judge I was privileged to sit with the Supreme Court for a week, hearing, as I remember, a series of property tax appeals.

In that week I formed an impression of him, a giant of a man, a towering intellect, courtly, friendly and genuinely interested in your thoughts, your experiences and your opinions.

Over the succeeding years I grew to know him better, and my earlier judgments were confirmed.

In his approach to the law, Les understood the majesty of the common law, that that which is fixed should be followed, but he also believed, as did Holmes, that the law was based on experience and not logic. He recognized that the law was for the living and change was at times both desirable and necessary. His dedication to the law was one of respect, almost reverence. Lincoln wrote, "Let reverence for the law be taught by every American mother to the child that prattles in her lap. Let it be taught in schools, in seminaries and in colleges. Let it be written in primers, spelling books and in almanacs. Let it be preached from the pulpit, proclaimed in fine legislative halls and enforced in the courts of justice. And in short let it become the political religion of the nation."

Les's approach to the role as appellate judge was to compose an opinion, carefully crafted to decide this case and not another, and to leave for another day an issue not yet discussed, briefed or argued. His words on presentation of opinion that he deemed too long and inclusive was, "I apologize for the length of the opinion. I didn't have time to write a short one."

Judge Boslaugh's interests went far beyond his devotion to his law career, his interest in military history due to his World War II role as an artillery man. His colleague Chief Justice William Hastings, also a cannoneer, frequently discussed their experience. I was an avid listener, as only an office soldier could be fascinated. He lies buried among his fellow warriors.

Judge Boslaugh was proud of his family, and his love of them shone when he was in their presence.

His encyclopedic knowledge of American railroads was inspiring. I had a limited knowledge in my boyhood as a gandy dancer and he required of me to tell all the aspects to add to his warehouse of facts. A gandy dancer is somebody who works on railroad tracks.

Judge Boslaugh was again of the group with which I served, a man for all seasons. We will not see his — soon see his like again.

Robert Louis Stevenson's poem is of comfort.

"Under a wild and starry sky
Dig the grave and let me lie

Gladly did I live, and gladly die
And I lay me down with a will
And this the verse you grave for me
Here he lies where he longed to be
Home is the sailor home from the sea
and the hunter home from the hill."

I thank the Court for permitting me to speak.

CHIEF JUSTICE HEAVICAN: Thank you.

CHIEF JUSTICE HASTINGS: May I introduce John G. Grant, Retired Judge of this Court.

CHIEF JUSTICE HEAVICAN: Thank you.

JUSTICE GRANT: May it please the Court, I used to jump up and run up here but them days is gone.

I'm extremely pleased to be here, and I don't have much to add to what Tom and these other learned guys are going to say, but I had to tell you this one story. About the first day I was on the Court we were going, walking to lunch, and school let out. I turned around this way. I don't know where it is. And he knew I was a Catholic and he said, "My goodness, those Catholic kids are sure noisy," he said. So I knew I had a friend and from then on I was a great pal to him. He was just a dear, dear, friend and just not too solemn and yet wise as an owl, and I loved him and I want to extend my condolences, belated, to his family, but he's a great man and I hope everybody knows that. Thank you very much.

CHIEF JUSTICE HEAVICAN: Thank you, Judge Grant.

CHIEF JUSTICE HASTINGS: May I present at this time James Hewitt, Professor at Wesleyan University and a lawyer.

CHIEF JUSTICE HEAVICAN: You may indeed. Thank you. Mr. Hewitt.

MR. JAMES HEWITT: May it please the Court, I'm exceptionally happy to be here this afternoon to tell you a few things about Les Boslaugh, whom I revered and enjoyed for 50 years.

I graduated from law school in 1956. I had an Air Force ROTC commission and I was going to be called to active duty sometime after the first of 1957. I needed a job. I needed to do something and Lester Stiner and Leslie Boslaugh, lawyers in Hastings, practicing together, who were longtime friends of

our family, offered me the opportunity to be an associate in their office during this span of time before I was called up to active duty.

I enjoyed it very much. I learned a great deal from both of them. One of the things that I learned was in October of 1956 — I remember it very clearly — I came back to the office after lunch and neither Mr. Stiner nor Judge Boslaugh were there. I didn't know if they had a hearing that afternoon or if I had forgotten something that they were going to do.

I stayed in the office pretty much all afternoon doing meaningful work. I think I was probably filing advance sheets or something of that kind, but in any event I stayed in the office all afternoon, not knowing where they were, until late in the afternoon when they both returned to the office and advised me that on that particular day Don Larsen had pitched the first perfect game ever pitched in a World Series. I don't know what I learned from that except that partners in law firms and associates function on a significantly different level.

During the fall of 1956 the United States was engaged in a presidential campaign. Dwight Eisenhower, who was then president, was running against his challenger for the second time, Adlai Stevenson. Leslie Boslaugh was an official in the Adams County Republican Party and he worked very diligently to bring about the reelection of President Eisenhower.

In that particular fall, the Big 10 high school athletic conference held its championship football game at Hastings High School. They played at Hastings College but it was Hastings against McCook for the championship and Judge Boslaugh this time invited me to go to the game with him and we did. It was an afternoon game and we went out there. And we ran into Frank Morrison who subsequently became the Governor of Nebraska, who was a Democratic activist to the Nth degree, and Jerry Whelan who was Lieutenant Governor during the Exon administration and another Democratic activist.

These people had been fighting each other tooth and nail over the election of Dwight Eisenhower or Adlai Stevenson, and yet I stood and watched as they laughed and joked and had a wonderful time visiting with each other throughout the course of the afternoon. It taught me that it is quite, quite possible for

people to compete, for people to be against each other vigorously and still retain a wonderful respect and regard for each other and to enjoy each other's company.

After Judge Boslaugh came to this Court and I came back from the service, I frequently came to see him in his office. Things were different at the Court then. There weren't any bomb threats. There weren't any of the things that you walk through, the metal detectors. There was no glass wall in the clerk's office where you pass your papers through like you were buying something in a cheap liquor store. It was very different. I would come in and sit down and chat with the judge and he would tell me stories and we would have a good time and I learned another lesson. He had books piled all the way across his couch and I realized that it was possible to be a success even if you had a messy office.

I — when I was considering an important career change of my own from private practice to working in a corporate situation, I came to see the judge, talked to him at some length. I came several times. He asked me searching questions. He focused on a number of issues and made me decide the issue for myself. I learned the lesson then that a good friend can be invaluable in dealing with major challenges in your life.

In the 1970s I was elected by the lawyers of Nebraska to be the state delegate to the House of Delegates of the American Bar Association. After a while while I had served in that post I was invited to go to Minden, Nebraska, to a meeting of the 10th Judicial District Bar Association and to tell them what I thought the ABA was up to. Judge Boslaugh knew that I was going and he called me and asked if he could ride along and I said I would love to have him, and we had a great visit on the way out and on the way back.

This was shortly after a former member of this Court had had some difficulty in an automobile situation. It was not any of the judges who are here today. But in any event, it was a difficult situation and I was interested in trying to find out more than I knew about it. I used every bit of cross-examination skill that I had to try and elicit the information from Judge Boslaugh and he handled it very nicely and I did not learn a single thing. The thing I did learn, however, was that a good judge treats the

business of the Court as privileged and confidential no matter to whom he or she is talking.

I also learned from watching Judge Boslaugh in his intersection with the lawyers of the 10th Judicial District where he had lived and worked for a long time that it is quite possible for lawyers and judges to eat and meet and break bread and drink and enjoy each other without their respect for each other diminishing in any sense of the word.

During the 1970s when Jerry Whelan was the Lieutenant Governor in the Exon administration, he and Judge Boslaugh and I would frequently meet at the University Club for lunch. That was one of Judge Boslaugh's favorite haunts and we would have clam chowder and we would talk about what was going on in business and industry and in the law. And I learned that judges do not check their interest in community life, in contemporary life at the door when they reach the bench.

As you can see, I have learned a great deal from Judge Boslaugh over a long span of time, but the lessons he taught me were not confined to me. Over the years, both as a lawyer and as a judge, Leslie Boslaugh served as a shining example of what is good in a man and in a servant of the law.

We hear a lot these days about parties, about groups having a big tent. Leslie Boslaugh's tent was immense. He did not discriminate. All who wanted to learn were welcome to learn what he had to teach, and hundreds of Nebraska's lawyers and judges benefited from his example.

I can think of no finer epitaph. Thank you very much.

CHIEF JUSTICE HEAVICAN: Thank you, Mr. Hewitt.

CHIEF JUSTICE HASTINGS: May I present D. Nick Caporale, Retired Judge of this Court.

CHIEF JUSTICE HEAVICAN: Yes, you may. Judge Caporale.

JUSTICE CAPORALE: May it please the Court. Though there's not much new that can be said concerning the nature of Judge Boslaugh and his contributions to the juris prudence of this state, I am nonetheless grateful for the opportunity to say a few words about this talented and unusual man, a man whom I respected, admired and who by example taught me a great deal about appellate judging.

Here are a few of the things for which I remember him the most.

I remember him for his calming and leveling influence on the Court. I remember an occasion during my freshman period as a member of this body when I was arguing, rather passionately I think, my view of the law to Judge Boslaugh. He listened quietly for a time and then said, "Judge Caporale" — and as many here know, when judges call each other by title, idle chitchat has ended and serious business is at hand — and then he calmly said, "I'm not trying to convert you. I'm simply trying to explain my point of view." My response, of course, was, "But I am trying to convert you." I don't remember what the issue was. I do remember I did not succeed.

I remember him for his compassion and his politeness. Though he never shied away from a harsh result when the law required a harsh result, you could nonetheless sometimes discern that he was discomforted by having to do what had to be done.

He was unfailingly polite. He didn't ask many questions during oral argument because experience had taught him, as he once observed, that if you simply wait, the lawyers will tell you what you need to know.

When he did ask a question, it was a crucial one and it was nearly always at the end of the lawyer's presentation. And I know what some of you are thinking, but remember my observation was that he taught many lessons, not that they were all taken.

He had one of the most inquisitive minds I've ever encountered. He was well-read and well-versed about virtually everything. And if an occasion presented itself when he was not as well-versed as he would like to have been, you can rest assured that the next time the topic came up, he would be. This was true whether you were talking about the law or carpentry or food or finance and most especially railroads.

He had one of the most organized minds and disheveled offices I have ever seen. As has been alluded before, there were books and piles of paper on the desk, on the couch and on the chairs. When you came in he was always cordial and asked

you to sit. Fulfilling that requirement sometimes presented a challenge.

And I said that his office was disheveled, not disorganized, and that distinction I think is illustrated by an occasion when I needed to look to a rather antiquated version of the Code of Professional Conduct and happened to mention during our coffee meeting that morning that I was having difficulty locating it and Les said, "You know, I think I've got that." And so we went to his office, he selected a pile of papers on his desk and on his first archeological dig came within three or four sheets of where we needed to be. It was an amazing feat, worthy of Houdini.

I remember him, too, because he seldom said anything bad about anyone. About the harshest comment I remember is that occasionally he would observe that if you could buy so-and-so for what he was actually worth and sell him for what he thought he was worth, you would do very well indeed.

The exact opposite was true of Les Boslaugh. We were privileged to have him walk among us and I am uneasy by the fact that he no longer does so. Thank you.

CHIEF JUSTICE HEAVICAN: Thank you, Judge Caporale.

CHIEF JUSTICE HASTINGS: Les was my very good friend. We first became really acquainted when I was serving as a judge of the District Court for Lancaster County. We were both members of the Judicial Qualification Commission which meant frequently we would have lunch together, always at the University Club because they had linen tableclothes and napkins. He hated the paper variety.

He would never let me reimburse him so in defense of my own integrity, I finally joined the Nebraska Club which presented similar niceties and equally good food.

In addition to possessing skills as a judge, he had those as a plumber, carpentry, model train building. He was a real railroad enthusiast. He knew about every train in Nebraska by its number; that is, he would not say that was the westbound Denver train, but that's No. 8.

His son Paul works for the railroad and they shared their love of the rails which was a great joy to the judge.

Besides being a great legal scholar, his years of service on the Court permitted him to have outstanding institutional memory, which I'm sure you've all found has been invaluable in discussing and deciding cases.

He was a great judge and we all miss him. On behalf of my committee I thank you for the privilege we've had of being here today. Thank you.

CHIEF JUSTICE HEAVICAN: Thank you, Former Chief Justice William Hastings.

I take this final opportunity to note for those present that this entire proceeding has been memorialized by the court reporter who today is Sue Wurm, and we want to thank her. After these proceedings have been transcribed by the court reporter, copies will be distributed to family members and those of you who have spoken on behalf of Justice Boslaugh. We will also forward a copy of the transcription to West Publishing for inclusion in its Northwest Reporter.

On behalf of the Nebraska Supreme Court, I extend its appreciation to Former Chief Justice William C. Hastings who chaired the Court's Memorial Committee, who, with the assistance of Janet Bancroft from the Court Administrator's Office is primarily responsible for organizing this ceremonial session.

This concludes the special ceremonial session of the Nebraska Supreme Court. The Court would encourage any of the participants, family members and friends of Justice Leslie Boslaugh to remain in the courtroom for a moment to greet each other on this occasion. I thank you all for attending. We are adjourned.

(Ceremonial session adjourned at 2:56 p.m.)

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

CYNTHIA A. LOVETTE AND RICHARD D. LOVETTE, APPELLANTS, V. STONEBRIDGE LIFE INSURANCE COMPANY, FORMERLY KNOWN AS J.C. PENNEY LIFE INSURANCE COMPANY, A STOCK COMPANY, APPELLEE.

716 N.W.2d 743

Filed July 14, 2006. No. S-05-389.

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. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the trial court.
4. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions when the contract was made.
5. ____: ____: ____. When the terms of an insurance contract are clear, the court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain meaning of the policy.
6. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.
7. ____: ____. 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: RICHARD J. SPETHMAN, Judge. Affirmed.

Jeffrey F. Putnam, of Inserra & Kelley, for appellants.

Glen Th. Parks and Peter C. Wegman, of Rembolt Ludtke, L.L.P., for appellee.

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

STEPHAN, J.

Cynthia A. Lovette and Richard D. Lovette brought this action against Stonebridge Life Insurance Company (Stonebridge), formerly known as J.C. Penney Life Insurance Company, to recover as beneficiaries on an accidental death policy issued by Stonebridge to their son, Jason M. Lovette. Stonebridge refused payment, contending that an exclusion in the policy applied. The parties filed cross-motions for summary judgment, and the district court granted summary judgment in favor of Stonebridge and denied the Lovettes' motion. The Lovettes appeal from that final order. We find no error and affirm the judgment of the district court.

FACTS

The case was submitted on stipulated facts. According to the stipulation, Cynthia and Richard are the parents and next of kin of Jason, who was born July 10, 1979. Jason purchased a life insurance policy from Stonebridge insuring his life for $100,000 against loss through accidental injuries. The certificate of insurance contained an exclusion which provided that "[n]o benefit shall be paid for Injury that . . . is caused by or results from the Covered Person's blood alcohol level being .10 percent weight by volume or higher."

Jason died on October 6, 2002, at approximately 3 a.m. in Wallace, Lincoln County, Nebraska, in a motor vehicle accident. The vehicle he was driving rolled over and pinned him underneath it. The certificate of death stated that the "IMMEDIATE CAUSE" of death was "Blunt Force Trauma," which was "DUE TO, OR AS A CONSEQUENCE OF [a] Motor Vehicle Accident." At the time of his death, Jason had a blood alcohol content of .27 grams per 100 milliliters of blood, which is equivalent to a blood alcohol level of .22 percent.

The accident occurred when Jason was backing his 1991 Honda Accord and attempted to make a moving 180-degree

turn. His vehicle entered the south ditch of Nebraska Highway 23. The right front corner of the vehicle struck the ditch, which caused the vehicle to flip onto its top. Jason was ejected through the open driver's-side window. The weather was clear, the asphalt road was level, and the pavement was dry. Investigating officers observed that Jason's face had been pressed into the mud by the weight of the vehicle. A V-shaped dent was visible on the driver's-side roof area that appeared to have been caused by Jason's body. An impact mark on the sunroof was consistent with an impact on the back of Jason's head. Investigating officers found several full, unopened bottles of beer lying in and around the vehicle. Investigating officers also detected a strong odor of alcoholic beverage on or about Jason.

A front seat passenger in Jason's vehicle told investigators that at the time of the accident, Jason had been rapidly accelerating backward, westbound, and was attempting to complete a 180-degree turn and continue westbound without stopping. The passenger told a bystander that the vehicle had been traveling approximately 50 to 55 miles per hour backward prior to the accident and told investigating officers that the vehicle was traveling approximately 30 to 35 miles per hour backward prior to the accident. No autopsy was performed.

The district court concluded that the "accident was caused at least in part by or resulted from [Jason's] blood alcohol level being over two times the legal limit." The court found that the policy exclusion thus applied, and the court granted summary judgment in favor of Stonebridge. The Lovettes filed this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The Lovettes assign that the district court erred in finding that the policy exclusion applied and erred in granting Stonebridge's motion for summary judgment.

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. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006); *Andres v. McNeil Co.*, 270 Neb. 733, 707 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. *Andres v. McNeil Co., supra*; *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

[3] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the trial court. *Molina v. American Alternative Ins. Corp.*, 270 Neb. 218, 699 N.W.2d 415 (2005); *Chief Indus. v. Great Northern Ins. Co.*, 268 Neb. 450, 683 N.W.2d 374 (2004).

ANALYSIS

[4,5] The issue presented is whether the exclusion contained within the policy prohibits the Lovettes from recovering against Stonebridge. Familiar general principles guide our analysis of this issue. An insurance policy is to be construed as any other contract to give effect to the parties' intentions when the contract was made. *Boutilier v. Lincoln Benefit Life Ins. Co.*, 268 Neb. 233, 681 N.W.2d 746 (2004). When the terms of an insurance contract are clear, the court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. *Id.* In such a case, a court shall seek to ascertain the intention of the parties from the plain meaning of the policy. *Id.*

The policy provides that "[n]o benefit shall be paid for Injury that . . . is caused by or results from the Covered Person's blood alcohol level being .10 percent weight by volume or higher." The Lovettes argue that this language is not satisfied by the mere fact that Jason was intoxicated at the time of the accident. Instead, they contend that the language of the exclusion unambiguously requires a "causal connection" between Jason's "blood alcohol weight," or his intoxication, and the injuries he suffered. Brief

for appellants at 6. They contend that such a connection is not present in this action because the uncontroverted evidence is that Jason's death was caused by "blunt force trauma" as a result of a motor vehicle accident. *Id.*

We agree that the plain language of the policy exclusion requires the insurer to show a causal connection between the decedent's blood alcohol level and the accident in which the fatal injuries were sustained. See *Bankers Life & Cas. Co. v. Jenkins*, 547 S.W.2d 237 (Tenn. 1977). However, the Lovettes view the connection too narrowly by focusing on the ultimate cause of death and disregarding the circumstances that led up to the motor vehicle accident that resulted in Jason's death. The unambiguous language of the policy does not require that the intoxication, or blood alcohol weight, be the sole cause of the death in order to trigger the exclusion. Rather, the language requires only that the intoxication be a cause of a fatal event. See, *Ober v. CUNA Mut. Soc.*, 645 So. 2d 231 (La. App. 1994); *Bankers Life & Cas. Co. v. Jenkins, supra*; *Richard v. American Home Assurance Company*, 318 So. 2d 613 (La. App. 1975). Thus, where death results from a vehicular accident, the insurer need not eliminate all other possible causes of the accident to invoke the policy exception, as long as it demonstrates that the insured's blood alcohol level is causally related to the accident.

[6] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005); *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). To meet this burden, Stonebridge was required to produce evidence from which a finder of fact could reasonably infer that Jason's blood alcohol level was a cause of his death. We note that in some reported cases where an insurer has successfully invoked a similar exclusion in circumstances where the insured was operating a motor vehicle at the time of death, the evidence includes expert testimony correlating blood alcohol level with impairment. *Ober v. CUNA Mut. Soc., supra*; *Bankers Life & Cas. Co. v. Jenkins, supra*; *Richard v. American Home Assurance Company, supra.* In at least one case, however, causation was established without

expert testimony. *Morgan v. Fortis Benefits Ins. Co.*, 107 P.3d 267 (Alaska 2005). The record in this case does not include expert opinion evidence that Jason's blood alcohol level resulted in impairment which was causally related to the fatal motor vehicle accident, and the parties have not briefed or argued whether an inference of causation can be drawn in the absence of such evidence.

Under a prior version of Nebraska's driving under the influence statute, this court held that a statutory presumption of intoxication arising from a specific blood alcohol level was in derogation of common law and therefore was applicable only to driving under the influence prosecutions. See *Hoffman v. State*, 160 Neb. 375, 70 N.W.2d 314 (1955). In *Raskey v. Hulewicz*, 185 Neb. 608, 616, 177 N.W.2d 744, 749-50 (1970), a personal injury case arising out of a motor vehicle accident, we first held that the trial court had properly excluded the results of a blood alcohol test because of insufficient foundation, and we then stated that the test results would have been inadmissible in any event because the "percentage of the alcohol content of the body fluids of a defendant in a civil matter is relevant, in the absence of a presumption, only when accompanied by expert opinion evidence of the effect thereof."

We do not regard this dictum in *Raskey* as establishing a bright-line rule that expert testimony is always necessary in a civil case to establish a causal relationship between a motorist's blood alcohol content and a motor vehicle accident which results in personal injury or death. In other circumstances where we have held that expert testimony is generally necessary to prove a fact, we have recognized exceptions. For example, although expert testimony is generally required to prove professional negligence, we have held that such testimony is not essential in circumstances where the recognition of the alleged negligence may be presumed to be within the knowledge of a layperson. *Boyd v. Chakraborty*, 250 Neb. 575, 583, 550 N.W.2d 44, 49 (1996) ("[i]n sum, this case involves the leaving of a foreign object, namely, a tube fragment, in a patient's body, which fragment should have been removed by an act understandable by the jury without technical evidence. . . . This is within the realm of knowledge of laypersons"); *Swierczek v.*

Lynch, 237 Neb. 469, 478, 466 N.W.2d 512, 518 (1991) ("[i]t is within the common knowledge and experience of a layperson to determine that an individual does not enter the hospital for extraction of her teeth and come out with an injury to nerves in her arms and hands, without some type of negligence occurring"). Similarly, we have stated that "where injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, use of expert testimony is not legally necessary to establish the cause and extent of such injuries." *Storjohn v. Fay*, 246 Neb. 454, 461, 519 N.W.2d 521, 527 (1994), citing *Eiting v. Godding*, 191 Neb. 88, 214 N.W.2d 241 (1974).

In most circumstances in civil cases, expert testimony will be necessary to establish a causal relationship between a motorist's blood alcohol level and a fatal accident. This, however, is an exceptional case. There is undisputed evidence that Jason, the insured, with a blood alcohol level of .22 percent, was operating a motor vehicle backward on a public highway at 3 a.m. at a speed of 30 to 55 miles per hour in an attempt to make a moving 180-degree turn and that he was ejected from the vehicle when it struck a ditch and flipped over, resulting in fatal injury. It is within the general knowledge of laypersons that a blood alcohol level of more than twice the legal limit impairs physical and mental faculties, and thus, a fact finder could infer, without expert testimony, that Jason's blood alcohol level was causally related to the manner in which his fatal accident occurred. By establishing these facts, Stonebridge met its prima facie burden of producing enough evidence to demonstrate that it would be entitled to judgment if the evidence were uncontroverted at trial. See, *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005); *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[7] The burden then shifted to the Lovettes to produce evidence showing the existence of a material issue of fact that would prevent judgment as a matter of law. See *id.* There is no evidence in the record suggesting an alternative cause for the accident or negating the inference of a causal relationship between the blood alcohol level and the fatal accidental injury. See *Morgan v. Fortis Benefits Ins. Co.*, 107 P.3d 267 (Alaska 2005).

Accordingly, the district court did not err in entering summary judgment in favor of Stonebridge and in denying the Lovettes' motion for summary judgment.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., participating on briefs.

BEVERLY A. REED, APPELLANT, V. STATE OF NEBRASKA DEPARTMENT OF LABOR AND FERNANDO LECUONA III, COMMISSIONER OF LABOR, APPELLEES.

717 N.W.2d 899

Filed July 14, 2006. No. S-05-1473.

1. **Administrative Law: Final Orders: Appeal and Error.** An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act.
2. **Administrative Law: Time: Appeal and Error.** Under Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999), when the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
4. **Administrative Law: Statutes: Appeal and Error.** Under *Chevron U. S. A. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), a court reviewing an agency's construction of a statute it administers confronts two questions: (1) whether Congress has directly spoken to the precise question at issue and (2) whether the agency's answer is based on a permissible construction of the statute.
5. **Administrative Law: Appeal and Error.** Under *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000), interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant the deference of *Chevron U. S. A. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); instead, they are entitled to respect to the extent they have the power to persuade.
6. **Statutes: Courts.** When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.

7. ____: ____. The courts will not apply an administrative construction that has been prohibited by subsequent legislative enactments of the same nature.
8. **Federal Acts: Employment Security: Statutes: Time: Waiver.** The Trade Adjustment Assistance Reform Act of 2002 and remaining regulations forbid using state laws or regulations to waive time limits or late filings for good cause.

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

Riko E. Bishop, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

John H. Albin, Thomas A. Ukinski, and W. Russell Barger for appellees.

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

CONNOLLY, J.

Goodyear Tire and Rubber Company (Goodyear) laid off appellant, Beverly A. Reed, early in 2004. Reed was eligible to apply for trade readjustment allowance (TRA) benefits under 19 U.S.C. § 2291 (2000 & Supp. II 2002) of the Trade Act of 1974 (Trade Act), a federal unemployment benefits program administered by the states to assist workers who were laid off because of foreign trade competition. Nebraska Workforce Development (Workforce Development) failed to notify Reed of her rights and eligibility under the Trade Act as an "oversight." Reed missed the deadline to apply for TRA benefits, as interpreted by both the state and the federal Departments of Labor, and Workforce Development denied her benefits application as untimely.

Reed appealed the denial of benefits, arguing that the plain language of the statute does not support the state Department of Labor's interpretation of the deadline and that even if it does, Workforce Development is equitably estopped from enforcing the deadline against her. We affirm the district court's order that Reed's application was properly denied as untimely because Congress, when adopting the new deadlines, rejected the interpretation which Reed advocates.

BACKGROUND

The facts are not disputed. Goodyear employed Reed from March 26, 1987, to January 31, 2004, when she was laid off. On

January 29, 2003, the U.S. Department of Labor certified that employees laid off from Goodyear on or after December 18, 2001, would be eligible to apply for benefits under the Trade Act.

The U.S. Secretary of Labor appoints individual state agencies to administer the TRA benefits program; in Nebraska, the Secretary of Labor designated Workforce Development as that state agency. Paul Elkins of Workforce Development conceded at the administrative hearing that Reed's separation from employment fell "within the certification parameters." Elkins also explained that the Trade Act affirmatively requires his office to send notification letters to those eligible for Trade Act benefits even when the employer does not provide a list of affected employees. Elkins conceded that Goodyear had notified Workforce Development of Reed's separation, but that Reed received no notice. Elkins described this as an oversight. He explained that his office copies and files every notification letter sent to eligible employees and confirmed that the Goodyear file lacked a copy of Reed's notification letter.

Reed also confirmed that Workforce Development never sent her information about her rights under the Trade Act. She explained that she had heard from other Goodyear employees that "we may be eligible for benefits," but that Goodyear's human resources employee told Reed during her initial meetings about unemployment benefits and that Workforce Development would contact her if she was eligible for other benefits. Reed stated that she did not question the lack of correspondence initially because she knew she had 1 year in which Goodyear could recall her. She also admitted she did not press Workforce Development about further benefits because she experienced a family crisis that occupied much of her time and because the unemployment benefits she received enabled her to cover expenses without worrying about her financial situation right away.

In September 2004, Reed's family crisis abated and finances became a concern. She had still not heard from Workforce Development about additional benefits, so she contacted Workforce Development on September 23. After meeting with a Workforce Development employee on October 1, the employee informed Reed that she would have been eligible for TRA benefits but that the deadline to apply had passed.

Reed filed a training approval request form, initiating the TRA benefits process. Nonetheless, Workforce Development denied Reed's application for training approval because she had not applied for benefits within the "8/16 week deadline." Elkins explained that under the Trade Act, applicants have 8 weeks after the certification date or 16 weeks after their separation date to apply for benefits. Elkins explained that the only remedy the office has when an employee is overlooked is a 45-day extension for extenuating circumstances, but that Reed first contacted his office in the fall of 2004, which exceeded even the extended deadline. Elkins informed Reed of the appeal process, and Reed initiated this appeal. Reed stated that had she been properly informed, she would have taken the steps to meet the deadlines.

ASSIGNMENTS OF ERROR

Reed assigns that the district court erred when interpreting the Trade Act and erred by concluding that equitable estoppel did not apply in this case.

STANDARD OF REVIEW

[1,2] An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act. *Lancaster Cty. Sch. Dist. No. 0001 v. State*, 260 Neb. 108, 615 N.W.2d 441 (2000). Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999) provides that "[w]hen the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency . . . ." Under such circumstances, the court may affirm, reverse, or modify the decision of the agency or remand the cause for further proceedings. § 84-917(6)(b).

[3] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006).

ANALYSIS

This case presents the question whether Workforce Development could deny Reed the opportunity to apply for TRA

benefits for missing the training application deadline when the agency failed to inform her of her eligibility. The answer is shrouded in a fog of federal statutes and regulations.

Workforce Development and the state Department of Labor argue that 19 U.S.C. § 2291(a)(5)(A) provides explicit deadlines for applying for TRA benefits and that by failing to comply with those deadlines, Reed is ineligible for TRA benefits.

The Trade Act provides in relevant part:

> ***(a) Trade readjustment allowance conditions***
>
> Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification . . . *who files an application for such allowance for any week of unemployment which begins more than 60 days after the date on which the petition that resulted in such certification was filed* under section 2271 of this title, if the following conditions are met:
>
> . . . .
>
> *(5)* Such worker—
>
> *(A)(i)* is enrolled in a training program approved by the Secretary under section 2296(a) of this title, *and*
>
> *(ii)* the enrollment required under clause (i) occurs no later than the latest of—
>
> > *(I)* the last day of the 16th week after the worker's most recent total separation from adversely affected employment which meets the requirements of paragraphs (1) and (2),
> >
> > *(II)* the last day of the 8th week after the week in which the Secretary issues a certification covering the worker,
> >
> > *(III)* 45 days after the later of the dates specified in subclause (I) or (II), if the Secretary determines there are extenuating circumstances that justify an extension in the enrollment period, *or*
> >
> > *(IV)* the last day of a period determined by the Secretary to be approved for enrollment after the termination of a waiver issued pursuant to subsection (c) of this section,
>
> *(B)* has, after the date on which the worker became totally separated, or partially separated, from the adversely affected

> employment, completed a training program approved by the Secretary under section 2296(a) of this title, *or*
>
> *(C)* has received a written statement under subsection (c)(1) of this section after the date described in subparagraph (B).

(Emphasis supplied.) 19 U.S.C. § 2291. Subsections 2291(a)(5)(A)(ii)(I) and (II) are commonly referred to as the "8/16 week deadline." The state Department of Labor argues that the petition certifying Goodyear employees as eligible for TRA benefits occurred before Reed's actual layoff, so Reed had until the last day of the 16th week after her layoff, May 22, 2004, to enroll in training or request a training waiver. Further, the state Department of Labor argues that even with the additional 45-day extension for extenuating circumstances, Reed missed the deadline because the 45-day extension would only extend the deadline to July 6, 2004, whereas Reed did not initiate contact with Workforce Development until September 23, 2004—124 days after the 16-week deadline.

[4] The state Department of Labor relies on the assistant secretary for the U.S. Department of Labor Training and Employment Guidance Letter No. 11-02, change 1, 69 Fed. Reg. 60903 (Oct. 13, 2004), as support. The letter provides:

> Section 114 of the 2002 amendments, which amended section 231(a)(5)(A) of the Trade Act, imposed a deadline by which a worker must be enrolled in approved training, or have a waiver of this requirement, in order to be eligible for TRA.
>
> This deadline is either the last day of the 8th week after the week of issuance of the certification of eligibility covering the worker or the last day of the 16th week after the worker's most recent total qualifying separation, whichever is later (commonly referred to as the 8/16 week deadline). The "8/16 week deadline" applies to eligibility for all TRA, both basic and additional TRA. *If a worker fails to meet the applicable 8/16 week deadline, then the worker is not eligible for any TRA (basic TRA or additional TRA, including TRA for remedial training) under the relevant certification.*

(Emphasis supplied.) The state Department of Labor argues that letter No. 11-02 is entitled to substantial deference under *Auer v.*

Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). See, also, *Chevron U. S. A. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under this test, a court reviewing an agency's construction of a statute it administers confronts two questions:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U. S. A. v. Natural Res. Def. Council, 467 U.S. at 842-43.

[5] Reed, however, urges that *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000), controls. In *Christensen*, the U.S. Supreme Court determined that *Chevron*-style deference does not apply to an agency's opinion letter. The Court distinguished opinion letters from regulations because opinion letters are not typically forged through "formal adjudication or notice-and-comment rulemaking." *Christensen v. Harris County*, 529 U.S. at 587. The Court further stated:

> Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. . . . Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944), but only to the extent that those interpretations have the "power to persuade." . . .

(Citations omitted.) *Id.*

But we need not determine which level of deference to apply because Congress has "directly spoken to the precise question at

issue" by adopting the Trade Adjustment Assistance Reform Act of 2002 (2002 Trade Act). See *Chevron U. S. A. v. Natural Res. Def. Council*, 467 U.S. at 842. See, also, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002). When Congress has resolved a policy dispute in enacting a statute, an agency or court can, and must, adopt Congress' resolution. *Chevron U. S. A. v. Natural Res. Def. Council, supra.* See, also, I Richard J. Pierce, Jr., Administrative Law Treatise § 3.3 (4th ed. 2002). When Congress has spoken, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U. S. A. v. Natural Res. Def. Council*, 467 U.S. at 842-43.

CONGRESSIONAL INTENT

Reed argues that when scrutinized, 19 U.S.C. § 2291 provides no deadline for securing training waivers. She points to the language of § 2291(a) as requiring that TRA applications be filed "no sooner than" 60 days after the certification petition is filed. Brief for appellant at 8. She argues that failure to specify a "no later than" deadline means that no such deadline exists. *Id.* Although inventive, Reed's argument loses its luster on further scrutiny.

Reed points us to federal regulations interpreting the Trade Act to bolster her claim. She argues that 20 C.F.R. § 617.10 (2005) provides the controlling time limit. It provides:

> (a) *Before and after certification.* An individual covered under a certification or a petition for certification may apply to a State agency for TRA. A determination shall be made at any time to the extent necessary to establish or protect an individual's entitlement to TRA or other [trade adjustment assistance], but no payment of TRA or other [trade adjustment assistance] may be made by a State agency until a certification is made and the State agency determines that the individual is covered thereunder.
>
> (b) *Timing of applications.* An initial application for TRA, and applications for TRA for weeks of unemployment beginning before the initial application for TRA is filed, may be filed within a *reasonable period of time* after publication of the determination certifying the appropriate group of workers under section 223 of the [Trade] Act.

> However, an application for TRA for a week of unemployment beginning after the initial application is filed shall be filed within the time limit applicable to claims for regular compensation under the applicable State law. For purposes of this paragraph (b), *a reasonable period of time means such period of time as the individual had good cause for not filing earlier, which shall include, but not be limited to, the individual's lack of knowledge of the certification or misinformation supplied the individual by the State agency.*

(Emphasis supplied.) Reed argues that this language provides a relaxed deadline for workers, like her, seeking retroactive benefits—benefits for periods of unemployment that occurred before an eligible worker files his or her initial TRA application. As enticing as 20 C.F.R. § 617.10 seems, we cannot apply its terms.

The federal Department of Labor adopted 20 C.F.R. § 617.10 on December 22, 1986, and last updated § 617.10 in 1994. The state Department of Labor argues that the 8/16 deadline enacted through the 2002 Trade Act superseded conflicting regulations like § 617.10. We agree. In addition to the 8/16 deadline, Congress added the following language through its 2002 amendments:

> ***(b)* Withholding of trade readjustment allowance pending beginning or resumption of participation in training program; period of applicability**
>
> . . . .
>
> *(2) The provisions of subsection (a)(5) of this section and paragraph (1) shall not apply with respect to any week of unemployment which begins—*
>
> *(A)* after the date that is 60 days after the date on which the petition that results in the certification that covers the worker is filed under section 2271 of this title, and
>
> *(B)* before the first week following the week in which such certification is made under subpart A of this part.

19 U.S.C. § 2291(b). In § 2291(b)(2), Congress excepted certain workers from the training requirements of § 2291(a)(5). But the enumerated exception in § 2291(b)(2) does not track with the retroactive/proactive distinction in 20 C.F.R. § 617.10. Instead, § 2291(b)(2) fails to mention the retroactive/proactive distinction recognized by the regulations.

[6] When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. *United States v. Johnson*, 529 U.S. 53, 120 S. Ct. 1114, 146 L. Ed. 2d 39 (2000). The proper inference is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth. See *id.* We infer from the language of § 2291(b)(2) that Congress opted not to adopt the eligibility requirements as interpreted by the regulations. Further, legislative history for the 2002 Trade Act supports this reading.

A House of Representatives conference report describes the decisionmaking process of the Trade Act. The report notes that § 114 of the 2002 Trade Act, now codified at § 2291(a)(5), "establishes qualifying requirements that *must* be met in order for an individual worker within a certified group to receive Trade Adjustment Assistance." (Emphasis supplied.) H.R. Conf. Rep. No. 107-624, 107th Cong., 2d Sess. 123, *reprinted in* 2002 U.S. Code Cong. & Admin. News 653. Further, the report details the discrepancy between the approach preferred by the House of Representatives and that preferred by the Senate. The House favored "requirements and deadlines for workers to enroll in training," while the Senate maintained the eligibility requirements in "current law" but revised provisions for granting waivers. *Id.* Ultimately, the Senate yielded to the House, adopting the training enrollment deadline. The two houses considered and expressly rejected the eligibility approach embodied in the regulations.

[7] The courts will not apply an administrative construction that has been prohibited by subsequent legislative enactments of the same nature. See, *United States v. Gilmore*, 75 U.S. (8 Wall.) 330, 19 L. Ed. 396 (1869); 2 Am. Jur. 2d *Administrative Law* § 81 (2004). See, generally, *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998) (stating legislative act which is complete in itself and is repugnant to or in conflict with prior law repeals prior law by implication to extent of repugnancy or conflict.)

Because Congress considered the issue of exceptions to its training requirement and explicitly rejected the approach embraced by the regulations, we, too, must reject that approach and adhere strictly to the language of the statute. While the regulatory

approach seems more equitable, we are bound by Congress' words and intent. Thus, we reluctantly affirm the district court's conclusion that Workforce Development properly denied Reed's application as untimely.

EQUITABLE ESTOPPEL

We next consider Reed's equitable estoppel argument. Reed concedes that 20 C.F.R. § 617.50(d) (2005) bars using state law or regulations to circumvent TRA time limits, but argues that the "reasonable period of time" language in 20 C.F.R. § 617.10 allows equitable estoppel review. Section 617.50 provides:

> [N]o provision of State law or regulations on good cause for waiver of any time limit, or for late filing of any claim, shall apply to any time limitation referred to or specified in this part 617, *unless such State law or regulation is made applicable by a specific provision of this part 617.*

(Emphasis supplied.)

[8] Reed argues that the good cause exception in § 617.10 implies equitable principles and allows equitable estoppel analysis. But as previously discussed, the mandatory deadlines of the 2002 Trade Act effectively supersede 20 C.F.R. § 617.10. Similarly, we can find no other provision of § 617 that allows application of state law on this topic. Thus, the 2002 Trade Act and remaining regulations forbid state action on this point. See *Lowe v. Unemployment Compensation Bd.*, 877 A.2d 494 (Pa. Commw. 2005). We affirm the district court's conclusion that equitable estoppel does not apply.

CONCLUSION

Because Congress amended the Trade Act by adopting qualifying deadlines, we conclude that the statute does not allow for a good cause exception in either state or federal law. For these reasons, we reluctantly affirm the district court's conclusion that Workforce Development properly denied Reed's application as untimely.

AFFIRMED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. KELLY M. HOGAN, RESPONDENT.

717 N.W.2d 470

Filed July 21, 2006. No. S-98-1228.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence.
3. **Disciplinary Proceedings: Appeal and Error.** In attorney discipline cases, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception.
4. ____: ____. Under Neb. Ct. R. of Discipline 10(L) (rev. 2005), when no exceptions are filed to the referee's report, the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive.
5. **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.
6. ____. Violation of a disciplinary rule is a ground for discipline.
7. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
8. ____. The following may be considered as discipline for attorney misconduct: (1) disbarment, (2) suspension, (3) probation, (4) censure and reprimand, (5) temporary suspension, or (6) private reprimand.
9. ____. 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.
10. ____. 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.
11. ____. The determination of appropriate discipline to be imposed on an attorney requires consideration of any aggravating and/or mitigating factors.
12. ____. The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.
13. **Disciplinary Proceedings: Attorney and Client.** In cases involving diagnosable behavioral issues, the suspension of an attorney is not designed as a punishment; rather, it is meant as a time period in which the attorney can seek treatment without posing a danger to his or her clients.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

K.C. Engdahl and Karisa D. Johnson, of Ballew, Schneider, Covalt, Gaines & Engdahl, P.C., L.L.O., for respondent.

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

PER CURIAM.

NATURE OF CASE

Relator, the Counsel for Discipline of the Nebraska State Bar Association, now known as the Counsel for Discipline of the Nebraska Supreme Court, initiated this attorney discipline proceeding against respondent Kelly M. Hogan. Formal charges were filed against respondent alleging ethical violations. A referee was appointed who heard evidence, made findings of fact, and recommended discipline. No exceptions were filed to the referee's report. We sustained relator's motion for judgment on the pleadings in part and adopted the referee's findings. We reserved the issue of the appropriate discipline, directed briefing, and conducted oral argument. We now order respondent suspended from the practice of law with no possibility of reinstatement prior to January 1, 2008, followed by a 2-year period of probation.

STATEMENT OF FACTS

The following facts are found in the referee's report: Respondent was admitted to the practice of law in the State of Nebraska on April 11, 1978. He was engaged in the private practice of law in Keith County, Nebraska, and he also served as the county attorney for Garden County, Nebraska.

In March 1992, respondent met D.F., who at the time had three minor children, one of whom was a daughter, A.H., born October 9, 1977. Respondent initially represented D.F. in a marriage dissolution proceeding. In late 1992, after his representation of D.F. had concluded, respondent entered into an intimate relationship with D.F. This relationship lasted until at least October 1998. During his relationship with D.F., respondent maintained a paternal relationship with D.F.'s children, including spending days and nights in D.F.'s home, offering the children advice, lending them money, discussing problems and acting as their confidante, helping them with homework, babysitting them when D.F. was away, taking them to their doctor appointments, preparing their

meals, taking them to extracurricular activities, and showing them affection by hugging and kissing them on the cheek.

Throughout respondent's relationship with D.F., he was suffering from a sexual compulsive disorder, which was evidenced in part by respondent's maintaining simultaneous intimate relationships with multiple women. In 1998, as a result of his disorder, respondent "peep[ed] through the window of D.F.'s home" to observe her youngest daughter. In May 1998, also as a result of respondent's sexual compulsive disorder, respondent masturbated and ejaculated on A.H.'s back as she sat at respondent's computer while respondent was helping her with college homework. A.H. was 20 years old at the time of this incident. As a result of respondent's behavior, D.F. filed a petition for and received a harassment protection order against respondent dated October 9, 1998, which order essentially restrained respondent from any contact with D.F. and members of her household. Respondent did not challenge D.F.'s petition seeking the protection order.

On November 12, 1998, as a result of the harassment protection order, the chairperson of the Committee on Inquiry of the Sixth Disciplinary District filed with this court an application for temporary suspension of respondent's law license. On November 16, respondent filed his consent to an order of temporary suspension, and on November 25, we suspended respondent from the practice of law until further order of the court.

From November 30 through December 4, 1998, respondent attended and completed a "Survivors I Workshop" at a facility in Arizona offering treatment for mental and addictive disorders. The workshop was designed for individuals with sexual compulsive disorders. From January 11 through 15, 1999, respondent attended and completed a "Sexual Compulsivity Workshop" at the Arizona facility.

In April 1999, respondent moved to Albuquerque, New Mexico, and thereafter, he began attending "Sexaholics Anonymous" meetings. Respondent later moved to Dallas, Texas, where he claimed he attended "Sex Addicts Anonymous" meetings. After a year in Dallas, respondent returned to Albuquerque, where he claimed he resumed his attendance at Sexaholics Anonymous meetings. Finding them "lacking," respondent claimed he formed with others a Sex Addicts Anonymous group, which he asserts he attended.

In 2003 and again in 2005, respondent was evaluated by Dr. Timothy S. Strongin, a psychologist in Albuquerque. Strongin did not provide any treatment for respondent. Instead, Strongin conducted an "occupational eval[uation]" relative to respondent's "fitness for duty." In performing his evaluation, Strongin did not engage in any independent investigation of the circumstances leading to respondent's suspension from the practice of law. Rather, he relied upon respondent's self-reporting of his condition and his suspension from the practice of law. Respondent did not advise Strongin of the specific allegations or incidents that led to his suspension. Respondent instead told Strongin that he had been intimately involved with a woman and her daughter in a small community and that respondent had experienced some political strife that "he felt contributed to the exaggeration of the significance of [respondent's] personal behavior, or even unfair treatment as a result of those connections." Further, respondent related to Strongin that his compulsions to enter into romantic relationships occurred in his "early adulthood." At the time of the 1998 incidents, respondent was approximately 48 years of age. Strongin's understanding regarding respondent's condition was as follows:

> I believe that there was a time in his life years before in which he had been indiscre[et] in choosing his adult sex partners, that he was sorry he had done that, and he felt that some — when he was anxious he felt some compulsion to enter into a romantic relationship, and that would [lead] to the self defeating behavior . . . .

Based upon his evaluations of respondent, Strongin concluded that respondent suffered from no mental illness or mental defect.

On May 15 and June 6 and 26, 2003, respondent filed applications with this court seeking reinstatement. We denied respondent's applications, in effect because he had failed to show a present fitness to practice law. On April 7, 2004, respondent filed his fourth application seeking reinstatement. On April 28, we denied the application and ordered relator to continue its investigation of respondent.

On February 25, 2005, relator filed formal charges containing a single count against respondent. The formal charges generally alleged that respondent's actions relative to D.F. and A.H. violated

Canon 1, DR 1-102(A)(1) (violating disciplinary rule) and (6) (engaging in conduct that adversely reflects on fitness to practice law), and Canon 9, DR 9-101 (avoiding appearance of impropriety), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent answered the formal charges on March 21, and a referee was appointed on March 30.

The referee hearing was held on November 17, 2005. A total of 23 exhibits were offered into evidence. Respondent testified in person. The testimony of Strongin and A.H. was introduced by deposition.

The referee filed her report on December 20, 2005. Based upon the evidence presented at the hearing, the referee found facts and concluded that respondent's actions constituted conduct that adversely reflected on respondent's fitness to practice law in contravention of DR 1-102(A)(1) and (6) and DR 9-101. The referee did not address whether respondent violated his oath of office as an attorney. The referee noted that respondent sought reinstatement to the practice of law and concluded that based upon her findings of fact, "the imposition of discipline [was] appropriate."

With regard to discipline, the referee recommended that respondent be suspended from the practice of law for a period of time, followed by a monitored probationary period of 2 years. The referee in effect recommended that respondent not be reinstated until he had "demonstrate[d] through verifiable means that treatment specific to his sexual compulsive disorder has resulted in a meaningful and sustained recovery."

As noted above, no objections were filed to the referee's report. On January 4, 2006, relator filed a motion for judgment on the pleadings. On January 25, this court granted the motion in part, adopting the referee's findings and setting for briefing and oral argument the issue of the appropriate discipline.

ASSIGNMENT OF ERROR

The only issue before the court is the appropriate discipline to be entered against respondent.

STANDARDS OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a

conclusion independent of the findings of the referee. *State ex rel. Counsel for Dis. v. Petersen*, 271 Neb. 262, 710 N.W.2d 646 (2006). When no exceptions are filed to the referee's report, the Nebraska Supreme Court may consider the referee's findings final and conclusive. See *id.* 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. Horneber*, 270 Neb. 951, 708 N.W.2d 620 (2006).

ANALYSIS

Findings.

[3,4] Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception. *State ex rel. Counsel for Dis. v. Petersen, supra*; *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Under Neb. Ct. R. of Discipline 10(L) (rev. 2005), the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive. *State ex rel. Counsel for Dis. v. Petersen, supra.* As previously noted, there were no exceptions filed to the referee's report in this case, and in an earlier order, this court adopted the findings of the referee. Given this record, we find clear and convincing evidence that respondent's conduct, set forth above, violated DR 1-102(A)(1) and (6) and DR 9-101. We further find that respondent's conduct violated his oath of office as an attorney. See § 7-104. We note that all of the conduct at issue in this case occurred prior to the September 1, 2005, effective date of the Nebraska Rules of Professional Conduct and is, thus, governed by the now-superseded Code of Professional Responsibility.

Factors Affecting Discipline to Be Imposed.

[5-8] We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. Counsel for Dis. v. Reilly*, 271 Neb. 465, 466-67, 712 N.W.2d 278, 279 (2006). Violation of a disciplinary rule is a ground for discipline. *State ex rel. Counsel for Dis. v. Petersen, supra.* With respect to the type of discipline appropriate in an individual case, we have stated that "[e]ach case justifying discipline of an attorney must be evaluated individually

in light of the particular facts and circumstances of that case." *State ex rel. Counsel for Dis. v. Hart*, 270 Neb. 768, 771, 708 N.W.2d 606, 609 (2005). Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct: (1) disbarment, (2) suspension, (3) probation, (4) censure and reprimand, (5) temporary suspension, or (6) private reprimand. See, also, rule 10(N).

[9-11] For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Rokahr*, 267 Neb. 436, 675 N.W.2d 117 (2004). To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Coe*, 271 Neb. 319, 710 N.W.2d 863 (2006). We have noted that the determination of appropriate discipline to be imposed on an attorney requires consideration of any aggravating and/or mitigating factors. See *State ex rel. Counsel for Dis. v. Hart, supra.*

Discipline to Be Imposed.

The evidence in the present case establishes that respondent engaged in highly inappropriate behavior, which at a minimum, violated the trust placed in him by D.F. and her children and adversely reflects on his fitness to practice law. With regard to respondent's actions, we agree with the referee's observation that

> [r]espondent's conduct in window peeping at D.F.'s youngest daughter is inexcusable and cannot be explained away as innocuous behavior. . . . Respondent's conduct in masturbating behind A.H. and ejaculating on her back while he was supposed to be helping her with a homework assignment is reprehensible. [R]espondent exploited his paternal relationship with A.H. and her younger sister. [Respondent's] conduct was exploitive, manipulative, and unjustifiable.

In her report, the referee noted that respondent was remorseful and ashamed regarding his conduct and that respondent

admitted his conduct violated the Code of Professional Responsibility.

Given the record in this case, the referee stated in her report that she "struggl[ed] mightily" when considering what recommendation to make regarding the appropriate discipline, in part because of the lack of current information with regard to respondent's treatment for his sexual compulsive disorder. In her report, the referee stated that Strongin's testimony concerning respondent's condition "as a whole is not particularly helpful in that it is based upon incomplete information and does not address the nature and extent of the sexual compulsions and other conduct (window peeping) that respondent engaged in and which resulted in respondent's temporary suspension." In reviewing the evidence adduced at the hearing, the referee stated that

> it is concerning . . . that there is very little evidence in the record relating to the respondent's sexual compulsive disorder. Keeping in mind that this is what resulted in the egregious behavior exhibited by respondent in 1998, one would expect evidence addressing the nature and extent of that disorder, the steps taken to address and treat that disorder including ongoing treatment to prevent a reoccurrence of such conduct, [and] corroboration of respondent's compliance with a treatment plan or relapse prevention plan by experts in the field of sexual disorders (particularly experts who are working or have worked with respondent on these issues) . . . . This evidence is lacking and the evidence that was adduced does not offer sufficient assurance that the public will be protected and the reputation of the bar promoted if respondent is allowed to return to the practice of law.
>
> . . . .
>
> The evidence which bears on the sexually compulsive behavior exhibited by respondent is simply too remote in time to be of help in determining whether respondent's sexual compulsions impede his fitness to practice law today.

We have reviewed the record, and we agree with the referee's assessment of the evidence. In particular, we find lacking a genuine acknowledgment of the conduct giving rise to these proceedings, a record of meaningful treatment, and an indication of

sustainable recovery. As a result, respondent has failed to demonstrate his present fitness to practice law.

[12,13] Our main concern in determining what impact respondent's sexual compulsive disorder should have on his discipline is the overall protection of the public. As we have noted, "the purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice." *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 568, 635 N.W.2d 427, 432-33 (2001). In this regard, in cases involving diagnosable behavioral issues, we have noted that the suspension of an attorney is not designed as a punishment; rather, it is meant as a time period in which the attorney can seek treatment without posing a danger to his or her clients. See *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002).

Upon due consideration of the record, we agree with the referee that a suspension for a period of time is necessary to adequately ensure there will be a demonstrated, meaningful, and sustained recovery before respondent is allowed to return to the practice of law and that reinstatement, if ordered, be followed by a period of probation on terms that we note below. Accordingly, we conclude that protection of the public demands respondent be suspended from the practice of law for an indefinite period, with no possibility of reinstatement prior to January 1, 2008. Compare, *State ex rel. Counsel for Dis. v. Petersen*, 271 Neb. 262, 710 N.W.2d 646 (2006), and *State ex rel. Counsel for Dis. v. Thompson, supra*. In the event respondent seeks reinstatement, respondent will have the burden of acknowledging the conduct giving rise to these proceedings and of showing by an independent and informed third party that treatment for respondent's sexual compulsive disorder has resulted in a meaningful and sustained recovery such that we can conclude he is fit to practice law.

In addition to requiring assurance regarding respondent's treatment and recovery, we are also concerned with the number of years that respondent has been away from the practice of law. For these reasons, we believe a period of probation following reinstatement is necessary. Accordingly, in the event respondent seeks reinstatement following his suspension, his reinstatement

will be conditioned upon the submission by respondent and approval by this court of a probation plan, to be in effect for a period of 2 years following reinstatement, whereby respondent's recovery program, his law practice and office management, and his compliance with the Nebraska Rules of Professional Conduct would be monitored by the Nebraska Lawyers Assistance Program and the Counsel for Discipline. Failure to comply with the terms of the probation plan would constitute grounds for further disciplinary action.

CONCLUSION

We find by clear and convincing evidence that respondent violated DR 1-102(A)(1) and (6), DR 9-101, and his oath of office as an attorney. It is the judgment of this court that respondent be suspended from the practice of law for an indefinite period with no possibility of reinstatement prior to January 1, 2008, and, if reinstated, respondent shall be subject to 2 years' probation as outlined above. 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. Furthermore, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), rule 10(P), and Neb. Ct. R. of Discipline 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

WRIGHT, J., participating on briefs.

CONNOLLY and MCCORMACK, JJ., not participating.

DARRYL DIDIER AND ELECTRIC COMPANY OF OMAHA, APPELLANTS, V. ASH GROVE CEMENT COMPANY, APPELLEE.

718 N.W.2d 484

Filed July 21, 2006. No. S-03-924.

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

2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
4. ____. Whether a duty is nondelegable is a question of law.
5. **Statutes.** Statutory interpretation presents a question of law.
6. **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.
7. **Negligence: Liability: Contractors and Subcontractors.** Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. There are two recognized exceptions to the general rule pursuant to which the employer of an independent contractor may be vicariously liable to a third party. Those two exceptions are where (1) the employer retains control over the contractor's work or (2) the employer has a nondelegable duty to protect another from harm.
8. **Negligence: Contractors and Subcontractors.** Nondelegable duties include, but are not limited to, (1) the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee, (2) a duty imposed by statute or rule of law, and (3) the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions.
9. **Federal Acts: Negligence.** Coverage of the Occupational Safety and Health Act does not extend to working conditions that are regulated by other federal agencies.
10. ____: ____. The preemption inquiry pursuant to 29 U.S.C. § 653(b)(1) (2000) is satisfied once it is determined that an agency has exercised its authority to prescribe a safety standard or regulation and that regulation covers the specific working conditions at issue.

Petition for further review from the Nebraska Court of Appeals, CARLSON, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Cass County, RANDALL L. REHMEIER, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

James R. Harris and Mark P. Grell, of Harris Law Offices, P.C., L.L.O., for appellant Darryl Didier.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Darryl Didier filed a negligence action in the district court for Cass County against Ash Grove Cement Company (Ash Grove), seeking damages for injuries he sustained after falling from the roof of a building located on Ash Grove's Louisville, Nebraska, premises. Electric Company of Omaha (ECO), Didier's employer, had been hired by Ash Grove to perform certain work at the Louisville site. The district court granted summary judgment in favor of Ash Grove. Didier appealed to the Nebraska Court of Appeals. In its opinion, the Court of Appeals reversed the grant of summary judgment and remanded the cause to the district court for further proceedings. *Didier v. Ash Grove Cement Co.*, No. A-03-924, 2005 WL 2276848 (Neb. App. Sept. 20, 2005) (not designated for permanent publication). Ash Grove sought further review. We granted Ash Grove's petition for further review. We reverse the decision of the Court of Appeals and remand the cause with directions to affirm the order of the district court granting summary judgment in favor of Ash Grove.

STATEMENT OF FACTS

On March 19, 1997, Didier fell from the roof of a building located on the site of Ash Grove's Louisville facility and sustained injuries. At the time of his accident, Didier was employed by ECO, an independent contractor retained by Ash Grove to relocate a cable tray. The cable tray was accessed from the flat roof of the building from which Didier fell. Didier fell off the flat roof while he was walking backward and carrying cable. The fall occurred during the first morning on the job after approximately 15 minutes of work. Didier was not wearing any "fall protection" equipment at the time of his accident. Didier fell nearly 20 feet to the ground, landing on a concrete surface and fracturing various bones throughout his body. After the accident, Didier underwent multiple surgeries and incurred significant medical and hospital expenses.

Didier filed a petition on March 5, 2001, asserting a negligence action against Ash Grove. ECO was joined as a "Third-Party Plaintiff" to protect its interests relative to Didier's workers' compensation claim. Didier alleged that a proximate cause of his fall was Ash Grove's negligence in (1) failing to provide

a reasonably safe place to work, (2) failing to have handrails or other safety devices on the roof, (3) failing to warn Didier of the dangers, (4) designing the building in such a manner as to not allow the work Didier was engaged in to be performed in a safe manner, (5) failing to have a safety net in place on the ground, and (6) failing to exercise reasonable care in supervising ECO with respect to the use of safety equipment. Didier alleged that Ash Grove was, at all times, acting as a general contractor and retained control over the work of Didier and ECO. In his petition, Didier also alleged that Ash Grove breached various duties as they related to the standard of care, including the duty to maintain the roof of the building from which he fell in a reasonably safe condition, and that thus, Ash Grove breached its nondelegable duty to provide a safe workplace for Didier. Didier alleged that Ash Grove had a plant, mine, and mill at its Louisville facility and that the U.S. Department of Labor had rules and regulations that were applicable to facilities such as Ash Grove. Didier sought a determination of ECO's rights and liabilities relative to his workers' compensation claim and sought judgment against Ash Grove for his past, present, and future medical expenses; his loss of wages and permanent loss of earning capacity; and his past, present, and future disability and pain and suffering.

Ash Grove moved for summary judgment on February 19, 2003, alleging that there was no genuine issue of material fact and that Ash Grove was entitled to judgment as a matter of law. At a hearing on Ash Grove's motion on July 8, the court received exhibits, including various depositions and affidavits, and heard arguments from the parties. On July 29, the court entered a lengthy opinion and order granting Ash Grove's motion for summary judgment. The court summarized the evidence, which we discuss below as relevant to our analysis, and concluded, inter alia, that there was no evidence to support the claim that Ash Grove retained control over the work contracted to be done by ECO; that there was no evidence to support a conclusion that the work to be performed by ECO constituted a "peculiar unreasonable risk" of harm such that Ash Grove had a nondelegable duty to protect Didier; and that as a matter of law, Ash Grove was subject to the regulation of the Mine Safety and Health Administration (MSHA) and there was no competent evidence

that Ash Grove had breached any relevant MSHA regulation which would have established a duty of Ash Grove. The court dismissed Didier's petition.

Didier appealed to the Court of Appeals and asserted that the district court erred in granting Ash Grove's motion for summary judgment. The Court of Appeals determined that the court had not erred in concluding that (1) there was no evidence to support a conclusion that Ash Grove retained control over the work done by ECO and (2) there was no evidence to support a conclusion that the work to be performed by ECO constituted a "peculiar unreasonable risk" of harm such that Ash Grove had a nondelegable duty to protect Didier. In its opinion, the Court of Appeals stated that the district court did not address the issue of whether Ash Grove breached a nondelegable duty to provide a safe workplace.

In further ruling on the appeal, the Court of Appeals determined that there was a question of fact precluding summary judgment and that the district court had erred in granting summary judgment on the issue of whether Ash Grove's plant fell under the jurisdiction of MSHA or under the jurisdiction of the Occupational Safety and Health Administration (OSHA). As noted, the district court had determined that Ash Grove fell under the jurisdiction of MSHA. In the Court of Appeals' opinion, it stated that the district court had erred when it had concluded that there was no genuine issue of material fact with regard to whether Ash Grove was a " 'cement plant' " and, as such, was considered a " 'milling' " operation exclusively under the jurisdiction of MSHA rather than of OSHA. *Didier v. Ash Grove Cement Co.*, No. A-03-924, 2005 WL 2276848 at *10 (Neb. App. Sept. 20, 2005) (not designated for permanent publication).

In its opinion, the Court of Appeals acknowledged that the record contained various references to Ash Groves' Louisville plant as a "cement plant" subject to MSHA jurisdiction, that the record showed that a MSHA inspector was conducting an inspection on the Ash Grove property at the time of Didier's accident, and that MSHA conducted an investigation of Didier's accident and issued a citation to ECO for failing to provide safety equipment or fall protection to Didier. MSHA did not cite Ash Grove. The Court of Appeals stated that the record contained

little information about what processes actually occurred at the Ash Grove location. In this regard, the Court of Appeals noted that Didier had presented testimony which it determined raised a question of fact as to whether the activities performed at the location were of the type that would subject Ash Grove to OSHA, rather than MSHA, jurisdiction. As noted, the district court had concluded that Ash Grove was under the jurisdiction of MSHA rather than OSHA, and the district court had therefore considered only whether Ash Grove had violated MSHA regulations without considering whether Ash Grove had violated OSHA regulations when the district court concluded that there was no evidence that Ash Grove had breached any statutory or regulatory duty. The Court of Appeals reversed the district court's grant of summary judgment in regard to the MSHA or OSHA issue and remanded the cause for further proceedings. The Court of Appeals affirmed the district court's grant of summary judgment in all other respects. Ash Grove petitioned for further review, which we granted.

ASSIGNMENTS OF ERROR

On further review, Ash Grove asserts that the Court of Appeals erred in (1) concluding that a genuine issue of material fact existed with respect to whether MSHA or OSHA had jurisdiction over Ash Grove's plant and whether Ash Grove had complied with the relevant regulations and (2) stating that the district court did not address whether Ash Grove breached any nondelegable duty to provide a safe workplace and in "reserving" the issue for further determination.

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. *Willet v. County of Lancaster*, 271 Neb. 570, 713 N.W.2d 483 (2006). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3-6] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005). Whether a duty is nondelegable is a question of law. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003). Statutory interpretation presents a question of law. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Home Builders Assn. v. City of Lincoln*, 271 Neb. 353, 711 N.W.2d 871 (2006).

ANALYSIS

Liability to Third Parties of One Who Employs an Independent Contractor for Acts or Omissions of Independent Contractor.

This case deals with Ash Grove's liability, if any, to Didier where Ash Grove employed an independent contractor, ECO. Therefore, before addressing Ash Grove's specific assignments of error on further review, we review the law relating to the liability of one who employs an independent contractor.

[7,8] Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. There are two recognized exceptions to the general rule pursuant to which the employer of an independent contractor may be vicariously liable to a third party. Those two exceptions are where (1) the employer retains control over the contractor's work or (2) the employer has a nondelegable duty to protect another from harm. See *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000). Regarding the second exception involving nondelegable duties, in *Parrish v. Omaha Public Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993), we noted that nondelegable duties included (1) the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee, (2) a duty imposed by statute or rule of law, and (3) the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions. We do not read the list of nondelegable duties in *Parrish* as exhaustive, and we

therefore note that nondelegable duties include, but are not limited to, those three listed above.

As we read Didier's petition, the district court's order, the Court of Appeals' decision, and the record and argument in this case, we understand Didier to claim that Ash Grove was liable both because Ash Grove retained control over ECO's work and because Ash Grove had nondelegable duties. With respect to nondelegable duties, Didier asserted that Ash Grove's nondelegable duties included (1) the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee, (2) duties imposed by rules and regulations of the U.S. Department of Labor, and (3) the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers. In granting summary judgment in favor of Ash Grove, the district court summarized the facts and, as we read the district court opinion, effectively concluded that Ash Grove either did not have or did not breach any of those duties.

The Court of Appeals affirmed the district court's determination that Ash Grove did not have a nondelegable duty arising from special risks. That issue was not raised on further review, and we therefore do not further discuss special risks herein. The nondelegable duty derived from duties imposed by rules or law and the nondelegable duty due to control of premises by the one who employs an independent contractor are implicated in Ash Grove's two assignments of error on further review. Those issues are discussed below.

Nondelegable Duty Imposed by Statute or Rule: Court of Appeals Erred in Determining That There Was a Genuine Issue of Material Fact as to the Legal Question of Whether Ash Grove Was Subject to Regulation and Rules Imposed by MSHA or by OSHA.

In its first assignment of error on further review, Ash Grove asserts that the Court of Appeals erred in finding that a genuine issue of material fact existed with respect to whether MSHA or OSHA had jurisdiction over Ash Grove's Louisville site and in failing to affirm the district court's finding that there was no competent evidence that Ash Grove breached any relevant MSHA rule or regulation. We conclude that because MSHA had

exercised jurisdiction, the Court of Appeals erred as a matter of law in concluding that there was a genuine issue of material fact as to whether MSHA or OSHA should have jurisdiction, and we further conclude that the district court did not err when it found that there was no evidence that Ash Grove had breached any relevant MSHA regulation.

The Court of Appeals' determination that a genuine issue of material fact existed as to whether MSHA or OSHA had jurisdiction was based on the testimony of Didier's expert, Frank Burg. Burg was a self-employed safety and health professional who had previously worked for OSHA. Burg testified that he understood Ash Grove's operations at the site to be a concrete processing operation and that as such, the plant was subject to OSHA jurisdiction rather than MSHA jurisdiction. The Court of Appeals noted that Burg's testimony was somewhat equivocal in that he stated, " 'Other people besides me decide these [jurisdictional questions] and they are deciding on bases that I don't always understand.' " *Didier v. Ash Grove Cement Co.*, No. A-03-924, 2005 WL 2276848 at *13 (Neb. App. Sept. 20, 2005) (not designated for permanent publication). The Court of Appeals acknowledged that the evidence showed MSHA had actually exercised jurisdiction over the plant and investigated Didier's accident. However, the Court of Appeals stated that in reviewing a grant of summary judgment, it was required to view the evidence in the light most favorable to Didier and concluded that at the summary judgment stage, Burg's testimony was sufficient to raise a question of fact as to whether Ash Grove's operations were subject to MSHA or to OSHA jurisdiction. This conclusion overlooks the federal authority which controls the outcome and is contrary to the analysis of the Court of Appeals.

[9,10] The Occupational Safety and Health Act of 1970, at 29 U.S.C. § 653(b)(1) (2000), provides: "Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." The U.S. Supreme Court has noted that because of the language in § 653(b)(1), "coverage of the [Occupational Safety and Health] Act does not . . . extend to

working conditions that are regulated by other federal agencies." *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 241, 122 S. Ct. 738, 151 L. Ed. 2d 659 (2002). The Court noted that the use of the word "exercise" in § 653(b)(1) made clear that actual exercise rather than "mere possession by another federal agency of unexercised authority to regulate certain working conditions" was required to displace OSHA's apparent jurisdiction and that "OSHA is only pre-empted if the working conditions at issue are the particular ones 'with respect to which' another federal agency has regulated." *Id.* Other federal appellate courts have stated that "the preemption inquiry is satisfied once we determine that an agency [such as MSHA] has exercised its authority to prescribe a safety standard or regulation and that regulation covers the specific working conditions at issue." *Pennsylvania Elec. v. Fed. Mine S. & H. Rev. Com'n*, 969 F.2d 1501, 1505 (3d Cir. 1992). See, also, *United Energy Services v. MSHA*, 35 F.3d 971 (4th Cir. 1994).

In the present case, there was undisputed evidence that MSHA had exercised its regulatory authority at Ash Grove's Louisville site and, in particular, that MSHA had exercised authority with respect to the specific accident at issue in this case. There was undisputed evidence that a MSHA investigator was onsite at the time of the accident, that MSHA actually investigated the accident and issued a citation to ECO, and that the citation to ECO identified the Ash Grove operation as a milling operation under the jurisdiction of MSHA. There was no evidence that OSHA, Ash Grove, or ECO disputed MSHA's authority to investigate the accident and to issue a citation.

The evidence as a whole showed without contradiction that MSHA exercised its statutory authority over the specific working conditions related to Didier's accident, and because of the provisions of 29 U.S.C. § 653(b)(1), MSHA's exercise of authority over the particular working conditions at issue in this case preempted OSHA authority over such conditions as a matter of law. Evidence regarding the processes that actually occur at the Louisville site and the comments by Burg which were noted by the Court of Appeals are not material to the resolution of this issue. The district court's conclusion that MSHA had jurisdiction was correct, and the Court of Appeals erred as a matter of law

when it concluded that there was a genuine issue of material fact regarding whether MSHA or OSHA had jurisdiction.

We further conclude, without regard to the discussion by the Court of Appeals, that the district court did not err when it determined that there was no competent evidence that Ash Grove breached any MSHA statutory or regulatory duty or corresponding standard of care. The district court noted that the evidence indicated that Ash Grove had complied with the specific MSHA regulations noted by the parties, and the district court further observed that although MSHA issued a citation to ECO after its investigation of Didier's accident, MSHA issued no citation to Ash Grove. Didier did not present evidence that Ash Grove violated any specific rules or regulations, and on appeal, Didier does not assert specific laws that Ash Grove violated as they bear on the standard of care but simply argues that OSHA rather than MSHA had jurisdiction.

In sum, we conclude that the Court of Appeals erred in reversing the grant of summary judgment in which the district court had concluded that MSHA had jurisdiction and further erred in failing to affirm the district court's grant of summary judgment in which it had determined that Ash Grove had not violated any nondelegable duty imposed by MSHA regulations.

Nondelegable Duty as Owner of Premises to Provide Safe Place to Work: Court of Appeals Erred in Stating That District Court Had Not Considered Whether Ash Grove Had Violated Nondelegable Duty as Owner in Control of Premises to Provide a Safe Place to Work.

In its second assignment of error on further review, Ash Grove claims that the Court of Appeals erred when it stated that the district court had not considered the issue of whether Ash Grove as the owner of the premises had breached a nondelegable duty to provide a safe workplace. We agree with Ash Grove that the Court of Appeals misread the district court's opinion and order. We determine that the district court did not fail to consider the issue of whether Ash Grove breached the nondelegable duty to provide a safe workplace and that the district court did not err when it ruled against Didier on this issue.

Ash Grove argues that the Court of Appeals' affirmance of the district court's explicit finding that Ash Grove did not retain

control of the work necessarily prevents a finding that Ash Grove had and breached a nondelegable duty to provide a safe workplace. As noted above, the duty derived from control of work is distinguishable from the nondelegable duty derived from ownership and control of workplace premises, and although both may or may not be present, these duties involve separate considerations. Thus, we do not agree with Ash Grove's analysis that the finding that Ash Grove did not retain control of the work is inconsistent with and prevents a finding that Ash Grove may have had a nondelegable duty arising from its ownership and control of the premises where the work occurred. Nevertheless, on the record in this case, we determine that, contrary to the opinion of the Court of Appeals, the district court did consider and effectively rejected Didier's claim that Ash Grove breached a nondelegable duty arising from its ownership and control of the premises and that the Court of Appeals erred when it stated that the district court had failed to consider this issue. We further determine that the district court did not err when it rejected Didier's claim that Ash Grove breached the nondelegable duty to provide a safe place to work.

As noted above, an employer of an independent contractor is generally not liable for physical harm caused to another by the acts or omissions of the contractor or his servants, but an employer of an independent contractor may be vicariously liable to a third party pursuant to two exceptions, where (1) the employer retains control over the contractor's work or (2) the employer has a nondelegable duty to protect another from harm. See *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000). As noted above, nondelegable duties include, but are not limited to (1) the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee, (2) a duty imposed by statute or rule of law, and (3) the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions. See *Parrish v. Omaha Public Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993).

In its argument on further review, Ash Grove appears to misinterpret this court's opinion in *Parrish*. Although certain

nondelegable duties arise from the owner's possession and control of the premises, not all nondelegable duties are dependent on such possession and control. Ash Grove tends to confuse the employer's retaining control of the work, which gives rise to the first exception noted above, with the employer's retaining control of the premises, which gives rise to one of the nondelegable duties pursuant to the second exception encompassing various nondelegable duties.

We do, however, find merit to Ash Grove's assertion that the Court of Appeals erred when it stated that the district court did not address the issue of whether Ash Grove breached a nondelegable duty to provide a safe workplace arising from its ownership and control of the premises. In its opinion and order, the district court discussed at length the evidence submitted at the hearing on summary judgment. The district court noted specifically the uncontroverted admission by the safety director for ECO that there were no "site-specific or abnormal hazards on top of the flat concrete roof on which the work was to be performed." We read the district court's grant of summary judgment to include an implicit finding that Didier did not present sufficient evidence as a matter of law to show that Didier's accident was the result of Ash Grove's breach of a nondelegable duty arising from its possession and ownership of the premises, and we find no error in the district court's conclusion in this regard. We therefore agree with Ash Grove that the Court of Appeals erred when it stated that the district court did not consider this issue.

CONCLUSION

We conclude that because MSHA actually exercised jurisdiction, as a matter of law, MSHA preempted OSHA and the Court of Appeals erred in concluding that there was a genuine issue of material fact with regard to whether MSHA or OSHA had jurisdiction over the accident at issue. As a matter of law, MSHA had jurisdiction. The district court did not err in finding no genuine issue of material fact as to whether Ash Grove actually violated any duties derived from MSHA regulations. We further conclude that because the district court's opinion and order implicitly found in Ash Grove's favor on this issue, the Court of Appeals erred in stating that the district court did not consider the issue of whether Ash Grove breached a nondelegable duty to provide a

safe workplace arising from its ownership and control of the premises. We therefore reverse the decision of the Court of Appeals, and we remand the cause with directions to the Court of Appeals to affirm the district court's grant of summary judgment in all respects.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.
HENDRY, C.J., not participating.

GARY RIESEN, APPELLANT, V. IRWIN INDUSTRIAL TOOL COMPANY, FORMERLY KNOWN AS AMERICAN TOOL COMPANIES, INC., APPELLEE.

717 N.W.2d 907

Filed July 21, 2006. No. S-05-208.

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. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
4. **Employer and Employee: Public Policy: Damages.** Under the public policy exception to the at-will employment doctrine, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy.
5. **Actions: Workers' Compensation: Employer and Employee.** An action for retaliatory discharge is allowed when an employee has been discharged for filing a workers' compensation claim.
6. **Workers' Compensation: Employer and Employee: Proof.** The burden of proof for a prima facie case of retaliatory discharge for filing a workers' compensation claim is on the employee.
7. **Employer and Employee: Circumstantial Evidence.** Ordinarily, a prima facie case of retaliatory discharge must, in the nature of things, be shown by circumstantial evidence, since the employer is not apt to announce retaliation as its motive.
8. **Termination of Employment: Workers' Compensation: Employer and Employee: Circumstantial Evidence.** Circumstantial evidence sufficient to establish a causal link between termination of an employee and the filing of a workers' compensation claim

includes: (1) knowledge of the compensation claim by those making the decision on termination, (2) expression of a negative attitude toward the employee's injured condition, (3) failure to adhere to established company policies, (4) discriminatory treatment in comparison to similarly situated employees, and (5) evidence that the stated reason for the discharge was false.

9. **Workers' Compensation: Employer and Employee: Time.** Proximity in time between a workers' compensation claim and the discharge of an employee is a typical beginning point for proof of a causal connection.
10. **Summary Judgment.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
11. ____. Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.
12. **Employer and Employee: Discrimination: Words and Phrases.** In employment law, a "pretext" has been described as a reason that the employer offers for the action claimed to be discriminatory and that the court disbelieves, allowing an inference that the employer is trying to conceal a discriminatory reason for its action.
13. **Workers' Compensation: Employer and Employee.** The filing of a workers' compensation claim does not insulate an employee from the requirement that he or she abide by all personnel rules. Such personnel policies must be applied in a neutral fashion, however.

Appeal from the District Court for Saline County: PAUL W. KORSLUND, Judge. Reversed and remanded for further proceedings.

Eric B. Brown, of Atwood, Holsten & Brown Law Firm, P.C., L.L.O., for appellant.

Bryan S. Hatch and Andrew W. Muller, of Stinson, Morrison & Hecker, L.L.P., for appellee.

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

HANNON, Judge, Retired.

I. NATURE OF CASE

Gary Riesen brought suit against his former employer, Irwin Industrial Tool Company (Irwin Industrial), alleging he was fired in retaliation for filing a workers' compensation claim. The trial court granted summary judgment for Irwin Industrial, and Riesen appealed.

In this opinion, we conclude that Riesen met his burden of establishing a prima facie case of retaliatory discharge for filing a workers' compensation claim. We also conclude that Riesen's evidence, viewed in a light most favorable to Riesen, created a

genuine issue of fact as to whether the reason offered by Irwin Industrial for the termination of Riesen's employment was a pretext for an impermissible termination. Thus, we reverse the trial court's order of summary judgment and remand the cause for further proceedings.

II. 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. *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (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.*

III. FACTS

On October 9, 2000, an employment agency placed Riesen with Irwin Industrial as a temporary employee. On December 1, Riesen submitted an application for employment with Irwin Industrial. The form instructed applicants to list "all present and past employment, beginning with [their] most recent." The application provided three spaces on which applicants were to list their previous employers. Applicants were instructed to "[u]se a separate sheet of paper if necessary." Riesen listed three previous employers. The form also specified that by signing the application, the applicants certified that their answers were "true and complete to the best of [their] knowledge" and that they understood that "false information given in [their] application [could] result in discharge." On December 11, Irwin Industrial hired Riesen for a full-time position on its second shift.

On May 8, 2001, Riesen injured his right shoulder while working at Irwin Industrial. He filed a claim for workers' compensation benefits. His treating physician instructed him to avoid using his right arm at work.

On July 11, 2001, Riesen received a positive performance appraisal from Irwin Industrial, which assessed him as a "[g]ood"

employee, and he was given a 10-percent pay increase. On July 31, Riesen requested to transfer from second shift to first shift. His request was approved on August 9. Before Riesen accepted the shift change, Judy Brahm, an employee relations representative, advised him that the requested shift change would result in a reduction in pay. He was also advised that although his transfer was approved, Irwin Industrial could not immediately accommodate him on the first shift within his medical restrictions and, thus, he would be out of work until an appropriate position became available. Riesen accepted the shift change under those conditions.

Approximately 2 months after his initial accident, Riesen took an insurance form regarding his off-work status to Robert Summers, the manager of Irwin Industrial's human resources department. This form was required by an insurance provider as a precondition for making payments on Riesen's bank loans while he was disabled. Summers refused to sign the insurance form because, according to him, "[Riesen] was not totally disabled. He had restrictions, but was not disabled." In a meeting with Riesen and his wife concerning this issue, Summers allegedly told Riesen that he would not sign the form, that he had no work available for Riesen because of Riesen's one-arm restriction, and that "it would be a lot easier on all of [them] if [Riesen would] just quit." Summers admitted that he refused to sign the insurance form, but he denied making the other statements.

On August 23, 2001, Riesen's treating physician released him to return to work without restrictions, and Riesen did so. On December 13, Riesen received another positive performance evaluation at work.

At some point between August 20, 2001, and January 7, 2002, Riesen met with Summers and a human resources administrator in Summers' office to discuss Riesen's physical restrictions. After this meeting, Riesen went to a nearby human resources office to discuss insurance. Riesen claims that Summers thought Riesen had left the area and that he overheard Summers tell the administrator in the hallway: "[H]e expects me to believe that he's injured" and "the little son of a bitch is faking and he only did this to get his raise." Riesen believed Summers was referring

to him because he had just met with Summers concerning his injury and had recently received a raise. Riesen claims that when Summers became aware Riesen was still nearby, Summers became quiet and retreated to his office. Summers denied making such statements.

The record indicates that between August 23, 2001, and January 2, 2002, Riesen missed work on three different days due to his work-related injury sustained on May 8, 2001. On January 7, 2002, Riesen underwent surgery on his shoulder as a result of the same work-related injury. Following surgery, Riesen missed work for over a month, during which time he received temporary total disability benefits. He missed work on several occasions between February 11 and April 24 due to his work-related injury.

On February 2, 2002, Riesen received a 4-percent pay increase. On February 28, Riesen received another positive employment evaluation from Irwin Industrial, in which he was rated as a "[g]ood" employee. On February 16, Riesen was given a 9-percent pay increase, which was approved by Summers.

On April 28, 2002, Riesen informed Brahm in the human resources department that his physician had said another surgery on his shoulder was necessary. Brahm responded by telling Riesen, "[L]et's get her fixed, do whatever you can to get it fixed."

During the morning of April 30, 2002, Summers received Riesen's answers to interrogatories and requests for production of documents in an action Riesen had filed against Irwin Industrial in Workers' Compensation Court. After reviewing Riesen's answers, Summers reviewed Riesen's personnel file, including his employment application. Summers discovered that the employment history Riesen provided in his answers to interrogatories differed from the employment history he had provided on his job application.

Later that morning, Summers called Riesen into his office. Riesen claims Summers stated: " 'You finally messed up . . . you lied on your work comp application.' " Summers denies making this statement. Summers then fired Riesen. Riesen was told his employment had been terminated because he had falsified his employment application.

Following the termination of his employment, Riesen again had surgery on his shoulder. He continued to receive workers' compensation benefits through August 4, 2002.

On June 19, 2003, Riesen filed an amended complaint against Irwin Industrial in the district court for Saline County, which complaint alleged that he had been fired in retaliation for filing a workers' compensation claim and pursuing his rights under the Nebraska Workers' Compensation Act. Irwin Industrial moved for summary judgment, and after a hearing was held, the trial court sustained the summary judgment motion and dismissed Riesen's complaint. The court reasoned that Riesen's evidence had failed to establish that Irwin Industrial was motivated by retaliation or that the company's justification for termination of Riesen's employment was pretextual. Riesen appealed.

IV. ASSIGNMENTS OF ERROR

Riesen asserts that the trial court erred in finding that he had failed to establish a prima facie case of retaliatory discharge and in sustaining Irwin Industrial's motion for summary judgment.

V. ANALYSIS

[3-5] The record indicates that Riesen was hired on an at-will basis. The general rule in Nebraska is 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). Under the public policy exception to the at-will employment doctrine, however, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy. *Id.* In *Jackson*, this court recognized that the Nebraska Workers' Compensation Act presents a clear mandate of public policy which warrants application of the public policy exception to the at-will employment doctrine. Thus, an action for retaliatory discharge is allowed when an employee has been discharged for filing a workers' compensation claim. *Id.*

In this appeal, we are asked to determine whether dismissal of Riesen's retaliatory discharge claim was improper because the evidence, viewed in the light most favorable to Riesen, disclosed

a genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts.

1. APPLICABILITY OF BURDEN-SHIFTING ANALYSIS

In cases involving claims of employment discrimination, albeit not involving workers' compensation claims, this court has recognized the burden-shifting analysis which originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See, e.g., *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002) (age discrimination); *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999) (gender discrimination); *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987) (discrimination against person with disability); *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985) (retaliatory discharge for filing claim with Nebraska Equal Opportunity Commission); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984) (gender discrimination). This court has noted that as clarified in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), " '*McDonnell Douglas Corp.* allocates the burden of production and the order for the presentation of the evidence; the ultimate burden of persuasion, however, rests on the plaintiff.' " *Billingsley*, 264 Neb. at 70, 645 N.W.2d at 803.

The following procedure is utilized under the three-tiered allocation of proof standard: First, the plaintiff has the burden of proving a prima facie case of discrimination. See *Goerke, supra.* Second, if the plaintiff succeeds in proving that prima facie case, the burden shifts to the defendant-employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection or discharge from employment. See *id.* This burden is a burden of production, not of persuasion. See *Lincoln County Sheriff's Office v. Horne*, 228 Neb. 473, 423 N.W.2d 412 (1988). The employer need only explain what has been done or produce evidence of a legitimate, nondiscriminatory reason for the decision. *Id.* It is sufficient if the employer's evidence raises a genuine issue of fact as to whether it discriminated against the employee. *Id.* " ' "If the defendant carries this burden of production, the

presumption raised by the prima facie case is rebutted" . . . and "drops from the case . . . ." '" (Citation omitted.) *Agnew*, 256 Neb. at 402, 590 N.W.2d at 694, quoting *St. Mary's Honor Center, supra.*

Third, assuming the employer establishes an articulated nondiscriminatory reason for disparate treatment of an employee, the employee maintains the burden of proving that the stated reason was pretextual and not the true reason for the employer's decision; i.e., that the disparate treatment would not have occurred but for the employer's discriminatory reasons. *Lincoln County Sheriff's Office, supra.*

Most jurisdictions apply the above-described analysis to workers' compensation retaliatory discharge cases. See, e.g., *Gonzalez v. City of Minneapolis*, 267 F. Supp. 2d 1004 (D. Minn. 2003) (applying Minnesota law); *Provo v. Continental Eagle Corp.*, 650 So. 2d 881 (Ala. 1994); *Ford v. Blue Cross and Blue Shield*, 216 Conn. 40, 578 A.2d 1054 (1990); *Rebarchek v. Farmers Co-op. Elevator*, 272 Kan. 546, 35 P.3d 892 (2001); *Buckner v. General Motors Corp.*, 760 P.2d 803 (Okla. 1988); *Hinton v. Designer Ensembles, Inc.*, 343 S.C. 236, 540 S.E.2d 94 (2000); *La Tier v. Compaq Computer Corp.*, 123 S.W.3d 557 (Tex. App. 2003); *Wentworth v. Fletcher Allen Health Care*, 171 Vt. 614, 765 A.2d 456 (2000); *Wilmot v. Kaiser Aluminum*, 118 Wash. 2d 46, 821 P.2d 18 (1991); *Cardwell v. American Linen Supply*, 843 P.2d 596 (Wyo. 1992). See, generally, 3 Natl. Employment Lawyers Assn., Employee Rights Litigation: Pleading and Practice § 11.06 (Janice Goodman ed., 2005) (describing allocation of burdens of production and proof, and providing additional and contra authority).

Like the trial court in the present case, we will apply the burden-shifting analysis this court has utilized in employment discrimination actions to this case involving retaliatory discharge for filing a workers' compensation claim. Our conclusion, however, differs from that of the trial court.

2. Allocation of Burdens

(a) Riesen's Prima Facie Case

[6] To establish a prima facie case of unlawful retaliation, an employee must show that he or she participated in a protected

activity, that the employer took an adverse employment action against him or her, and that a causal connection existed between the protected activity and the adverse employment action. *Fraternal Order of Police v. County of Douglas*, 270 Neb. 118, 699 N.W.2d 820 (2005). The burden of proof for a prima facie case of retaliatory discharge for filing a workers' compensation claim is on the employee. See 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 104.07[3] (2005). See, e.g., *Rebarchek, supra*; *Buckner, supra*.

In *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003), this court did not address what elements are necessary to establish a prima facie case for retaliatory discharge for filing a workers' compensation claim. In the present case, the trial court asserted that to demonstrate a prima facie case of retaliatory discharge for filing a workers' compensation claim, Riesen had to establish the following elements: (1) that he filed a workers' compensation claim, (2) that he was terminated from employment, and (3) that a causal link existed between the termination and the workers' compensation claim. The three elements utilized by the trial court fairly summarize the most common articulations of the prima facie case in such actions. See Jean C. Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 Hastings L.J. 551 (1986). See, also, *Webner v. Titan Distribution, Inc.*, 267 F.3d 828 (8th Cir. 2001) (applying Iowa law); *Gonzalez v. City of Minneapolis*, 267 F. Supp. 2d 1004 (D. Minn. 2003) (applying Minnesota law); *Hinton v. Designer Ensembles, Inc.*, 343 S.C. 236, 540 S.E.2d 94 (2000). Those elements also parallel this court's established elements for unlawful retaliation actions in general. See *Fraternal Order of Police, supra*. We find that the trial court's articulation of the elements of a prima facie case applicable to this case was correct.

There is no dispute that Riesen satisfied the first two elements of a prima facie case. First, Riesen established that he filed a workers' compensation claim arising from an injury sustained on May 8, 2001, in the course and scope of his employment. That claim, in fact, was being litigated when he was fired. Second, Riesen established that Irwin Industrial fired him on April 30, 2002.

The trial court found that Riesen had failed to establish a prima facie case of workers' compensation retaliatory discharge because he had not met the third element—a causal nexus. The court stated that "Riesen's evidence fail[ed] to establish that Irwin [Industrial] was motivated by retaliation . . . ."

[7,8] "Ordinarily the prima facie case must, in the nature of things, be shown by circumstantial evidence, since the employer is not apt to announce retaliation as its motive." 6 Larson & Larson, *supra* at 104-65. Accord, *Rebarchek v. Farmers Co-op. Elevator*, 272 Kan. 546, 35 P.3d 892 (2001); *Wilmot v. Kaiser Aluminum*, 118 Wash. 2d 46, 821 P.2d 18 (1991). One court has opined that

> [c]ircumstantial evidence sufficient to establish a causal link between termination and filing a compensation claim includes: (1) knowledge of the compensation claim by those making the decision on termination; (2) expression of a negative attitude toward the employee's injured condition; (3) failure to adhere to established company policies; (4) discriminatory treatment in comparison to similarly situated employees; and (5) evidence that the stated reason for the discharge was false.

Continental Coffee Products v. Cazarez, 937 S.W.2d 444, 451 (Tex. 1996).

Riesen injured his right shoulder at work on May 8, 2001. No dispute exists between the parties that Riesen had a valid workers' compensation claim as a result of that injury. Not only had he pursued his right to benefits, he had received substantial benefits and was seeking unknown future benefits. Riesen was fired on April 30, 2002, the same day on which Summers received Riesen's answers to interrogatories in the workers' compensation action.

In its brief, Irwin Industrial emphasizes that almost 1 year had elapsed between the date of Riesen's compensable injury and his termination of employment. Irwin Industrial argues that "[o]ne year is too long a time period to generate any inference of retaliatory intent based on temporal proximity." Replacement brief for appellee at 11. This argument ignores the fact that Riesen's claim was still pending. As such, the nature and extent of the injuries he claimed to have received had not yet been determined.

The record before us includes Riesen's answers to interrogatories, which Summers received on April 30, 2002, just prior to Riesen's dismissal. These answers show that Riesen and Irwin Industrial were in some sort of dispute over his right to recovery. They indicate that both parties were anticipating further litigation. In these answers, Riesen claimed that he had not reached maximum medical improvement and that he was reserving his right to claim benefits for vocational rehabilitation, further medical expenses, and temporary and permanent disability. This situation is clearly distinguishable from one in which a discharged employee had filed a workers' compensation claim that had been settled and satisfied without serious dispute.

[9] "Proximity in time between the claim and discharge is a typical beginning point for proof of a causal connection." *Rebarchek v. Farmers Co-op. Elevator*, 272 Kan. 546, 555, 35 P.3d 892, 899 (2001). A plaintiff supports an assertion of retaliatory motive by demonstrating proximity in time between the workers' compensation claim and the firing, along with evidence of satisfactory work performance and supervisory evaluations. See 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 104.07[3] (2005). In the present case, Riesen had received several positive work performance reviews and pay increases from his employer. He was fired just 2 days after he notified Irwin Industrial's human resource department that after nearly 12 months of medical treatment and accompanying workers' compensation benefits, he needed more surgery on his shoulder. The temporal proximity of 2 days between Riesen's notice that he needed additional surgery and the termination of his employment, coupled with evidence of his satisfactory work performance, created a causal nexus sufficient to satisfy the third prima facie element.

In cases involving retaliatory discharge for filing a worker's compensation claim, a "claimant's 'prima facie case is not an onerous burden under the McDonnell Douglas burden-shifting scheme.' " See *Rebarchek*, 272 Kan. at 557, 35 P.3d at 901, quoting *Robinson v. Wilson Concrete Co.*, 913 F. Supp. 1476 (D. Kan. 1996). We conclude that Riesen met his burden of establishing a prima facie case of retaliatory discharge for filing a workers' compensation claim.

(b) Irwin Industrial's Justification for Discharge

Irwin Industrial asserted that it had terminated Riesen's employment because he had misrepresented his past employment on his employment application. Thus, Irwin Industrial met its burden of production.

(c) Pretext

[10,11] Once Irwin Industrial successfully rebutted Riesen's prima facie case, Riesen was required to present evidence showing that the company's proffered explanation for firing Riesen was merely pretextual. The trial court found that Riesen's evidence had failed to establish that the company's justification was a pretext for a retaliatory motive. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005). Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted. *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000). Therefore, we must address whether Riesen presented sufficient evidence to create a genuine issue of fact for the jury. In other words, could Riesen's evidence, when viewed in the light most favorable to him (the nonmoving party), create an inference in reasonable minds that Irwin Industrial had retaliatory motives for firing Riesen?

[12] Riesen asserts that Summers seized upon the first opportunity to terminate Riesen's employment for what would appear to be a valid, nonretaliatory reason, but Riesen claims that Irwin Industrial's explanation was a pretext for retaliatory discharge. In employment law, a "pretext" has been described as " 'a reason that the employer offers for the action claimed to be discriminatory and that the court disbelieves, allowing an inference that the employer is trying to conceal a discriminatory reason for his action. . . .' " *Ryther v. KARE 11*, 108 F.3d 832, 837 n.4 (8th Cir. 1997).

In addition to the temporal proximity between Riesen's firing and his protected activity under the workers' compensation scheme, Riesen asserts other evidence to demonstrate a causal nexus and to show that Irwin Industrial's proffered reason was pretextual. For example, Summers had been the head of the

human resources department for approximately 6 years, but when deposed, he could not recall ever taking any other disciplinary action for a discrepancy between an employee's answers to interrogatories and that employee's personnel file. Although Summers stated it was the company's practice to terminate the employment of employees who misrepresent any information on their application, he had never before terminated the employment of an employee for that reason.

In *Reedy v. White Consol. Industries, Inc.*, 890 F. Supp. 1417 (N.D. Iowa 1995), a former employee claimed his employer fired him for seeking workers' compensation benefits. The employer said it fired the employee for misrepresentations on his job application and health forms. The federal district court found that a jury question existed as to the actual reason for the termination of employment. The court noted that the employee's evidence showed the employer had taken "no action to discipline him for any misrepresentations in his application and health forms until he actually appeared likely to run up medical bills and seek workers compensation benefits." See *id.* at 1434. Regarding this evidence, the court explained: "One implication of [such evidence] is that [the employer] decided to ignore those misrepresentations until health problems for which it might be required to pay manifested themselves." *Id.* The court continued:

> [A]nother implication of [the employer's] delay in terminating [the employee] until he actually appeared likely to require workers compensation benefits is that it was not until that time that [the employer] had any notice of [the employee's] misrepresentations of his health condition, and therefore no reason to invoke those misrepresentations as grounds for his discharge, and that [the employer] merely followed up on the warnings in both the application form and the health form which notified [the employee] that misrepresentations, or even omissions of fact, were grounds for dismissal. . . . [T]he real reason [for the discharge], [the employee's] misrepresentations or need for workers compensation benefits, is a fact question for the jury.

Id. at 1434 n.8.

In the case at bar, the employment application completed by Riesen instructed applicants to list "all present and past

employment" and to "[u]se a separate sheet of paper if necessary," but the application left room to list only three previous employers. Riesen listed only three previous employers on his application (although Riesen suggests that a separate page might have been lost from his personnel file). The record before us includes copies of other employees' job applications. Most of those applications include a listing of only three prior employers, with no addition of a separate page. Such evidence, Riesen claims, supports an inference that "Irwin [Industrial] itself does not consider the inclusion of all employers essential and material and thus, jumped at the first pretextual low-grade reason to terminate [him]." Brief for appellant at 22.

[13] "[T]he filing of a workers' compensation claim does not insulate the employee from the requirement that he or she abide by all personnel rules . . . . Such . . . personnel polic[ies] must be applied in a neutral fashion, however." 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 104.07[4] at 104-67 (2005). In *Rebarchek v. Farmers Co-op. Elevator*, 272 Kan. 546, 35 P.3d 892 (2001), the defendant-employer claimed that it fired the plaintiff because of poor job performance. The Kansas Supreme Court found that the plaintiff had "presented evidence that other . . . employees with somewhat similar performance deficiencies were not terminated." *Id.* at 558, 35 P.3d at 901. The court concluded that "[a]lthough [the plaintiff's] admittedly poor job performance supports [the employer's] position, we agree . . . that [the plaintiff] is entitled to test his case before a jury by virtue of his coming forward with evidence that raises genuine issues concerning [the employer's] motivation." *Id.*

Several statements allegedly made by Summers also tend to support an inference that Irwin Industrial's proffered reason for Riesen's firing was pretextual. Riesen claims that following a meeting between Summers and Riesen regarding Riesen's physical restrictions, he heard Summers exclaim, "[T]he little son of a bitch is faking and he only did this to get his raise." Approximately 2 months after his initial accident, Summers allegedly told Riesen that he would not sign an insurance form regarding Riesen's off-work status, that he had no work available for Riesen because of his one-arm restriction, and that "it would be a lot easier on all of [them] if [Riesen would] just quit."

Summers' statements, along with other evidence, could create an inference that Summers refused to sign the form in good conscience, but they could also tend to create an inference that he was upset with Riesen over Riesen's compensable injury.

Riesen further points to Summers' statement on April 30, 2002, as evidence of pretext. Riesen claims that on the date of the termination of his employment, Summers called him into Summers' office and told him, " 'You *finally* messed up . . . you lied on your *work comp* application.' " (Emphasis supplied.) Riesen asserts that, viewed in a light most favorable to him, the phrases "you finally messed up" and "work comp application" (as opposed to "employment application") create an inference that Summers was biding his time until he found a reason to terminate Riesen's employment and that the termination was actually in retaliation for Riesen's workers' compensation claim.

We need not decide whether the evidence offered by Riesen would be sufficient for him to prevail at trial. However, we conclude that Riesen's evidence, viewed in a light most favorable to him, created a genuine issue of fact as to whether the reason offered by Irwin Industrial for the termination of Riesen's employment was a pretext for an impermissible termination. Thus, the trial court erred in granting summary judgment for Irwin Industrial.

VI. CONCLUSION

We conclude that Riesen established a prima facie case of retaliatory discharge for filing a workers' compensation claim. We also conclude that Riesen's evidence, viewed in a light most favorable to Riesen, created a genuine issue of fact as to whether the reasons offered by Irwin Industrial for the termination of Riesen's employment were a pretext for an impermissible termination. Accordingly, we reverse the trial court's order granting summary judgment for Irwin Industrial and remand the cause to that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. STUART B. MILLS, RESPONDENT.

736 N.W.2d 712

Filed July 28, 2006. No. S-02-1085.

1. **Rules of the Supreme Court.** The Nebraska Supreme Court has the inherent power to define and regulate the practice of law in this state.
2. **Disciplinary Proceedings.** A suspended lawyer seeking reinstatement is required to affirmatively show that he or she has fully complied with the order of suspension and in the future will not engage in practices offensive to the legal profession.
3. **Disciplinary Proceedings: Proof.** The burden is upon a suspended lawyer to show his or her present fitness to again exercise the privileges and functions of an attorney in view of his or her previous conduct, the discipline imposed, and any reformation of character wrought thereby, or otherwise, as shown by his or her more recent conduct.
4. ____: ____. Whether or not a suspended lawyer has made a showing sufficient for reinstatement is dependent upon the record before the Nebraska Supreme Court and the suspended lawyer's prior conduct as reflected in the records of the court.
5. **Disciplinary Proceedings.** The character of the respondent in a disciplinary proceeding and the question of his or her reformation as to the previous unethical conduct are of great importance in determining whether or not a reinstatement should be granted.

Original action. Application for reinstatement granted.

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

Robert F. Bartle, of Bartle & Geier Law Firm, for respondent.

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

PER CURIAM.

INTRODUCTION

Stuart B. Mills asks this court to reinstate him to the practice of law following a 2-year suspension. The Counsel for Discipline resists the application for reinstatement because, subsequent to this court's suspension order, Mills pleaded guilty in federal court to a felony charge based upon the same conduct for which he was disciplined.

FACTS

Mills was admitted to the practice of law in the State of Nebraska on January 22, 1973. On December 5, 2003, this court suspended Mills from the practice of law for 2 years as a result of his engaging in conduct which violated the Code of Professional

Responsibility. Among other things, Mills notarized certain renunciations and deeds without witnessing the signatures of those signing the documents, and he filed a federal estate tax return form with the Internal Revenue Service based upon information which Mills knew to be false. The specific facts relating to those disciplinary proceedings are set forth in *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003).

The parties have entered into a stipulation for the purpose of establishing the factual record with respect to Mills' application for reinstatement. In June 2004, in the U.S. District Court for the District of Nebraska, Mills was charged with a felony in violation of 26 U.S.C. § 7212(a) (2000) relating to his conduct during the course of his representation of Cheryl Borgelt as personal representative of David Borgelt's estate in Cuming County, Nebraska.

Mills was charged by information in the U.S. District Court as follows:

> On or about the 30th day of June, 1999, in the District of Nebraska, the defendant, did corruptly obstruct and impede or endeavor to obstruct or impede the due administration of the Internal Revenue laws by filing altered renunciations with the Cuming County Court in an effort to evade and impede the collection of an estate tax.
>
> In violation of Title 26, United States Code, Sections 7212(a).

Mills entered a guilty plea to the federal charge and was sentenced on August 31, 2004, to 2 years' probation; fined $3,000; and required to perform 250 hours of community service. He has completed all the requirements of his sentence. On January 12, 2006, the U.S. District Court ordered that Mills be discharged from probation supervision and terminated the proceedings in that case.

On September 28, 2004, the Counsel for Discipline submitted a complaint to the Committee on Inquiry of the Third Disciplinary District (Committee) and requested the Committee to conduct an inquiry to determine whether reasonable grounds for discipline existed as a result of Mills' federal felony conviction. It was the Counsel for Discipline's position that the conviction, "in and of itself," was a new basis on which discipline could be grounded.

The complaint alleged that Mills' felony conviction constituted a violation of Canon 1, DR 1-102(A), of the Code of Professional Responsibility, which, in relevant part, prohibited a lawyer from violating a disciplinary rule; engaging in illegal conduct involving moral turpitude; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; engaging in conduct that is prejudicial to the administration of justice; and engaging in any other conduct that adversely reflects on his or her fitness to practice law. The Counsel for Discipline recommended formal charges against Mills be filed with this court. Mills' attorney submitted a response letter to the Committee in which he noted that the felony conviction arose from the same conduct for which Mills had been suspended by this court and that no new or different facts had arisen.

On October 18, 2004, the Committee determined that no public interest would be served by the filing of formal charges. The Committee determined that a private reprimand of Mills was appropriate.

The Counsel for Discipline appealed the Committee's determination to the Disciplinary Review Board (Board). The Counsel for Discipline stated that its practice had been "to consider [a] felony conviction as a separate and distinct violation of the Code of Professional Responsibility." The Counsel for Discipline again recommended the filing of formal charges against Mills.

Mills' attorney sent a letter to the Board in which it was expressed that Mills accepted the Committee's recommendation of a private reprimand. The letter also emphasized that all parties involved in the matter were fully aware that a federal grand jury investigation was pending during the course of the 2002-03 disciplinary proceedings against Mills and that the Nebraska Supreme Court, during oral argument, had raised the issue of a possible felony prosecution against Mills.

The Board concluded that the public interest had been served by the 2-year suspension of Mills, and it affirmed the determination of the Committee to issue a private reprimand of Mills. A private reprimand was issued on December 3, 2004. No further appeal was pursued by the Counsel for Discipline or by Mills.

On January 23, 2006, Mills requested this court to reinstate him to the practice of law in Nebraska, and the Counsel for

Discipline filed a resistance to such reinstatement. In its resistance, the Counsel for Discipline described Mills' felony conviction. The Counsel for Discipline stated that the private reprimand related to the conviction had been "an insufficient sanction" and that "Formal Charges should have been filed" against Mills. The Counsel for Discipline opposed the reinstatement because "subsequent to the entry of the two-year suspension herein, [Mills] was convicted of a felony involving moral turpitude."

The chairperson of the Committee filed a statement regarding Mills' reinstatement application, stating that he knew of no reason why Mills should not be reinstated to the practice of law and that the Committee recommended such reinstatement. The chairperson of the Board also filed a response to Mills' reinstatement motion. Therein, she stated that she was unaware of any information which would indicate that Mills should not be reinstated.

STANDARD OF REVIEW

[1] The Nebraska Supreme Court has the inherent power to define and regulate the practice of law in this state. *State ex rel. Nebraska State Bar Assn. v. Butterfield*, 172 Neb. 645, 111 N.W.2d 543 (1961).

ANALYSIS

The question is whether Mills' subsequent felony conviction, which was based on the same conduct for which he was suspended, prevents his reinstatement to the practice of law in this state. Upon his suspension, Mills was directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001) and to pay the costs and expenses of the action in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001). See *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003). There is no dispute that Mills has completed all the requirements set forth in the order of suspension, has paid all costs assessed against him, and has complied with rule 16. The chairpersons of the Committee and the Board have filed statements in support of Mills' reinstatement application.

[2-5] A suspended lawyer seeking reinstatement is required to affirmatively show that he or she has fully complied with the order of suspension and in the future will not engage in practices

offensive to the legal profession. See *Butterfield, supra*. The burden is upon the suspended lawyer to show his or her present fitness to again exercise the privileges and functions of an attorney in view of his or her previous conduct, the discipline imposed, and any reformation of character wrought thereby, or otherwise, as shown by his or her more recent conduct. *Id.* Whether or not such a showing is sufficient is dependent upon the record before us and the suspended lawyer's prior conduct as reflected in the records of this court. *Id.* The character of the respondent in a disciplinary proceeding and the question of his or her reformation as to the previous unethical conduct are of great importance in determining whether or not a reinstatement should be granted. *Id.* If a sufficient showing is made, the suspended lawyer "will be reinstated and allowed to engage in the practice of law." See, e.g., *State ex rel. Nebraska State Bar Assn. v. Erickson*, 204 Neb. 692, 704, 285 N.W.2d 105, 111 (1979).

In the present case, the record shows and the parties have stipulated that Mills has fully complied with the terms of his suspension. No evidence suggests that he has engaged in the practice of law or that he has engaged in any improper conduct since being suspended by this court. The Counsel for Discipline acknowledges that Mills is not currently under disciplinary investigation and that there are no pending disciplinary complaints against Mills.

Mills has shown that he will not in the future engage in conduct offensive to the practice of law. When suspending Mills in 2003, this court found as follows:

> It is clear from the record that Mills' behavior surrounding his handling of the Borgelt estate was an isolated incident in what has otherwise been an exemplary legal career. The record indicates that Mills is involved in his community and has countless letters of support from judges, lawyers, and laypersons. In addition, Mills has never been disciplined in the 30 years he has been authorized to practice law in Nebraska.

Mills, 267 Neb. at 71, 671 N.W.2d at 776.

In the present proceeding, Mills has sworn by affidavit that he agrees to abide by the rules of this court. The record also contains numerous letters in support of Mills' application for

reinstatement written by attorneys, county officials, businesspersons, community leaders, and former clients. These letters attest to Mills' good reputation, experience, community involvement, willingness to provide pro bono legal services, remorse for the improper conduct that precipitated his suspension, and adherence to this court's suspension order.

Despite not having appealed the private reprimand of Mills issued on December 3, 2004, the Counsel for Discipline now alleges that the private reprimand was an insufficient sanction for Mills' subsequent felony conviction. The sole reason offered by the Counsel for Discipline against reinstatement is that after he was suspended, Mills received a federal felony conviction for his conduct relating to the Borgelt estate.

The problem with the Counsel for Discipline's argument is that this court has already sanctioned Mills for the conduct which is at issue. He was suspended from the practice of law. Furthermore, after Mills pleaded guilty to the federal charge and was sentenced as described above, the Committee determined that a private reprimand of Mills would be appropriate. The Committee's determination was affirmed by the Board, and no further appeal was taken by the Counsel for Discipline. Mills was thus privately reprimanded in December 2004.

Mills has fully complied with the order of suspension issued by this court, and he has successfully completed the requirements of his sentence in the federal case. He has affirmatively shown that he will not in the future engage in conduct offensive to the practice of law. The chairpersons of the Committee and the Board have filed statements in support of his reinstatement. We conclude that Mills should be reinstated to the practice of law.

CONCLUSION

For the reasons stated herein, we order that Mills be reinstated to the practice of law in the State of Nebraska, effective immediately.

APPLICATION FOR REINSTATEMENT GRANTED.

WRIGHT, J., participating on briefs.

GERRARD and MCCORMACK, JJ., not participating.

MICHAEL D. HUFFMAN, APPELLEE, V. GREG E. PETERSON AND LYNDA J. PETERSON, APPELLANTS.

718 N.W.2d 522

Filed July 28, 2006. No. S-04-941.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Boundaries: Ejectment: Quiet Title.** Boundary disputes are properly brought as an action in ejectment or pursuant to Neb. Rev. Stat. § 34-301 (Reissue 2004). But when parties pursue a boundary dispute as a quiet title action without objection, the mode of procedure is no longer in question.
4. **Boundaries: Parties.** The common grantor rule provides that where conveyances from a common grantor to adjoining landowners describe the premises conveyed by lot numbers, but adjoining owners purchase with reference to a boundary line then marked on the ground, the boundary line, as marked on the ground by the common grantor, is binding upon such adjoining landowners and all persons claiming under them irrespective of the length of time which has elapsed thereafter.
5. **Equity: Boundaries: Parties: Intent.** The common grantor doctrine is an equitable rule that is designed to ascertain the intention of the parties with respect to the location of premises described by lot number in a conveyance which is executed by a grantor who conveys only part of an area of land owned by him.
6. **Property: Boundaries: Title: Parties.** In applying the common grantor rule, the focus is on unity of title. If title to the property is actually held by the same party, the name in which such party conveys the property is irrelevant.
7. **Equity.** Equity looks through form to substance. Thus, a court of equity goes to the root of the matter and is not deterred by form.
8. **Trial: Witnesses: Testimony.** The credibility of witness testimony and weight to be given the testimony are questions for the trier of fact.
9. **Trial: Evidence: Appeal and Error.** An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

John D. Rouse and Gregory C. Damman for appellants.

Andrew D. Strotman and Trent R. Sidders, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

GERRARD, J.

NATURE OF CASE

Ben Justus James III conveyed adjoining residential lots to Greg E. Peterson (Peterson) and Lynda J. Peterson, as well as Michael D. Huffman. A dispute between the Petersons and Huffman arose after a survey conducted on the property revealed that Huffman's driveway encroached on the lot owned by the Petersons. Huffman filed an action to quiet title to the property in his favor, and in response, the Petersons filed an action seeking to eject Huffman from the property. Applying the common grantor doctrine, the district court determined that the boundary of Huffman's lot encompassed Huffman's driveway and quieted title to the disputed property in his favor. The Petersons challenge the court's application of the common grantor doctrine. For the following reasons, we conclude that the common grantor rule was applied correctly, and we affirm the court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In October 1987, Pioneer Partners, a partnership established by Robert Kerrey and James, acquired the property composing Pioneer Estates in Lancaster County, Nebraska. In 1989, Kerrey assigned his right, title, and interest in Pioneer Partners and conveyed his interest in Pioneer Estates to James.

In 1990, James had the main road, known as Westbrook Circle, built on the property, along with a driveway to his house, located at 3001 Westbrook Circle, also known as Lot 10, Block 2, Pioneer Estates (Lot 10). In 1992, James conveyed a life estate in the adjacent property to his father, who lived on the adjacent property, located to the east of Lot 10 at 3000 Westbrook Circle, Lot 9, Block 2, Pioneer Estates (Lot 9), until 1995, when James sold Lot 9 to the Petersons, the appellants in this action. At that time, James' father conveyed his life estate to the Petersons, and James, individually and as partner of Pioneer Partners, conveyed his remainder interest in the property to the Petersons. Thus, the remainder merged into the life estate, leaving the Petersons with title in fee simple. See *Watson v. Dalton*, 146 Neb. 78, 18 N.W.2d 658 (1945).

James lived next to the Petersons on Lot 10 until June 1999, when he sold Lot 10 to the appellee, Huffman. James never had a survey performed on Lots 9 and 10. Similarly, the Petersons and Huffman did not have surveys of the lots performed prior to their purchases in 1995 and 1999, respectively.

In August 1999, Huffman had his property surveyed in order to obtain financing. In May 2000, Huffman used the survey to obtain a building permit for a new detached garage and noticed an indication on the document that his driveway was encroaching on the Petersons' property, Lot 9. Huffman then told Peterson and James about his discovery. Prior to Huffman's discovery, Huffman, Peterson, and James had all assumed that Huffman's driveway was located entirely on Lot 10.

In October 2001, Huffman and Peterson met to discuss potential options for remedying the encroachment. Huffman offered to purchase the encroaching land or arrange for an easement, but Peterson indicated that the encroaching driveway should be moved from his property. In November 2002, Huffman filed an action against the Petersons, requesting the court to quiet title in the disputed property pursuant to the common grantor theory. Under that theory, Huffman alleged that at the time of the parties' respective conveyances, Huffman and the Petersons, along with James, intended a metal post and a tree located between the properties to mark the boundary between Lots 9 and 10. The Petersons filed an answer and cross-petition, asserting an ejectment action.

Following a bench trial, the district court ordered title to the disputed property quieted in Huffman's favor. The court found that the parties acquired their adjacent properties from a common grantor with an "understanding that the boundary between the lots was marked by a north-south line running through a metal T-post and a cottonwood tree east of the driveway leading to [Huffman's] residence." Pursuant to the common grantor doctrine, the court found such line to be the boundary between the two properties.

ASSIGNMENTS OF ERROR

The Petersons assign that the district court erred in (1) finding that the Petersons and Huffman acquired their properties from a

common grantor; (2) assuming the parties acquired their properties from a common grantor, finding that the common grantor conveyed the subject lots to Huffman and the Petersons with reference to "'a boundary line then marked on the ground'"; (3) finding a small tree and movable metal post to be monuments for purposes of the common grantor rule; and (4) failing to eject Huffman from their property.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005).

ANALYSIS

[3] We first note that boundary disputes are not to be determined in a quiet title action. Rather, boundary disputes are properly brought as an action in ejectment or pursuant to Neb. Rev. Stat. § 34-301 (Reissue 2004). *Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998). But when parties pursue a boundary dispute as a quiet title action without objection, the mode of procedure is no longer in question. *Id.*

[4,5] The common grantor rule provides that where conveyances from a common grantor to adjoining landowners describe the premises conveyed by lot numbers, but adjoining owners purchase with reference to a boundary line then marked on the ground, the boundary line, as marked on the ground by the common grantor, is binding upon such adjoining landowners and all persons claiming under them irrespective of the length of time which has elapsed thereafter. See *Phillippe v. Horns*, 188 Neb. 304, 196 N.W.2d 382 (1972). This equitable rule is designed to ascertain the intention of the parties with respect to the location of premises described by lot number in a conveyance which is executed by a grantor who conveys only part of an area of land

owned by him. *Kraus v. Mueller*, 12 Wis. 2d 430, 107 N.W.2d 467 (1961).

The Petersons argue that the facts of this case and the testimony given at trial do not support the district court's application of the common grantor rule. Specifically, the Petersons challenge the court's findings (1) that Lots 9 and 10 were conveyed by a common grantor and (2) that the parties acquired the lots with the understanding that the boundary between their properties was marked by a line east of Huffman's driveway, running through a metal T-post and a cottonwood tree. In that regard, the Petersons question the evidence of both the understanding of the parties and the sufficiency of the markers. We address each argument in turn.

Lot 9 and Lot 10 Were Conveyed by Common Grantor.

The Petersons first assign that the district court erred in applying the common grantor rule because Lots 9 and 10 were not conveyed by a common grantor. While Lot 10 was conveyed to Huffman by one grantor—James—the Petersons assert that Lot 9 was conveyed to the Petersons by three separate grantors—James, James' father, and Pioneer Partners. Thus, according to the Petersons, the common grantor doctrine does not apply because the grantor of Lot 9 was not the same as the grantor of Lot 10.

Huffman argues that Lot 9 was conveyed to the Petersons by James, just as Lot 10 was conveyed to Huffman by James. Huffman asserts that James developed the properties at issue and constructed Huffman's driveway prior to conveying a life estate interest in Lot 9 to James' father and that, thus, the common grantor rule is not precluded by the interest later acquired by James' father. In addition, Huffman argues that because James was the sole partner in Pioneer Partners at the time of the conveyance of Lot 9, the partnership was not a separate entity or grantor in the conveyance.

James and Kerrey originally acquired title to the property at issue in the name of their partnership, Pioneer Partners, and later, James became the sole partner in Pioneer Partners and acquired sole ownership of the property at issue through an assignment and quitclaim deed from Kerrey. Thus, James acquired Lots 9 and 10 in the same transaction. Subsequently, James conveyed

Lot 9 to the Petersons, naming as grantor himself, individually, and as partner of Pioneer Partners. Several years later, James conveyed Lot 10 to Huffman, naming only himself, individually, as grantor.

[6,7] Based on these facts, the Petersons argue that the lots were not conveyed by the same grantor. However, in applying the common grantor rule, the focus is on unity of title. If title to the property is actually held by the same party, the name in which such party conveys the property is irrelevant. In other words, James acquired ownership of the two parcels at issue in the same transaction, in the same name. Equity looks through form to substance. Thus, a court of equity goes to the root of the matter and is not deterred by form. See *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999). Even though James ultimately drafted the conveyance documents using different language—one in his name alone, and one in his name along with the name of his partnership—the lots were owned by him in the same capacity. Thus, the language of the deed documents does not prevent proper application of the common grantor rule.

Furthermore, Lots 9 and 10 were originally owned by James in their entirety, giving him the power to determine the location of the boundary between the properties. The fact that James conveyed a life estate interest in Lot 9 to his father prior to conveying complete ownership of Lot 9 to the Petersons does not change the fact that James was the common grantor of the two parcels because James owned both parcels before conveying any interest at all.

For example, the common grantor rule could have applied had James conveyed a fee simple title in Lot 9 to his father, making his father the original grantee under the common grantor rule; similarly, the common grantor rule would have applied if James had not conveyed any interest in Lot 9 to his father, making the Petersons the original grantees under the rule. It would make little sense to refuse to apply the doctrine to facts presenting an initial conveyed interest that lies between those situations. All that matters for purposes of determining whether a common grantor is present is whether that grantor held title to both disputed parcels, such that the grantor had the power to establish the boundary between the two parcels.

Here, James held title to Lot 9 in fee simple before conveying a life estate to his father, but retained a remainder interest. James conveyed that remainder interest directly to the Petersons and also sold the life estate on his father's behalf. The Petersons' unified title to Lot 9 came from both James and James' father, but part of that title—the remainder interest—was conveyed directly from James. On the whole, the purchase was effectively negotiated and completed as a conveyance from James to the Petersons.

Most important, the nature of the Petersons' purchase was such that James was in a position to establish the boundaries of the property, and the Petersons were in the position of relying on James' description of the boundary. The fact that James' father first held part of the title to Lot 9 does not change the fact that the Petersons were the original grantees of the remainder of the title, and the first to obtain a unified title subsequent to James. The intent of the common grantor doctrine is to give effect to the original grantor's representation of the boundary to property. Based on this evidence, the district court did not err in concluding that James was a common grantor with respect to his conveyance to the Petersons. The Petersons' first assignment of error is without merit.

Huffman Proved Parties' Understanding of Boundary Line.

The Petersons next argue that Huffman failed to prove that the parties purchased their lots with the understanding that the boundary between the properties was marked by a metal T-post and a cottonwood tree to the east of Huffman's driveway and that such markers were sufficient to establish the boundary. The Petersons argue that without evidence of this shared understanding, the common grantor doctrine does not apply.

The metal post identified by Huffman as a marker of the boundary between Lots 9 and 10 was placed in the ground by James before the Petersons and Huffman acquired their respective lots. James testified that the post was meant to stabilize one of several telephone poles that had been placed as a barrier along the east side of the driveway in an effort to keep traffic from going beyond the roadway and onto the property then occupied by James' father. Peterson testified that the post was in

place at the time he purchased Lot 9 in 1995 and remained in place when Huffman purchased Lot 10 in 1999.

Huffman testified that prior to his purchase of Lot 10, James accompanied him on a walk around the perimeter of the lot to show Huffman the boundary lines. Huffman stated that he and James started at the northeast corner of Lot 10 where the metal post was located and that James represented the post to be the "original northeast property stake."

The cottonwood tree alleged to be a boundary marker between Lots 9 and 10 was planted by James in 1991 or 1992 on the east side of the Lot 10 driveway before the Petersons and Huffman acquired their lots. Huffman testified that during his walk with James around the perimeter of Lot 10, James stated that the tree was planted on the property line and that Peterson "knows about it, it's no big deal." Huffman also explained that prior to discovering the encroachment, Peterson asked his permission to landscape around the tree.

Peterson, however, testified that another post was located at the fence line to the south of Lots 9 and 10. Peterson stated that the post was located in the southwest corner of his property when he purchased it and described the post as a "wood lath painted pink [with] a pink flag." As shown on a map of Lots 9 and 10 entered into evidence at trial, this post is in line with the platted boundary between the lots. Huffman testified that during his walk with James around Lot 10, James indicated that the southeast boundary marker was near a common gate into a city park but, due to the heavy growth in the area, told Huffman of the boundary, "it's around here."

Huffman's testimony regarding James' representations that the boundary between Lots 9 and 10 was marked by the post and tree was disputed at trial. James testified that the post was installed for the sole purpose of preventing the telephone poles from rolling and not to mark a boundary. James stated that he never represented that the post marked the boundary between the lots. When asked how long the post remained in place, James explained that he tried to pull the post out of the ground when he removed the telephone poles but was unable to remove the post. Further, James testified that while walking the perimeter of Lot 10 with Huffman, he only referred to survey stakes as boundary

markers. Peterson testified that he purchased Lot 9 based on the legal plat and that James told both Huffman and him that the post had nothing to do with the boundary.

[8,9] Although Peterson and James contradicted Huffman's testimony regarding James' representations of the boundary between Lots 9 and 10, the credibility of witness testimony and weight to be given the testimony are questions for the trier of fact. See *In re Guardianship of Robert D.*, 269 Neb. 820, 696 N.W.2d 461 (2005). In this case, the court saw and heard the testimony of Huffman, Peterson, and James and, based on its judgment, gave greater weight to Huffman's testimony. An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006). The common grantor rule would be of little use if it could be defeated simply by the assertion of contrary accounts, without any regard for whether those accounts are credible or persuasive to the fact finder.

We also note the testimony of Peterson and James that until the encroachment was discovered, both assumed that the entire driveway was located on Lot 10. Further, although there was no direct testimony that James pointed out the tree and post at the time of the conveyance of Lot 9 to the Petersons, the subsequent conduct of the Petersons in occupying Lot 9 from 1995 until 2000 and observing a boundary along the east of the driveway supports an inference that they purchased Lot 9 with the understanding that the west boundary of the premises ran through the tree and post. See *Kraus v. Mueller*, 12 Wis. 2d 430, 107 N.W.2d 467 (1961). Although the tree and post may not have been placed with the intent that they serve as boundary markers, according to Huffman's testimony, James used them in that capacity when conveying the property. We find nothing in the law to preclude fixed, visible landmarks from being used to define a boundary line, even if that was not their original purpose.

The evidence establishes that the landmarks Huffman testified had been identified by James as boundary markers were apparent upon visual examination of the property when Lots 9 and 10 were conveyed to the Petersons and Huffman. The parties were

under the impression that the boundary between Lots 9 and 10 ran east of Huffman's driveway, as evidenced by their subsequent conduct on the properties and mutual surprise after discovering that the plat specifications indicated otherwise. This evidence, giving weight to the district court's evaluation of the credibility of the witnesses, is sufficient to prove that the common grantor doctrine is applicable. Thus, we conclude that the district court properly applied the common grantor doctrine, quieting title to the disputed property in Huffman. We find the Petersons' second and third assignments of error to be without merit.

The Petersons also assign that the district court erred in failing to eject Huffman from their property. Having concluded that the court correctly quieted title in the disputed property in favor of Huffman, we naturally conclude that the court did not err in dismissing the Petersons' ejectment action and reject the Petersons' final assignment of error.

CONCLUSION

The district court correctly applied the common grantor rule, quieting title in favor of Huffman. Therefore, we affirm the judgment of the district court.

AFFIRMED.

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

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. CAREY DEAN MOORE, APPELLANT AND CROSS-APPELLEE.

718 N.W.2d 537

Filed July 28, 2006. No. S-04-1081.

1. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Postconviction: 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.
3. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.

4. **Criminal Law: Judgments: Sentences.** The judgment in a criminal case is the sentence.
5. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal.
6. ____: ____. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
7. **Postconviction: Constitutional Law: Sentences.** An issue of constitutional dimension involving a sentence does not constitute grounds for postconviction relief unless it also constitutes grounds for finding the sentence void or voidable.

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

Alan E. Peterson, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

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

PER CURIAM.

NATURE OF CASE

Appellant, Carey Dean Moore, was convicted of two counts of first degree murder and sentenced to death in 1980. Since his original convictions and sentences, the state and federal courts have considered numerous cases brought by Moore, including direct appeals and collateral proceedings, one of which resulted in a remand for resentencing where Moore was again sentenced to death. On August 31, 2004, the district court for Douglas County denied Moore's second petition for postconviction relief since his resentencing, and thereafter, Moore filed this appeal.

Moore's petition for postconviction relief relies on the 8th and 14th Amendments to the U.S. Constitution and art. I, §§ 3, 9, and 15, of the Nebraska Constitution. Moore makes two challenges relative to the use of electrocution to enforce a sentence of death. First, Moore claims that "under any protocol, the use of electrocution [as the statutorily mandated method of execution] violates" his rights. Second, Moore claims that the electrocution procedure to be used pursuant to a new protocol which "provides for an uninterrupted application of 2,450 volts of electricity for

15 seconds" violates his rights. The district court denied an evidentiary hearing and postconviction relief on the basis that this court had recently rejected Eighth Amendment challenges to the use of the electric chair.

Moore appeals the denial of postconviction relief. The State cross-appeals and asserts that the district court reached the right result for the wrong reason. We agree with the State's analysis that Moore's claims are either procedurally barred or not authorized in a postconviction action. Therefore, albeit for reasons different than those stated by the district court, we affirm the district court's denial of postconviction relief.

STATEMENT OF FACTS

In our opinion in the appeal of Moore's previous state postconviction action after resentencing and prior to the present case, the procedural background of this case was set forth as follows:

> In a 4-day span during August 1979, Moore robbed and murdered two Omaha taxi drivers. Moore was convicted of two counts of first degree murder, based on a felony murder theory, and was sentenced to death by a three-judge panel in 1980. We affirmed the convictions and sentence in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864 (*Moore I*). The facts of the underlying crimes are more fully set out in that opinion.
>
> Moore filed his first state postconviction action in 1982, alleging, inter alia, that his trial counsel was ineffective and that Nebraska's death penalty procedures were unconstitutional. On appeal, we rejected these arguments. *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984) (*Moore II*).
>
> Moore then filed a federal habeas corpus action and was granted a writ of habeas corpus based upon his constitutional challenge to Nebraska's death penalty procedures. The U.S. Court of Appeals for the Eighth Circuit affirmed the order of resentencing, and this order was reaffirmed by the Eighth Circuit on denial of rehearing. *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *rehearing denied* 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992).

> On remand, this court determined that it would decline to itself resentence Moore, but would instead remand the cause to the state district court for resentencing. *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993) (*Moore III*). Moore was again sentenced to death, and on direct appeal from his resentencing, he again alleged, inter alia, that [some aspects of] Nebraska's death penalty statutes and procedures were unconstitutional. We rejected those arguments. *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *cert. denied* 520 U.S. 1176, 117 S. Ct. 1448, 137 L. Ed. 2d 554 (1997) (*Moore IV*).
>
> On March 3, 1997, this court set an execution date of May 9 for Moore. Moore filed the [first] state action for postconviction relief [after resentencing] on April 30. On May 5, this court stayed Moore's execution in light of *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996), *rev'd* 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998). On the same date, the district court denied Moore's motion for postconviction relief, without an evidentiary hearing. This appeal followed, and because this is a capital case, the appeal was placed on our docket. See Neb. Rev. Stat. § 24-1106 (Reissue 1995).

State v. Moore, 256 Neb. 553, 554-55, 591 N.W.2d 86, 88-89 (1999) (*Moore V*).

As will be discussed below, we note that although Moore had unsuccessfully challenged the "use of an 'electric chair' " as the statutory method of execution in a motion filed in district court on April 8, 1994, in connection with his resentencing, he did not raise the denial of his challenge to the use of the electric chair in the appeal thereof, which appeal resulted in our opinion *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996) (*Moore IV*). In *Moore V*, Moore's first postconviction case following resentencing, we concluded that all of Moore's claims for postconviction relief were either procedurally barred or without merit, and we affirmed the district court's denial of that petition for postconviction relief.

On October 5, 1999, Moore filed a petition for writ of habeas corpus in the federal district court for the district of Nebraska. See *Moore v. Kinney*, 119 F. Supp. 2d 1022 (D. Neb. 2000). The

federal district court denied Moore's petition in its entirety and dismissed the petition with prejudice. *Id.* Among the claims Moore made in the petition for writ of habeas corpus was a claim that " 'Nebraska's death penalty by electrocution violates the Eighth and Fourteenth Amendments.' " 119 F. Supp. 2d at 1038. The district court rejected the claim based on the U.S. magistrate judge's recommendation that the claim was barred because the claim was "available to [Moore] and could have been raised during either the state direct appeal or postconviction proceedings" and the claim was therefore "subject to procedural default." *Id.* at 1039-40. The magistrate noted that Moore did "not even attempt to demonstrate either cause or prejudice sufficient to excuse this default." *Id.* at 1040. The denial of Moore's petition for writ of habeas corpus was affirmed by the Court of Appeals for the Eighth Circuit. *Moore v. Kinney*, 320 F.3d 767 (8th Cir. 2003).

On July 26, 2004, Moore filed his second petition for postconviction relief following resentencing in the district court for Douglas County. The denial of this petition for postconviction relief gives rise to the current appeal. In this postconviction petition, Moore alleges that "the imposition of death by electric chair violates his rights under the Nebraska and United States Constitutions' prohibitions against cruel and unusual punishment and right not to be deprived [of] his life without due process." Moore relies on the 8th and 14th Amendments to the U.S. Constitution and Neb. Const. art. I, §§ 3, 9, and 15, and Neb. Rev. Stat. § 29-2532 (Reissue 1995). In his petition, Moore notes the adoption of a new protocol for implementation of electrocution which he alleges provides for "an uninterrupted application of 2,450 volts of electricity for 15 seconds." Moore makes a global challenge to electrocution, which is the statutorily mandated method of execution in Nebraska, wherein he claims that "under any protocol, the use of electrocution violates" his rights. Moore makes the more specific claim that the new protocol providing for a specific electrocution procedure violates his rights. Moore requested, inter alia, an evidentiary hearing and an order declaring electrocution unconstitutional.

On August 31, 2004, the district court entered an order denying Moore's motion for postconviction relief without an evidentiary

hearing. The court stated, "The Nebraska Supreme Court in *State v. Bjorklund*, 258 Neb. 452 (2000) and in *State v. Ryan*, 248 Neb. 405 (1995) ruled that death by electrocution is not cruel and unusual punishment. Therefore, the Court finds that the defendant's pending motion for post-conviction relief should be overruled and denied." Moore appeals. The State cross-appeals.

ASSIGNMENTS OF ERROR

Moore claims, restated, that the district court erred in denying his petition for postconviction relief without an evidentiary hearing. In the State's cross-appeal, it claims, restated, that the district court reached the right result for the wrong reasons and that, inter alia, the district court erred in reaching the merits of Moore's claims and in failing to find that Moore was procedurally barred from raising the claims raised in this postconviction petition.

STANDARDS OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[2] 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. *Id.*

ANALYSIS

Moore filed this appeal challenging the denial of postconviction relief. The State filed a cross-appeal challenging the reasoning of the district court. We find merit to the arguments of the State on cross-appeal, the substance of which precludes Moore's success on appeal, and we therefore affirm the order of the district court.

Nebraska Postconviction Statute.

Postconviction relief in Nebraska is authorized by statute. Neb. Rev. Stat. § 29-3001 (Reissue 1995) provides, in part, as follows:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the

> judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion [for postconviction relief].

Under the postconviction statute, "[t]he court need not entertain a second or successive motions for similar relief on behalf of the same prisoner." *Id.*

[3,4] We have stated that in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). We have stated that "[t]he judgment in a criminal case is the sentence." *State v. Reeves*, 258 Neb. 511, 524, 604 N.W.2d 151, 161 (2000). We have also stated that "[a] finding of guilty is a conviction, but it is not a judgment or final order, and there can be no appeal until a sentence has been imposed." *State v. Hess*, 261 Neb. 368, 375, 622 N.W.2d 891, 899 (2001).

In this postconviction case, Moore does not challenge his underlying conviction. Instead, Moore makes two claims relative to the State's carrying out his sentence of death. First, he claims that electrocution as the statutorily mandated method of execution in Nebraska is unconstitutional. Second, he claims that the electrocution procedure recited in the new protocol summarized above is unconstitutional. We consider these claims separately.

Moore's Claim That Electrocution as the Statutorily Mandated Method of Execution Is Unconstitutional Is Procedurally Barred.

The State argues on cross-appeal that Moore's claim in this second postconviction petition following resentencing asserting that electrocution as the statutorily mandated method of execution is unconstitutional is procedurally barred. We agree.

[5,6] With respect to procedural default, we have stated that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal. *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003). We have further stated that an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at

the time the movant filed the prior motion. *Id.*; *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *State v. Ortiz, supra.* See, also, § 29-3001.

As his first claim in his petition for postconviction relief, Moore makes a global challenge to electrocution as the statutorily mandated method of execution in Nebraska. As noted in our "Statement of Facts," Moore previously challenged the "use of an 'electric chair' " to enforce capital punishment in Nebraska in a motion filed on April 8, 1994, in his resentencing case, which became known on appeal as *Moore IV.* However, after the district court overruled Moore's "motion re[garding] constitutionality of death penalty" on May 17, 1994, Moore chose not to appeal the denial of this constitutional challenge.

It is clear on the explicit record in this case that the use of electrocution as an issue relative to a sentence of death was known to Moore and that he could have litigated this issue on direct appeal from the resentencing. See *State v. Ortiz, supra.* The current postconviction motion cannot be used to secure review of this issue which we conclude, as did the federal district court, is procedurally barred. See *Moore v. Kinney*, 119 F. Supp. 2d 1022 (D. Neb. 2000). The district court did not err in denying relief without a hearing.

Moore's Claim That the Electrocution Procedure in the New Protocol Is Unconstitutional Cannot Be Reached in This Postconviction Case.

Moore alleges in this postconviction case that the electrocution procedure recited in the new protocol is unconstitutional. Moore's electrocution procedure challenge is based on purported violations of the 8th and 14th Amendments to the U.S. Constitution and article I, §§ 3, 9, and 15, of the Nebraska Constitution. Moore does not allege that use of the new protocol violates his civil rights under 42 U.S.C. § 1983 (2000). In making his electrocution procedure claim, Moore does not challenge either his underlying conviction or the judgment of a sentence of death. We conclude that in making his electrocution procedure claim, Moore has not alleged facts which if established would

render the judgment void or voidable as required to succeed under the Nebraska Postconviction Act, and, therefore, we conclude, albeit for reasons different than those stated by the district court, that the district court did not err in denying postconviction relief.

As noted, to succeed under the Nebraska Postconviction Act, a defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). The judgment in a criminal case for present purposes is the sentence. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

We have reviewed Moore's postconviction petition, and we determine that Moore's petition as it pertains to the electrocution procedure issue does not seek to set aside Moore's sentence of death and that, thus, he does not claim that the judgment is void or voidable. In making this determination, we are guided by the Nebraska postconviction statute and the analysis of the U.S. Supreme Court in *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004).

In *Nelson*, a state prisoner sentenced to death filed a civil rights action under § 1983 alleging that Alabama's proposed use of a "cut-down" procedure, not mandated by state law, to access his veins during the lethal-injection procedure constituted cruel and unusual punishment. The dismissal of the prisoner's action by the federal district court was affirmed by the Court of Appeals for the 11th Circuit. The U.S. Supreme Court reversed. Although *Nelson* states that it leaves unresolved the question as to whether a global challenge to a statutorily mandated method of execution "would call into question the death sentence itself," 541 U.S. at 645, the Court concluded that § 1983 was the appropriate vehicle for the prisoner to challenge the particular lethal-injection procedure. The U.S. Supreme Court stated that the prisoner's suit challenging "a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself [because by altering the lethal-injection procedure] the State can go forward with the sentence." 541 U.S. at 644.

Recently, on June 12, 2006, in *Hill v. McDonough*, 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006), the U.S. Supreme Court reaffirmed the principles in *Nelson*. *Hill* was a § 1983 challenge to a three-drug lethal-injection procedure proposed in Florida. The Court in *Hill* observed that under Florida law, implementation of lethal injection was left to Florida's department of corrections. We view Neb. Rev. Stat. §§ 29-2532 to 29-2536 (Reissue 1995), which identifies the warden of the Nebraska Penal and Correctional Complex as the executioner, as similar to the Florida law dealing with implementation. The *Hill* court also noted that a prior habeas corpus petition filed by the prisoner did not preclude this § 1983 action and that the injunction sought by him enjoining the specific procedure would not foreclose the State of Florida from implementing lethal injection by another procedure and, thus, it could not be said that the prisoner's suit sought to establish " 'unlawfulness [that] would render a conviction or sentence invalid.' " 547 U.S. at 583, quoting *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

[7] Similar to *Hill*, in the instant case, it cannot be said that Moore's constitutional challenge to the electrocution procedure under the new protocol would render his sentence of death invalid. Unlike the cases in *Nelson* and *Hill* which were permitted to proceed, however, Moore has not filed this case as a § 1983 action but instead has filed for relief under Nebraska's postconviction statute. As such, Moore has not alleged facts which if proved would render his sentence of death void, and we conclude that in an action under Nebraska's postconviction statute, an issue of constitutional dimension involving a sentence does not constitute grounds for postconviction relief unless it also constitutes grounds for finding the sentence void or voidable. See *State v. Cole*, 207 Neb. 318, 298 N.W.2d 776 (1980). Moore's electrocution procedure challenge would not constitute grounds for setting aside his sentence of death and would not "render the judgment void or voidable." § 29-3001. Therefore, as to his challenge to the electrocution procedure, Moore has not alleged grounds for relief under the Nebraska Postconviction Act. The district court did not err in denying relief without a hearing.

CONCLUSION

We conclude that Moore, having previously raised the issue, is procedurally barred in this second postconviction action following resentencing from again raising a claim that electrocution as the statutorily mandated method of execution is unconstitutional. We also conclude that Moore's challenge to the electrocution procedure under the new protocol cannot be reached in a postconviction action under the Nebraska Postconviction Act. We find no merit to Moore's assignments of error, and we find merit to certain arguments in the State's cross-appeal. For reasons different than those stated by the district court, we affirm the district court's denial of postconviction relief.

AFFIRMED.

WRIGHT, J., not participating.

HALLIE MANAGEMENT CO., A NEBRASKA CORPORATION, APPELLANT, V. GAIL PERRY, AN INDIVIDUAL, AND BAYLOR, EVNEN, CURTISS, GRIMIT & WITT, LLP, A NEBRASKA LIMITED LIABILITY PARTNERSHIP, APPELLEES.

718 N.W.2d 531

Filed July 28, 2006. No. S-04-1436.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. ____: ____: ____. Generally, in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.
5. **Final Orders: Appeal and Error.** To fall within the collateral order doctrine, an order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.
6. **Pretrial Procedure: Final Orders: Attorney and Client: Appeal and Error.** An interlocutory discovery order compelling the production of documents for which a claim of attorney-client privilege is asserted can be adequately reviewed on appeal from a final judgment and, thus, is not appealable under the collateral order doctrine.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Appeal dismissed.

Clay M. Rogers and Edward F. Pohren, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, L.L.P., for appellant.

Michael J. Mooney and Gregory D. Marchant, of Gross & Welch, P.C., L.L.O., for appellees.

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

GERRARD, J.

NATURE OF CASE

Hallie Management Co. (Hallie) filed a legal malpractice action against Gail Perry and Baylor, Evnen, Curtiss, Grimit & Witt, LLP (Baylor), alleging that Perry and Baylor (hereinafter collectively appellees) failed to exercise due care in advising Hallie regarding the implementation of a motorized scooter policy at a Lincoln retirement community managed by Hallie. Hallie claimed that the actions of the appellees subjected Hallie to a housing discrimination lawsuit filed by the U.S. Department of Housing and Urban Development (HUD). The appellees sought discovery of documents related to the HUD lawsuit, and Hallie filed a motion for a protective order claiming the documents were protected by the attorney-client privilege and work product doctrine. The district court overruled Hallie's motion and ordered the documents to be made available to Perry and Baylor. Hallie appeals the order. We conclude that we are without jurisdiction to consider the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The appellant, Hallie, manages Savannah Pines, an independent retirement community in Lincoln. After developing a written motorized scooter policy addendum (the Scooter Policy) to the Savannah Pines rental agreement, Hallie retained the services of Perry, an attorney with Baylor, to evaluate the Scooter Policy and advise Hallie as to whether the Scooter Policy complied with the law. On September 4, 2001, Perry sent a letter to Hallie, advising that proprietors must provide reasonable accommodation to disabled residents but that a policy permitting unlimited

scooter use would pose a greater liability risk than a policy limiting the residents' use of scooters.

In response to the Scooter Policy, several residents of Savannah Pines filed housing discrimination complaints with HUD. Subsequently, Perry sent Hallie another letter, advising Hallie to implement an amendment to the Scooter Policy, allowing scooters to be parked in the residence center rather than in the extended dining room. In November 2001, HUD filed a complaint (the HUD Complaint) against Hallie in federal district court. Perry represented Hallie in connection with the housing discrimination complaints until withdrawing in May 2002. In April 2003, Hallie agreed to a consent order, requiring payment of civil penalties, fines, and damages.

In August 2003, Hallie filed a complaint against the appellees, alleging legal malpractice in their evaluation of and advice regarding the Scooter Policy, which resulted in the charges filed by HUD, the expense of defending those charges, and the resulting penalties and fines required by the consent order, totaling $160,000.

In their answer, the appellees asserted, in part, that Hallie's Scooter Policy was not in violation of law and that Hallie had similarly denied any violation in its answer to the HUD Complaint. Further, the appellees asserted that Hallie agreed to the consent order to economically resolve the claim, avoid litigation costs, and establish a reputation as a facility accessible to disabled persons—not as a result of admitting guilt.

During discovery, the appellees issued a subpoena to the attorney who represented Hallie in the lawsuit filed by HUD, seeking to obtain documents pertaining to that representation. Hallie moved for a protective order, claiming that some of the documents were shielded by the attorney-client privilege and the work product doctrine. The parties entered into a stipulation in which Hallie agreed to release documents subject to the subpoena, with the exception of documents identified on a "Privilege Log" attached to the stipulation.

Subsequently, the appellees filed a motion to compel, asking the court to order Hallie to produce several documents identified on the Privilege Log. In response, Hallie filed another motion for protective order.

At a hearing on the motions, the parties agreed that the documents at issue were protected by the attorney-client privilege and work product doctrine. However, the appellees asserted that the protections of the attorney-client privilege and work product doctrine had been waived by Hallie.

At the request of the appellees, the court conducted an in camera review of the documents and sustained the appellees' motion to compel and overruled Hallie's motion for protective order, finding that the documents at issue were protected by the attorney-client privilege and work product doctrine but that Hallie had waived such protections. See *State v. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001). Accordingly, the court ordered Hallie to produce the documents for inspection and photocopying by the appellees.

Hallie filed the present appeal, challenging the court's order compelling disclosure of the privileged documents.

ASSIGNMENTS OF ERROR

Hallie assigns, restated, that the district court erred in determining that the elements set forth in *Roeder, supra*, were satisfied and that Hallie waived the protections of the attorney-client privilege and work product doctrine. Hallie also argues that "[c]ompelling disclosure of attorney-client communications will have a chilling effect on the client's willingness to give open and full disclosure of facts to its attorney for fear they may be disclosed in future unconsidered litigation." Brief for appellant at 14.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Allied Mut. Ins. Co. v. City*

of Lincoln, 269 Neb. 631, 694 N.W.2d 832 (2005). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Id.*

Although Hallie concedes that the order on appeal here is not a final order, see *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989), Hallie argues that this court nonetheless has jurisdiction to hear the appeal pursuant to the collateral order doctrine adopted in *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997). In contrast, the appellees argue that due to the absence of a final order, Hallie must wait to appeal the order until after final judgment or, alternatively, seek a peremptory writ of mandamus.

[4] Generally, in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *Id.* However, in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), the U.S. Supreme Court announced a rule providing for appellate review of interlocutory orders that fall within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." In *Richardson, supra*, this court adopted the exception, allowing an appeal of an order granting a motion to disqualify counsel.

> "[I]f the appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate."

Id. at 831, 560 N.W.2d at 435, citing *Maddocks v. Ricker; Casson*, 403 Mass. 592, 531 N.E.2d 583 (1988). See, also, *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004); *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002).

[5] The U.S. Supreme Court has set forth three elements that must be met for an order to fall within the collateral order

doctrine: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978). The Court has emphasized the modest scope of the collateral order doctrine, stating that

> the "narrow" exception should stay that way and never be allowed to swallow the general rule . . . that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994).

[6] Here, the failure to meet the third condition of the collateral order doctrine, that the order be effectively unreviewable upon final judgment, forecloses Hallie's appeal. We join the majority of courts to have considered the question in holding that an interlocutory discovery order compelling the production of documents for which a claim of attorney-client privilege is asserted can be adequately reviewed on appeal from a final judgment and, thus, is not appealable under the collateral order doctrine. See, e.g., *Boughton v. Cotter Corp.*, 10 F.3d 746 (10th Cir. 1993); *Texaco Inc. v. Louisiana Land and Exploration Co.*, 995 F.2d 43 (5th Cir. 1993); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159 (2d Cir. 1992); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642 (Fed. Cir. 1991); *Abrams v. Cades, Schutte, Fleming & Wright*, 88 Haw. 319, 966 P.2d 631 (1998); *Melia v. Hartford Fire Ins. Co.*, 202 Conn. 252, 520 A.2d 605 (1987). Cf. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997) (concluding that appellant in postjudgment appeal had waived issue of attorney disqualification by not appealing pursuant to collateral order rule, but reaching issue of discovery order compelling production of allegedly privileged documents).

We recognize that delayed appellate review of these orders does not entirely eliminate the breach of confidentiality that results from an erroneous order to disclose privileged information. However, the U.S. Supreme Court has stated that the jurisdiction

of appellate courts should not depend on a party's ability to characterize the right asserted as one that would be "irretrievably lost" if review were confined to final judgments only. See *Digital Equipment Corp., supra.*

> A fully litigated case can no more be untried than the law's proverbial bell can be unrung, and almost every pretrial or trial order might be called "effectively unreviewable" in the sense that relief from error can never extend to rewriting history. Thus, erroneous evidentiary rulings, grants or denials of attorney disqualification . . . and restrictions on the rights of intervening parties . . . may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . and other errors, real enough, will not seem serious enough to warrant reversal at all, when reviewed after a long trial on the merits . . . . In still other cases, . . . an erroneous district court decision will, as a practical matter, sound the "death knell" for many plaintiffs' claims that might have gone forward if prompt error correction had been an option. But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be "irretrievably lost" has never sufficed to meet the third [requirement of the collateral order doctrine].

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 872, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994).

Thus, we must balance the potential harm of delaying appeal from orders compelling the production of documents over claims of privilege to final judgment, against the harm caused by the delay certain to result if interlocutory review of such orders is permitted. This third condition of the collateral order doctrine simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement. *Id.*

In most cases, as in this case, a court's decision to compel production of potentially privileged documents can be effectively reviewed on appeal from a final judgment, at which time, the appellate court, if it determines that production of the documents was erroneously compelled, may reverse the judgment and order

a new trial, prohibiting any use of the documents and any evidence obtained as a result of their disclosure. See *Boughton v. Cotter Corp.*, 10 F.3d 746 (10th Cir. 1993). Alternatively, if every order compelling the production of documents over claims of privilege were appealable, the litigation process would be significantly delayed, decreasing judicial efficiency and increasing costs of litigation. See, *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989); *Abrams v. Cades, Schutte, Fleming & Wright*, 88 Haw. 319, 966 P.2d 631 (1998).

Thus, any harm resulting from the occasional erroneous discovery order that might have been corrected, if interlocutory appeals had been available, is outweighed by the delay and disruption that would occur in the litigation process if we were to allow appeals from every discovery order claimed to implicate privilege. Furthermore, allowing interlocutory appeals from orders compelling the disclosure of privileged documents would interfere with the trial court's duty to oversee the discovery process. See *Abrams, supra*. Cf. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997) (describing discovery process with respect to allegedly privileged materials). We do not intend to minimize the harm that may be occasioned by an erroneous attorney-client privilege ruling. However, when the harm of delaying the correction of an occasional erroneous discovery order is balanced against the institutional harm that would be produced by allowing wholesale interlocutory appeals from this type of a disputed discovery order, we determine that the remedies available after appeal from a final judgment are sufficient to preclude application of the collateral order doctrine.

CONCLUSION

For the foregoing reasons, we conclude that the district court's order compelling Hallie to produce the documents requested by the appellees is not reviewable under the collateral order doctrine, and accordingly, we dismiss the appeal.

APPEAL DISMISSED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DENNIS F. STARK, APPELLANT.

718 N.W.2d 509

Filed July 28, 2006. No. S-05-070.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Trial: Appeal and Error.** Conduct of final argument is within the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed.
3. **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.
4. ____: ____. 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.
5. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
6. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
7. **Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender.
8. **Aiding and Abetting: Indictments and Informations: Notice.** An information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified.
9. **Jury Instructions: Appeal and Error.** A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial.
10. **Criminal Law: Constitutional Law: Trial: Witnesses.** The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th amendment to the U.S. Constitution, as incorporated in the 14th amendment, as well as by article I, § 11, of the Nebraska Constitution.
11. **Constitutional Law: Trial: Witnesses.** The functional purpose of the Confrontation Clause is to ensure the integrity of the factfinding process through the provision of an opportunity for effective cross-examination.
12. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from

engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.

13. **Trial: Testimony.** The right of cross-examination is not unlimited.
14. **Trial: Testimony: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
15. **Trial: Jurors.** Trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jurors.
16. **Trial: Proof: Appeal and Error.** A defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.
17. **Trial: Juries: Appeal and Error.** When there is some incorrect conduct by a trial court which, on review of the record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant, the error is harmless.
18. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Gregory A. Pivovar, and, on brief, Michael F. Maloney for appellant.

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

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

NATURE OF CASE

Dennis F. Stark was convicted of first degree murder and use of a deadly weapon to commit a felony, and he was sentenced to a term of life imprisonment and 15 to 20 years' imprisonment, to be served consecutively. After obtaining a new direct appeal through a postconviction action, Stark appeals his convictions and sentences.

FACTUAL AND PROCEDURAL BACKGROUND

On August 27, 2002, Victoria Fortune's body was discovered near U.S. Highway 75 in Washington County, Nebraska. An

autopsy revealed that she died as a result of blunt force trauma to the head. On August 28, Donald Ficenec, an officer with the Omaha Police Department and detective in the homicide unit, became involved in the investigation of Fortune's murder. Ficenec obtained information from Fortune's friends regarding her close friendship with Eric Bylund and involvement with the defendant, Stark. Upon visiting Bylund's home, Ficenec interviewed, among others, Bylund's roommate, Scott McNeill. Ficenec spoke to McNeill several more times after August 28, and on September 4, McNeill contacted Ficenec and confessed to his involvement in the Fortune murder. Based on the information provided by McNeill, he and Stark were arrested for Fortune's murder. In October 2002, Stark was charged with first degree murder and use of a deadly weapon to commit a felony. In exchange for McNeill's testimony against Stark at trial, McNeill was to be charged with second degree murder.

McNeill moved to Omaha, Nebraska, on August 5, 2002, and moved into Bylund's house, across the street from Stark. McNeill met Stark through Bylund and another of Bylund's roommates and began working for Stark shortly after moving to Omaha. McNeill helped Stark with his power-washing business and helped him build a retaining wall at his house. McNeill also met Fortune through his roommates, with whom she was good friends.

Stark met Fortune through Bylund toward the end of 2001 and began a sexual relationship with her in February or March of the following year. At trial, Stark testified that when he ended the relationship in June 2002, Fortune continued to contact him and informed his wife of the affair.

During the trial, McNeill and Stark presented conflicting accounts of the events leading to Fortune's murder.

McNeill's Testimony.

McNeill testified that sometime in the late hours of August 24 or early hours of August 25, 2002, he went over to Stark's house. He and Stark drank beer, smoked marijuana, and played pool. The two men then left the house in Stark's vehicle to get more beer and stopped at Fortune's house.

McNeill stated that once they arrived at Fortune's house, he and Stark drove around the block and down an alley. Stark

parked the vehicle and went to the door to knock. When nobody answered the door, Stark went around to the steps at the side of the house. Stark climbed the steps, while McNeill stood below. Stark and McNeill returned to the vehicle and drove to a gas station around the corner where Stark used the telephone to call Fortune's house. The two men drove back around to Fortune's house; McNeill got out and stood by the vehicle, while Stark went up to the house to look in a window. When Stark returned, the two men got in the vehicle and drove away.

McNeill testified that he and Stark returned to Stark's house for another game of pool, more beer, and more marijuana. McNeill went upstairs and "shot a bag [of heroin] up." When McNeill came back downstairs, Stark indicated that Fortune had called and was coming over to the house. Fortune arrived, and the three of them drank beer and smoked marijuana outside on the patio. The group then moved inside to the basement, where they played pool and continued drinking and smoking marijuana. McNeill testified that he and Stark ended up in the laundry room, where Stark said that he wanted to kill Fortune, and picked up a hammer from a toolbox sitting behind him and handed it to McNeill. McNeill placed the hammer in the back of his pants, and the two men left the laundry room. McNeill testified that Stark nodded toward Fortune, at which point McNeill pulled out the hammer and hit Fortune in the head. McNeill testified that the hammer left his hands but could not recall if he threw the hammer or dropped it. Fortune was on her hands and knees, gripping her head, when Stark came over and hit her with the hammer in the same spot. Fortune fell to the floor, and Stark hit her two more times. McNeill testified that Fortune began making noises, took a deep breath, and stopped moving.

McNeill explained that Stark wrapped the hammer in a T-shirt and retrieved two pairs of gloves from the laundry room. McNeill picked up Fortune and carried her to the garage; Stark tied a bag over her head to contain the blood. The men placed the body on a tarpaulin in the back of Stark's vehicle. Stark gave McNeill the keys to Fortune's car and instructed McNeill to meet him at a carwash. The men left Fortune's car parked at the carwash and drove for approximately 30 minutes before dumping Fortune's body on the side of the road.

McNeill and Stark returned to Stark's house, stopping on the way at a carwash to wash the exterior and part of the interior of the vehicle. Back at Stark's home, McNeill and Stark used buckets of "Oxi-Clean" to clean up the blood in the basement and placed the rags used to clean, and other bloodstained items, in a trash bag along with their clothing and the bath towels they used after showering. The men took the trash bag outside to Stark's backyard and buried it, covered it with cement, and placed Stark's doghouse on top of it. After cleaning up the basement, McNeill and Stark smoked marijuana. Stark then received a call from his wife in Harlan, Iowa, asking him to bring something to her. Stark left for Harlan, and McNeill went home.

Stark's Testimony.

Stark testified that he was working on his retaining wall on August 24, 2002, from 10 a.m. until 2:30 or 3 p.m. He then went inside, took his clothes off at the bottom of the stairs in the basement to avoid tracking dirt through the house, and went upstairs to clean up. Stark left his house at 3 or 3:15 p.m. in his flatbed pickup, to power wash in Valley, Nebraska.

Stark testified that he power washed until 1:30 a.m. on the morning of August 25, 2002. When he returned to his house after work, Stark testified that his vehicle was backed up to his garage door. Stark went inside to let his dogs out and sat down in the backyard with a beer and smoked marijuana. McNeill came from the south side of Stark's house to the backyard and joined Stark for a beer and some marijuana.

Stark testified that McNeill wanted to play pool, so the two men proceeded to the basement. Stark explained that when he went downstairs, he saw a blue tarpaulin at the bottom of the stairs containing what appeared to be a body. When Stark inquired about it, McNeill stated that "he fucked up" and that "this is [Fortune]." Stark responded that they had to get rid of the body, worrying that the police would suspect him, since he had had an affair with Fortune and the murder took place at his house.

Stark testified that he helped McNeill carry Fortune's body to the garage and load it into the vehicle. The two men drove out toward Fort Calhoun, Nebraska, where they dumped Fortune's body on the side of the road. Stark stopped at a carwash to clean

the vehicle, went home, and fell asleep on the couch after showering. Stark testified that McNeill cleaned the basement.

Other Testimony.

At trial, the State presented the testimony of Alexander Sturgeon, who lives across the street from Fortune's house. Sturgeon testified that between 2:40 and 3 a.m. on August 25, 2002, he heard an idling truck outside and looked outside to find a vehicle matching the description of Stark's. He testified that the vehicle went around the block a few times. It then parked, and two men got out. Sturgeon was able to describe the individuals. He testified that the men "snooped" around Fortune's house before getting back in the vehicle and driving through the alley. Then, the driver got out of the vehicle and climbed the stairs at the side of the house, while the passenger stayed down below. At this point, Sturgeon called the 911 emergency dispatch service and testified that "[i]t just didn't look right." Sometime later, Sturgeon observed police officers and crime scene tape around Fortune's house and immediately told the officers what he saw on the morning of August 25.

Following the jury trial, Stark was found guilty of both first degree murder and use of a deadly weapon to commit a felony and, subsequently, received sentences of life imprisonment and 15 to 20 years' imprisonment, to be served consecutively. After Stark's trial counsel failed to file an appeal, Stark filed a motion for postconviction relief asking the court to reinstate his right to file an appeal. The district court sustained the motion, and accordingly, Stark filed the present appeal. See *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

ASSIGNMENTS OF ERROR

Stark assigns that the district court erred in (1) refusing to instruct the jury on his theory that he was only an accessory to a felony, (2) overruling his objection to the prosecutor's statements during closing argument that Stark argues were unsupported by the evidence, (3) preventing questioning of McNeill regarding McNeill's fear of the death penalty and McNeill's

motion to suppress his statement to the police, and (4) testifying from the bench that the death penalty was not an issue in the case and instructing the jury not to consider information regarding the death penalty. Stark also argues that his trial counsel was ineffective in failing to object to testimony given by police officers Ficenec and Larry Cahill.

STANDARD OF REVIEW

[1] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[2] Conduct of final argument is within the discretion of the trial court, and absent an abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed. *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999).

[3-5] 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. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

ANALYSIS

District Court Did Not Err in Denying Stark's Proposed Jury Instruction.

During the jury instruction conference with the court, Stark proposed a jury instruction on the crime of accessory to a felony. The instruction described the elements of the crime of accessory to a felony and instructed that if the jury finds that the State established each element beyond a reasonable doubt, the jury is dutybound to find the defendant guilty of the crime of accessory to a felony, and vice versa. The court denied the request,

concluding that a defendant must "be charged with the crime in order to be instructed on the elements of that crime."

Stark assigns that the district court erred in failing to instruct the jury on his defense theory, accessory to a felony, thereby prejudicing Stark by withdrawing an essential issue from the jury and preventing trial counsel from informing the jury of the distinctions between the crimes of aiding and abetting and accessory to a felony. In contrast, the State asserts that the instruction was properly rejected because Stark was not charged with the crime of accessory to a felony, nor was the crime a lesser-included offense of first degree murder.

[6] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). Without addressing the first two elements, this court can dispose of Stark's first assignment of error based on the lack of prejudice resulting from the court's refusal to give the instruction.

[7,8] In this case, Stark was charged with first degree murder and use of a deadly weapon to commit a felony. The jury was instructed on the elements of each offense and the lesser-included offenses of second degree murder and manslaughter. The jury was also properly instructed on the concept of aiding and abetting—that is, that a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender. See *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004). Given the provisions of Neb. Rev. Stat. § 28-206 (Reissue 1995), an information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified. *Contreras, supra.*

As the defendant, Stark's goal was to rebut evidence presented by the State attempting to establish that he committed, or aided in the commission of, the crime of murder. Stark argues that his theory of defense was inhibited by the court's refusal to instruct

the jury as to the crime of accessory to a felony because he was prevented from drawing distinctions for the jury between aiding and abetting and the crime of accessory. However, the court's failure to instruct the jury as requested did not inhibit Stark's right or ability to defend himself against the crimes charged.

As defined in Neb. Rev. Stat. § 28-204 (Cum. Supp. 2004), the crime of accessory to a felony involves action taken by an individual with the intent to "interfere with, hinder, delay, or prevent the discovery, apprehension, prosecution, conviction, or punishment of another for an offense." As defined, the crime is based upon action taken after the crime is committed. Thus, any attempt by Stark to show evidence establishing his role as an accessory to Fortune's murder would not have assisted him in arguing that he did not aid and abet in the commission of the murder. In other words, even if Stark presented evidence at trial establishing that he was an accessory to the murder, such proof would not have precluded a finding of guilt in aiding and abetting the commission of the crime. Thus, the court's refusal to instruct the jury on the crime of accessory to a felony did not prejudice Stark's defense.

[9] In addition, instructing the jury on the elements of accessory to a felony—a crime of which Stark was not accused—would have tended to confuse and distract the jury in this case. A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial. *Id.* Accordingly, the court did not err in refusing Stark's proposed instruction, and the first assignment of error is without merit.

Stark's Defense Was Not Prejudiced as Result of State's References During Closing Argument to Sturgeon's 911 Call.

While discussing Sturgeon's testimony during closing argument, the State argued, in part:

> [Sturgeon] saw people matching the defendant's description that he gave you and McNeill's description that was very specific. And it's not a guess of time. We're not estimating.

> It's not guessing time when . . . Sturgeon saw this because he called 911 and they record calls at 911. So we know that . . . Sturgeon made a call to 911 at 2:59 a.m., Saturday, August 25th.

Stark objected on the basis that neither the 911 call, nor any evidence concerning the exact time at which the 911 call was made, was offered into evidence. The court sustained the objection to the extent that no evidence was presented regarding the exact time of the 911 call. However, the court otherwise overruled the objection, explaining that Sturgeon did testify to calling 911 and also testified about the time of his observations.

Stark argues that the State referred to evidence that was not presented during trial and, therefore, not properly before the jury and that the State used such information to bolster the credibility of Sturgeon's testimony. Thus, Stark claims that the court erred in overruling his objection.

The State argues that because Stark failed to make a motion for a mistrial after the State's allegedly prejudicial remarks during closing, he did not properly preserve the issue for appeal. Alternatively, the State argues that even if Stark had preserved the issue for appeal, the statements at issue did not prejudice his rights and, therefore, did not warrant a mistrial.

In this case, the court properly sustained Stark's objection as to the State's references to evidence of the official record of Sturgeon's 911 call because such a record was not presented at trial. However, Sturgeon did testify about the approximate time and duration of his observations on August 25, 2002, stating that he saw Stark's vehicle "[p]robably around 2:40, three o'clock [a.m.], somewhere around there" and that the two men were in the area for no more than 45 minutes. Furthermore, Sturgeon testified that during that time, he called 911 to report the suspicious activity.

After the objection was sustained, the State argued:

> Sturgeon came in and he told you that the time that he called 911, it was Saturday night about 2:59 a.m. — excuse me, Sunday morning about 2:59 a.m., and he called 911 and he reported to 911 at that time on Sunday morning that he saw [Stark's vehicle] and he saw the activities that he reported to the police. Keep that in mind.

Stark failed to object following this second reference to the time of Sturgeon's 911 call during the State's closing argument. Furthermore, although the prosecutor was incorrect in arguing that Sturgeon testified that he called 911 at 2:59 a.m., that argument did not suggest that there was independent verification of Sturgeon's testimony. Although technically inaccurate, the State's reference to 2:59 a.m. as the recorded time of the 911 call was within the time period to which Sturgeon testified that he made his observations and called 911 and, thus, cannot be said to have effected a substantial miscarriage of justice. Finally, we cannot say that Stark was prejudiced when Stark did nothing during Sturgeon's testimony to challenge his credibility. Simply put, Stark did not dispute Sturgeon's testimony. Therefore, Stark's second assignment of error is without merit.

Stark's Right to Confront Witnesses Through Cross-Examination Was Not Violated by Court's Actions in Limiting Inquiry Regarding McNeill's Fear of Death Penalty and Attempt to Suppress His Statements to Police.

Stark assigns that the district court erred in sustaining the State's relevancy objections, preventing testimony by McNeill regarding his fear of receiving the death penalty and McNeill's motion to suppress his own statement to police. Stark asserts that such testimony was relevant to reveal McNeill's motivation in cooperating with the State in its case against Stark and McNeill's credibility in testifying against Stark. As a result of the court's ruling, Stark argues that he was deprived of his right to confront witnesses against him.

The State argues that Stark failed to preserve the issue for appeal because he failed to make known to the trial judge the substance of the evidence he was attempting to offer through the cross-examination of McNeill. The State argues that Stark's right to confront McNeill was not violated because he was not prohibited from all inquiry into McNeill's concerns about the death penalty. The State asserts that the court properly limited questioning of McNeill regarding his own prosecution, thereby excluding irrelevant testimony and guarding against jury confusion. Finally, the State argues that any error committed by the court in limiting the cross-examination of McNeill resulted in harmless error.

[10-12] The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th amendment to the U.S. Constitution, as incorporated in the 14th amendment, as well as by article I, § 11, of the Nebraska Constitution. *State v. Johnson*, 255 Neb. 865, 587 N.W.2d 546 (1998). The functional purpose of the Confrontation Clause is to ensure the integrity of the fact-finding process through the provision of an opportunity for effective cross-examination. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination. *Johnson, supra*; *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996).

[13,14] The right of cross-examination, however, is not unlimited. *State v. Dixon*, 240 Neb. 454, 482 N.W.2d 573 (1992). The U.S. Supreme Court, in *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986), has held:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, *confusion of the issues*, the witness' safety, or *interrogation* that is repetitive or *only marginally relevant*.

(Emphasis supplied.) This court has also recognized the well-established rule in this jurisdiction that " ' " 'the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion.' " ' " *Dixon*, 240 Neb. at 463, 482 N.W.2d at 579.

In this case, Stark was not prohibited from cross-examination of McNeill to show bias. Rather, Stark was permitted to question McNeill about the reduction of his charges to second degree murder and his concern with getting the death penalty without objection. Such evidence was sufficient to support an argument that McNeill had a motive to confess and testify against Stark,

thereby questioning McNeill's credibility. Furthermore, because Stark was permitted to elicit such testimony from McNeill, it cannot be said that the jury would have received a significantly different impression of McNeill's credibility had Stark been permitted to pursue the cross-examination prevented by the court in this case.

McNeill's filing of motions to suppress his confession in the proceedings pending against him was not probative with respect to McNeill's credibility and motive to testify falsely against Stark. Information regarding McNeill's attempt to suppress statements he made to police in proceedings against him was irrelevant and could have caused jury confusion.

Given the lack of probative value of the excluded testimony and the scope of cross-examination that was permitted, we conclude that the court did not abuse its discretion. Stark's third assignment of error is without merit.

Statements Made by Court to Jury During Closing Arguments Did Not Result in Prejudice to Stark's Defense.

Discussing McNeill's credibility during closing argument, Stark argued, "[McNeill] had a huge motivation to sit up here and tell you the story he told you up here because he got a deal for it. He got second-degree murder. They took . . . death off the table." Following these comments, the State objected and asked the court to remind the jury that "in neither case at any time was the death penalty ever an issue in this case." The court indicated that such a statement was accurate, and after a conversation with counsel at the bench, the court stated to the jury, "You're instructed not to consider any information regarding the death penalty. It was not an issue in either case."

Stark asserts that the court erred in making these statements to the jury because not only were they inaccurate, but they served to bolster McNeill's credibility, indicating that McNeill was not motivated to lie during his testimony due to his fear of the death penalty.

The State asserts that both parties, as well as the court, informed jurors that the death penalty was not at issue in the case during voir dire, without any objection by Stark, and that therefore, similar statements made by the court during closing were not prejudicial. In addition, the State argues that Stark's

statements regarding the State's separate prosecution of McNeill—"[t]hey took . . . death off the table"—were not supported by evidence presented at trial. In other words, the State asserts that Stark failed to present any evidence that the State had filed an information charging McNeill with first degree murder, providing notice of aggravating circumstances to support punishment by death.

[15-17] Trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jurors. However, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). When there is some incorrect conduct by a trial court which, on review of the record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant, the error is harmless. See *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004).

Even if the court erred in making the statements complained of, the comments were not prejudicial. Stark's attack of McNeill's credibility during closing argument was adequately supported by referencing McNeill's testimony, through which it was apparent that McNeill received a reduced charge for his testimony at trial, regardless of whether the death penalty was applicable, and that McNeill had lied to officers prior to making his confession. Thus, Stark's fourth assignment of error is without merit.

Defense Counsel's Failure to Object to Specific Testimony Given by Ficenec and Cahill Did Not Result in Prejudice to Stark's Defense.

Finally, Stark asserts that he received ineffective assistance of counsel at trial due to his attorney's failure to object to certain testimony given by Ficenec and Cahill, who participated in the search of Stark's residence and the excavation of the backyard. Specifically, Stark argues that his trial counsel was ineffective in failing to object to Ficenec's testimony regarding his attempt to subject McNeill to a polygraph examination; Ficenec's testimony about a conversation he had had with McNeill prior to his confession, during which Ficenec stated that he believed that

Stark killed Fortune and that McNeill helped dispose of the body; and the testimony of Ficenec and Cahill that they used information provided by McNeill to obtain warrants to arrest Stark and search his home.

[18] Stark brings his claim of ineffective assistance of counsel on direct appeal. However, such a claim need not be dismissed merely because it is made on direct appeal. See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005). The determining factor is whether the record is sufficient to adequately review the question. *Id.* If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006). We determine that given the nature of these issues, in the absence of testimony as to counsel's strategy for not raising certain objections at trial, the record is not sufficient to evaluate the effectiveness of trial counsel. Thus, we do not consider Stark's ineffective assistance of counsel arguments in this appeal.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT and MILLER-LERMAN, JJ., participating on briefs.

CALVIN L. SJUTS, INDIVIDUALLY AND AS TRUSTEE OF THE CALVIN L. SJUTS TRUST, AND BARBARA F. SJUTS, INDIVIDUALLY AND AS TRUSTEE OF THE BARBARA F. SJUTS TRUST, APPELLANTS, V. GRANVILLE CEMETERY ASSOCIATION ET AL., APPELLEES.

719 N.W.2d 236

Filed July 28, 2006. No. S-05-124.

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. **Statutes.** The interpretation of a statute presents a question of law.

3. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Easements: Adverse Possession.** The use and enjoyment that will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession that will give title to real estate.
5. **Easements: Proof.** A party claiming a prescriptive easement must show that his or her use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
6. **Easements: Words and Phrases.** In the area of prescriptive easements, the term "exclusive" does not mean that the easement must be used by one person only. Rather, it means that the use does not depend upon a similar right in others and that it must be exclusive as against the community or public at large.
7. **Easements: Proof.** The law treats a claim of prescriptive right with disfavor, and, accordingly, such a claim requires that all the elements of such adverse use be clearly, convincingly, and satisfactorily established.
8. **Easements.** In an action for a prescriptive easement, the record must show that there is no legal impediment to the claim of a prescriptive right.
9. **Property.** A cemetery, by its inherent nature, is not subject to the laws of ordinary property.
10. ____. Cemetery property in general has a public nature.
11. ____. Under Nebraska's cemetery association laws, there is a public nature to certain of the statutory authority given cemetery associations with regard to cemetery property.
12. **Property: Easements.** In the context of a claim of a prescriptive easement against cemetery property owned by a cemetery association that has not been abandoned, the cemetery property is similar in nature to public property, and consistent with Neb. Rev. Stat. § 39-1404 (Reissue 2004), such property is not subject to a prescriptive easement claim.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

James G. Egley, of Moyer, Moyer, Egley, Fullner & Montag, for appellants.

Brian F. Beckner for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellants, Calvin L. Sjuts, individually and as the trustee of the Calvin L. Sjuts Trust, and Barbara F. Sjuts, individually and as the trustee of the Barbara F. Sjuts Trust, brought this quiet title action in the district court for Platte County against appellees,

Granville Cemetery Association and all persons having or claiming some right, title, or interest in the property involved in the action (collectively Granville), seeking a prescriptive easement to operate a center-pivot irrigation system over a portion of a 123-year-old cemetery owned by Granville in Platte County, Nebraska. The cemetery property contains at least 17 graves, all of which are marked by stone monuments. Appellants and Granville filed cross-motions for summary judgment. Following an evidentiary hearing, the district court determined that pursuant to the state statutes governing cemetery associations, Granville held certain quasi-public authority with respect to the cemetery property and that as such, the cemetery property possessed a public nature that protected it from appellants' claim of a prescriptive easement. The district court sustained Granville's motion for summary judgment, overruled appellants' motion for summary judgment, and dismissed appellants' quiet title action. Appellants filed an appeal. We affirm.

STATEMENT OF FACTS

There is essentially no dispute with regard to the material facts. In accordance with the state statutes then in effect, Granville was incorporated as a cemetery association on February 15, 1881. The current version of those laws is now codified at Neb. Rev. Stat. §§ 12-501 to 12-529 (Reissue 1997 & Cum. Supp. 2004). A board of trustees was selected, and the incorporation document was filed with the Platte County clerk on May 5, 1881. In March 1883, Granville acquired 1 acre of property located in Platte County. The deed conveying the property to Granville was recorded. Granville used the property as a cemetery. Seventeen stone grave markers presently mark burial sites within the cemetery property. The most recent stone marker is dated August 16, 1896. There is evidence in the record that as many as 20 other graves may exist in the cemetery, given the existence of various unmarked depressions in the ground. At least one Civil War veteran, F. (Francis) H. Baker, who served from January 11, 1864, to June 24, 1865, is buried in the cemetery.

There is no evidence that Granville was ever dissolved or that the cemetery property was legally abandoned. At some point in time, however, Granville's board of trustees became inactive, and

Granville's board was not reactivated until February 11, 2004. The record reflects that Granville is presently operated on a nonprofit basis.

In 1974, appellants took title to 160 acres, or a quarter section, in Platte County, initially individually, and later as trustees for their own individual trusts. The deeds conveying the quarter section to appellants purported to include the acre containing Granville's cemetery property. Appellants admit in their brief, however, that regardless of the language in the deeds, Granville "holds title to one square acre in the [quarter section]." Brief for appellants at 4. Appellants paid property taxes upon the entire quarter section until 2001, at which time, the cemetery property was taken off the tax rolls.

In 1976, appellants installed and began to operate a center-pivot irrigation system on the quarter section, and they have continued to operate the irrigation system annually, on a seasonal basis, since it was installed. When in operation, the irrigation system crosses a portion of the cemetery property. The two wheels that carry the last tower of the pivot system travel in a regular path across portions of the cemetery property, and the record shows that these wheels have left well-worn tracks as a result of crossing the cemetery grounds. Although appellants assert that the wheels of the pivot system do not cross any graves, they acknowledge that "irrigation pipe and sprinklers pass over the gravesites." Brief for appellants at 5.

On November 13, 2003, appellants filed their quiet title complaint, seeking a prescriptive easement across the cemetery property to operate their center-pivot irrigation system. Granville filed an answer, which in summary denied that appellants were entitled to the easement. Following discovery, the parties filed cross-motions for summary judgment. The cross-motions for summary judgment came on for an evidentiary hearing on August 13, 2004. Numerous witnesses testified by deposition and affidavit, including Mary Schott, a descendent of several persons buried in the cemetery.

On December 30, 2004, the district court filed its memorandum order, sustaining Granville's motion for summary judgment, overruling appellants' motion for summary judgment, and dismissing appellants' complaint. In its order, the district court

noted that it had reviewed the statutes governing cemetery associations. The court determined that under those statutes, cemetery associations possessed several characteristics with regard to cemetery property ownership that were similar to characteristics possessed by public entities. Those characteristics included the cemetery association's authority to condemn property, restrictions on the alienation of cemetery property, and the tax-exempt status of cemetery property. The district court noted that pursuant to Neb. Rev. Stat. § 39-1404 (Reissue 2004), adverse possession actions, such as an action for a prescriptive easement, cannot be maintained against governmental properties. Given the public nature of certain characteristics possessed by cemetery associations with regard to cemetery property, the district court reasoned that property owned by cemetery associations was in the nature of public property and, thus, was not subject to prescription. As a result, the court concluded that appellants were not entitled to a prescriptive easement against Granville's cemetery property to operate their irrigation system. Appellants filed their appeal.

ASSIGNMENT OF ERROR

On appeal, appellants assign three errors that can be restated as one. Appellants claim, restated, that the district court erred in sustaining Granville's motion for summary judgment, denying appellants' motion for summary judgment, and dismissing appellants' quiet title complaint.

STANDARDS OF REVIEW

[1-3] 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. *Cole v. Isherwood*, 271 Neb. 684, 716 N.W.2d 36 (2006). The interpretation of a statute presents a question of law. See *State ex rel. Musil v. Woodman*, 271 Neb. 692, 716 N.W.2d 32 (2006). When an appeal calls for statutory interpretation, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

ANALYSIS

The issue presented in this case is whether appellants can obtain a prescriptive easement for the purpose of operating irrigation equipment over property that is held by a cemetery association and that has been and continues to be used for human burial purposes. Critical to our analysis in this case is the fact that this cemetery has not lost its character as a burial place throughout its existence.

On appeal, appellants challenge the district court's decision granting Granville's motion for summary judgment, denying appellants' motion for summary judgment, and dismissing appellants' quiet title action seeking the prescriptive easement. As noted above, the district court reasoned, in part, that given the provisions of the statutes governing cemetery associations, cemetery property was of a "public nature" and that thus, the property was afforded protection from a claim of prescriptive rights pursuant to § 39-1404, which provides:

> No privilege, franchise, right, title, right of user, or other interest in or to any street, avenue, road, thoroughfare, alley or public grounds in any county, city, municipality, town, or village of this state, or in the space or region under, through or above such street, avenue, road, thoroughfare, alley, or public grounds, shall ever arise or be created, secured, acquired, extended, enlarged or amplified by user, occupation, acquiescence, implication, or estoppel.

Upon due consideration, we conclude under the facts of this case that given the statutes governing cemetery associations as well as other statutes, and given certain principles regarding property law and the law of cemetery property, the district court did not err. We affirm the district court's decision.

[4-8] Appellants claim a prescriptive easement over the cemetery association's property. In considering appellants' claim of a prescriptive easement, we refer initially to certain principles of ordinary property law. We have noted that the use and enjoyment that will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession that will give title to real estate. See *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 639 N.W.2d 905 (2002) (citing *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001)). A

party claiming a prescriptive easement must show that his or her use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. *Id.*; *Simacek v. York County Rural P.P. Dist.*, 220 Neb. 484, 370 N.W.2d 709 (1985). With regard to the element of exclusivity, however, we have recognized that in the area of prescriptive easements, "[t]he term 'exclusive' does not mean that the easement must be used by one person only." *Scoville v. Fisher*, 181 Neb. 496, 503, 149 N.W.2d 339, 344 (1967). Rather, it means that "the use does not depend upon a similar right in others and that it must be exclusive as against the community or public at large." *Id.* We have noted that the law treats a claim of prescriptive right with disfavor and that accordingly, such a claim requires all the elements of such adverse use be clearly, convincingly, and satisfactorily established. *Lake Arrowhead, Inc. v. Jolliffe, supra.* Further, as the instant case demonstrates, the record must show that there is no legal impediment to the claim of a prescriptive right. See, e.g., § 39-1404; *Topping v. Cohn*, 71 Neb. 559, 99 N.W. 372 (1904) (stating that title by adverse possession cannot be acquired against state or general government property).

Cemetery associations are created and governed pursuant to the provisions of chapter 12, article 5, of the Nebraska Revised Statutes, and thus, we review the statutory provisions relevant to the resolution of this case. Section 12-501 provides, inter alia, as follows:

> Every cemetery hereafter established, other than those owned, operated and maintained by towns, villages and cities, by churches, and by fraternal and benevolent societies, shall be owned, conducted and managed by cemetery associations organized and incorporated as hereinafter provided. . . . It shall be lawful for any number of persons, not less than five, who are residents of the county in which they desire to form themselves into an association, to form themselves into a cemetery association, and to elect any number of their members, not less than three, to serve as trustees, and one member as clerk, who shall continue in office during the pleasure of the society . . . .

Pursuant to § 12-506, cemetery associations "have the power to purchase or take by gift, devise, or by exercising the power

of eminent domain . . . . The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724." With regard to property held by cemetery associations, the cemetery association statutes provide that such property is not subject to taxation and is generally exempt from execution, attachment, or partition. See, § 12-506 (describing cemetery association property as "exempt from taxation, execution, or from any appropriation of public purchasers"); § 12-517 (generally exempting burial lots sold by cemetery association from "taxation, execution, attachment, or any other claim, lien or process whatever"); § 12-520 (providing that "[l]ands appropriated and set apart as burial grounds, either for public or private use, and so recorded in the county clerk's office of the county where such lands are situated, shall not be subject to sale on execution on any judgment to be hereafter recovered, to taxation, nor to compulsory partition").

The cemetery association statutes also restrict a cemetery association's ability to alienate property. If a cemetery association has sold a lot for burial purposes, and the purchase price of a cemetery lot has not been fully paid in 3 years, a cemetery association may "sell the unused portion of [the] lot," but only after giving 60 days' notice of its intention to sell the lot and filing proof of such notice with the register of deeds. See § 12-505.

Further, in the event a cemetery association determines that cemetery association property should cease to be used as a cemetery, due to abandonment or other reasons, the cemetery association must generally comply with the provisions of §§ 12-521 to 12-529, which require, inter alia, that the cemetery association file an action in the district court of the county where the property is located and obtain a court order to discontinue the cemetery association and to sell the unused portions of the cemetery property.

[9] These statutes deal specifically with cemetery property owned by cemetery associations, and the fact that it is property that continues to be used as a cemetery over which appellants seek a prescriptive easement to operate an irrigation system is relevant to our analysis. Compare *Cleveland Cemetery Assn v Cuyahoga Co Comrs*, 7 Ohio Law Abs. 589 (Ohio App. 1929) (granting cemetery association's request to enjoin county's

attempt to acquire easement through cemetery property, stating "such proposed easement would in some degree destroy the use of the cemetery association, or at least materially interfere with the use by the association and the lot owners"). It has been widely recognized that "a cemetery, by its inherent nature, is not subject to the laws of ordinary property." See *State ex rel. Stephan v. Lane*, 228 Kan. 379, 386, 614 P.2d 987, 993 (1980). See, also, *Abrams v. Lakewood Park Cemetery*, 355 Mo. 313, 325, 196 S.W.2d 278, 284 (1946) (stating that "[i]ndubitably, the usual and ordinary rules of real property law are modified once land is devoted to cemetery purposes"); *Smallwood v. Midfield Oil Co.*, 89 S.W.2d 1086, 1090 (Tex. Civ. App. 1935) (stating "[i]n reverence of the dead, the law segregates and removes from the realm of commerce property dedicated as a cemetery, and it is no longer a subject-matter of conveyance . . . as other property so as to interfere with the use and possession to which it has been devoted").

[10] Moreover, the cases have observed that cemetery property in general has a public nature. " '[A] cemetery is as public a place as a courthouse, or a market. It may not be frequented as much, but visits to it are necessary and as certain. . . . We may keep away from the courthouse, and avoid the market, but the place of the dead none may shun.' " *State ex rel. Stephan v. Lane*, 228 Kan. at 386, 614 P.2d at 993 (quoting *Cemetery Association v. Meninger*, 14 Kan. 312 (1875)). See, also, *Trustees of First Presbyterian Church v. Alling*, 54 N.J. Super. 141, 145, 148 A.2d 510, 513 (1959) (stating "[a] burying ground or cemetery is affected with a public interest and is a trust").

In view of the foregoing, we agree with the reasoning of the district court that for purposes of evaluating appellants' action seeking a prescriptive easement, cemetery property is quasi-public in nature and that as a result, appellants are not entitled to a prescriptive easement against Granville's cemetery property to operate an irrigation system. But see *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64, 60 N.W. 358 (1894) (stating that in context of libel action, cemetery association was considered private entity).

[11] Under Nebraska's cemetery association laws, and as recognized by other jurisdictions, it is apparent that there is a

public nature to certain of the statutory authority given cemetery associations with regard to cemetery property. Like a public entity, cemetery associations are authorized to take property by the power of eminent domain. See § 12-506. Compare *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 720, 605 N.W.2d 472, 478 (2000) (stating that actions involving eminent domain have "public nature"). Like public property in Nebraska, the property held by a cemetery association is exempt from taxation and execution. See §§ 12-506 and 12-517. Compare Neb. Rev. Stat. §§ 15-844 (Cum. Supp. 2004) (relating to tax-exempt and execution-exempt status of cities) and 77-202 (Supp. 2005) (relating to tax-exempt status of state).

[12] The authority and exemptions given to cemetery associations with regard to cemetery property are very similar to those given to public entities, and we conclude that with regard to cemetery property owned by a cemetery association, the Legislature intended that such property was quasi-public in nature. See *Edholm v. Missouri P. R. Corporation*, 114 Neb. 845, 847, 211 N.W. 206, 208 (1926) (stating in part that right-of-way seized by railroad under eminent domain power was possessed by railroad for "public use"). We agree with the district court that in the context of appellants' claim of a prescriptive easement against cemetery property owned by Granville that has not been abandoned, the cemetery property is similar in nature to public property. Thus, consistent with § 39-1404, which ordinarily precludes obtaining an interest in "public grounds," as a matter of law, appellants were not entitled to a prescriptive easement to operate an irrigation system across the cemetery property.

For the sake of completeness, we note that we are aware of certain authorities in other jurisdictions suggesting that adverse possession or prescriptive easement claims can be brought against cemetery property. See, e.g., *Bogner v. Villiger*, 343 Ill. App. 3d 264, 796 N.E.2d 679, 277 Ill. Dec. 593 (2003); *Trout v. Summit Lawn Cemetery Assoc.*, 160 Ind. App. 552, 312 N.E.2d 498 (1974); *Phinney v. Gardner*, 121 Me. 44, 115 A. 523 (1921). However, because each of these cases failed due to failure of proof, and none of these cases involved a legal discussion of cemetery association statutes similar to those enacted in Nebraska, we find these cases inapposite.

CONCLUSION

In summary, we conclude that given the public nature of certain characteristics possessed by cemetery associations with regard to cemetery property, the district court did not err when it determined that the cemetery property owned by Granville that has been in continuous use as a burial ground was in the nature of public property and, thus, was not subject to a prescriptive easement. The court did not err when it sustained Granville's motion for summary judgment, overruled appellants' motion for summary judgment, and dismissed appellants' quiet title complaint seeking a prescriptive easement over Granville's cemetery property to operate an irrigation system. Appellants' assignment of error is without merit. We affirm.

AFFIRMED.

AARON FERER AND ROBIN MONSKY, APPELLANTS, V. ERICKSON & SEDERSTROM, P.C., A LIMITED LIABILITY ORGANIZATION, A NEBRASKA CORPORATION, APPELLEE.

718 N.W.2d 501

Filed July 28, 2006. No. S-05-619.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor, and a complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery.
3. ____: ____. Complaints must set forth sufficient information to suggest that there is some recognized theory upon which relief may be granted.
4. **Negligence: Actions: Attorneys at Law.** An attorney's alleged professional misconduct gives rise to a professional negligence action.
5. **Uniform Commercial Code: Stock.** Pursuant to Neb. U.C.C. § 8-404(a)(1) (Reissue 2001), an issuer is liable for wrongful registration if the issuer has registered the transfer of security to a person not entitled to it as a result of an ineffective endorsement or instruction.
6. **Derivative Actions: Words and Phrases.** A derivative action is a suit by a shareholder to enforce a cause of action belonging to the corporation.
7. **Derivative Actions: Corporations.** A shareholder may not commence or maintain a derivative proceeding unless the shareholder adequately represents the interests of the corporation in enforcing the right of the corporation.

8. **Derivative Actions: Corporations: Standing: Proof.** Whether a plaintiff fairly and adequately represents other shareholders and the corporation involves a factual determination by the court, and the burden of proof is on the party challenging the plaintiff's standing. The derivative plaintiff is not required to prove that he or she is the proper representative of the shareholders.
9. **Actions: Corporations: Standing.** A determination of adequate representation of other shareholders and the corporation depends on two factors: (1) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the litigation, and (2) the plaintiff must not have interests antagonistic to those of the class.
10. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Because a motion pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. However, while a court's consideration of a rule 12(b)(6) motion is generally confined to the allegations in the complaint, a court may take judicial notice of matters of public record without converting a rule 12(b)(6) motion to dismiss into a motion for summary judgment.
11. **Derivative Actions: Corporations.** A plaintiff in a shareholder derivative action owes the corporation his or her undivided loyalty. The plaintiff must not have ulterior motives and must not be pursuing an external personal agenda.
12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed in part, and in part reversed.

James D. Sherrets and Jason M. Bruno, of Sherrets & Boecker, L.L.C., for appellants.

Michael F. Kinney and Daniel J. Epstein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The appellants, Aaron Ferer (Aaron) and Robin Monsky, brought derivative claims on behalf of Aaron Ferer & Sons Co. (AFSC) against Erickson & Sederstrom (E&S) and AFSC, to recover for E&S' allegedly negligent representation of AFSC. Aaron brought an individual action against the same defendants to recover for the alleged wrongful registration of his AFSC shares of common stock.

The district court granted E&S' motion to dismiss. With regard to Aaron's individual claim, the district court treated it as a claim for professional malpractice and concluded that E&S, who served as corporate counsel and transfer agent for AFSC, did not owe a duty to Aaron individually. With regard to the appellants' derivative claims, the district court found that the appellants did not fairly and adequately represent the shareholders of AFSC.

Following the entry of a final order, the appellants perfected the instant appeal, which we removed 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).

BACKGROUND

The appellants brought the present action against E&S and AFSC. This action was filed concurrently with separate actions against AFSC and majority shareholders, which are not part of this appeal.

In the operative complaint, Aaron asserts one individual claim against E&S and the appellants assert four counts against E&S and AFSC.

Count I is an individual claim on behalf of Aaron for wrongful registration against E&S only. Under this count, Aaron alleges that he was gifted 11,764 shares of common stock in AFSC by his father, Harvey Ferer, and that E&S, in its capacity as transfer agent for AFSC, canceled the stock certificate representing his 11,764 shares of common stock and caused another stock certificate to be issued for those shares in the name of Harvey Ferer. Aaron further alleges that E&S subsequently recorded a transfer of those shares to Matthew Ferer and Whitney Ferer and issued those individuals new stock certificates which represented their purported ownership of that stock. Aaron alleges that the transfer of stock to Harvey Ferer and then to Matthew Ferer and Whitney Ferer was wrongful because it was done so without Aaron's endorsement or authority.

Counts II through V are derivative claims on behalf of AFSC for breach of duty of care, breach of duty of loyalty, wrongful registration, and unjust enrichment and accounting. The appellants allege that Aaron made demand on AFSC to pursue an action against E&S and that over 90 days had elapsed without action.

Under count II, the appellants allege, inter alia, that E&S negligently advised AFSC regarding the effect of the appellants' dissent from the asset sale of AFSC, the appellants' rights to payment of the fair value of their stock under the dissenters' rights provisions found in Neb. Rev. Stat. § 21-20,141 (Reissue 1997) of the Business Corporation Act, and the appellants' entitlement to payment under AFSC's plan of partial liquidation. The appellants claim that E&S' negligent advice has and will cause AFSC to sustain numerous financial damages.

Under count III, the appellants essentially allege that E&S breached its duty of loyalty to AFSC by representing Matthew Ferer and Whitney Ferer at the same time as they represented AFSC and by facilitating the appropriation of corporate opportunities by Matthew Ferer and Whitney Ferer.

Under count IV, the appellants allege that E&S is liable for damages sustained by AFSC as a result of E&S' actions in the wrongful registration of Aaron's stock, which was ultimately reissued in the names of Matthew Ferer and Whitney Ferer.

Finally, under count V, the appellants allege that E&S is not entitled to the attorney fees paid to it by AFSC due to its negligent advice and its representation of conflicting interests. The appellants claim that to allow E&S to retain those fees would result in E&S' being unjustly enriched.

The district court granted E&S' motion to dismiss filed pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). With regard to the appellants' derivative claims, the district court found that the appellants did not fairly and adequately represent AFSC's interests as required in derivative actions. With regard to Aaron's individual claim for wrongful registration, the district court treated it as a claim for legal malpractice and concluded that E&S did not owe Aaron any duty.

The appellants filed an appeal of the dismissal of their claims to the Nebraska Court of Appeals. The Court of Appeals dismissed the appeal on the ground that the appellants were not appealing a final order. See *Ferer v. Erickson & Sederstrom*, 13 Neb. App. xlvi (No. A-04-1299, Apr. 8, 2005). On remand, the appellants filed a motion for a final order pursuant to Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004), and a motion to strike AFSC as a defendant, which motion was granted. Upon the district

court's entry of a final order, the appellants timely filed the present appeal.

ASSIGNMENTS OF ERROR

The appellants assert, restated and consolidated, that the district court erred in (1) dismissing Aaron's individual claim against E&S for wrongful registration, (2) failing to find that the appellants fairly and adequately represent the corporation in their derivative claims, and (3) considering matters outside the pleadings.

STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006); *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005); *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

ANALYSIS

Individual Claim

We first address whether Aaron failed to state a claim against E&S in his individual capacity. Aaron argues on appeal that the district court erred in dismissing his individual claim for wrongful registration against E&S on rule 12(b)(6) grounds.

[2,3] Complaints should be liberally construed in the plaintiff's favor, and a complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery. *Anderson v. Wells Fargo Fin. Accept., supra.* Nonetheless, in *Anderson*, we stated that complaints must set forth sufficient information to suggest that there is some recognized theory upon which relief may be granted. *Id.*

In his operative complaint, Aaron alleges that E&S registered a transfer of Aaron's stock to a person not entitled thereto because the transfer was registered pursuant to an ineffective endorsement or instruction. He claims the registration was ineffective because Aaron, the appropriate person, did not authorize the transfer. Specifically, Aaron alleges that E&S, in its capacity

as transfer agent for AFSC, issued stock certificate No. 468 for 11,764 shares of AFSC common stock to Aaron. Aaron further alleges that pursuant to a request by Matthew Ferer, E&S purportedly canceled certificate No. 468 and caused certificate No. 479 to be issued for 11,764 shares of AFSC common stock in the name of Harvey Ferer and subsequently in the names of Matthew Ferer and Whitney Ferer without any endorsement on certificate No. 468, duly executed stock power, or any other evidence of authority by Aaron.

The district court treated Aaron's individual claim as one based on legal malpractice. The court concluded that E&S did not owe Aaron a duty and therefore dismissed Aaron's individual claim. We disagree. We find instead that Aaron has stated a claim for wrongful registration under Neb. U.C.C. § 8-407 (Reissue 2001), and reverse the district court's order on this issue.

[4] We have stated that an attorney's alleged professional misconduct gives rise to a professional negligence action. See, *Swanson v. Ptak*, 268 Neb. 265, 682 N.W.2d 225 (2004); *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995). In the instant case, however, E&S was not acting as legal counsel with respect to the allegedly wrongful registration of Aaron's stock. Rather, it was alleged to be acting as transfer agent for AFSC.

Transfer agents are frequently employed to take charge of stock transfers on the corporate stock books and the issuance of new stock certificates in order to facilitate the transfer of shares and to guard against mistakes or overissues. 12 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 5485 (perm. ed., rev. vol. 2004). See, e.g., *Geiger v. S.E.C.*, 363 F.3d 481 (D.C. Cir. 2004); *Ins. Co. of N. America v. Breham*, 257 Or. 385, 478 P.2d 387 (1970). The transfer agent must pass on and satisfy himself as to the validity and propriety of the transfer, and the transfer agent is generally held liable for the improper issue and transfer of certificates, both to the corporation and to persons injured. 12 Fletcher, *supra*. See § 8-407. There is no restriction under Nebraska law that a transfer agent must be a lawyer or a law firm. See, e.g., Neb. U.C.C. § 8-102 (Reissue 2001). In fact, a transfer agent may be any individual or a department of the corporation itself, though the transfer agent is usually a bank or trust company with a special transfer

department and trained staff. 12 Fletcher, *supra*. Accordingly, an attorney or law firm may serve as transfer agent for a corporation notwithstanding its role as legal counsel for the corporation and, consequently, may be liable under § 8-407 for wrongful registration. Were we to conclude otherwise, we would in essence be saying that attorneys and law firms enjoy a special protection from liability under § 8-407, which holds a transfer agent liable to the owner of a security for the wrongful registration of that security. See § 8-407, official comment 1.

In the instant case, E&S was alleged to be acting in its capacity as transfer agent for AFSC, not in its capacity as legal counsel, when it transferred Aaron's shares of AFSC stock. Hence, E&S may potentially be held liable under § 8-407 for wrongful registration.

Having determined that E&S transferred Aaron's stock shares in its capacity as transfer agent, we must next determine whether Aaron alleged sufficient facts to state a claim for wrongful registration under § 8-407.

[5] Section 8-407 bestows on a transfer agent the same obligations to the holder or owner of a security as the issuer and holds a transfer agent liable where the issuer would itself be liable. Neb. U.C.C. § 8-404(a)(1) (Reissue 2001) provides that an issuer is liable for wrongful registration if the issuer has registered the transfer of security to a person not entitled to it as a result of an ineffective endorsement or instruction. The official comment 1 to this section explains in part that "[t]he fact that the issuer had no reason to suspect that the [e]ndorsement was forged or that the issuer obtained the ordinary assurances under section 8-402 does not relieve the issuer from liability."

Aaron has alleged in his operative complaint that E&S transferred his shares of AFSC to Harvey Ferer and then to Matthew Ferer and Whitney Ferer, despite his failure to endorse the stock certificate or authorize the transfer. If Aaron's allegations are true, which we must assume for purposes of a motion to dismiss, see *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006), E&S would be liable under § 8-407 because of the alleged ineffective endorsement. We therefore conclude that Aaron has stated a claim for wrongful registration, and the district court erred in concluding otherwise.

DERIVATIVE CLAIMS

The appellants next argue that the district court erred in dismissing their derivative claims against E&S.

The appellants assert that the district court's determination that they do not fairly and adequately represent the interest of the company was erroneous.

[6,7] A derivative action is a suit by a shareholder to enforce a cause of action belonging to the corporation. *Sadler v. Jorad, Inc.*, 268 Neb. 60, 680 N.W.2d 165 (2004). A shareholder may not commence or maintain a derivative proceeding unless the shareholder adequately represents the interests of the corporation in enforcing the right of the corporation. Neb. Rev. Stat. § 21-2071 (Reissue 1997). This requirement is particularly important because the derivative plaintiff occupies the position of a fiduciary character vis-a-vis the shareholders. *Cohen v. Beneficial Loan Corp*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

[8] "[W]hether a plaintiff fairly and adequately represents other shareholders and the corporation involves a factual determination by the court and the burden of proof is on the party challenging the plaintiff's standing." 13 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 5981.40 at 152-53 (perm. ed., rev. vol. 2004). See, also, *Smallwood v. Pearl Brewing Company*, 489 F.2d 579, 592 n.15 (5th Cir. 1974) ("[t]he burden is on the defendants to obtain a finding of inadequate representation"). Thus, the derivative plaintiff is not required to prove that he or she is the proper representative of the shareholders. *Id.*

[9] A determination of adequate representation depends on two factors: " '(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.' " *Vanderbilt v. Geo-Energy Ltd.*, 725 F.2d 204, 207 (3d Cir. 1983) (quoting *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir. 1975)). There has been no challenge to the qualifications of the appellants' attorney; thus, our inquiry is limited to the question of whether the appellants' interests are antagonistic to those of the corporation.

As described by the Connecticut Supreme Court, "[t]he kind of assurance demanded by due process and the equitable requirement of adequate and fair representation is that the nominal plaintiff 'be free of any interest which holds the potential of influencing his conduct of the litigation in a manner inconsistent with the interests' of [the] shareholders." *Barrett v. Southern Connecticut Gas Co.*, 172 Conn. 362, 377, 374 A.2d 1051, 1058 (1977). Although our focus in the instant case is on the interests of the corporation, rather than the interests of the shareholders, we find that the same assurances apply.

According to E&S, the appellants do not fairly and adequately represent the interests of the corporation because they are motivated by their personal interests. In support of this contention, E&S asserts that it asked the district court to take judicial notice of the multiple lawsuits brought by the appellants against AFSC. See, Ferer v. Aaron Ferer & Sons Co. et al., Douglas County District Court, docket 1007, No. 217; Ferer v. Aaron Ferer & Sons Co. et al., Douglas County District Court, docket 1031, No. 621; Ferer v. Aaron Ferer & Sons Co. et al., Douglas County District Court, docket 1038, No. 306.

[10] Because a rule 12(b)(6) motion tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. See *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977 (9th Cir. 2002). However, while a court's consideration of a rule 12(b)(6) motion is generally confined to the allegations in the complaint, a court may take judicial notice of " 'matters of public record' " without converting a rule 12(b)(6) motion to dismiss into a motion for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001); Neb. Rev. Stat. § 27-201(6) (Reissue 1995) ("[j]udicial notice may be taken at any stage of the proceeding"). See, also, *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993). Thus, the district court may, and in this case did, consider the other lawsuits filed by the appellants in determining whether the district court erred in granting E&S' rule 12(b)(6) motion.

[11] In *Smith v. Ayres*, 977 F.2d 946 (5th Cir. 1992), the plaintiff was a shareholder of a family corporation owning what the court described as an infinitesimal stake in the corporation. The

court described the suit as a "protracted internecine feud" and said that the trial court could properly consider the plaintiff's vindictiveness toward the defendant in determining whether the plaintiff was an adequate representative. *Id.* at 947. The court further stated that "[a] plaintiff in a shareholder derivative action owes the corporation his undivided loyalty. The plaintiff must not have ulterior motives and must not be pursuing an external personal agenda." *Id.* at 949. A review of the record in this case reveals that the appellants' personal interests are at the forefront of this litigation.

The appellants' derivative claims are each connected to how AFSC treated the appellants in regard to their stock. In addition, the facts which form the basis of the appellants' derivative claims in the instant case also form the basis for the appellants' claim against AFSC and the majority shareholders in Ferer v. Aaron Ferer & Sons Co. et al., Douglas County District Court, docket 1007, No. 217. The appellants cannot, based on the same facts, fairly and adequately represent the interests of AFSC while simultaneously suing AFSC based upon the same set of facts. The appellants' derivative claims in this case are representing their own interests and not enforcing the rights, if any, of AFSC against E&S. We, therefore, conclude that the district court did not err in dismissing the appellants' derivative claims against E&S.

[12] Having determined that the district court did not err in concluding the appellants do not fairly and adequately represent the interests of AFSC and, therefore, in dismissing their derivative claims against E&S, we need not address E&S' argument on appeal that the appellants' derivative claims are barred by the statute of limitations. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

Considering Matters Outside Pleadings

In their final assignment of error, the appellants argue that the district court erred in considering matters outside the pleadings in its evaluation of the merits of E&S' rule 12(b)(6) motion. As previously explained, a court may consider matters over which it could take judicial notice in ruling on a rule 12(b)(6) motion. Accordingly, we conclude that the district court did not err in

considering the other cases brought by the appellants against AFSC and the majority shareholders.

CONCLUSION

For the reasons discussed above, we conclude that Aaron has stated a claim against E&S for wrongful registration under § 8-407. We therefore reverse the district court's dismissal of Aaron's individual claim against E&S. We affirm, however, the court's dismissal of the appellants' derivative claims against E&S for the reason that they do not fairly and adequately represent AFSC.

AFFIRMED IN PART, AND IN PART REVERSED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
JOHN F. KEEN, APPELLANT.
718 N.W.2d 494

Filed July 28, 2006. No. S-05-945.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
3. **Judgments: Collateral Attack.** When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
4. **Judgments.** A judgment is an adjudication of all the matters that are essential to support it, and every proposition assumed or decided by the court leading up to the final conclusion and on which such conclusion is based is as effectually passed upon as the ultimate question which is finally resolved.
5. **Res Judicata.** The rule of res judicata is grounded on public policy and necessity to end litigation and the hardship imposed on a person by being vexed twice for the same cause.
6. **Constitutional Law.** A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.
7. **Constitutional Law: Statutes.** Not even a statute which is declared unconstitutional is void ab initio insofar as a previous judgment based upon the statute is concerned.
8. **Res Judicata.** The conclusiveness of the judgment in a case extends not only to matters actually determined, but also to other matters which could properly have been

raised and determined therein. The rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented by the exercise of diligence.

Appeal from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge, on appeal thereto from the County Court for Sarpy County, ROBERT C. WESTER, Judge. Judgment of District Court affirmed.

James Walter Crampton for appellant.

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

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

HANNON, Judge, Retired.

NATURE OF CASE

In the county court for Sarpy County, John F. Keen pled guilty to having violated Neb. Rev. Stat. § 60-6,196 (Reissue 2004) and was convicted of second-offense driving while under the influence (DUI). The enhancement to second offense was based on a DUI conviction Keen received in 1998 under Omaha Mun. Code, ch. 36, art. III, § 36-115 (1995). In county court and on appeal to the district court, Keen unsuccessfully maintained that the 1998 conviction could not be used for enhancement purposes because it was not a "[p]rior conviction" as defined in Neb. Rev. Stat. § 60-6,197.02(1)(a) (Reissue 2004). He contended that under § 60-6,197.02(1)(a), the 1998 conviction was neither a conviction "[f]or a violation of section 60-6,196" nor a conviction "for a violation of a city or village ordinance enacted in conformance with section 60-6,196." To support his argument, Keen cited *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003), in which § 36-115 (1998) of the Omaha Municipal Code was declared unenforceable because it was inconsistent with § 60-6,196 (Cum. Supp. 2000). The State maintained and the district court found that Keen's position was an impermissible collateral attack on his 1998 conviction. We agree and affirm Keen's conviction and sentence.

STANDARD OF REVIEW

[1] The issue presented by this appeal is a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Furrey*, 270 Neb. 965, 708 N.W.2d 654 (2006).

[2] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006).

FACTS AND PROCEDURAL BACKGROUND

On October 13, 2004, Keen was arrested for DUI. On November 19, the State charged Keen with, among other charges, second-offense DUI and alleged that he had previously been convicted of DUI in 1998. On January 13, 2005, pursuant to a plea agreement, Keen pled guilty to the DUI charge.

After accepting Keen's plea and finding him guilty on the DUI charge, the county court held an enhancement hearing. As evidence of a prior conviction, the State offered exhibit 1, which consisted of copies of several documents related to Keen's 1998 conviction in Douglas County under § 36-115 (1995) of the Omaha Municipal Code, a DUI ordinance. Exhibit 1 showed that on July 21, 1998, Keen was represented by counsel when he pled no contest to the DUI charge and was convicted and sentenced for that offense. The court received exhibit 1 into evidence without objection and ordered a presentence investigation.

On March 18, 2005, Keen asked the county court to reconsider its finding of second-offense DUI because his 1998 conviction was not a valid "[p]rior conviction" for enhancement purposes, given that the Omaha ordinance under which he was convicted did not conform to the state DUI statute, as required by § 60-6,197.02(1)(a). Keen cited *Loyd* as authority for his position. On April 8, the county court reopened the case in order to reconsider the enhancement issue, and the parties were allowed to make an evidentiary record. The court acknowledged that exhibit 1 offered by the State had already been received into evidence. Keen introduced a copy of the Omaha ordinance under which he was convicted in 1998. The court again found that Keen's latest conviction was a second offense and proceeded to sentence him. Keen was ordered to serve 60 days in jail (with

credit for 1 day served) and to pay a fine of $500. The court also revoked his driver's license for 1 year.

Keen appealed from the conviction, enhancement, and sentence to the district court, alleging the county court had erred in finding that he had a valid prior conviction, in denying probation, and in imposing an excessive sentence. The district court found that Keen was attempting to collaterally attack his 1998 conviction, in violation of *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999). The district court determined that Keen's 1998 DUI conviction was valid for enhancement purposes and affirmed the conviction and sentence.

Keen appealed, and this court moved the appeal to its docket on its own motion, pursuant to its statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

We summarize Keen's assignments of error as alleging the district court erred in finding (1) that Keen was attempting to collaterally attack the validity of his prior conviction, (2) that his 1998 DUI conviction under an Omaha city ordinance constituted a prior conviction for purposes of DUI sentence enhancement, and (3) that the sentence was not excessive.

ANALYSIS

Keen claims he is not making a collateral attack on his 1998 DUI conviction under the Omaha city ordinance because he is not arguing that the 1998 conviction was invalid but that it could not be used to enhance his current DUI conviction under the state DUI statutes. State law provides for enhanced penalties when a DUI defendant has one or more prior convictions. See Neb. Rev. Stat. § 60-6,197.03 (Reissue 2004). A prior conviction, as defined in § 60-6,197.02(1)(a), includes "[a]ny conviction for a violation of a city or village ordinance enacted in conformance with section 60-6,196" which was received within the 12-year period immediately preceding the current offense.

Keen maintains that to use the 1998 conviction for enhancement purposes, the State must prove he was convicted under an ordinance which was enacted "in conformance with" the DUI statute. See § 60-6,197.02(1)(a). He bases his position on *State*

v. Loyd, 265 Neb. 232, 655 N.W.2d 703 (2003), in which this court held on a direct appeal by the State that § 36-115 (1998) of the Omaha Municipal Code was unenforceable because the penalty provisions therein were inconsistent with those in § 60-6,196 (Cum. Supp. 2000).

Keen received his 1998 conviction under a 1995 version of § 36-115, whereas in *Loyd*, this court reviewed a 1998 version of the same ordinance. The 1995 version of the ordinance was slightly different from the 1998 version and was somewhat inconsistent with the controlling version of § 60-6,196. Given our conclusion in this opinion, however, we need not decide whether that distinction is significant. For purposes of this opinion, we assume that the DUI ordinance under which Keen was convicted in 1998 would be unenforceable under *Loyd* and that if Keen had pled not guilty and raised the issue of the ordinance's invalidity when he was prosecuted in 1998, the ordinance would have been invalidated.

[3] The State maintains that Keen is collaterally attacking his 1998 DUI conviction in the present case. When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). When the court has jurisdiction over the person and subject matter, a party to the proceeding will be bound by the judgment in the case when collaterally attacking it, even though the judgment was irregularly or erroneously entered. See, *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985); *State ex rel. Ritthaler v. Knox*, 217 Neb. 766, 351 N.W.2d 77 (1984). Until such judgment is rendered void in a proper proceeding and set aside, it remains "'"'valid and binding for all purposes and cannot be collaterally attacked.'"'" *Mayfield*, 221 Neb. at 124, 375 N.W.2d at 148.

In *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999), this court held that the validity of a prior DUI conviction used for sentencing enhancement could not be collaterally attacked. This court opined that "[a]t some point, judgments of conviction must become final and the State should not be required to 'rummage through frequently nonexistent or difficult to obtain . . .

transcripts or records' in order to defend them against collateral attack." *Id.* at 187, 595 N.W.2d at 926. *Louthan* overruled several cases which had held that a defendant could object to the validity of a judgment if he or she initiated a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.

[4] This court has recognized that a judgment is an adjudication of all the matters that are essential to support it, and every proposition assumed or decided by the court leading up to the final conclusion and on which such conclusion is based is as effectually passed upon as the ultimate question which is finally resolved. *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 181 N.W.2d 119 (1970). In *Norlanco, Inc.*, the city of Norfolk had passed an ordinance in 1959 annexing the plaintiff's property to the city. Following annexation proceedings in the district court, the plaintiffs' property was formally annexed in 1963. In 1967, the plaintiffs sought an injunction enjoining the county from assessing and levying municipal taxes on the plaintiffs' property annexed to the city. The plaintiffs contended that a statute similar to the one under which their property was annexed had been declared unconstitutional by this court in a 1967 case and that, thus, the Norfolk ordinance and the annexation decree were null and void as unconstitutional. This court declined to consider whether the relevant statute was unconstitutional, choosing instead to dispose of the case on res judicata grounds.

[5,6] In *Norlanco, Inc.*, 186 Neb. at 105, 181 N.W.2d at 122, this court stated that the "rule of res judicata is grounded on public policy and necessity to end litigation and the hardship imposed on a person by being vexed twice for the same cause." The court noted that at the time of the annexation proceedings, the plaintiffs in *Norlanco, Inc.*, had questioned neither the jurisdiction of the court nor the constitutionality of the act under which the proceeding had been commenced and had in effect waived those claims. Quoting the U.S. Supreme Court, this court declared that "'"'[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" . . .'" *Id.* at 106, 181 N.W.2d at 123, quoting

Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

[7] Similar reasoning was applied in *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276*, 204 Neb. 316, 282 N.W.2d 576 (1979). In that case, property owners sought to have a sanitary and improvement district declared void ab initio although they had not appealed the decree which established the district years earlier. This court opined that "[n]ot even a statute which is declared unconstitutional is void ab initio insofar as a previous judgment based upon the statute is concerned," *id.* at 323, 282 N.W.2d at 580, and found that the earlier decree was not subject to collateral attack because the court had jurisdiction of the parties and the subject matter.

In the present case, we deal not with an ordinance which was declared unconstitutional but one which might have been unenforceable on the basis of the statutory interpretation adopted in *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003). The principles and reasoning which support holdings that parties are generally not permitted to collaterally attack prior judgments, even when the prior judgment is based upon an unconstitutional statute, also support a holding that a defendant cannot collaterally attack a conviction by alleging that it is invalid because it was obtained pursuant to an ordinance which was later declared to be unenforceable as inconsistent with a statute.

[8] Keen claims he is not questioning the validity of his 1998 DUI conviction but merely asserting that the conviction could not be used to enhance his current conviction given that the Omaha DUI ordinance was subsequently invalidated in *Loyd* for being inconsistent with the state DUI statute. He is in fact seeking to attack one of the determinations in the 1998 conviction, that is, that the 1995 ordinance was valid. Keen's argument ignores the breadth of the doctrine of res judicata, which this court recognized in *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 181 N.W.2d 119 (1970). The doctrine of res judicata, precluding subsequent litigation of the same cause of action,

> "is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which

> could properly have been raised and determined therein. The rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented by the exercise of diligence."

Id. at 106, 181 N.W.2d at 123.

Inherent in Keen's 1998 conviction was a determination that the Omaha DUI ordinance to which he pled no contest and under which he was convicted was enforceable, and inherent in that determination was a finding that the city ordinance under which he was convicted was "in conformance with" the state statute. See § 60-6,197.02(1)(a). Thus, Keen could have and should have raised these issues in the 1998 prosecution.

Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). Only a void judgment is subject to collateral attack. *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985). Although Keen's 1998 DUI conviction may have been voidable and subject to reversal upon appeal, it was not void.

We conclude that Keen's 1998 DUI conviction was valid for the purpose of sentence enhancement and that Keen is attempting to collaterally attack that conviction. Therefore, we affirm the judgment of the district court on this issue.

Keen also assigns as error his sentence. He claims that his sentence was excessive and that he should have been sentenced to probation. His argument, however, is based upon the assumption that we would rule in his favor on the enhancement issue. His theory is that the county court should have imposed a sentence appropriate for a first-offense DUI conviction. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006). Upon reviewing the record on appeal from the county court, the district court found that Keen's sentence was not excessive and that probation would not have been appropriate. We conclude that the district court did not err in affirming Keen's sentence, and thus, we affirm the judgment of the district court.

CONCLUSION

The district court correctly determined that Keen was attempting to collaterally attack his 1998 DUI conviction in the enhancement proceedings concerning his current DUI conviction. The district court also correctly affirmed Keen's sentence. We affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

HAZEL I. WILSON, APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES AND RON ROSS, DIRECTOR OF THE NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES.

718 N.W.2d 544

Filed August 4, 2006. No. S-04-1085.

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.
2. **Medical Assistance: Federal Acts: States.** The Medicaid program, 42 U.S.C. § 1396 et seq. (2000 & Supp. II 2002), was established by Congress in 1965 as a cooperative federal-state program in which the federal government reimburses states for a portion of the costs of medical care for persons in need.
3. **Medical Assistance: Federal Acts.** The purpose of the Medicaid program is to provide medical assistance to those whose resources are insufficient to meet the costs of necessary medical care.
4. **Medical Assistance: Federal Acts: States.** A state is not obligated to participate in the Medicaid program; however, once it has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.
5. **Administrative Law: Medical Assistance: Federal Acts: States.** Nebraska has elected to participate in the Medicaid program by its enactment of Neb. Rev. Stat. § 68-1018 et seq. (Reissue 2003, Cum. Supp. 2004 & Supp. 2005), and the Department of Health and Human Services is responsible for the administration of the Medicaid program in this state.
6. ____: ____: ____: ____. Under federal law, a state participating in the Medicaid program must establish resource standards for the determination of eligibility. These standards must take into account only such income and resources as are available to the

applicant or recipient, as determined in accordance with standards prescribed by the Secretary of the U.S. Department of Health and Human Services.

7. **Medical Assistance: Federal Acts: Time.** The 1993 amendment to the Medicaid act applies only to trusts established after August 10, 1993, the effective date of the enactment.
8. **Medical Assistance: Federal Acts: Statutes.** To the extent that state Medicaid regulations conflict with the federal Medicaid statutes, the federal provisions prevail.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded with directions.

Kimberli D. Dawson and Bruce L. Hart, of Hart, Dawson & Sudbeck, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, Michael J. Rumbaugh, Royce N. Harper, and Patricia R. Wenzl, Special Assistant Attorney General, for appellee.

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

GERRARD, J.

NATURE OF CASE

An applicant for Medicaid was found ineligible for benefits because she transferred resources to her sons for less than fair market value within 60 months preceding her application for benefits. On appeal to the district court, the order was affirmed. The applicant appeals the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

The appellant, Hazel I. Wilson, and her husband, Ray C. Wilson, executed a revocable trust agreement in April 1991 to establish the Ray and Hazel Wilson Trust (the Trust). The Trust agreement was later amended in February 1994. The Trust agreement provided, in part:

> At any time or times prior to the death of a GRANTOR by a duly executed and acknowledged written instrument substantially in the form set forth at Appendix "B" attached hereto, GRANTORS may, either jointly or individually, amend or alter this Trust Agreement in any manner, in whole or in part; and may revoke this Trust Agreement in whole or in part.

The Trust agreement provided that upon the death of either Ray or Hazel, the Trust estate would be divided into two new trusts, "Trust A" and "Trust B." The Trust agreement specified the assets to be placed in each of the trusts. Ray died on July 23, 1998, and pursuant to the Trust agreement, the Trust estate was divided into Trusts A and B.

The Trust agreement instructed the trustee to distribute from the net income of Trust A, and to the extent that the income is insufficient, from the principal of Trust A, all amounts required for the medical care, education, support, and maintenance of Hazel. Further, Hazel was given the power to withdraw all or any part of the principal of Trust A by delivering a signed document describing such property to the trustee. Upon receipt of the document, the trustee would distribute the property to Hazel. The Trust agreement similarly instructed the trustee to distribute from the net income of Trust B all amounts required for the health, education, support, and maintenance of Hazel. While the income generated by Trust B was available to Hazel, she was not entitled to invade the principal of Trust B.

In 1999, Hazel transferred property totaling $636,638.07 to her sons, Douglas L. Wilson and Randy R. Wilson. The property included real estate that had been held in the Trust. The property was deeded from the Trust to Hazel by trustee's deed and then deeded by Hazel to Douglas and Randy. Hazel also directed the trustee to distribute various stock and bond accounts, cash, and other personal property to Douglas and Randy.

On January 28, 2003, while residing in a nursing home, Hazel applied for Medicaid benefits with a local office of the Nebraska Department of Health and Human Services (DHHS) in Kearney, Nebraska. The application was revised in part on February 21. Hazel was found ineligible for benefits as a result of her gifting resources for less than fair market value within the 60 months preceding her application. Further, Hazel was instructed that she would remain ineligible until approximately August 2014.

Hazel filed a request for hearing with DHHS. After an administrative hearing, the director of DHHS affirmed the decision finding Hazel to be ineligible for Medicaid benefits. Hazel filed a petition for review in the district court; a hearing was held, and

the court affirmed the judgment of the director. Hazel filed this timely appeal.

ASSIGNMENTS OF ERROR

Hazel assigns, restated, that the district court erred in affirming the decision of DHHS (1) finding Hazel to be ineligible for Medicaid assistance because she transferred resources for less than fair market value within the 60 months preceding the date of her application and (2) determining that Hazel may not reapply for Medicaid benefits until approximately August 2014.

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. *Mortgage Elec. Reg. Sys. v. Nebraska Dept. of Banking*, 270 Neb. 529, 704 N.W.2d 784 (2005).

ANALYSIS

Hazel assigns that the district court erred in affirming the decision of DHHS finding Hazel to be ineligible for Medicaid benefits as a result of her gifting of resources for less than fair market value within the 60 months preceding her application for assistance. Specifically, Hazel asserts that DHHS incorrectly applied a 60-month look-back period in determining Hazel's eligibility for benefits.

Medicaid Background.

[2-6] The Medicaid program, 42 U.S.C. § 1396 et seq. (2000 & Supp. II 2002), was established by Congress in 1965 as a cooperative federal-state program in which the federal government reimburses states for a portion of the costs of medical care for persons in need. See *Boruch v. Nebraska Dept. of Health & Human Servs.*, 11 Neb. App. 713, 659 N.W.2d 848 (2003). The purpose of the program is to provide medical assistance to those whose resources are insufficient to meet the costs of necessary

medical care. *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006). A state is not obligated to participate in the Medicaid program; however, once it has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations. *Id.* Nebraska has elected to participate in the Medicaid program by its enactment of Neb. Rev. Stat. § 68-1018 et seq. (Reissue 2003, Cum. Supp. 2004 & Supp. 2005), and DHHS is responsible for the administration of the Medicaid program in this state. *Pohlmann, supra.* Under federal law, a state participating in the Medicaid program must establish resource standards for the determination of eligibility. These standards must take into account only such income and resources as are available to the applicant or recipient, as determined in accordance with standards prescribed by the Secretary of the U.S. Department of Health and Human Services. *Id.*

Prior to 1986, irrevocable trusts were not considered assets in determining eligibility for Medicaid benefits. As a result, many people were receiving benefits when they had irrevocable trusts containing assets that would otherwise have made them ineligible for public assistance. Many people began to take advantage of the "trust gap" in Medicaid, establishing trust funds to shield their assets. In 1986, Congress passed an amendment attempting to close the gap so that assets in certain trusts would be counted in determining whether a Medicaid applicant satisfied the maximum assets requirement. *Boruch, supra.* See § 1396a(k) (Supp. IV 1986). Congress repealed § 1396a(k) in 1993 and passed § 1396p(d), expanding the types of trusts that could be considered to preclude applicants from Medicaid eligibility. See, § 1396p (Supp. V 1993); *Pohlmann, supra.*

Section 1396p(d)(3)(B) states, in relevant part:

> In the case of an irrevocable trust—
>
> (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—

> (I) to or for the benefit of the individual, shall be considered income of the individual, and
>
> (II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and
>
> (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

If an institutionalized individual disposes of assets for less than fair market value on or after the look-back date specified by federal law, the individual is ineligible for medical assistance for a period of time. See § 1396p(c)(1)(A). Section 1396p(c)(1)(B) states:

> (i) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d) of this section, 60 months) before the date specified in clause (ii).
>
> (ii) The date specified in this clause, with respect to—
>
> (I) an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan[.]

In other words, the look-back period is calculated from the date that an institutionalized individual applies for Medicaid assistance. The look-back period is generally 36 months, except for a 60-month look-back period for payment from a revocable trust, see § 1396p(d)(3)(A)(iii), or portions of an irrevocable trust not payable to the individual, see § 1396p(d)(3)(B)(ii).

[7,8] Congress specified that the 1993 amendment to the Medicaid act applies only to trusts established after August 10,

1993, the effective date of the enactment. *Boruch v. Nebraska Dept. of Health & Human Servs.*, 11 Neb. App. 713, 659 N.W.2d 848 (2003). The Nebraska regulation implementing the extended look-back periods is located at 469 Neb. Admin. Code, ch. 4 § 005.03A (2001), which states, "[t]o determine if a client or his/her spouse deprived himself/herself of a resource to qualify for medical assistance, the worker shall look back 36 months. The worker shall look back 60 months in cases of a trust or annuity." To the extent that state regulations conflict with the federal statutes, the federal provisions prevail. See, *Reames v. Oklahoma ex rel. OK Health Care*, 411 F.3d 1164 (10th Cir. 2005); *Ramey v. Reinertson*, 268 F.3d 955 (10th Cir. 2001); *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006). Although § 005.03(A) purports to apply a 60-month look-back period to all trust assets, federal law requires us to consider whether a 36- or 60-month look-back applies to the trust assets at issue in this case.

Application of Medicaid Provisions to Present Case.

DHHS, and the district court, determined that the transfers at issue here fell within the 60-month look-back period. Hazel argues that the 60-month look-back period in § 1396p(c)(1)(B)(i) does not apply to the transfers at issue because the Trust from which the transfers were made was established on April 13, 1991, before the effective date of the amendment creating the trust-specific, 60-month look-back period. Thus, Hazel argues that transfers from the Trust are subject to review under the look-back provision as it existed prior to the amendment; specifically, § 1396p(c)(1) (Supp. IV 1992), which specified a 30-month look-back period for examining the disposal of resources for less than fair market value. Hazel argues that application of the 30-month look-back period would require DHHS to examine transfers that occurred only as far back as July 28, 2000 (30 months preceding Hazel's Medicaid application), that Hazel's transfers to her sons occurred over 7 months prior to that date, and that thus, DHHS erred in finding Hazel to be ineligible for Medicaid benefits based on such transfers.

In contrast, DHHS asserts that the transfers at issue in this case were made from Trusts A and B, which were established

upon Ray's death in 1998. Accordingly, DHHS argues that the trusts at issue were established after the effective date of the 1993 amendment and are, therefore, subject to review under the more inclusive trust provisions added in 1993.

However, we need not determine whether the transfers are subject to the 30-month look-back period in place prior to the 1993 amendment, or the look-back period as it exists now, because the transfers at issue do not render Hazel ineligible for benefits under the application of either version of the statutes. DHHS incorrectly applied a 60-month look-back period when the look-back period specified by federal law was no longer than 36 months.

Assuming, for the sake of argument, that DHHS is correct in arguing that Trusts A and B were created upon Ray's death in 1998 by operation of the original Trust agreement, then the asset transfers at issue are subject to the 1993 Medicaid amendments. Those amendments impose a 36-month or 60-month look-back period for reviewing asset transfers for Medicaid eligibility. Under § 1396p(c)(1)(B)(i), the 60-month look-back period applies only to "payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d)." The Trust at issue in this case became irrevocable upon Ray's death and therefore falls under § 1396p(d)(3)(B)(i) or (ii), of which only the latter is subject to a 60-month look-back period.

The Trust agreement provides that Hazel shall receive distributions from the income of Trusts A and B and the principal of Trust A. Therefore, such sums are considered resources available to the individual, and any transfer of such sums is considered a transfer of assets under § 1396p(d)(3)(B)(i), subject to the 36-month look-back period in § 1396p(c)(1)(B). The principal of Trust B, to which Hazel was not entitled under the Trust agreement, is considered to be disposed of or transferred by Hazel on the date upon which Hazel was no longer entitled to payment from such amount; such disposal is subject to the 60-month look-back period of § 1396p(c)(1)(B).

The property transferred by Hazel to her sons in this case was necessarily from the income and principal of Trust A or the income of Trust B. Hazel was not entitled to any distribution or

use of the corpus of Trust B and, therefore, could not have legally initiated transfers of property from the principal of Trust B to her sons. None of the parties to this case have offered argument or evidence suggesting that any of the Trusts at issue were not created, funded, or managed according to their terms. Therefore, the transfers in this case could have been made only from the income and principal of Trust A or the income of Trust B. The 60-month look-back period does not apply to either source of property. Consequently, even assuming that the 1993 amendments to the Medicaid act are applicable to Trusts A and B, DHHS may only look as far back as January 2000 for transfers affecting Hazel's eligibility for benefits, 36 months prior to Hazel's January 28, 2003, application. The transfers took place in 1999 and, therefore, are not considered for purposes of determining Hazel's eligibility for benefits.

The 1999 transfers made by Hazel to her sons were outside the look-back period for Medicaid eligibility when considered under either the pre-1993 Medicaid statutes or the statutes as amended in 1993. The transfers do not render Hazel ineligible for benefits. Thus, the district court erred in affirming the findings and order of DHHS.

CONCLUSION

Based on the foregoing, we reverse the judgment of the district court with directions to reverse the order of DHHS and remand the cause for reinstatement of Hazel's Medicaid benefits.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
CLIFFORD J. DAVLIN, APPELLANT.
719 N.W.2d 243

Filed August 4, 2006. No. S-05-547.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

2. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
3. **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.
4. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. 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.
5. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
6. **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.
7. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
8. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
9. **Actions: Appeal and Error.** 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. Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.
10. **Indictments and Informations.** Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.
11. **Jury Instructions.** In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
12. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), 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.
13. **Trial: Expert Witnesses.** The trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.
14. **Trial: Rules of Evidence: Expert Witnesses.** A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. The court must first determine whether the witness is qualified to testify as an expert by reference to his or her knowledge, skill, experience, training, and education. If it is necessary for the court to conduct an analysis under *Daubert v. Merrell Dow Pharmaceuticals,*

Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. To aid the court in its evaluation, the court may consider several factors, including but not limited to whether the reasoning or methodology has been tested and has general acceptance within the relevant scientific community. Once the reasoning or methodology has been found to be reliable, the court must determine whether the methodology was properly applied to the facts in issue. In making this determination, the court may examine evidence to determine whether the methodology was properly applied and whether the protocols were followed to ensure that the tests were performed properly. Finally, the court determines whether the probative value of the expert evidence and the opinions related thereto are substantially outweighed by the danger of unfair prejudice, as required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

15. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision under these evidentiary rules will not be reversed absent an abuse of discretion.
16. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
17. **Homicide: Photographs.** If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome.
18. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
19. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
20. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

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

Dennis R. Keefe, Lancaster County Public Defender, Scott P. Helvie, and Matthew G. Graff for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Clifford J. Davlin appeals his conviction and sentence for second degree murder. After his first conviction was reversed by this court in *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002), Davlin was convicted a second time. Following his second conviction, Davlin was sentenced to life in prison. On appeal, Davlin assigns error to the jury instructions given by the district court for Lancaster County, the court's denial of his motion to continue the trial, and the court's admission of certain evidence including expert testimony, Davlin's statements to detectives, and photographs of the victim's body. Davlin also raises issues with regard to double jeopardy, the form of the verdict, sentencing, and ineffective assistance of counsel. We affirm Davlin's conviction and sentence.

STATEMENT OF FACTS

The underlying facts of this case were described in Davlin's appeal of his first conviction as follows:

> Tamara Ligenza, also known as Tamara Martin, was found dead in her Lincoln apartment after a fire on September 7, 1993. Ligenza was legally blind and was 6 months pregnant at the time of her death. Ligenza had been living with Davlin, but on September 6, Ligenza told Davlin to leave the apartment. . . . Davlin remained at or near the apartment building on September 6 and into the morning of September 7.
>
> Ligenza was last seen alive, by her roommate, at about 1 a.m. on September 7, 1993. Ligenza lived in a house that had been converted to a duplex with one entrance that led to both apartments. Witnesses who lived in the building testified that they were awakened at approximately 4:30 a.m. by reports of a fire in the building. Davlin was identified as being in the duplex at the time of the fire, staying in the other apartment. Firefighters removed a severely burned body from the bedroom of Ligenza's apartment; the body

> was later identified by dental records as Ligenza's. An autopsy was performed, and the coroner's physician concluded that Ligenza had been killed by manual strangulation prior to the fire.

State v. Davlin, 263 Neb. at 286-87, 639 N.W.2d at 638-39.

Davlin was charged in 1997 with first degree murder in connection with the death of Ligenza. Davlin was also charged with arson. Following a trial in 2000, the jury found Davlin guilty of second degree murder and arson. He appealed to this court and assigned various errors. We first rejected Davlin's assertion that the district court erred in retroactively applying this court's decision in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), and in therefore not instructing the jury that malice was an element of second degree murder. However, we concluded that the district court had committed reversible error when it instructed the jury on the essential elements of second degree murder by stating that in order to convict Davlin, the jury must find that Davlin caused Ligenza's death " 'intentionally, but *without malice*.' " (Emphasis supplied.) *Davlin*, 263 Neb. at 292, 639 N.W.2d at 642. We therefore reversed Davlin's conviction for second degree murder and remanded the cause for a new trial on that count. We noted that because the jury acquitted Davlin of first degree murder, the Double Jeopardy Clause barred the State from retrying Davlin for first degree murder but did not prevent the State from proceeding with a new trial on a charge of second degree murder because the evidence at the first trial was sufficient to support Davlin's conviction. We rejected Davlin's remaining assignments of error and affirmed his conviction and sentence for arson. *Davlin, supra*. Among the assignments of error we rejected were assertions that the district court erred in admitting the expert testimony of Ken Scurto, a fire investigator for the State Fire Marshal's office, and Brian Nehe, a fire inspector for the city of Lincoln.

Upon remand, the State, on April 12, 2002, filed an amended information charging Davlin with having caused the death of Ligenza "intentionally, but without premeditation." On July 3, Davlin filed a motion to quash the amended information. He argued that the information should be quashed because it failed to allege that the killing was committed with "malice" and because

it failed to allege that the killing was committed with the "specific intent to kill." The district court denied the motion to quash.

On December 27, 2002, Davlin filed a plea in bar asserting that a second prosecution for second degree murder would violate the Double Jeopardy Clause of the 5th and 14th Amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution. The district court overruled the plea in bar, and Davlin filed an interlocutory appeal of the denial to this court. We granted the State's motion for summary affirmance and affirmed the district court's order overruling the plea in bar. *State v. Davlin*, 266 Neb. xxiv (No. S-03-151, July 16, 2003). The State filed a second amended information on December 6, 2004, charging Davlin with second degree murder.

Prior to the new trial, Davlin filed a motion for a hearing regarding the State's experts including, inter alia, the fire experts, Scurto and Nehe, and the pathologists, Drs. John Porterfield, Matthias Okoye, and Thomas Bennett. Davlin sought a hearing pursuant to *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). Davlin also moved in limine to preclude the State from presenting the opinion testimony of such witnesses. Davlin specified that his challenge was not to the qualifications of the witnesses or to the validity of the scientific methods used, but, rather, that he was challenging the reliability of the experts' application of the scientific methods to the facts of this case. Following a hearing, the court denied Davlin's motion in limine with regard to the opinions of Porterfield, Okoye, and Bennett. The court generally denied the motion in limine with regard to the opinions of Scurto and Nehe, but sustained the motion in limine as to Scurto's opinion regarding the duration of the fire. The testimony of the pathologists and of the fire experts was admitted at trial over Davlin's objections.

Jury selection began on January 18, 2005. Before the jurors were brought into the courtroom, Davlin moved to continue the trial on the basis that he wished to secure the appearance of two witnesses who had appeared for the State in the first trial and who had been subpoenaed but had not been located by the State. Davlin asserted that both could provide potentially exculpatory

testimony. The court denied Davlin's motion to continue, and jury selection and trial proceeded. Neither the State nor Davlin offered the testimony of these witnesses from the prior trial into evidence at this trial.

At trial, the court admitted over Davlin's objection recordings of three conversations between Davlin and certain Lincoln police detectives. These included a September 7, 1993, conversation with Det. Larry Barksdale, a September 11 conversation with Det. James Breen, and a November 22 conversation with Barksdale. Each of the conversations concerned events surrounding the fire, Davlin's relationship with Ligenza, and the police investigation of the fire and Ligenza's death. The court also admitted, over Davlin's objections, various photographs and slides of Ligenza's body. These included two photographs of the back of the body, five slides taken during the autopsy, and five photographs that were made from the autopsy slides.

The case was submitted to the jury on January 31, 2005. The court instructed the jury on the elements of second degree murder by stating that in order to find Davlin guilty, the jury must find that Davlin caused the death of Ligenza and that he "did so intentionally, but without premeditation." On February 1, the jury returned a verdict of guilty of second degree murder. The verdict form signed by the presiding juror stated "**We, the Jury**, duly impaneled and sworn in the above-entitled cause, do find the defendant, CLIFFORD J. DAVLIN, **guilty of second degree murder**."

On April 5, 2005, the court sentenced Davlin to life imprisonment and ordered that the sentence be served consecutively to any other sentences being served by Davlin, including the sentence previously imposed for arson. In imposing the sentence, the court stated:

> Having regard for the nature and circumstances of the crime and the history, character and condition of . . . Davlin, the Court finds that imprisonment of . . . Davlin is necessary for the protection of the public and because a lesser sentence would depreciate the seriousness of his crime and promote disrespect for the law.
>
> I do not believe that I am in a position to change the sentence that I imposed previously for the same offense.

> It is therefore the judgment and the sentence of the Court that you, Clifford J. Davlin, be and hereby are ordered committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of life.

Davlin appeals his conviction and sentence.

ASSIGNMENTS OF ERROR

Davlin asserts on appeal that his conviction for second degree murder in this case was in violation of the Double Jeopardy Clause. Davlin also asserts that the district court erred in (1) failing to quash the information because it did not contain and allegation that Davlin had the specific intent to kill Ligenza and failing to instruct the jury that it must find that Davlin had the specific intent to kill Ligenza, (2) failing to instruct the jury that malice was a material element of second degree murder, (3) failing to grant his motion to continue trial, (4) admitting into evidence the opinions of the fire investigators as to the cause and nature of the fire, (5) admitting into evidence the opinions of the pathologists as to the cause of Ligenza's death, (6) admitting into evidence the tape recordings of his statements to police detectives, and (7) admitting into evidence photographs and slides of Ligenza's body. Davlin also asserts (1) that the jury verdict form was unclear and ambiguous because it did not specify that Ligenza was the victim of second degree murder, (2) that the court abused its discretion in sentencing him because the court felt bound to impose the same sentence that it had imposed after the prior conviction, and (3) that he was denied effective assistance of counsel in various respects.

STANDARDS OF REVIEW

[1] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

[2,3] A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be

disturbed on appeal absent an abuse of discretion. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). 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. *Id.*

[4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005). 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. *Id.*

[5,6] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *Mason, supra.* A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005).

[7] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

ANALYSIS

Double Jeopardy.

Davlin first asserts that his conviction for second degree murder on retrial subjected him to double jeopardy in violation of the federal and Nebraska Constitutions. We conclude that because the issue has already been decided by this court in this prosecution, reconsideration of the issue is precluded in this appeal. See *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

Davlin argues that he was " 'impliedly acquitted' " of second degree murder in the first trial because at that trial, the court instructed the jury that to convict Davlin of second degree murder, it must find that he caused Ligenza's death " 'intentionally, but *without malice*.' " (Emphasis supplied.) Brief for appellant at 18-19. The court in the first trial wherein Davlin was convicted of second degree murder defined "malice" as an intentional act, and Davlin argues that when the jury in that trial found that he

acted "without malice," it found that he did not act intentionally. Because it is a necessary element of second degree murder that the defendant acted " 'intentionally, but without premeditation,' " Davlin argues that the jury in the first trial effectively acquitted him of second degree murder and that therefore, it was a violation of double jeopardy to try him a second time for second degree murder. *Id.* at 18.

However, we have already decided the issue against Davlin. In remanding the cause in the first appeal, we specifically stated that the Double Jeopardy Clause did not "prevent the State from proceeding with a new trial on a charge of second degree murder." *Davlin*, 263 Neb. at 309, 639 N.W.2d at 653. In addition, prior to the second trial, Davlin filed a plea in bar on double jeopardy grounds. Davlin took an interlocutory appeal of the district court's denial of the plea in bar, and we summarily affirmed the denial. *State v. Davlin*, 266 Neb. xxiv (No. S-03-151, July 16, 2003).

[8,9] Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). 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. *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005). Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. *Id.* Davlin has presented no such facts.

Our previous holdings that the Double Jeopardy Clause did not prevent retrial constitute the law of the case and preclude reconsideration of the issue in this appeal. We therefore reject Davlin's first assignment of error.

"Specific Intent" in Information and in Elements Instruction.

Davlin next asserts that the district court erred in failing to quash the amended information because it failed to allege that Davlin had the specific intent to kill Ligenza and that the court erred in failing to instruct the jury that in order to find Davlin

guilty of second degree murder, the jury needed to find that Davlin had the specific intent to kill Ligenza. Because both the information and the elements instruction used statutory language, we conclude that the district court did not err in denying the motion to quash or in giving its elements instruction.

[10] In the operative information, the State charged Davlin with second degree murder pursuant to Neb. Rev. Stat. § 28-304 (Reissue 1995) and alleged that Davlin "did cause the death of [Ligenza] intentionally, but without premeditation." Davlin moved to quash the information on the basis that, inter alia, the information failed to allege that Davlin had the specific intent to kill. The district court rejected the motion. We have stated that where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). The information in this case used the language of § 28-304(1) which provides, "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." We therefore conclude that the district court did not err in rejecting Davlin's motion to quash the information.

With respect to the elements instruction, we note that Davlin concedes that trial counsel failed to object to the instruction and therefore failed to preserve the issue for appeal. However, we consider the instruction issue because Davlin also asserts that he received ineffective assistance of trial counsel when counsel failed to object to the instruction. We conclude that the instruction was not erroneous and that therefore, Davlin was not prejudiced when counsel did not object to the instruction.

Davlin argues that the elements instruction, which stated that the jury must find Davlin caused the death of Ligenza "intentionally, but without premeditation," defined second degree murder as a general intent crime and that therefore, the jury could find him guilty if it found that he intentionally set in motion events that caused Ligenza's death even though he did not specifically intend to kill her. Davlin argues that this court has recognized second degree murder as a specific intent crime because we have said that second degree murder "require[s] the intentional killing of another human being," *State v. McCracken*, 260

Neb. 234, 251, 615 N.W.2d 902, 917-18 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), and that "[t]he distinction between second degree murder and manslaughter is the presence or absence of intent to kill," *State v. Jackson*, 258 Neb. 24, 38, 601 N.W.2d 741, 752 (1999).

[11] We have stated that "in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute." *State v. Sanders*, 269 Neb. 895, 913, 697 N.W.2d 657, 672 (2005). The elements instruction in this case used the language of the statute and stated that in order to find Davlin guilty, the jury was required to find Davlin "caused the death" of Ligenza "intentionally, but without premeditation."

Furthermore, the instruction as stated requires a finding of specific rather than general intent. The instruction requires that the jury find Davlin intentionally "caused the death" of Ligenza; therefore, contrary to Davlin's assertion, the instruction would not permit the jury to find Davlin guilty of second degree murder if the jury found that, without an intent to cause Ligenza's death, Davlin simply set in motion events that happened to cause her death.

We conclude that the elements instruction was not erroneous in the respect challenged, and we further conclude that the fact counsel did not object to the instruction did not prejudice Davlin's defense.

"Malice" in Information and in Elements Instruction.

Davlin asserts that the district court erred in failing to quash the information because it did not allege malice and in failing to include malice as an element of second degree murder in its instructions to the jury. Davlin argues that the trial court erred by retroactively applying this court's holding in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Davlin concedes that this court decided this question against him in the appeal of his first conviction. See *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). We reject this assignment of error, both on its merits for the reasons set forth in *Davlin, supra*, and on the further ground that our holding in that opinion is the law of the case. See, *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

Motion to Continue Trial.

Davlin asserts that the district court abused its discretion by failing to grant his motion to continue the trial. We find no abuse of discretion.

Davlin moved for a continuance to allow time to locate two witnesses who had testified at the first trial. Davlin concedes that his motion to continue trial was an oral motion rather than a written motion as required under Neb. Rev. Stat. § 25-1148 (Reissue 1995). However, he notes that this court has stated that failure to comply with § 25-1148 "is but a factor to be considered in determining whether a trial court abused its discretion in denying a continuance." *State v. Santos*, 238 Neb. 25, 28, 468 N.W.2d 613, 615 (1991). Davlin further argues that if his motion was properly denied because it was an oral rather than a written motion, then trial counsel provided ineffective assistance by failing to make a written motion.

A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Gales, supra.* 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. *Id.*

Davlin asserts in his appellate brief that one of the two witnesses who had testified at the first trial could have been helpful to the defense because his fingerprints were found on a can of charcoal lighter fluid in the commons area of the house in which Ligenza was killed. He further asserts that the other witness was "thought to" have seen a " 'mystery man' " who was at Ligenza's apartment on the night she was killed. Brief for appellant at 26. He also generally asserts that both men were "possible" alibi witnesses. *Id.*

We conclude that the district court did not abuse its discretion when it denied a continuance. At the trial level, Davlin generally described the testimony the witnesses could have provided as noted above, and he made the assertion that they "might" have exculpatory information. Upon questioning by the court, Davlin's counsel could not give any reason to think that the witnesses would be found within days or weeks if a continuance

were granted. We further note that Davlin's argument that the witnesses could have provided helpful testimony is belied by the fact that although both witnesses were apparently unavailable, he did not attempt to enter any of their prior testimony into evidence at this trial. We reject this assignment of error, and we conclude that trial counsel's failure to file a written motion did not prejudice Davlin's defense.

Testimony of Fire Experts.

Davlin asserts that the district court erred in admitting into evidence the opinions of the fire investigators Scurto and Nehe. He argues that their opinions as to the cause and nature of the fire were not admissible because the fire investigation methodology they used was not valid in the abstract and was not applied in a reliable manner. We conclude that the district court did not abuse its discretion in admitting the testimony of Scurto and Nehe.

We note first that the State argues that law-of-the-case doctrine bars consideration of the issue in this appeal because the issue of admissibility of Scurto's and Nehe's testimony was decided against Davlin in the appeal from the prior trial. However, because an expert's testimony and opinions may vary from one trial to the next, we determine that the law-of-the-case doctrine does not necessarily preclude a foundational challenge to an expert's testimony in a retrial. We further note that in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), we adopted the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and ordered that such standards be applied prospectively for trials commencing on or after October 1, 2001. The *Daubert/Schafersman* standards were not applicable in Davlin's first trial which commenced in March 2000, *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002), but were applicable in the retrial which commenced in January 2005. We therefore consider the district court's decision of the *Daubert/Schafersman* challenge to the expert testimony presented at retrial.

[12,13] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006). An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), 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. *Mason, supra.* When the opinion involves scientific or specialized knowledge, this court held in *Schafersman, supra*, that we will apply the principles of *Daubert, supra.* Under our recent *Daubert/Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Schafersman, supra.*

[14] A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. *Mason, supra.* The court must first determine whether the witness is qualified to testify as an expert by reference to his or her knowledge, skill, experience, training, and education. If it is necessary for the court to conduct a *Daubert* analysis, then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. To aid the court in its evaluation, the court may consider several factors, including but not limited to whether the reasoning or methodology has been tested and has general acceptance within the relevant scientific community. Once the reasoning or methodology has been found to be reliable, the court must determine whether the methodology was properly applied to the facts in issue. In making this determination, the court may examine evidence to determine whether the methodology was properly applied and whether the protocols were followed to ensure that the tests were performed properly. Finally, the court determines whether the probative value of the expert evidence and the opinions related thereto are substantially outweighed by the danger of unfair prejudice, as required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). See *Mason, supra.*

The district court in this case noted that as to both Scurto and Nehe, Davlin did not challenge their individual qualifications, nor did he challenge the scientific validity or reliability of the methodology they employed. Instead, Davlin's challenge was to whether the methodology was applied in a reliable manner. The

court noted that Scurto and Nehe both generally followed the guidelines set forth in the National Fire Protection Association's publication No. 921 (NFPA 921). The court noted that although neither Scurto nor Nehe rigidly followed the guidelines of NFPA 921, such guidelines were intended as a model, and that Scurto's and Nehe's deviations did not affect the reliability of their opinions. The district court found that a reasonable basis existed for Scurto's and Nehe's opinions as to the origin of the fire and as to whether the fire was intentionally set. The court did not find a reasonable basis for, and therefore did not allow, Scurto's opinion as to the duration of the fire.

On appeal, Davlin criticizes the methodology followed by Scurto and Nehe as well as their application of such methodology. The district court noted that Scurto and Nehe generally followed the guidelines of NFPA 921. As we have recently noted, NFPA 921 has been accepted as a valid and reliable methodology. See *Perry Lumber Co. v. Durable Servs.*, 271 Neb. 303, 710 N.W.2d 854 (2006). Davlin does not appear to have challenged the scientific validity and reliability of the methodology set forth by NFPA 921 at the trial level, and nothing in the record calls such validity and reliability into question. As we noted in *Perry Lumber Co.*, the *Daubert* and *Schafersman* standards do not require that courts "'"'reinvent the wheel each time that evidence is adduced,'"'" 271 Neb. at 311, 710 N.W.2d at 861, and because Davlin did not present evidence to call the methodology into question, a *Daubert* analysis of the methodology itself was not necessary in this case.

Rather than challenging the methodology, Davlin challenged Scurto's and Nehe's application of such methodology. The district court in this case thoroughly reviewed the procedures used by Scurto and Nehe and, as noted above, found that a reasonable basis existed for their opinions as to the origin of the fire and as to whether the fire was intentionally set. Although Davlin asserts that Scurto and Nehe failed to properly follow certain aspects of the NFPA 921 methodology, our review of the district court's consideration of procedures followed by Scurto and Nehe leads us to conclude that the district court did not abuse its discretion in determining that they had reasonable bases for the opinions the court allowed them to give and that the district

court therefore did not abuse its discretion by admitting the opinion testimony of Scurto and Nehe. We reject this assignment of error.

Testimony of Pathologists.

Davlin also asserts that the district court erred in rejecting his *Daubert* challenges and admitting the opinions of the pathologists, Porterfield, Okoye, and Bennett. He argues that their opinions regarding the cause of Ligenza's death failed to meet *Daubert* standards because they did not apply their methodologies in a reliable manner. We conclude that the district court did not abuse its discretion in admitting the testimony of Porterfield, Okoye, and Bennett.

Similar to its response with respect to the challenges to the fire experts' testimony, the State asserts that consideration of Davlin's challenges to the pathologists' testimony is barred by the law-of-the-case doctrine because the same evidence was challenged in the first appeal. However, as noted above with regard to the fire experts, an expert's testimony and opinions may vary from one trial to the next, and the law-of-the-case doctrine does not necessarily preclude a foundational challenge to the expert's testimony in a retrial. We therefore consider Davlin's challenges to the pathologists' testimony.

Davlin does not challenge the doctors' qualifications, nor does he question their methodologies. Instead, he claims that there were failings in the manner in which Porterfield conducted the original autopsy and that such failings made his opinions unreliable. He further argues that the failings in Porterfield's autopsy also made Okoye's and Bennett's opinions unreliable because, in addition to their own failings, they based their opinions in part on Porterfield's findings.

The district court in this case thoroughly reviewed the procedures used by Porterfield, Okoye, and Bennett and, as noted above, found that a reasonable basis existed for their opinions. We note that much of Davlin's argument challenging the reliability of Porterfield's examination is based on the testimony of a pathologist who testified at Davlin's first trial and critiqued Porterfield's procedures and opinions. Although testimony critiquing the procedures and opinions of another expert is an acceptable form of expert testimony, *Perry Lumber Co. v. Durable*

Servs., 271 Neb. 303, 710 N.W.2d 854 (2006), a reasonable critique of an expert's procedures and opinion does not necessarily indicate that such procedures were so unreliable as to make the expert's opinion testimony inadmissible. Our review of the district court's consideration of the procedures followed by Porterfield, Okoye, and Bennett leads us to conclude that the district court did not abuse its discretion in determining that they had reasonable bases for their opinions and that the court therefore did not abuse its discretion by admitting the opinion testimony of Porterfield, Okoye, and Bennett. We reject this assignment of error.

Tape Recordings of Davlin's Statements to Police Detectives.

Davlin asserts that the district court erred in admitting tape recordings of three conversations Davlin had with police detectives Breen and Barksdale. He argues that his statements were not relevant and that even if they were relevant, they should have been excluded pursuant to Neb. Evid. R. 403, § 27-403, because the probative value of the statements was substantially outweighed by the danger of unfair prejudice. We conclude that the evidence was relevant and that it was not unfairly prejudicial.

Davlin argues that the tape recordings were not relevant because in the conversations, he did not make an admission of guilt, and because his statements shed no light on how Ligenza died or whether Davlin had the opportunity to cause her death. He further argues that even if the statements were relevant, they were unfairly prejudicial because they contained statements that portray him in a negative light. These statements included the following: a reference to the fact that Davlin had been in the military during the Vietnam War, references to Davlin's attempts to hire a private investigator to look into Ligenza's death, references to the fact that Davlin had gone on a "flower drive" to raise money to buy flowers for Ligenza's funeral, and a reference that Davlin had found a lock of Ligenza's hair after her death and had kept it as a keepsake. He argues that these statements portray him as "a rather strange individual who seemed to be discussing peculiar subject matter" with the police. Brief for appellant at 43.

[15] The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat.

§ 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, § 27-403, and a trial court's decision under these evidentiary rules will not be reversed absent an abuse of discretion. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). We conclude that the district court did not abuse its discretion in admitting the statements. Davlin's conversations with the police detectives included discussion of various matters concerning Davlin's activities preceding and following Ligenza's death. The conversations also included discussion regarding Davlin's relationship with Ligenza. We determine that the court could reasonably have concluded that these discussions were relevant to establish that Davlin had the opportunity to commit the crime, in that he was near Ligenza's apartment at the time she was killed and the fire was started and that he had a motive to commit the crime because of the nature of his relationship with Ligenza. We also determine that the court could reasonably have concluded that the tape recordings were not unfairly prejudicial. The portions of the conversations which Davlin claims portray him as a "strange" individual were of minor duration in the context of the entire conversations and do not portray Davlin in such a negative light that they would be unfairly prejudicial in the context of the entirety of the statements. We conclude that the district court did not abuse its discretion by admitting the tape recordings into evidence, and we reject this assignment of error.

Admission of Photographs and Slides of Ligenza's Body.

Davlin asserts that the district court erred in admitting into evidence photographs of the back of Ligenza's body, photographs taken during the autopsy, and slides of the autopsy photographs. Davlin argues that the photographs were not relevant and that even if they were relevant, their admission was unfairly prejudicial. We conclude that the photographs were relevant and that their admission was not unfairly prejudicial.

Davlin argues that the photographs were not relevant because none of the photographs showed physical injury to the throat and they therefore did not support the State's theory that Ligenza was strangled. He also argues that the photographs were not necessary to establish identity, nor were they relevant to any issue regarding the condition of the body or the nature of the injuries or to establishing malice or intent. Davlin argues that

even if the photographs were relevant, their probative value was outweighed by the danger of unfair prejudice. He asserts that the shocking, gruesome, and grisly nature of the photographs of a burned corpse would be so emotionally overwhelming as to override the jury's objectivity.

[16,17] The admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). Likewise, in a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent. *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999).

We determine that the photographs were relevant. The photographs of the back of the body were used to illustrate testimony by the pathologists who stated that the fact that the back was not as badly burned as the front and sides indicated that the fire started after Ligenza was dead because otherwise she would have attempted to escape and the burns would have been more evenly distributed. The slides and photographs from the autopsy were used to illustrate portions of the testimony of the doctor who performed the autopsy. The photographs illustrated observations made by the doctor from which he formed opinions regarding the cause and timing of death. The testimony of the pathologists and the doctor who performed the autopsy was relevant because it indicated that Ligenza's death was not caused by the fire, therefore supporting the State's theory that Davlin strangled Ligenza before he started the fire, and because it contradicted an alternative finding that the fire caused Ligenza's death. The photographs supported the testimony and were relevant to the same issues.

Because the photographs and slides were relevant to important issues in the case, we conclude that the district court did not abuse its discretion in determining that their probative value

outweighed their potential prejudicial effect and in admitting the photographs and slides into evidence. We reject this assignment of error.

Verdict Form.

Davlin asserts that the verdict form returned by the jury was insufficient as a matter of law because it was unclear and ambiguous. Davlin concedes that no objection was made at trial to the verdict form, but he additionally argues ineffective assistance of counsel for failure to object. We conclude that the verdict form was sufficient and that the fact counsel did not object to the verdict form did not prejudice Davlin's defense.

Davlin argues that the verdict form was insufficient because it simply stated that Davlin was guilty of second degree murder and it did not name Ligenza as the victim. Davlin notes that there was evidence that Ligenza was pregnant at the time of her death, and he argues that the jury might have found that he had caused "a death other than the death of Tamara Ligenza." Brief for appellant at 48.

We do not find the verdict form in this case to be indefinite or uncertain. The verdict form states that the jury found Davlin "guilty of second degree murder." Although the form does not name the victim, the jury instructions made clear to the jury that the charges involved the death of Ligenza. The court instructed the jury that in order to find Davlin guilty of second degree murder, it needed to find that he caused the death of Ligenza. Therefore, the verdict form stating that the jury found Davlin guilty of second degree murder sufficiently indicates that the jury found Davlin had caused the death of Ligenza. We reject Davlin's assignment of error and conclude that the fact counsel did not object to the verdict form did not prejudice his defense.

Sentencing.

Davlin asserts that the district court abused its discretion when it imposed a sentence of life imprisonment simply because the court had given the same sentence after his first conviction. We conclude that the court did not abuse its discretion in sentencing Davlin.

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

State v. Aldaco, 271 Neb. 160, 710 N.W.2d 101 (2006). Second degree murder is a Class IB felony, § 28-304(2), and a sentence of life imprisonment is within the statutory limits for a Class IB felony, Neb. Rev. Stat. § 28-105 (Reissue 1989). Therefore, we will not disturb the sentence absent an abuse of discretion.

Davlin argues that the court felt that it was bound to give the same sentence it gave after his first conviction and that the court therefore did not consider all relevant factors. Davlin notes that at sentencing, the court stated, "I do not believe that I am in a position to change the sentence that I imposed previously for the same offense." Davlin argues that this statement indicates that the court did not consider the appropriate factors and did not use its discretion but simply gave the same sentence that was given in the first trial.

We do not read the court's statement as indicating that the court felt it was bound to give the same sentence as in the first trial. To the contrary, the court stated:

> Having regard for the nature and circumstances of the crime and the history, character and condition of . . . Davlin, the Court finds that imprisonment of . . . Davlin is necessary for the protection of the public and because a lesser sentence would depreciate the seriousness of his crime and promote disrespect for the law.

We read the court as stating that after reviewing the presentence report prepared for this trial and considering all the relevant factors, the court had not seen anything that would change its conclusion that a sentence of life imprisonment was appropriate. The court used its discretion and simply noted that it had come to the same conclusion it had come to in the first trial. We therefore conclude that the court did not abuse its discretion in sentencing Davlin.

Other Assignments of Error.

In his brief on appeal, Davlin makes additional arguments not repeated here in which he claims error at the retrial. We have considered all such claims and find them to be without merit.

Ineffective Assistance of Counsel.

Finally, Davlin asserts that he was denied effective assistance of trial counsel. Davlin gives various reasons why trial counsel

was ineffective, including, inter alia, failure to adequately investigate and prepare the case, failure to adequately cross-examine and confront witnesses, failure to present certain witnesses, and failure to adequately challenge certain evidence. We conclude that each of Davlin's claims of ineffective assistance of counsel not previously commented on in this opinion either is without merit or is not capable of adequate review on direct appeal.

[18] To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). Certain of Davlin's allegations of ineffective assistance of counsel have been considered herein with respect to other assignments of error, specifically, trial counsel's purported failures to object to the elements instruction, to file a written motion to continue, and to object to the verdict form. We have determined that such purported failures did not prejudice Davlin's defense, and we therefore reject Davlin's claims of ineffective assistance with respect to such claims.

[19,20] Davlin has different counsel on appeal, and in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review. See *id.* Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

In order to preserve his claims of ineffective assistance of counsel, Davlin has raised various claims which he recognizes require an evidentiary hearing and cannot be resolved on direct appeal. We conclude that the record on appeal is not sufficient to review Davlin's claims of ineffective assistance, other than those claims rejected above, and we therefore do not address Davlin's remaining claims of ineffective assistance of counsel.

CONCLUSION

Having rejected each of Davlin's assignments of error, we affirm Davlin's conviction and sentence.

AFFIRMED.

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

IRVING F. JENSEN COMPANY, INC., AN IOWA CORPORATION, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

719 N.W.2d 716

Filed August 11, 2006. No. S-04-1315.

1. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
2. **Contracts: Claims.** The State Contract Claims Act governs all contract disputes between the claimant and the State of Nebraska or a Nebraska state agency.
3. **Contracts: Claims: Time.** Neb. Rev. Stat. § 81-8,306 (Reissue 2003) of the State Contract Claims Act provides that contract claims permitted under the act are barred unless the claim is filed with the risk manager within 2 years of the time at which the claim accrued.
4. **Limitations of Actions.** Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
5. **Actions: Contracts: Time: Damages.** A cause of action in contract accrues at the time of breach or the failure to do the thing agreed to. This is so even though the nature and extent of damages may not be known.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded.

Thomas H. DeLay, of Jewell, Collins & DeLay, for appellant.

Jon Bruning, Attorney General, and Martel J. Bundy for appellee.

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

McCORMACK, J.

NATURE OF CASE

Irving F. Jensen Company, Inc. (Jensen), appeals the decision of the district court which found that Jensen's petition against the State of Nebraska, Department of Roads (DOR), was time barred.

BACKGROUND

In April 1998, Jensen and the DOR entered into a written contract whereby Jensen was the contractor on two construction projects commonly known as the Tarnov Wetland Site and US-81 South of Tarnov projects. The Tarnov Wetland Site, which is the subject of this action, involved the excavation and construction of a wetlands mitigation site.

With regard to the construction of the wetlands mitigation site, the contract provided:

> The contractor will be required to remove 300,000 cubic meters of material from the wetland bank as "Excavation, Borrow" for [the US-81 South of Tarnov project]. The remainder of the material will be removed and paid for as "Excavation" for [the Tarnov Wetland Site].
>
> The bottom one-half meter of the mitigation site and the 3 pond areas will be at or near the water table. This material will be wet and may be wasted at the site shown in the plans, not to exceed elevation 465.0, as directed by the engineer. This material would be suitable for use in the embankment, but will be slow to dry.

The contract also included by reference the "1996 Metric Supplemental Specifications to the Standard Specifications for Highway Construction Series 1985" (the Specifications), published by the DOR. Section 102.08 of the Specifications required in pertinent part that the bidder carefully examine the site of proposed work before submitting a proposal. Section 102.08 further provided that the submission of the bid was considered conclusive evidence that the bidder examined the site and was satisfied with and understood the conditions to be encountered in performing the work and other requirements of the contract.

Before commencing construction of the wetlands mitigation site, Jensen and its subcontractor for excavation of the site, J.P. Theisen & Sons, Inc. (Theisen), determined that the soil conditions were wetter than anticipated at the time of bidding. As a

result of the wetter conditions, Jensen and Theisen determined that excavation measures different from those anticipated at the time of bidding would need to be employed and that the excavation of the site would be more costly than originally anticipated.

Section 104.02 of the Specifications provided as follows:

> (1) Differing site conditions:
>
> a. The Contractor shall notify the Department in writing of the specific differing conditions before they are disturbed, before any additional work is performed, and as soon as the condition is discovered.
>
> (1) This includes subsurface or latent physical conditions which differ materially from those indicated in the contract.
>
> (2) It also includes unknown physical conditions of an unusual nature and differing materially from those ordinarily encountered and generally recognized as inherent in the work provided in the contract.
>
> b. Before the site is disturbed or the affected work is performed, the Engineer shall be given an opportunity to investigate.
>
> c. Upon written notification, the Engineer will investigate the differing conditions. If the Engineer determines that they do materially differ and will result in an increase or decrease in the cost or time required for the performance of any work under the contract, a cost (excluding loss of anticipated profits) or time allowance adjustment will be made. The Engineer will make a written determination, and the contract will be modified in writing if a change is warranted.
>
> d. No contract adjustment which results in a benefit to the Contractor will be allowed unless the Contractor has provided the required written notice.

Section 109.05(9)(a) of the Specifications provided:

> In any case where the Contractor feels that extra compensation is due for "extra work" or material neither clearly covered in the contract nor ordered in writing by the Engineer, the Contractor shall give written notice of his/her intention to make a claim for such extra compensation before the work begins.

In the spring of 1998, Jensen and Theisen notified the DOR that conditions were wetter than anticipated at the time of bidding

and requested additional payment. Jensen and Theisen also notified the DOR that it intended to seek damages for the "extra work" not included in its original bid.

In May and July 1998, the DOR conducted two meetings regarding the wetlands mitigation site project. An engineer for the DOR testified that at the May meeting, the president of Theisen inquired into how the DOR had determined the volume of material to be removed from the wetlands mitigation site and the water table information. The engineer testified that he advised Jensen and Theisen that the DOR had estimated this information based on soil borings that the DOR had taken. The engineer testified that Jensen and Theisen did not request the information from the soil borings at that time. At the July meeting, Jensen again informed the DOR that it believed the water table was higher than stated in the contract and that in order to complete the project, it would have to proceed differently at an additional cost.

On July 29, 1998, the DOR informed Jensen that site conditions were not different from those indicated in the contract, and it denied in writing Jensen's claim for additional compensation. Thereafter, rather than suffer liquidated damages, which Jensen faced under the terms of the contract if it did not complete the project within the authorized timeframe, Theisen began the excavation of the wetlands mitigation site. Following the completion of the excavation, Jensen calculated the extra costs it incurred as a result of the alleged differing site conditions and on September 7, 2000, made a claim for payment in the amount in excess of that allowed under the contract. On May 22, 2001, the DOR denied Jensen's claim. Thereafter, the DOR issued its final acceptance of the work and completion of the project. Under the terms of the contract, the DOR reserved the right to make changes to the contract or changes to the estimated compensation until final acceptance.

On August 29, 2001, Jensen filed a claim against the DOR under the State Contract Claims Act, Neb. Rev. Stat. § 81-8,302 et seq. (Reissue 2003), with the State Claims Board. The DOR objected to the submission of Jensen's claim to the State Claims Board, and the claim was withdrawn from consideration, allowing for the filing of a claim with the district court pursuant to

§ 81-8,305(3). In its operative petition, Jensen asserted causes of action for breach of contract, fraudulent misrepresentation, negligent misrepresentation, and breach of implied covenant of good faith and fair dealing. The DOR denied liability and raised as an affirmative defense the statute of limitations. The matter was then bifurcated, and a bench trial was held on the issue of the statute of limitations.

On October 29, 2004, the district court entered an order dismissing Jensen's claims. With regard to Jensen's breach of contract claim, the district court found that the breach of contract occurred and that Jensen's cause of action accrued in July 1998 when the DOR first denied Jensen's claim for additional compensation. The court stated that Jensen's claim was not filed with the risk manager until July 2001, and thus it concluded that Jensen's breach of contract action and claim for breach of implied covenant of good faith and fair dealing were time barred. With regard to Jensen's misrepresentation claims, the district court determined that the alleged misrepresentations occurred when the proposal plans and special provisions were published for bid solicitation and Jensen had signed the contract. It concluded, however, that Jensen was unaware of the misrepresentation at that time, and, applying the discovery rule, found that Jensen was put on inquiry notice in approximately May 1998, when Jensen acknowledged knowing that the site conditions differed from those represented by the DOR. Accordingly, the district court held that Jensen's claims for misrepresentation were also barred. Jensen appealed the denial of its petition, and we granted Jensen's petition to bypass review by the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Jensen assigns, consolidated and restated, that the district court erred in determining that Jensen's claims for breach of contract, fraudulent misrepresentation, negligent misrepresentation, and breach of implied covenant of good faith and fair dealing were barred by the statute of limitations.

STANDARD OF REVIEW

[1] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision

of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Teater v. State*, 252 Neb. 20, 559 N.W.2d 758 (1997).

ANALYSIS

Breach of Contract

Jensen claims that the district court erred in dismissing its breach of contract claims against the DOR.

[2,3] The State Contract Claims Act governs all contract disputes between the claimant and the State of Nebraska or a Nebraska state agency. § 81-8,303. Section 81-8,306 of the State Contract Claims Act provides that contract claims permitted under the act are barred unless the claim is filed with the risk manager within 2 years of the time at which the claim accrued.

[4,5] Generally, a cause of action accrues and the period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). A cause of action in contract accrues at the time of breach or the failure to do the thing agreed to. *Snyder v. EMCASCO Ins. Co., supra*; *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995). This is so even though the nature and extent of damages may not be known. *Cavanaugh v. City of Omaha*, 254 Neb. 897, 580 N.W.2d 541 (1998); *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989).

Jensen contends that the district court erred when it determined that the breach of contract occurred in 1998 when the DOR denied the existence of differing site conditions and first refused Jensen's request for additional compensation. We agree and instead find that the breach of contract occurred on May 22, 2001, when the DOR denied Jensen's claim for extra compensation for extra work resulting from the differing conditions.

Under the terms of the contract, in order for it to be modified to account for the differing conditions, Jensen was required to notify the DOR of the differing site conditions before they were disturbed, before any additional work was performed, and as soon as they were discovered. See § 104.02(1)(a) of the Specifications.

In order to make a claim for extra work not covered under the contract or ordered in writing by the engineer, Jensen was required to give written notice of its intention to make a claim for such extra compensation before work began. See § 109.05(9)(a) of the Specifications.

Jensen adhered to both of these requirements. In 1998, before excavation of the wetlands site commenced, Jensen notified the DOR of the differing site conditions, requested additional compensation for the additional work anticipated as a result of those conditions, and, pursuant to § 109.05(9)(a), notified the DOR of its intent to seek damages for the "extra work."

Section 104.02(2) of the Specifications provided that upon notification of the differing site conditions, the engineer would investigate the differing conditions and make a written determination. The engineer did so and, in July 1998, denied Jensen's request for additional compensation based upon its determination that site conditions did not differ. The DOR claims that it was at this point that the statute of limitations commenced on Jensen's breach of contract claim. We disagree.

Under § 109.01(1)(a)(2) of the Specifications, the DOR's ultimate obligation was to pay Jensen for "the actual quantity of work performed in accordance with these Specifications." Regardless of whether the DOR breached the contract by refusing to modify the contractual obligations or expressly authorize extra work, the DOR's failure to pay Jensen for extra work that Jensen performed in compliance with the Specifications would, if proved, constitute a separate and distinct breach of contract that did not accrue until the DOR refused Jensen's claim for extra compensation. In other words, Jensen alleges that it performed extra work for which the DOR has refused to pay—a breach of § 109.05(9)(a), the extra-compensation provision. We, therefore, conclude that Jensen has stated a cause of action for a breach of contract occurring on May 22, 2001.

Because the breach of contract occurred within 2 years of the filing of Jensen's claim, we determine that the district court erred in finding that Jensen's breach of contract claim was time barred and that the court committed reversible error by dismissing the claim.

REMAINING ASSIGNMENTS OF ERROR

Jensen's complaint also alleges that the act constituting the breach of the implied warranty of good faith and fair dealing was the DOR's determination in 1998 that site conditions did not differ from those described by the DOR in the contract. Jensen's claim was not filed with the risk manager until August 29, 2001. We, therefore, conclude that this claim of Jensen is time barred. We have also reviewed Jensen's assignment of error regarding misrepresentation and find it to be without merit.

CONCLUSION

For the reasons discussed above, we reverse the district court's order with regard to its dismissal of Jensen's breach of contract claim. As to Jensen's claims for fraudulent and negligent misrepresentation and breach of implied covenant of good faith and fair dealing, we affirm the district court's decision that those claims were time barred. We remand the cause for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

WRIGHT, J., not participating.

NATIONAL AMERICAN INSURANCE COMPANY, APPELLANT, V. CONSTRUCTORS BONDING COMPANY, DOING BUSINESS AS CONSTRUCTORS BONDING AND INSURANCE, APPELLEE.

719 N.W.2d 297

Filed August 11, 2006. No. S-05-251.

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. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.

4. **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.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

William M. Lamson, Jr., and Michele E. Young, of Lamson, Dugan & Murray, L.L.P., and R. Patrick Gilmore for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

WRIGHT, J.

NATURE OF CASE

National American Insurance Company (NAICO) sued Constructors Bonding Company, doing business as Constructors Bonding and Insurance (CBI). NAICO alleged that CBI negligently breached its duty to inform NAICO of certain facts which would have affected the issuance of surety bonds that NAICO provided for a third party, C.R. Welshiemer Co. (Welshiemer). The district court sustained CBI's motion for summary judgment and dismissed NAICO's complaint. NAICO appeals.

SCOPE 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. *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006). 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.*

FACTS

On March 15, 2000, NAICO and CBI entered into an agreement that authorized CBI to receive and accept applications for

surety bonds covering classes of risks authorized by NAICO. In October, the vice president of CBI wrote to NAICO, stating that he wanted to build a "book of business" with NAICO and that he was seeking a new bonding company for Welshiemer. The vice president stated that CBI was terminating its relationship with Mid-State Surety, a bonding company that had previously provided surety bonds to Welshiemer.

After NAICO was required to pay certain claims on the surety bonds it had issued for Welshiemer, NAICO filed an action against CBI, alleging that CBI had negligently breached its duty to NAICO by not informing it of facts which would have impacted NAICO's decision to write certain surety bonds for Welshiemer. NAICO claimed that it relied upon CBI's professional skill and expertise in the area of bond applications and that based upon CBI's representations, NAICO issued several surety bonds for Welshiemer. NAICO alleged that CBI had also negligently failed to inform NAICO of claims against Welshiemer involving Mid-State Surety.

NAICO asserted that CBI was under a duty to inform NAICO of any claims activity, including unresolved, outstanding, or pending claims, made by another surety against Welshiemer. NAICO argued that because it relied upon CBI to inform NAICO of any claims, it did not independently investigate whether any other claims had been made against Welshiemer at the time the surety bonds covering Welshiemer were issued. NAICO claimed that CBI knew or should have known of the claims against Welshiemer with Mid-State Surety and that CBI was under a duty to disclose such information.

On September 15, 2000, CBI had received a memorandum from Mid-State Surety which contained criticisms or concerns regarding Welshiemer's financial status. NAICO issued its first surety bond for Welshiemer on December 27. The surety bond was prepared and executed by CBI pursuant to its power of attorney for NAICO. Between January and March 2001, CBI received copies of stop-payment letters written by Mid-State Surety concerning claims on surety bonds written for Welshiemer.

When the operative complaint in this case was filed, the surety bonds issued by NAICO had claims against them for which NAICO had been required to pay $857,908.45. NAICO alleged

that it did not discover Welshiemer's problems with Mid-State Surety until November 2002 and that it would not have issued the surety bonds to Welshiemer had it known of these claims.

In its answer, CBI alleged that any duties between NAICO and CBI were covered by the terms of the March 15, 2000, agreement. CBI denied that it was negligent in any manner in the performance of its duties or in handling the Welshiemer surety bonds. CBI further alleged that if NAICO sustained any damages, it was because of NAICO's negligence in handling the Welshiemer surety bonds. CBI alleged that NAICO failed to properly investigate Welshiemer before issuing the surety bonds, failed to follow recognized underwriting standards, and failed to follow its own underwriting standards in issuing the surety bonds.

In its summary judgment order, the district court determined the following: (1) CBI was an independent contractor or independent insurance agent representing numerous surety bonding companies; (2) CBI's authority to act for NAICO was limited to receiving and accepting applications for surety bonds, providing notice of claims affecting NAICO surety bonds, and collecting premiums; (3) the decision to write surety bonds for a particular contractor for a specific project was solely that of NAICO; (4) NAICO did its own underwriting of potential risks and did not expect CBI to do its underwriting; and (5) NAICO recognized that CBI was acting for the contractor.

The district court found that NAICO's representatives had admitted in deposition and by affidavit that CBI was authorized to bind NAICO to surety bonds " 'following underwriting approval by NAICO.' " The court concluded that the agreement did not extend binding authority to CBI and that NAICO had its own underwriting department and could make the final decision on whether to issue a particular surety bond on an application for a bond submitted by CBI. The court further concluded that the agreement did not expressly impose any duty with respect to disclosure of information regarding Welshiemer and that if those duties were described in the underwriting rules and regulations referred to in the agreement, such rules and regulations were not part of the record and were not provided to CBI during the period in question.

The district court sustained CBI's motion for summary judgment, and NAICO's complaint was dismissed. NAICO timely appeals.

ASSIGNMENT OF ERROR

NAICO assigns as error the district court's sustaining of CBI's motion for summary judgment.

ANALYSIS

[3] The issue is whether CBI had a duty to disclose to NAICO certain facts which CBI knew or had reason to know related to claims against Welshiemer prior to the time that NAICO issued surety bonds for Welshiemer. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005).

NAICO argues that CBI was dutybound to provide it with information so NAICO could underwrite surety bonds. NAICO claims the evidence establishes that there are material facts in dispute which support its claim that CBI's failure to disclose such information to NAICO caused it to suffer losses on the surety bonds issued to cover Welshiemer.

The record shows that CBI had received at least two stop-payment letters from Mid-State Surety, in which it demanded that no further payments be made on certain Welshiemer surety bonds. CBI did not furnish the stop-payment letters to NAICO, even though NAICO was writing surety bonds for Welshiemer at the time CBI received the letters. The president of CBI testified that such letters from Mid-State Surety regarding the stop-payment letters were important information that a surety company would want to know.

A former vice president at NAICO testified that NAICO relied on its agents, such as CBI, to inform NAICO as to a surety bond applicant's character. He stated that companies like CBI also developed information that a surety would need in order to make a proper analysis of a contractor. The former vice president admitted that the contract between NAICO and CBI established the relationship between NAICO and CBI as it related to surety bonds. He stated that pursuant to such agreement, NAICO

reserved the right to decide whether it would accept an application for a surety bond and whether to write a surety bond on a particular project. To his knowledge, NAICO had not sent any underwriting rules or regulations to CBI.

David Alsip, the current vice president of surety bonds for NAICO, testified that after an application for insurance on a surety bond was submitted, the decision whether to issue the particular surety bond rested with NAICO. An agent's authority was limited to soliciting business, collecting premiums, and activities of that nature. The decision to insure a particular risk was made by NAICO. Alsip admitted that CBI was an independent contractor, as opposed to an employee of NAICO. Under the agreement, CBI had authority to receive and accept applications for surety bonds. CBI would then forward those applications to NAICO for its review and analysis. After NAICO conducted its review and analysis pursuant to its guidelines, NAICO made the decision as to whether to write a surety bond on a contractor for a particular project. According to Alsip, the decision whether to write or to decline a particular surety bond was made by NAICO personnel only and NAICO did its own underwriting work. Between December 27, 2000, and August 8, 2001, NAICO wrote 10 surety bonds for Welshiemer.

Alsip further stated that in evaluating whether to issue surety bonds for a contractor, NAICO reviewed the contractor's financial statements, tax returns, work programs, working capital, equity, and other factors. Upon acceptance, NAICO required the contractor to submit an application for each job for which the contractor wanted to be bonded. NAICO conducted two reviews: one to accept the contractor and one to accept the specific project involved. NAICO's policies required its own underwriters to conduct a thorough review of a contractor's prior experience with other companies, but Alsip did not believe this was done in Welshiemer's case. NAICO's underwriting guidelines provided that the final assessment of the financial condition of the contractor applying for a surety bond was a function to be performed by NAICO. NAICO's internal guidelines also provided that it must have three fiscal yearend statements from the contractor applying for the surety bond. Alsip could not recall if such statements were obtained before NAICO began writing surety bonds for Welshiemer.

Alsip testified that as an underwriter for NAICO, he had rejected eight of Welshiemer's applications for surety bonds. NAICO rejected the first application on November 14, 2000. Another application by Welshiemer was rejected because Alsip felt the proposed job was too large for the company. He stated that NAICO was trying to get Welshiemer to restructure some of its debt. Between October 8 and 23, 2001, Alsip rejected seven applications by Welshiemer for surety bonds.

NAICO obtained Dun & Bradstreet reports on Welshiemer, beginning on October 13, 2000, with periodic updates. It also obtained indemnity agreements from Welshiemer, as well as from the company owner and his wife personally. Alsip stated these indemnity agreements provided the backbone of the relationship between NAICO and Welshiemer. NAICO did its own internal financial analysis of Welshiemer as a part of its underwriting process. According to Alsip, NAICO had never asked CBI about the claim history of Welshiemer and had never contacted any of Welshiemer's prior sureties.

[4] In summary, the question is whether CBI had a duty to disclose to NAICO information regarding stop-payment letters that it had received from Mid-State Surety which showed that Mid-State Surety had halted payments on certain Welshiemer surety bonds. 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. *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005). In the case at bar, the district court found that a duty to disclose the information concerning Welshiemer could arise only if there was a fiduciary, special, or confidential relationship between NAICO and CBI.

NAICO argues that there is at least a material issue of fact regarding whether CBI was an agent of NAICO. It is upon this claim of agency that NAICO asserts CBI had a fiduciary relationship and, hence, a duty to inform it of "any claims activity, including unresolved, outstanding or pending claims, to another surety regarding Welshiemer."

In *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992), we noted that whether an insurance intermediary is an

agent of the insured or the insurer is generally a question of fact. We therefore examine the record to determine if there is a material issue of fact regarding whether CBI was the agent of NAICO.

NAICO authorized CBI to solicit and accept proposals for business. Pursuant to section II of the agreement between the parties, CBI's authority was limited to receiving and accepting applications for surety bonds covering classes of risks that NAICO would from time to time authorize. CBI was required to comply with NAICO's underwriting rules and regulations, but the record does not disclose that NAICO's rules and regulations were ever provided to CBI.

The undisputed facts establish that CBI was an independent contractor. Alsip, NAICO's vice president of surety bonds, testified that CBI was an independent contractor. Evidence showed that CBI had contractual relationships with more than 10 surety companies. CBI's authority to act for NAICO was limited to receiving and accepting applications for surety bonds, providing notice of claims affecting NAICO bonds, and collecting premiums. The record does not establish that CBI was an agent of NAICO, which would create a fiduciary relationship between them.

Having concluded that CBI was an independent contractor, we must determine whether CBI had any duty to disclose to NAICO the information about Welshiemer. In *Jones v. Stewart*, 62 Neb. 207, 210, 87 N.W. 12, 13 (1901), this court stated: "[W]here persons are dealing with each other upon equal terms, and no confidential relation exists between them, neither is bound to disclose superior information he may have respecting the transaction, and, in the absence of fraud or deception to induce the contract, the courts can afford no relief." As a general rule, a party to a transaction does not have a duty to disclose facts to the other unless there is a fiduciary relationship between the parties. *Midland Nat. Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404 (Minn. 1980). The record does not establish that a fiduciary relationship existed between NAICO and CBI, and there is no allegation that CBI's conduct was fraudulent or that the information it furnished to NAICO was false.

The relationship between NAICO and CBI was defined by the "Surety Producer Agreement." This document, which was

prepared by NAICO, described the obligations between the parties. Absent a fiduciary relationship, the duty to disclose to NAICO any information concerning Welshiemer would have to arise under the terms of the agreement. We conclude that no duty to provide such information was set forth in the agreement.

The facts are undisputed that it was NAICO's decision whether to issue the surety bonds for a particular contractor based upon its own underwriting of potential risks and that NAICO did not expect or require CBI to complete any underwriting on its own. NAICO's representatives testified that CBI was authorized to bind NAICO to surety bonds following underwriting approval by NAICO. Although the agreement provided that CBI would comply with NAICO's underwriting rules and regulations, it was undisputed that NAICO did not provide any rules or regulations to CBI.

Alsip testified that NAICO's guidelines provided for underwriters to make a thorough review of a principal's prior experience with other companies, but he did not believe that this was done in Welshiemer's case. He stated that NAICO's guidelines provided that it would assess a contractor's financial condition and that NAICO would obtain three fiscal yearend statements before issuing surety bonds for a contractor. The guidelines also provided for reference checks with a contractor's major subcontractors, suppliers, architects, and engineers and that prior sureties would be contacted if there was any conflict in other information obtained.

NAICO conducted its own debt-to-equity analysis of Welshiemer after it was advised that the ratio was too high. NAICO reduced Welshiemer's aggregate bonding limit after the first claim against Welshiemer was submitted. It received Dun & Bradstreet financial reports on Welshiemer and obtained an indemnity agreement from Welshiemer, as well as from the company's owner and his wife. NAICO never inquired of CBI regarding Welshiemer's claim history.

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. *Wise v. Omaha Public*

Schools, 271 Neb. 635, 714 N.W.2d 19 (2006). We conclude that CBI had no duty to disclose to NAICO information regarding Welshiemer's relationship with Mid-State Surety. There is no genuine issue of material fact which would establish that CBI had a duty to disclose such information to NAICO. The district court did not err in granting CBI's motion for summary judgment and dismissing NAICO's complaint.

CONCLUSION

NAICO has not established that CBI had a duty to disclose to NAICO any claims activity involving Welshiemer and another surety. The district court correctly sustained CBI's motion for summary judgment and dismissed NAICO's complaint.

AFFIRMED.

CONNOLLY and MCCORMACK, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V.
LUCKY I. IROMUANYA, APPELLANT.
719 N.W.2d 263

Filed August 11, 2006. No. S-05-367.

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. ____: ____. The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
3. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
4. **Criminal Law: Witnesses.** A defendant's attempted intimidation of a witness is evidence of the defendant's conscious guilt that a crime has been committed and is a circumstance from which an inference may be drawn that the defendant is guilty of the crime charged.
5. **Homicide: Photographs.** In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.

6. **Evidence: Words and Phrases.** Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
7. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
8. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
9. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
10. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
11. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
12. **Trial: Appeal and Error.** The responsibility for conducting a trial in an orderly and proper manner for the purpose of ensuring a fair and impartial trial rests with the trial court, and its rulings in this regard will be reviewed for an abuse of discretion.
13. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record which supports the errors assigned. Absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed.
14. **Trial: Motions for Mistrial: Waiver: Appeal and Error.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
15. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
16. **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.
17. ____: ____: ____. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
18. **Intent.** From circumstances around a defendant's voluntary and willful act, a finder of fact may infer that the defendant intended a reasonably probable result of his or her act.
19. **Homicide: Intent: Weapons.** Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death.

20. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
21. ____: ____. It is not error for a trial court to refuse to give a party's requested instruction where the substance of the requested instruction was covered in the instructions given.
22. **Criminal Law: Homicide.** Malice is not an element of second degree murder.
23. **Self-Defense: Jury Instructions.** A trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense.
24. **Self-Defense.** To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using force. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances.
25. **Self-Defense: Evidence: Jury Instructions.** If the trial evidence does not support a claim of self-defense, the jury should not be instructed on it.
26. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
27. **Criminal Law: Convictions: Statutes: Legislature: Intent.** A determination of whether multiple convictions in a single trial lead to multiple punishments depends on whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on such offenses.
28. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
29. ____: ____. An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
30. **Sentences.** A judge should take into account facts obtained from victim impact statements in imposing a sentence, as he or she should consider all facts pertinent to sentencing, but a judge must not and cannot allow the judgments and conclusions of the victim's family to be substituted for those of the court in imposing a sentence.
31. ____. 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, and motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

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

Korey L. Reiman, of Reiman Law Firm, and John Stevens Berry, Sr., John S. Berry, and Jason M. Caskey, Senior Certified Law Student, of Berry & Kelley Law Firm, for appellant.

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

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

STEPHAN, J.

During a party at a Lincoln, Nebraska, residence in the early morning hours of April 25, 2004, Lucky I. Iromuanya fired a single shot from a derringer handgun which wounded Nolan Jenkins and killed Jenna Cooper. Following a jury trial, he was convicted on one count of attempted second degree murder and a related count of use of a weapon to commit a felony in connection with the injury to Jenkins, and one count of second degree murder and a related count of use of a weapon to commit a felony relating to the death of Cooper. He was sentenced to 25 to 35 years' imprisonment on the attempted second degree murder conviction and 10 to 20 years' imprisonment on the related weapons conviction. He received a sentence of not less than life imprisonment nor more than life imprisonment on the second degree murder conviction and 10 to 20 years' imprisonment on the weapons conviction related to that charge. The four sentences were ordered to run consecutively. Iromuanya appeals from these convictions and sentences.

I. FACTS

On the evening of April 24, 2004, University of Nebraska-Lincoln students Cooper and Lindsey Ingram hosted a barbeque and party at the Lincoln residence they shared. Both women were members of the university's varsity soccer team. The evening was planned because spring soccer season had just ended and final examinations were approaching. An initial group of 10 to 15 people gathered in the early evening hours. In addition to Cooper and Ingram, this group included several of their current teammates and a former teammate who was visiting Lincoln. Also present were Jenkins, who was dating Ingram, and Jenkins' cousin. Throughout the evening hours, most of those present consumed alcohol, and some played "drinking games." Witnesses testified that the party attendees were drinking and having a good time but that the party was not "wild."

After midnight, more people arrived at the party in several groups. One group included Carrington Hartley and Nathanial Buss, who both practiced against the women's soccer team and were acquainted with Cooper and other players. Another group included Margaret Rugh, who had been given directions to the party by someone who accompanied Hartley and Buss. Rugh had been acquainted with Iromuanya for several weeks. Shortly after her arrival, Rugh called Iromuanya and asked him to come to the party. Iromuanya and his friend Aroun Phaisan, who had both been at a downtown bar from approximately 11:45 p.m. until closing time, arrived at the party at approximately 1:30 a.m. in Phaisan's vehicle. Each had consumed one beer at the bar. When they arrived at the party, Phaisan parked his vehicle across the street from the house. Rugh greeted them outside the residence, took them inside, and introduced them to others who were present. Phaisan testified that during this time, people at the party were friendly to him and Iromuanya.

The events leading to the shooting began in the living room of the residence where a shot glass collection belonging to Cooper was displayed on open shelves. Several persons, including Phaisan and Iromuanya, had been standing in the general vicinity of the collection. Phaisan testified that he observed a Caucasian male handling some of the shot glasses. Buss testified that one of his friends showed him some shot glasses he had taken from the collection and asked for the keys to the vehicle which Buss had driven to the party. Buss gave him the keys. Buss knew that the collection belonged to either Ingram or Cooper, so he advised Ingram that "somebody," a male, had taken some shot glasses from the collection. Buss did not identify the individual by name but generally pointed him out to Ingram. Angered, Ingram confronted the individual. There is conflicting testimony as to whether this confrontation occurred in the house or in the driveway to the house. In any event, the individual admitted taking the shot glasses and placing them in a vehicle, and Ingram demanded that they go to the vehicle to retrieve them. In the meantime, Buss had gone to another room where Cooper was talking on a telephone and informed her of the incident. Upon hearing this, Cooper ended her telephone conversation and went outside. Buss followed shortly thereafter.

Inside the house, Phaisan had heard mention of the missing shot glasses and became concerned that he and Iromuanya might be accused of the theft because they had been standing in the area of the collection and were unknown to most of the persons at the party. He told Iromuanya that they should leave, and they exited the residence several minutes later. As Ingram was walking to the vehicle to retrieve the shot glasses, she observed Phaisan and Iromuanya leaving the house "very quickly." Knowing that they had been standing in the same area of the living room as the individual who had taken the glasses, and uncertain whether they had had any involvement in the incident, Ingram told them "very assertively" that no one could leave until everything was returned.

Adam Ellingson, who had been invited to the party by his friend Jenkins, had arrived at approximately 9 p.m. Later in the evening, he observed a group of people whom he did not know, including Phaisan and Iromuanya, standing in the general vicinity of the shot glass collection in the living room. He did not see anyone handle or take the shot glasses. At approximately 2 a.m., Ellingson went outside to check the windows of his vehicle, which was parked on the street in front of the house. Standing in the front yard, he observed a male whom he did not know come out of the house, followed closely by Ingram. Ellingson heard Ingram say that she wanted the shot glasses returned. During this conversation, Ellingson observed another male approaching the person to whom Ingram was talking and also observed Iromuanya and Phaisan come out of the house. He heard Ingram say that no one could leave until the shot glasses were returned. At that point, Ellingson went to the front door and called to Jenkins to come outside. He then returned to the front yard.

When Jenkins came out of the house, he grabbed Iromuanya's sweatshirt with both hands, pushing him backward, and asked if he had stolen items from the house. Iromuanya tried to push Jenkins away, stating that he had done nothing, and the two scuffled for approximately 5 seconds. Ellingson stepped in and placed Iromuanya in a bear hug to keep him from Jenkins, and Phaisan ultimately separated Iromuanya from Ellingson. Hartley also helped by pushing Jenkins backward. As they were being separated, Iromuanya punched Jenkins in the back of the head.

Ellingson testified that Iromuanya denied taking anything or doing anything wrong and said Ellingson could search him. Ellingson replied that he did not wish to search Iromuanya, but asked him not to leave until the shot glasses had been retrieved. Buss, who was also present during this confrontation, told Jenkins that Iromuanya had not taken the shot glasses.

After the scuffle, Brooke Bredenberg, one of the party guests, told Jenkins that Iromuanya was not the person who had taken the shot glasses. Seeing that Iromuanya "appeared to be very, very angry and appeared . . . like he still wanted to fight," Ingram approached him and told him several times to "calm down" and "chill out." Ingram testified that Iromuanya appeared not to pay attention to her and was focused on Jenkins, who was behind her. Iromuanya did not become calm. At that point, Ingram and Jenkins went to retrieve the shot glasses from the vehicle.

Buss, Hartley, Ellingson, and Cooper remained with Iromuanya. Phaisan was also in the area. Iromuanya was very upset, jumping around and repeating phrases such as "you don't know me" and "[d]on't mess with me." Iromuanya repeatedly asked who had run up on him. Observing that Iromuanya "was obviously pretty perturbed, pretty upset," Hartley approached him in an effort to calm him. Hartley testified that Iromuanya did not appear to be afraid, but, rather, was "riled up. I mean I would parallel his behavior to a fighting cock. He was all riled up, he was ready to go basically." Hartley believed that because he and Iromuanya were members of the same racial minority group and because Hartley knew the people at the party and Iromuanya did not, Hartley could provide Iromuanya with assurance that "nobody would be messing with him, that he would be fine and he would calm down." Hartley tried to talk to Iromuanya, but Iromuanya was still focused on Jenkins and was still yelling. Iromuanya tried to get around Hartley, so Hartley grabbed his arm. Iromuanya gave Hartley a "cold stare," and Hartley released his grasp. Iromuanya kept moving back and forth and Hartley had to move correspondingly in order to keep himself between Iromuanya and the direction of Jenkins.

At that point, Cooper stepped in and attempted to speak to Iromuanya in order to calm him, but he continued yelling in

the direction that Jenkins had gone. Buss had informed Cooper that Iromuanya had not taken the shot glasses. Iromuanya eventually acknowledged Cooper and seemed to become calmer, but then Cooper mentioned the shot glasses and he again became upset, stating that he had not taken them. Buss attempted to calm him down, telling him that everyone knew that he had not taken the shot glasses, but Iromuanya remained agitated. Buss then attempted to move Cooper away from Iromuanya. By that time, approximately 5 minutes had elapsed since the initial confrontation between Iromuanya and Jenkins.

Jenkins then walked back across the yard toward Iromuanya. He was walking at a normal pace, and some witnesses testified that his hand was outstretched, as if he intended to shake hands with Iromuanya. Jenkins testified that this was his intent. Bredenberg observed that Iromuanya appeared to become more upset as Jenkins approached, and she yelled to Iromuanya to "chill out, he's trying to apologize." Phaisan, who was nearby, heard this and thought there was no longer any reason for concern. Both Phaisan and Bredenberg thought Jenkins appeared calm as he approached Iromuanya. Hartley, who was also near Iromuanya, saw Jenkins coming and was initially worried that Iromuanya might think Jenkins was coming to hit him. But then Hartley heard Bredenberg shout out that Jenkins was coming to apologize and assumed that Iromuanya heard it too.

Jenkins approached within one step of Iromuanya, but not as aggressively as in the previous confrontation. Iromuanya then shoved Jenkins in the chest with both hands, knocking Jenkins backward. Hartley quickly stepped in between them and put his hands on Iromuanya's ribcage, and Phaisan reached his arm out in front of Jenkins to restrain him. Phaisan's back was to Iromuanya. Ellingson observed Iromuanya remove a handgun from the pocket of his trousers, "point it right at" Jenkins, who was approximately 5 feet away, and fire. Hartley, who was facing Iromuanya with his back to Jenkins, heard an explosion and then observed the handgun in Iromuanya's hand. Hartley grabbed Iromuanya's hand and pointed it toward the street. Hartley testified that at this point, Iromuanya yelled, "[Y]eah, what's up now? I'm the ghetto." Iromuanya and Phaisan then

ran to Phaisan's vehicle and drove away. Ellingson gave conflicting testimony regarding Hartley's position with respect to Iromuanya when the shot was fired.

After the shooting, Jenkins grabbed his head and walked toward the house. Buss testified that when he and Cooper had walked away from Iromuanya, he heard the shot and realized that Cooper had also been hit. He called out for emergency assistance. It was later determined that a single bullet entered Jenkins' left temple and exited above his left ear. The bullet then pierced Cooper's neck, causing her death.

When they were several blocks away from the scene of the shooting, Phaisan asked Iromuanya what had happened and he replied that he thought he had hit someone. At about that same time, Phaisan's cellular telephone rang and he recognized the caller as Rugh. Phaisan gave the telephone to Iromuanya and heard him say, "Charles Allen" and "you don't know me." Rugh had been in the house at the time of the shooting, but when she became aware of it, she suspected that Iromuanya was involved because she knew that he had carried a handgun in the past. Rugh testified that during their telephone conversation after the shooting, Iromuanya told her to say that his name was "Charles Allen" and that she did not know him. She testified that she told Iromuanya that he had shot a girl and that he said, " 'A girl?' " She stated at trial that she was not sure whether he was surprised that a girl was shot or that someone was shot. Four days after the shooting, however, Rugh told an investigator that when she told Iromuanya that he shot a girl, his response was " 'not a guy?' "

Phaisan drove to his apartment and told Iromuanya to go home. Phaisan then went in and told his girl friend that Iromuanya had shot at someone and missed and hit some girl. Although at trial Phaisan stated that he did not know Iromuanya's intent at the time of the shooting, he admitted that immediately after the incident, it "made sense to [him]" Iromuanya had shot at someone, and that he thought Iromuanya had shot at Jenkins.

After initially identifying Iromuanya as "Charles Allen," Rugh informed police of his identity. Police were then dispatched to the Lincoln address where Iromuanya resided. Iromuanya was observed leaving the house, and after being engaged in conversation, he told officers he had been home all night. Iromuanya

was patted down, and the weapon was found inside his right front jeans pocket. Chain of custody testimony at trial established that the handgun was in the same condition from the time of seizure until ballistics testing was conducted by Mark S. Bohaty, a criminalist employed by the Nebraska State Patrol crime laboratory. Bohaty identified the weapon as a single action .32-caliber derringer with two barrels in an "over and under" configuration. Bohaty testified that the weapon could only be fired by the separate steps of first cocking the hammer all the way back and then pulling the trigger. Test firing revealed a trigger pull of 9.5 pounds, which Bohaty described as "quite heavy" compared to other handguns. The shot which struck Jenkins and killed Cooper was fired out of the bottom barrel of the gun. There was an unfired round in the top barrel on which the primer was dimpled, indicating a misfire, although Bohaty could not say that this occurred on the day of the shooting. Test firing established that the derringer was relatively accurate.

Iromuanya did not testify or present any evidence in his behalf. The State offered videotaped and handwritten statements given by Iromuanya to Lincoln police following his arrest on the day of the shooting. The statements were received without objection. In the videotaped statement which was played for the jury, Iromuanya described the initial confrontation with Jenkins and Iromuanya's anger at being accused of stealing the shot glasses. He admitted that he intentionally fired the shot, but stated that he did not intend to kill either Jenkins or Cooper and that he was attempting to shoot "to the side" in order to scare Jenkins away from him. In his handwritten statement, Iromuanya acknowledged that a girl told him that she knew he did not steal anything and that when "the guy," presumably Jenkins, approached him the second time, the girl said, "don't worry he just wants to apologize." He further wrote that when the approaching male remarked that Iromuanya had punched him, Iromuanya pushed him back and drew the weapon. When the male continued to approach, Iromuanya stated, "I shot by him hoping to scare him and his friends."

In his closing argument, defense counsel characterized the issue to be decided by the jury as "murder or manslaughter." He argued that the evidence did not establish that Iromuanya acted

with the requisite intent to constitute second degree murder and attempted second degree murder, and he urged the jury to return a guilty verdict on a single count of manslaughter. The jury found Iromuanya guilty of all four charged offenses, and he was subsequently sentenced.

Additional facts will be set forth in our discussion of specific assignments of error.

II. ASSIGNMENTS OF ERROR

Iromuanya assigns, consolidated, restated, and renumbered, that the trial court erred in (1) receiving testimony suggesting that Iromuanya was involved with a gang; (2) permitting Cooper's mother to testify and receiving certain portions of her testimony over his relevance objections; (3) not taking steps to shield jurors from "memorial buttons" worn by members of Cooper's family; (4) giving jury instruction No. 8, pertaining to the element of intent; (5) refusing to give three jury instructions requested by the defense; (6) failing to set aside the convictions based on insufficiency of the evidence; (7) ordering consecutive sentences on the two convictions for use of a weapon to commit a felony; and (8) imposing excessive sentences.

III. ANALYSIS

1. Claimed Suggestion of Street Gang Involvement

(a) Additional Facts

Phaisan testified that after the initial altercation, he saw Iromuanya being "pushed back" away from Jenkins by another person. When asked if the other person was Hartley, Phaisan responded that he thought so, but that the person had a different hairstyle on the night of the shooting than at the trial. The State then asked Phaisan whether Iromuanya had a different hairstyle that evening, to which Phaisan responded, "I think his hairstyle — I think it was braided . . . ." At that point, Iromuanya objected on the basis of relevance, raising concerns that the prosecution was trying to insinuate that he was in a gang, and the objection was sustained. Iromuanya did not move to strike, make a motion for a mistrial, or ask that the jury be instructed in any manner with respect to the remark.

During Rugh's testimony, she was asked who, other than Phaisan, Iromuanya normally hung out with. The trial court overruled Iromuanya's relevancy objection, and Rugh testified that Iromuanya told her that "he hung — I don't know if he hung out with his — like went and played basketball with his boys. . . . He went and played basketball with his boys, his friends."

Rugh testified that after the shooting, she lied to police and told them Iromuanya's name was "Charles Allen" because Iromuanya told her to and she was scared. During her testimony, she stated that she did not go back to her dormitory room the night of the shooting because she was "scared." When pressed by the State to explain what she was afraid of, she said she was afraid that somebody, "maybe some of [Iromuanya's] friends," would do something to her. Iromuanya objected to this testimony, arguing it was irrelevant and more prejudicial than probative. The objections were overruled.

(b) Standard of Review

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. 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. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005); *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[2] The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Davlin, ante* p. 139, 719 N.W.2d 243 (2006); *State v. Sanders, supra*; *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

(c) Resolution

[3] The testimony about Iromuanya's hairstyle on the day of the shooting was clearly irrelevant, as there was no issue in

this case as to his identity. The district court properly sustained the relevance objection. Because Iromuanya did not request additional action from the court, he cannot now complain of error in that regard. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003); *State v. Reed*, 266 Neb. 641, 668 N.W.2d 245 (2003). Moreover, it is unclear how the mere fact that a person wears his hair in braids implicates gang involvement. The record includes nothing to correlate braided hair with street gangs; indeed, it includes no specific reference to street gangs whatsoever. Thus, Phaisan's answer standing alone could not have resulted in prejudice to Iromuanya.

Rugh's testimony concerning her knowledge of who Iromuanya "hung out with" was relevant to the issue of how well she knew him, which would affect the credibility of her testimony at trial and her statements made the night of the shooting. In addition, her brief reference to "his boys," standing alone, was not prejudicial to Iromuanya. Rugh quickly explained that by "boys" she meant "friends." There is nothing in the record to correlate the phrase "his boys" with street gangs. During the cross-examination of Ellingson in which defense counsel sought to establish his friendship with Jenkins, counsel asked, "Nolan's one of your boys, right?" The only inference with respect to the phrase which can be drawn from this record is that it is used by young people in reference to male friends.

[4] The testimony that Rugh was afraid of Iromuanya's friends was relevant to the issue of her credibility, which was challenged during trial. Rugh's trial testimony differed from the statements she had previously given to police regarding the shooting. In her prior statements, she stated that when she told Iromuanya that he had shot a girl, he replied, " 'not a guy?' " At trial, however, she testified that Iromuanya was surprised that someone was shot, not that a girl was shot. The fact that she was afraid after speaking to Iromuanya after the shooting is relevant to the jury's evaluation of which of Rugh's versions of events to believe. In addition, her testimony supports an inference that Iromuanya attempted to intimidate her into giving false information to the police soon after

the shooting had occurred. In this respect, we have held that a defendant's attempted intimidation of a witness is evidence of the defendant's conscious guilt that a crime has been committed and is a circumstance from which an inference may be drawn that the defendant is guilty of the crime charged. See *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). See, also, *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004). The trial court did not abuse its discretion in receiving this testimony.

Alternatively, Iromuanya argues that the combined effect of the admission of the testimony regarding his hairstyle, his "boys," and Rugh's fear of his friends amounted to prejudicial error because it suggested that he had gang ties. In support of this argument, he cites *Thomas v. State*, 625 So. 2d 1149 (Ala. Crim. App. 1992), and *People v. Parrott*, 40 Ill. App. 3d 328, 352 N.E.2d 299 (1976). *Thomas* was reversed by the Supreme Court of Alabama in *Ex parte Thomas*, 625 So. 2d 1156 (Ala. 1993). In reversing the case, however, the Alabama Supreme Court agreed with the premise that purposefully elicited testimony directly indicating gang membership was highly prejudicial to a defendant. *Ex parte Thomas, supra*. In that case, the state directly asked a witness about the defendant's gang ties in a case involving a driveby shooting after the defendant had specifically raised the impropriety of such questions. The Alabama Supreme Court found this was prejudicial error. *Id.* Similarly, in *Parrott*, the court held that in an action charging illegal sale of guns, it was irrelevant and highly prejudicial to allow evidence that the sale was made to street gangs. The instant case differs significantly from both *Thomas* and *Parrot* because, as noted above, the record includes no explicit reference to street gangs. We conclude that the evidence, even considered cumulatively, does not support Iromuanya's assignments of error.

2. Testimony of Mary Ellen Cooper

(a) Additional Facts

The State's first witness was Dr. Reginald Burton, a trauma surgeon who treated Cooper for the gunshot wound. Asked to identify a person shown receiving medical treatment in a photograph, Burton testified: "That appears to be [Cooper]." The

photograph was received into evidence without objection. With respect to a similar photograph, Burton testified, "that would be [Cooper] again." That photograph was also received into evidence without objection.

Mary Ellen Cooper (Ellen) of Louisville, Kentucky, is Cooper's mother. Prior to trial, Iromuanya filed a "Motion to Exclude Witness" in which he asked the court to determine the propriety of permitting Ellen to testify at trial. The motion was argued at a pretrial hearing and was denied. On the first day of trial, the State called Ellen as its third witness. Before Ellen testified, defense counsel stated that he was renewing the objection made in the pretrial motion "to preserve my [rule] 403 objection." The trial court made no specific ruling at that time, but permitted the State to call Ellen as a witness.

Ellen testified without objection that Cooper was born on September 28, 1982, and that she also has a son who was 2 years older than Cooper. Over a relevance and rule 403 objection, Ellen testified that Cooper's interests included various sports, that she was involved in many school activities, and that she was "just an incredibly, incredibly well-rounded person." Also over a defense objection, Ellen testified as to Cooper's reasons for coming to the University of Nebraska-Lincoln to play soccer and the course of study which Cooper was pursuing at the university. In overruling the objection to this testimony, the court noted that it was relevant to show "how [Cooper got] here and that this was a soccer party and the people that are at the party and why they're there."

Without objection, Ellen explained Cooper's hobby of collecting shot glasses. She also testified that she left Lincoln on the morning of April 24, 2004, after staying with Cooper and Ingram for approximately 10 days. She testified that she had a telephone conversation with Cooper that evening, but the court sustained a hearsay objection regarding its substance.

Ellen testified that she returned to Lincoln on the afternoon of April 25, 2004, after learning of the shooting, and that she was taken to the hospital to see Cooper. At this point, Iromuanya's counsel objected and a sidebar conference was held, during which the prosecutor advised the court that he intended to have Ellen identify one of the photographs which was received during

Burton's testimony. The court indicated that it would allow the testimony for that purpose. When shown the photograph, Ellen responded, "That's my baby girl Jenna." In a sidebar conference immediately thereafter, defense counsel made the following statement:

> I'd like the record to reflect that, that was fairly dramatic there at the end and [Ellen] broke down into tears as [counsel] showed her a picture that's been received into evidence. So, for the record, I'm objecting to when [Ellen] started breaking down and crying. And I think this is also going to relate to my [rule] 403 motion, as she goes back there and sits in the courtroom. So that's all I have to say. Thank you.

Neither the prosecutor nor the trial court responded to this statement. There was no motion for a mistrial nor any further direct or cross-examination, and Ellen was excused and released from the sequestration order.

In denying Iromuanya's motion for new trial, the trial court further explained its rulings with respect to the testimony of Ellen as follows:

> A review of the record reflects that most of the testimony of Ellen Cooper was received without objection. Many of the objections made during her testimony were sustained. This court attempted to limit her testimony to areas relevant to the issues in the trial. The court notes that Ellen Cooper was one of the first witnesses called during the trial. She testified that Jenna Cooper had been collecting shot glasses for some time, similar to her aunt's Kentucky Derby glass collection. The evidence at trial revealed that shot glasses had been stolen from Jenna Cooper's house. There was a strong reaction from Jenna Cooper and her roommate Lindsay Ingram when it was discovered that the shot glasses had been stolen. This testimony put perspective on the reaction of the victims as these weren't just glasses that had been stolen, they were glasses that were part of a collection that had strong sentimental value to Jenna Cooper. The testimony about Jenna Cooper being a soccer player and an engineering major simply put in perspective the reason for the party at her house and explained who was there and why. It was the end of the Spring season and just before finals. The court notes that

there was no objection to the testimony about the shot glass collection. There was no objection to Ellen Cooper testifying that she had been to Lincoln to watch Jenna Cooper play soccer and had left on April 24 to return to Louisville. There were no objections to numerous other questions asked of Ellen Cooper concerning returning to Lincoln after she had been informed that Jenna Cooper had been shot. [Iromuanya] did object to Ellen Cooper identifying her daughter in a photograph. The court notes that this photograph had already been received into evidence during the testimony of the treating physician. There was no testimony that the treating physician knew Jenna Cooper prior to her being brought to the hospital. . . . The court notes that this was a photograph of Jenna Cooper at the hospital which had already been received into evidence, and was not a family photograph or a "Senior" picture. The State bears the burden of proving beyond a reasonable doubt each and every element of the crime charged, including proving the identity of the victim. (It is customary to have someone who knows the victim to identify the body.) As noted, Ellen Cooper was one of the first witnesses to be called after the doctor testified. If no one who knew Jenna Cooper identified the photograph, could an argument be made that the State had failed to identify the victim since the doctor did not know whether the person he treated was Jenna Cooper or some other gunshot victim? Arguably, circumstantial evidence could have been introduced to prove identity or some other witness could have later identified Jenna Cooper. If it was unnecessary to allow Ellen Cooper to identify her daughter as the person in the photograph, it is the conclusion of the court that this was not so prejudicial as to have denied [Iromuanya] his right to a fair trial, and does not require this court to grant him a new trial. The court notes that on numerous occasions the court reminded the jur[ors] that they must not let emotion, sympathy, or prejudice play a role in their deliberations.

(b) Standard of Review

The exercise of judicial discretion is implicit in determinations of relevancy under rule 401 and prejudice under rule 403,

and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005); *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

(c) Resolution

The district court did not err in overruling the defense motion to preclude Ellen's testimony in its entirety. Our rules of evidence provide: "Every person is competent to be a witness except as otherwise provided in these rules." Neb. Evid. R. 601, Neb. Rev. Stat. § 27-601 (Reissue 1995). The issue on appeal, therefore, is whether the district court erred in overruling defense objections and permitting Ellen to testify on specific substantive issues as to which error has been assigned.

(i) Identification

[5] In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999). Here, there was no objection to admission of the photographs depicting Cooper or the identification by the physician who treated her. The issue is whether the district court erred in permitting additional identification by a family member.

Iromuanya urges that we adopt a rule similar to that followed by Florida courts which precludes a family member of the deceased from identifying a homicide victim unless there are independent reasons to call the family member. See *Welty v. State*, 402 So. 2d 1159 (Fla. 1981). The basis for this rule, as articulated by the Supreme Court of Florida, is to "assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt." *Id.* at 1162. Iromuanya contends that application of this rule to the instant case would have and should have prevented Ellen from giving the emotional identification of Cooper.

We have not previously addressed the specific issue of whether a family member should be precluded from identifying the victim of a homicide case. Numerous jurisdictions other than Florida

have no per se rule against family member identification of murder victims. See, *People v. Combs*, 34 Cal. 4th 821, 101 P.3d 1007, 22 Cal. Rptr. 3d 61 (2004); *Grayson v. State*, 824 So. 2d 804 (Ala. Crim. App. 1999); *People v. Harris*, 177 Misc. 2d 903, 679 N.Y.S.2d 242 (1998); *Matchett v. State*, 941 S.W.2d 922 (Tex. Crim. App. 1996); *State v. Moseley*, 336 N.C. 710, 445 S.E.2d 906 (1994); *State v. Buzzard*, 110 Idaho 800, 718 P.2d 1238 (Idaho App. 1986). These jurisdictions instead generally apply principles of rules 401 and 403 in determining the admissibility of the testimony on a case-by-case basis. See *id.* In doing so, they note that family member identification testimony is relevant because it is the State's burden to prove the identity of the victim and that such burden need not be met simply by a stipulation between the parties. See *id.* We note that even under the Florida rule, identification of a homicide victim by a family member can be considered harmless error in certain circumstances, as was the case in *Welty v. State, supra.*

We decline to adopt a bright-line rule on this issue, and instead, we align with those jurisdictions which utilize rules 401 and 403 to determine whether identification of a homicide victim by a family member is permissible under specific circumstances. The fact that Ellen became emotional when she made the identification must be considered in this analysis. However, Ellen's testimony was brief and occurred on the first day of a 9-day trial in which she was the third of 29 witnesses. Jurors were instructed at the beginning of jury selection and again upon final submission of the case that they should not permit sympathy or prejudice to influence their verdict. As noted, our review of this issue is for abuse of discretion. Based upon our review of the record and the reasoning given by the district court for receiving the identification testimony, we cannot conclude that it abused its discretion in doing so.

(ii) Cooper's Background and Accomplishments

Iromuanya argues that Ellen's testimony regarding Cooper's background and accomplishments was irrelevant and "did nothing but create bias and prejudice and had no relationship to . . . guilt or innocence." Brief for appellant at 35. His argument is premised upon the principle that a defendant " 'has the right to

expect that his fate will be fixed with reference only to the circumstances of the crime with which he is charged.' " *People v. Hope*, 116 Ill. 2d 265, 278, 508 N.E.2d 202, 208, 108 Ill. Dec. 41, 47 (1986), quoting *People v. Gregory*, 22 Ill. 2d 601, 177 N.E.2d 120 (1961).

[6] Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003). Portions of Ellen's testimony about Cooper were clearly relevant to the circumstances of the crimes with which Iromuanya was charged. The fact that Cooper came to the University of Nebraska-Lincoln to play soccer was relevant to the circumstances under which she and Iromuanya came to be in the same place at the same time and was established by the testimony of many witnesses in addition to Ellen. The testimony that Cooper's hobby was collecting shot glasses, to which no objection was made, was relevant to the circumstances which led directly to the fatal shooting.

However, Ellen's testimony regarding Cooper's other hobbies and interests and Cooper's aspirations as a soccer player does not fall within the legal definition of relevancy in this criminal prosecution. Neither does Ellen's testimony that Cooper was a good student and a well-rounded person, as none of this evidence makes it more or less probable that Iromuanya committed the crimes with which he was charged. Accordingly, the trial court erred in receiving this evidence.

[7-9] In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Neal*, 265 Neb. 693, 658 N.W.2d 694 (2003). Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Robinson, supra*; *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error

a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Freeman, supra.*

We conclude that the error was harmless. The record reflects undisputed evidence that Iromuanya fired the shot which wounded Jenkins and killed Cooper. The critical issue at trial was whether he did so with an intent to kill Jenkins so as to constitute attempted second degree murder and second degree murder under the doctrine of transferred intent. On this point, there was testimony from several eyewitnesses regarding the circumstances of the shooting, including detailed accounts of Iromuanya's words and actions before and after the shot was fired. The jury also saw and heard Iromuanya's account of the events in the statements he gave to police. The jury was instructed that it was to determine intent from Iromuanya's "words and acts and all of the surrounding circumstances." While legally irrelevant, Ellen's brief testimony regarding Cooper's background had no prejudicial bearing on the issue of intent.

[10] In addition, witnesses other than Ellen testified without objection that Cooper was an accomplished student-athlete who enjoyed a good relationship with her teammates. It is certainly possible that the jury could have felt sympathy for Cooper, just as any jury could feel sympathy for the innocent victim of a homicide. That is the reason why jurors are routinely instructed, as was done in this case, that they must not allow sympathy or prejudice to influence their verdict. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003); *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999). We conclude from the entire record that the verdict was surely unattributable to the erroneously received testimony of Ellen, and the error was therefore harmless.

(iii) Attendance at Trial

[11] The remaining assignment of error with respect to Ellen is that the trial court erred in allowing her to be present in the courtroom after her testimony was concluded. This assignment, however, is not argued in Iromuanya's brief. Errors that are assigned but not argued will not be addressed by an appellate

court. *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005); *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

3. "Memorial Buttons" Worn by Spectators

(a) Additional Facts

The record reflects that jury selection lasted 2 days. Prior to the resumption of voir dire examination on the second day, and out of the presence of the prospective jurors, Iromuanya's counsel informed the court:

> I think some of the family [are] starting to wear buttons with Jenna Cooper's face or photo or something like that. . . . So, I am going to move in limine that we exclude all nice buttons or stuff like that, or with Lucky Iromuanya's or Nolan Jenkins' picture on them. The jury is going to be coming in and seeing this stuff pretty quickly.

The prosecutor commented that he did not notice anything, "but I didn't talk to them this morning." When the court asked who was wearing a button, Iromuanya's counsel stated, "I thought the lady that was just talking." The prosecutor replied, "She has an overcoat and I think she's taken her overcoat off." The court then asked to see counsel in chambers, but we are presented with no verbatim record of that conference. When the verbatim record resumed, Iromuanya's counsel made the following statement:

> Your Honor, as I was walking out, I noticed that at least one, I believe, family member of Jenna Cooper's has some buttons on her coat. I am moving in limine to exclude those buttons . . . .
>
> Again, for the record, as I was walking out, I believe a female lady in the gallery has a coat with a couple of pictures. I believe that to be Jenna Cooper, I didn't look real close. Then, once we took a break, apparently she went outside, was around the jury again, walked back in with her coat on, so those buttons were visible.

When asked for case law in support of his position, Iromuanya stated:

> I don't have any case law, except if it continues, if we're heading down this direction, at some point if there's an influence on the jury, yes, there's going to be a mistrial. But, do I have any specific case law as to buttons? No, but

> I can find case law that when sympathy overcomes the jury or anybody tries to persuade the jury, that's a mistrial.

Iromuanya did not move for a mistrial on these grounds during the trial. The court took the oral motion in limine under advisement, but the record does not reflect a ruling on the motion.

In his motion for new trial and a supporting affidavit received over the State's objection, Iromuanya's counsel stated that he recalled that "it was not until the third day of trial after the entire panel had been exposed to this inadmissible evidence that the Court requested visitors not wear these memorials in the Courtroom." In denying the motion for new trial, the trial court stated: "There is no evidence before the court that any juror ever saw any of these 'buttons' or that any juror was influenced in any way by any button."

(b) Standard of Review

[12] The responsibility for conducting a trial in an orderly and proper manner for the purpose of ensuring a fair and impartial trial rests with the trial court, and its rulings in this regard will be reviewed for an abuse of discretion. See *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

(c) Resolution

[13] The colloquy between the trial court and counsel regarding the wearing of buttons by spectators occurred during the jury selection proceedings, before the jury was sworn and presentation of evidence began. Because the record does not reflect the court's ruling on the oral motion in limine, we are unable to review it. It is incumbent upon the appellant to present a record which supports the errors assigned. *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001). Absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

[14] Although defense counsel indicated during jury selection that the wearing of buttons could lead to a mistrial, no such motion was filed during the trial. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable

result, assert the previously waived error. *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004); *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

The inadequacy of the record to support this assignment of error is illustrated by comparison to *Musladin v. Lamarque*, 427 F.3d 653 (9th Cir. 2005), *cert. granted sub nom. Carey, Warden v. Musladin*, 547 U.S. 1069, 126 S. Ct. 1769, 164 L. Ed. 2d 515 (2006), the single case cited by Iromuanya in support of his argument. *Musladin* involved a murder prosecution in which the defendant contended he killed the victim in self-defense. There was evidence that on each day of the 14-day trial, at least three members of the victim's family sat in the front row of the gallery, directly behind the prosecution and in clear view of the jury, wearing buttons several inches in diameter displaying a photograph of the victim. The trial court denied a defense request to instruct the spectators to refrain from wearing the buttons. A divided panel of the Ninth Circuit Court of Appeals held that the defendant was entitled to a writ of habeas corpus because the wearing of the buttons created an unacceptable risk that impermissible factors came into play, which was inherently prejudicial. See *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

In contrast to the detailed evidence of spectators wearing buttons in *Musladin*, the record in this case gives us little information on which to evaluate Iromuanya's assigned error. We do not know how many spectators wore buttons, where they were seated in the courtroom, the size and specific content of the buttons, or the precise nature of the trial court's ruling with respect to the oral motion made by Iromuanya's counsel. From the scant record before us, we cannot conclude that the trial court abused its discretion with respect to the wearing of buttons by spectators.

4. Jury Instructions

(a) Additional Facts

Iromuanya's counsel objected to the district court's proposed jury instruction regarding intent because of the following language included in the instruction: "You may infer, but are not required to infer, that a person intended a reasonably probable

result of his or her act." The objection was overruled, and the instruction was given to the jury as instruction No. 8.

At the instruction conference, Iromuanya's counsel presented a proposed instruction asserting Iromuanya's position that his acts made him guilty of "involuntary manslaughter, not murder and attempted murder," and further stating:

> Unless you are convinced beyond a reasonable doubt that this is false, you must find [Iromuanya] not guilty of the attempted murder and murder charges. If a reasonable doubt exists whether Lucky Iromuanya intended anything short of killing Nolan Jenkins, then you must find [Iromuanya] not guilty of attempted murder and murder[.]

The district court declined to give the proposed instruction, noting that its content was included in other instructions given. Iromuanya's counsel also requested that the court instruct the jury that malice is an element of second degree murder, and the court denied the request. Iromuanya's counsel further submitted a proposed self-defense instruction, which the district court declined to give.

(b) Standard of Review

[15,16] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). 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. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005); *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005).

[17] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006); *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

(c) Resolution

(i) Instruction No. 8

The first paragraph of instruction No. 8 instructed the jury as follows: "Intent is an element of the crimes charged against the defendant. In deciding whether the defendant acted with intent, you should consider his words and acts and all of the surrounding circumstances." This language tracks that of NJI2d Crim. 5.1. However, the pattern instruction does not include the second paragraph of instruction No. 8, regarding the permissive inference that a person intends the reasonably probable result of an act, to which Iromuanya objected and has now assigned error.

[18,19] This court has held that "[f]rom circumstances around a defendant's voluntary and willful act, a finder of fact may infer that the defendant intended a reasonably probable result of his or her act." *State v. Keup*, 265 Neb. 96, 109, 655 N.W.2d 25, 36 (2003). Thus, intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death. *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992). See *State v. Keup, supra*. Iromuanya correctly points out that our holding in *Rokus* was in the context of determining the sufficiency of the evidence to support a conviction for second degree murder, and the same is true of the holding in *Keup*. While Iromuanya does not contend that the language in question is an incorrect statement of the law, he argues that its inclusion in the jury instruction was prejudicial because it allowed jurors "to infer that since Iromuanya said he pulled the trigger, and the consequence was hitting Jenkins in the head, he intended that result." Brief for appellant at 38.

In reaching the holding in *Rokus* that intent may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death, this court relied in part upon *United States v. Kimmel*, 777 F.2d 290, 292 (5th Cir. 1985), in which the court approved the following jury instruction:

> "As a general rule it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of conscious

> omission and any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant did possess the required intent."

The court reasoned that because the instruction permitted but did not require an inference of intent, it did not have the constitutionally impermissible effect of relieving the government of its burden to prove intent as an element of the crime.

Similarly, in this case, the challenged instruction stated a permissive inference which could be drawn from Iromuanya's admittedly knowing and intentional act of firing the handgun. The jury was presented with two versions of what occurred: Iromuanya's statement to police that he "shot by him" with the intent of scaring, but not killing, Jenkins and testimony from other witnesses that Iromuanya pointed the weapon in Jenkins' direction before firing. The challenged portion of instruction No. 8 did not preclude the jury from considering and accepting Iromuanya's version of the shooting. Rather, it correctly informed the jury that if it found that Iromuanya pointed the weapon at Jenkins and fired, it *could* infer an intent to kill despite the fact that such intent was not expressly stated.

[20] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005); *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). In this case, instruction No. 3 clearly informed the jury that the intent element with respect to the charge of attempted murder of Jenkins meant the intent to "cause the death of Nolan Jenkins." Instruction No. 5 informed the jury that the intent element with respect to the charged murder of Cooper was the intent to kill. Further, instruction No. 7 informed the jury of the doctrine of transferred intent and specifically stated that if it found Iromuanya "intended to kill Nolan Jenkins," the element of intent was satisfied as to Cooper even if he did not "intend to kill" her. The first sentence of instruction No. 8 informed the jury that in determining whether Iromuanya acted with the requisite intent, it should consider "his words and acts and all of the surrounding circumstances." We conclude that the permissive

inference language in instruction No. 8 was a correct statement of the law which did not prejudice Iromuanya.

(ii) Requested "Theory of Defense" Instruction

[21] It is not error for a trial court to refuse to give a party's requested instruction where the substance of the requested instruction was covered in the instructions given. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). If there is evidence to support it, a defendant is entitled to have an instruction given on his theory of the case. See *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). However, such an instruction is not needed where other instructions adequately cover the defense theory. *State v. Fitzgerald*, 1 Neb. App. 315, 493 N.W.2d 357 (1992).

The instructions given by the court in this case included an instruction on manslaughter as a lesser-included offense of second degree murder and repeatedly informed the jury of the State's burden to prove guilt beyond a reasonable doubt. We conclude that the instructions given by the court adequately covered all pertinent matters included in Iromuanya's proposed "theory of defense" instruction.

Based on *People v Lester*, 406 Mich. 252, 277 N.W.2d 633 (1979), Iromuanya argues that he was nevertheless entitled to a separate instruction on his theory of defense. In *Lester*, the Michigan Supreme Court held that a separate instruction on accidental homicide was mandated whenever the defense requested an instruction on the theory and there was evidence to support it, arguably even if the jury instructions given implicitly covered the theory. Notably, however, *Lester* has been overruled, and Michigan now applies a harmless error analysis when reviewing a failure to give an accidental homicide instruction. *People v. Hawthorne*, 474 Mich. 174, 713 N.W.2d 724 (2006). We have taken a similar approach. In *State v. Brown*, 220 Neb. 849, 374 N.W.2d 28 (1985), we stated that a separate accidental homicide instruction was not necessary when the intent instruction given to the jury adequately covered the issue. Thus, even if the proposed theory of the case instruction offered by Iromuanya was an attempt to help the jury distinguish between intent and accident, in this case, the jury was clearly instructed

that "[i]ntentionally" meant "willfully or purposely, not accidentally or involuntarily."

For these reasons, we conclude that the district court did not err in refusing to give Iromuanya's proposed instruction stating his theory of defense.

(iii) Requested Malice and Self-Defense Instructions

[22] Iromuanya argues that the district court erred in failing to either instruct the jury on malice as an element of second degree murder or give his requested self-defense instruction. Malice is not an element of second degree murder, and the district court therefore did not err in refusing to instruct that it was. Neb. Rev. Stat. § 28-304(1) (Reissue 1995); *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002); *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001); *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[23] In *Burlison*, we overruled prior cases which held that malice was an essential element of second degree murder. Iromuanya's argument that he was entitled to a self-defense instruction if the court declined to instruct on malice as an element is based on the following language in *Burlison*:

> We are now persuaded that when read in conjunction with Neb. Rev. Stat. § 28-102(1) (Reissue 1995), which defines the general purpose of the criminal code as "[t]o forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests," and the provisions of Neb. Rev. Stat. §§ 28-1406 to 28-1413 (Reissue 1995) dealing with justification for use of force, the Legislature's definition of second degree murder set forth in § 28-304(1) is not unconstitutionally overbroad. See *State v. Ryan, supra* (Gerrard, J., dissenting). Likewise, we are satisfied that in this context the statutes dealing with justification for use of force do not impose upon a defendant an unconstitutional shifting of the burden of proof, but, rather, a constitutionally permissible allocation of the burden of production, which when met by anything more than a scintilla of evidence requires the State to prove the lack of justification beyond a reasonable doubt.

255 Neb. at 196-97, 583 N.W.2d at 36. Prior and subsequent to *Burlison*, we have stated that a trial court must instruct the jury

on the issue of self-defense when there is "any evidence" adduced which raises a "legally cognizable" claim of self-defense. E.g., *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998); *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). We apply that standard here.

[24] Self-defense is a statutorily affirmative defense in Nebraska. *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). Neb. Rev. Stat. § 28-1409 (Reissue 1995) provides in pertinent part:

> (1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:
>
> . . . .
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a right thereto or by complying with a demand that he abstain from any action which he has no duty to take . . . .

Neb. Rev. Stat. § 28-1406(3) (Reissue 1995) defines "[d]eadly force" as

> force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using force. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances. *State v. Faust, supra*; *State v. Urbano, supra.*

[25] There is no evidence in the record to support a reasonable and good faith belief that Iromuanya was threatened with death or serious bodily harm at the time he fired the handgun. An instruction that no one was to leave until the shot glasses were retrieved cannot support an inference of such a threat. Several minutes had passed after the initial confrontation with Jenkins, which was broken up after a few seconds with no use of deadly force by anyone. Assuming the truth of Iromuanya's statement to police that when Jenkins approached a second time, he asked if Iromuanya was the person who had punched him previously, we conclude that neither that statement nor any other circumstance reflected in the record would warrant a reasonable or good faith belief in the necessity of using deadly force. There is no evidence that anyone, other than Iromuanya, was in possession of a deadly weapon. If the trial evidence does not support a claim of self-defense, the jury should not be instructed on it. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). Because there was no evidence to support a claim of self-defense in this case, the district court did not err in refusing to give the requested instruction.

5. Sufficiency of Evidence

(a) Standard of Review

[26] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005).

(b) Resolution

Our standard of review as stated above requires substantial deference to the factual findings made by the jury. As an appellate court, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence, as such matters are for the finder of fact. See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

Iromuanya was charged with and convicted of one count of attempted second degree murder, one count of second degree

murder, and two counts of using a weapon to commit a felony. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. § 28-304(1). Murder in the second degree is a Class 1B felony. § 28-304(2). A person is guilty of an attempt to commit a crime if he or she intentionally "engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime." Neb. Rev. Stat. § 28-201(1)(b) (Cum. Supp. 2004). Criminal attempt is a Class II felony when the crime attempted is a Class I, Class IA, or Class IB felony. § 28-201(4)(a). Any person who uses a firearm to commit any felony which may be prosecuted in a court of this state commits the offense of using a deadly weapon to commit a felony. Neb. Rev. Stat. § 28-1205(1) (Reissue 1995). Use of a deadly weapon which is a firearm to commit a felony is a Class II felony. § 28-1205(2)(b).

As we have noted, it is undisputed that Iromuanya intentionally fired the shot which injured Jenkins and killed Cooper. Viewed in a light most favorable to the prosecution, the circumstantial evidence is sufficient to establish that he did so with the intent of killing Jenkins. The evidence thus supports the conviction of attempted second degree murder and, under the doctrine of transferred intent, the conviction of second degree murder. See *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991) (holding evidence sufficient to support second degree murder conviction where defendant pointed gun at neck of person with whom he had exchanged angry words, fired and missed, but hit and killed another person). Because a firearm was used to commit both of these crimes, the evidence is also sufficient to support the convictions on two counts of use of a weapon to commit a felony.

There is no merit to Iromuanya's argument that the evidence was insufficient to support his convictions.

6. Sentencing Issues

(a) Additional Facts

At the sentencing hearing, Iromuanya objected to various documents included in the presentence investigation report

(PSI), which documents he characterized as "character letters" regarding Cooper. The court sustained the objection and stated it would only consider those portions of the PSI that "appropriately should be considered by the Court with respect to victim impact statements." After allocution and immediately prior to pronouncing sentence, the court made the following statement on the record:

> [T]his is a tragic case. It's a tragedy for the family and friends of Jenna Cooper, and for Nolan Jenkins, his family and his friends. And as in any murder case, whenever someone is murdered, there is a sense of loss for parents, brothers, relatives and friends, and that loss is immense. And when someone is shot and seriously injured, it has a significant emotional impact on the victim, their family, their friends, I recognize that.
>
> I also recognize that this is a tragedy for . . . Iromuanya's family and his friends. And I certainly consider [Iromuanya's] lack of any real significant criminal history. However, in determining the appropriate sentence, this Court must consider all of the surrounding facts and circumstances of these crimes.
>
> The jury determined that you intentionally tried to kill Nolan Jenkins, and the jury found you guilty of the murder of Jenna Cooper. You brought a gun with you. No one there had a gun that evening. No one had any type of a weapon that evening, except for you. It was your anger that caused you to pull that gun out of your pocket and you shot that gun in anger.
>
> In determining the appropriate sentence, this Court must consider the protection of the public, and I cannot ignore that you shot someone, simply because they pushed you and made you angry. I also must impose a sentence that will not depreciate the seriousness of these crimes.

The sentencing range for attempted murder in the second degree, a Class II felony, is a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2004) and §§ 28-201(4)(a) and 28-304(2). The court sentenced Iromuanya to imprisonment for

25 to 35 years on this conviction, charged in the information as count I. The sentencing range for use of a weapon which is a firearm to commit a felony, a Class II felony, is a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. §§ 28-105(1) and 28-1205(2)(b). The court sentenced Iromuanya to imprisonment for a period of 10 to 20 years on the weapons conviction related to the attempted second degree murder conviction, charged in the information as count II. The sentencing range for murder in the second degree, a Class IB felony, is a minimum of 20 years' imprisonment and a maximum of life imprisonment. §§ 28-105(1) and 28-304(2). The court sentenced Iromuanya to "not less than life imprisonment nor more than life imprisonment" on the second degree murder conviction, charged in the information as count III. On the separate weapons conviction relating to the second degree murder conviction, charged as count IV of the information, the court sentenced Iromuanya to imprisonment for a period of 10 to 20 years. The court further ordered that the sentence on count II is to run consecutively to count I, the sentence on count III is to run consecutively to counts I and II, and the sentence on count IV is to run consecutively to counts I, II, and III. Iromuanya was given credit for time served.

(b) Standard of Review

[27] A determination of whether multiple convictions in a single trial lead to multiple punishments depends on whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on such offenses. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

[28,29] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

(c) Resolution

(i) Multiple Punishments for Use of Weapon

Iromuanya argues that by imposing separate, consecutive sentences for the convictions of use of a weapon to commit a felony, the district court imposed multiple punishments for the same act in that both counts stemmed from the single shot that he fired. A similar issue was addressed in *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988), in which the defendant opened fire on a group of people, causing serious injury to Mark Heil. The defendant was found guilty of attempted second degree murder and the use of a firearm to commit that felony in connection with the injury to Heil. In a second prosecution, consolidated with the first for trial, the defendant was also convicted of first degree assault upon Heil and use of a firearm in the commission of that felony.

In his appeal from two consolidated cases, the defendant alleged that the two convictions for the use of a firearm against Heil offended the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution because they amounted to multiple punishments for the same conduct. In rejecting this contention, this court applied the principle that where a legislature specifically authorizes cumulative punishments under two statutes proscribing the same conduct, the prosecution may, in a single trial, seek and the court may impose such cumulative punishments without offending the Double Jeopardy Clause. *State v. Trevino, supra*, citing *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). We noted that under the Nebraska statute defining the offense of use of a weapon to commit a felony, the offense was to be " 'treated as a separate and distinct offense from the felony being committed' " and that the sentence " 'shall be consecutive to any other sentence imposed.' " *State v. Trevino*, 230 Neb. at 521, 432 N.W.2d at 521, quoting § 28-1205(3) (Reissue 1985). We concluded that because the defendant was found guilty of two distinct predicate offenses, attempted second degree murder and first degree assault, the trial court did not err in imposing consecutive sentences on the two corresponding convictions for use of a weapon to commit a felony. A dissent took the position that Nebraska law does not authorize cumulative punishment for attempted

murder and assault where both offenses arise from the same conduct, and the dissent concluded that the assault and corresponding firearm convictions should have been reversed and dismissed.

Nebraska law clearly authorizes cumulative punishments for the attempted second degree murder of Jenkins and the second degree murder of Cooper. Thus, when he fired the handgun, Iromuanya committed two predicate offenses. The language of § 28-1205 is the same today as it was at the time *Trevino* was decided. Because a firearm was used to commit each predicate offense, the district court properly found that there were two separate and distinct offenses of use of a weapon to commit a felony, and the court properly imposed consecutive sentences for each count.

Iromuanya's multiple punishments argument also relies on *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), in which we reiterated our statement in *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), that the Legislature's purpose in creating a separate offense of using a weapon in the commission of a felony was to "discourage individuals from carrying deadly weapons while they commit felonies." *State v. Pruett*, 263 Neb. at 105, 638 N.W.2d at 815. In both *Pruett* and *Ring*, we held that an unintentional crime could not serve as the predicate felony for a weapons charge under § 28-1205. In this case, however, intent is an essential element of both of the predicate felonies of which Iromuanya was convicted. Accordingly, we find no merit in the argument that his conviction on the two weapons counts amounted to impermissible multiple punishments.

(ii) Excessive Sentences

The sentences imposed by the district court fell within the statutory sentencing limits for each of the four offenses of which Iromuanya was convicted. Accordingly, we review the sentences for abuse of discretion. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Although Iromuanya generally contends that all of his sentences were excessive, his argument focuses exclusively on the maximum sentence he received on the second degree murder conviction. He argues that the trial court placed undue

weight on letters and materials received from Cooper's family and friends urging a maximum sentence, while disregarding materials submitted on his behalf arguing for leniency.

[30] As noted, Iromuanya's counsel objected to a "majority of the letters that were sent on behalf of Jenna Cooper and Nolan Jenkins" included in the PSI. The court sustained the objection, stating that it would only consider portions of the PSI that "appropriately should be considered by the Court with respect to victim impact statements." In this regard, we have stated that a judge should take into account facts obtained from victim impact statements in imposing a sentence, as he or she should consider all facts pertinent to sentencing, but a judge must not and cannot allow the judgments and conclusions of the victim's family to be substituted for those of the court in imposing a sentence. See *State v. Carlson*, 225 Neb. 490, 406 N.W.2d 139 (1987). After sustaining the objection, the court asked defense counsel if he was requesting that other materials be removed from the PSI, and defense counsel replied that removal was not necessary. Thus, it is unclear which portions of the voluminous PSI were actually considered by the sentencing court. However, unlike *Carlson*, we cannot conclude from this record that the court improperly relied on demands for a severe sentence made on behalf of the victims.

[31] 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, and motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005). In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing court's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *Id.*

Iromuanya was 23 years old at the time of his crimes. Although his parents were born in Nigeria, he was born and was raised in Lincoln. He has four siblings. He was never married, but had a steady relationship and three dependent children. He

completed high school and attended 1 year of community college. He had been unemployed since July 2003. He reported moderate use of alcohol and a single experimentation with marijuana at the age of 17. He denied use or experimentation with chemical substances other than marijuana. Testing results included in the PSI reflect a "low risk" for violence and aggressiveness, but a "problem risk" for "stress coping."

As specifically noted by the sentencing court, Iromuanya had no significant criminal history. In 1998, he was fined $50 and costs for having no operator's license and a charge of not having proof of insurance was dismissed. In 1999, he was fined $25 for trespassing. In 2001, he was fined $25 for failure to appear and a charge of disturbing the peace was dismissed.

The motivation for his offenses seems apparent from the record. When Ingram announced that no one was to leave until the shot glasses were recovered and Jenkins physically confronted Iromuanya and asked him if he had taken the shot glasses, Iromuanya felt wrongly accused and reacted with anger directed primarily at Jenkins. His anger, perhaps initially justified, explains but does not excuse his subsequent violent act in firing the handgun at Jenkins.

All four of Iromuanya's crimes resulted from the same act. The indeterminate sentences imposed on the attempted murder and weapons counts fall generally near the midpoint of the statutory sentencing ranges, with the minimum term of each sentence set below the maximum term. Based on the relevant sentencing factors outlined above, particularly those articulated by the district court, these sentences do not constitute an abuse of discretion and are not excessive.

[32] The sentence of not less than life imprisonment nor more than life imprisonment imposed for the second degree murder conviction is at the very top of the range permitted by statute and was ordered to run consecutively to the sentences for attempted murder and the related weapons charges. At the sentencing hearing, the court explained that it must consider the protection of the public and must also impose a sentence that would not depreciate the seriousness of the crimes. Those are, of course, valid general considerations which were applicable to sentencing on all four counts.

We find no abuse of discretion in setting life imprisonment as the maximum term of the second degree murder sentence. Iromuanya arrived at the party carrying a loaded, concealed handgun and used it without justification to extinguish a life. The shooting was a senseless act of violence, and the imposition of the maximum term of life imprisonment properly reflected the seriousness of the criminal conduct and its consequences.

However, the minimum term of Iromuanya's indeterminate sentence, which is the term used to calculate parole eligibility, was also set at life imprisonment. See Neb. Rev. Stat. § 83-1,110 (Cum. Supp. 2004). The court could not have imposed a more severe minimum term for second degree murder on a hardened criminal with a lengthy history of violent felony convictions. A sentence should fit the offender and not merely the crime. *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999), citing *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). The record contains no basis upon which we can discern why the minimum term of the sentence for second degree murder was the same as the maximum term, while the minimum terms of the sentences imposed for the other three crimes resulting from the same act were not. Taking into account all of the relevant circumstances, including but not limited to the fact that Iromuanya had no significant criminal record or history of violence, we conclude that the district court abused its discretion in setting life imprisonment as the minimum term of the sentence for second degree murder and that to that extent, the sentence was excessive. As noted, we find no abuse of discretion in sentencing on the other three counts.

Neb. Rev. Stat. § 29-2308 (Reissue 1995) provides in pertinent part that in criminal appeals brought in this court or the Nebraska Court of Appeals,

> the appellate court may reduce the sentence rendered by the district court against the accused when in its opinion the sentence is excessive, and it shall be the duty of the appellate court to render such sentence against the accused as in its opinion may be warranted by the evidence.

See, also, *State v. Etchison*, 188 Neb. 134, 195 N.W.2d 498 (1972); *State v. Oldenburg*, 10 Neb. App. 104, 628 N.W.2d 278 (2001). Based upon our statutory authority, we reduce Iromuanya's

sentence on count III, murder in the second degree, to imprisonment for not less than 50 years nor more than life. We further conclude that this sentence should run concurrently with the sentence of 25 to 35 years' imprisonment on count I, attempted murder in the second degree, which we affirm, inasmuch as both offenses resulted from the same act. We also affirm the sentences of 10 to 20 years' imprisonment each on counts II and IV, use of a weapon to commit a felony, and order that such sentences are to be served consecutively to the sentences on counts I and III, and to each other, as required by § 28-1205(3).

IV. CONCLUSION

For the reasons discussed herein, we affirm Iromuanya's convictions on all four counts. We also affirm the sentences on counts I, II, and IV. We conclude that the sentence imposed by the district court of not less than life imprisonment nor more than life imprisonment on count III, murder in the second degree, is excessive, and we modify that sentence to not less than 50 years' imprisonment nor more than life imprisonment, with the sentence on count III to be served concurrently with the sentence on count I. The sentences of 10 to 20 years' imprisonment on counts II and IV shall be served consecutively to the sentences on counts I and III, and to each other. Iromuanya shall receive credit for 305 days served, as ordered by the district court.

AFFIRMED AS MODIFIED.

WRIGHT, J., not participating.

CONNOLLY, J., concurring.

I join the majority opinion. I am, however, prompted to comment regarding how the trial court handled the issue of the spectators' wearing "memorial buttons." It is correct that we have a scanty record as to whether the "memorial buttons" affected the jury. However, this problem could have been easily averted. In this emotionally charged trial, the trial judge, at the first whiff of a problem, should have immediately smothered any incident that could have potentially prejudiced a jury.

It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias or prejudice can attach to any member thereof. *State v. Polinski*, 230 Neb. 43, 429 N.W.2d 725 (1988). "[C]ertain practices pose

such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.' " *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

Here, defense counsel informed the court on the second day of voir dire of a potential problem and moved in limine to exclude the buttons. Defense counsel stated at that time that "some of the family [are] starting to wear buttons with Jenna Cooper's face or photo . . . ." In response to the court's question, defendant's counsel also stated that he had seen at least one woman wearing buttons that morning. According to defense counsel's affidavit, submitted in support of Iromuanya's motion for new trial, the buttons included some type of slogan. The court's request of defense counsel for case law on the issue was wholly inadequate to address any potential prejudice. After being informed by counsel that family members were starting to wear the buttons, the court had a duty to immediately determine—out of the presence of the jury—who, if anyone, was wearing the buttons, and the message, if any, the buttons conveyed. Had the court appropriately reacted to the first indication of a potential problem, we would either not be dealing with this issue on appeal or have a sufficient record for review. Instead, after 2 days of trial, according to defense counsel's affidavit, the court requested that spectators not wear the memorial buttons. In many cases, this will be too little, too late—the infection will have already spread.

HENDRY, C.J., concurring in part, and in part dissenting.

I respectfully dissent from that portion of the opinion which modifies the sentence on count III, murder in the second degree, for which the district court sentenced Iromuanya to "not less than life imprisonment nor more than life imprisonment."

In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

It is true that the district court found that Iromuanya had no significant criminal history, but, as the majority notes, Iromuanya

brought a loaded, concealed handgun to the party. The gun was intentionally used in a senseless act of violence, resulting in the shooting of Nolan Jenkins in the head and Jenna Cooper's death. Regardless of whether this court would have imposed a sentence of life imprisonment for the minimum term of an indeterminate sentence under the same or similar circumstances, I cannot conclude that the sentencing court's reasons for the sentence, inter alia, protection of the public and imposition of a sentence that does not depreciate the seriousness of the crime, are clearly untenable and deprive Iromuanya of a substantial right and just result. See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). I would find no abuse of discretion and affirm Iromuanya's original sentence on count III.

In all other respects, I concur with the majority opinion.

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

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

I respectfully dissent from that portion of the opinion which modifies the sentence on count III, murder in the second degree. Whether or not I would have imposed the same sentence, under the facts and our jurisprudence, I do not find an abuse of discretion.

In all other respects, I concur with the majority opinion.

PENNFIELD OIL COMPANY, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLEE, V. W.L. WINSTROM, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF R.W. WINSTROM, APPELLEE AND CROSS-APPELLANT, AND ANDREW L. WINSTROM, APPELLANT AND CROSS-APPELLEE.

720 N.W.2d 886

Filed August 18, 2006. No. S-04-982.

1. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact

that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

3. **Contracts: Parol Agreement: Consideration.** The terms of a written executory contract may be orally modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration.
4. **Contracts: Appeal and Error.** Although a party may in retrospect be dissatisfied with a bargained-for provision, an appellate court will not rewrite a contract to provide terms contrary to those which are expressed.
5. **Decedents' Estates: Contracts: Stock.** The general rule is that while restrictions on the transfer of shares might not apply to testamentary dispositions in the absence of express terms that refer to such transfers, express share transfer restriction agreements will be enforced.
6. **Corporations: Contracts: Stock.** A transfer in violation of restrictions on the transfer of corporate stock is voidable in equity.
7. **Appeal and Error.** An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.
8. **Actions: Corporations: Equity.** The board of directors of a corporation, under ordinary circumstances, controls an action brought by the corporation, but a court of equity should interfere in the event of usurpation, fraud, gross negligence, or transgression of statutory limitations.
9. **Actions: Corporations.** A board of directors of a corporation has no right to dismiss an action through collusion with the defendant.
10. **Stock.** The intended beneficiaries of a share transfer restriction are entitled to enforce the restriction.
11. **Limitations of Actions: Words and Phrases.** "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress.
12. **Limitations of Actions.** A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit.
13. **Actions: Contracts: Time.** A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned to him or her.
14. **Breach of Contract.** The anticipatory breach of a contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evidencing an intention to refuse performance in the future.
15. ____. Anticipatory breach requires an unequivocal repudiation of the contract.
16. **Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.

17. **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.
18. **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.
19. **Contracts: Specific Performance: Stock.** Contracts for acquisition of shares of a closely held family corporation, which stock is not obtainable in the open market, are proper subjects for specific performance.
20. **Contracts: Specific Performance.** Specific performance is not generally demandable as a matter of absolute legal right; it is addressed to the legal discretion of the court and will not be granted where enforcement of the contract would be unjust.
21. ____: ____. In decreeing specific performance, courts ordinarily attempt to place the parties in the same position in which they would have been if the contract had been performed at the agreed-upon time.
22. **Contracts: Specific Performance: Proof.** The party seeking specific performance must show that it has substantially complied with the terms of the contract, including proof that it is ready, able, and willing to perform its obligations under the contract.
23. **Injunction.** Generally, the purpose of a temporary injunction is to protect the subject matter of litigation and preserve the status quo of the parties until a determination of the case on the merits.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with directions.

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

John R. Douglas, Brien W. Welch, and Daniel J. Epstein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee W.L. Winstrom.

Rodney M. Confer and Jeanelle R. Lust, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee Pennfield Oil Company.

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

GERRARD, J.

FACTUAL BACKGROUND

Pennfield Oil Company (Pennfield) is a closely held Nebraska corporation, formed in 1947 by R.W. Winstrom (R.W.). It has been a subchapter S corporation since 1987. At the time of the corporation's formation, R.W. held 50 shares of stock, as did

J.P. Stocker. Another 20 shares were later issued to V.J. Lich, and in 1948, the three shareholders entered into an agreement (the 1948 agreement) generally requiring redemption of the stock at book value upon the death of a shareholder or a shareholder's desire to sell stock. Stocker's shares were redeemed by Pennfield in 1949, and Pennfield's board of directors authorized the sale of Lich's stock to R.W. in 1951. Thus, in 1951, there were 70 outstanding shares of Pennfield stock, all held by R.W.

In 1960, R.W. gifted 20 shares of stock each to his two sons, W.D. Winstrom (Dean) and W.L. Winstrom (Bill). The three shareholders and their wives entered into a new agreement (the 1960 agreement), restricting ownership to the three shareholders and providing that "in the event of the demise" of any of the three shareholders, or if any of the three desired to dispose of stock, Pennfield "shall buy the stock at the book value of the stock, determined by a stockholders' meeting within thirty days of the date of demise or date of desiring to sell."

Dean's stock was redeemed by Pennfield in 1969. At this point, then, there were 50 outstanding shares of stock: 30 held by R.W., and 20 held by Bill.

In 1987, three stock certificates were issued to Bill, consisting of 5.27 shares gifted to Bill by R.W. This gave Bill a majority interest in the company—25.27 of the 50 outstanding shares. Later that year, R.W. died testate, and his will devised his Pennfield stock, or proceeds of its sale, to Bill. Bill also was the personal representative of R.W.'s estate (the Estate).

The Pennfield stock was a substantial portion of the Estate's assets, and the Estate elected to defer estate tax liability pursuant to I.R.C. §§ 6166 and 303 (1994), which permit deferral of estate tax liability for stock of qualifying closely held corporations. Evidence was presented that Pennfield's board of directors met on or about December 14, 1987, and resolved to invoke the 1960 agreement, but over an extended period of time because of the financial burden of redeeming the stock. Bill denied that any such meeting took place. As previously noted, the 1960 agreement required a meeting of "shareholders"; at this time, all the shares were owned by either Bill, in his personal capacity, or the Estate, of which Bill was the personal representative.

In 1988, Pennfield and all the shareholders (i.e., Bill and the Estate) entered into a new stock repurchase agreement (the 1988 agreement). Bill signed the agreement three times, on behalf of himself, the Estate, and Pennfield. The stated purpose of the 1988 agreement was "to confirm[,] restate, formalize and clarify" the existing 1948 and 1960 agreements. The 1988 agreement expressly applied to all outstanding stock as of the date of the agreement and stated that no transfer of shares would be made or recognized unless the transferee accepted the 1988 agreement and agreed to be bound by it. As with the previous agreements, the 1988 agreement provided for the redemption of stock at book value upon the death of a stockholder, "an offer by a Stockholder to sell stock to a person who is not a Stockholder of Pennfield, or the acceptance of an offer by a Stockholder of an offer to purchase such Stockholder's stock or any part thereof," or separation of a stockholder from employment with Pennfield.

The 1988 agreement further provided that

> redemption of shares pursuant to this Agreement shall be closed at such time and place as shall be mutually agreed, not earlier than thirty (30) days, nor later than fifteen (15) months from the effective date, provided, that in the case of redemption of the stock of a deceased Stockholder, closing with respect to so much of the deceased Stockholder's shares as are required to be retained to enable Stockholder's estate to qualify for federal estate tax deferral pursuant to I.R.C. Sec. 6166 (or the parallel provision of any subsequent Code) shall be deferred, if requested by the Personal Representative, until the balance of such deferred federal estate tax is paid.

The 1988 agreement also provided:

> Pennfield may waive its right to redeem and Stockholder or Personal Representative may waive the right to sell the stock to Pennfield as follows;
>
> > a) in the case of redemption by reason of death, if such stock will pass, pursuant to the will or other testamentary disposition of such Stockholder or the applicable laws of descent and distribution, or

> b) in the case of redemption by reason of proposed transfer, if such stock will be transferred,
>
> to a person who is an employee of Pennfield and who had endorsed this Agreement with respect to the stock to be transferred.

Bill's son, Andrew Winstrom (Andrew), became president of Pennfield later in 1988. Andrew agreed to be bound by the 1988 agreement in 1990. At that time, all the outstanding stock was still owned by either Bill or the Estate. In 1990, Pennfield repurchased a total of 16.24 shares of stock from the Estate. This action was approved by Pennfield's shareholders (Bill and the Estate) and board of directors (Bill, Andrew, and another board member). At the same time, the board adopted a resolution to sell Andrew 15.89 shares. Andrew's obligation to pay for the stock was assigned to the Estate in partial satisfaction of the redemption price of the 16.24 shares Pennfield had repurchased, with Pennfield paying the difference directly to the Estate. When these transactions were completed, Bill held 25.27 shares, Andrew held 15.89 shares, and the Estate held 8.49 shares.

The Estate's tender of 8.09 shares of the stock redeemed by Pennfield was accomplished in a new stock redemption agreement (the 1990 agreement). The 1990 agreement was signed by Bill on behalf of the Estate, Andrew on behalf of Pennfield, and accepted by Bill in his individual capacity. The 1990 agreement specified that the 8.09 shares of stock were tendered pursuant to the 1948, 1960, and 1988 agreements and that all the parties "confirm[ed] and ratif[ied]" the 1960 agreement "as restated" in the 1988 agreement. The 1990 agreement also stated:

> It is further agreed the rights and obligations of the [1988] Repurchase Agreement are continuing and either Estate or [Pennfield] shall have the right to enforce same at any time. Estate and [Pennfield] each stipulate and agree that any statute of limitations or rule of law of Nebraska or any other state which limits the time for filing any action pursuant to the agreement, whether in law or equity, is extended and tolled from the date hereof until either party hereto shall notify the other that such statute shall again commence to run.

In 1992, Andrew was gifted an additional 8.43 shares from Bill, bringing Andrew's interest in Pennfield to 24.32 shares. Bill still held 16.84 shares, and the Estate held 8.49 shares, for a total of 25.33 shares under Bill's control and *not* in Andrew's possession. Thus, Andrew was effectively a minority shareholder and would remain so if the Estate's stock was transferred to Bill, but Andrew would become the majority shareholder if the Estate's stock was redeemed by Pennfield.

In 1997, Bill sought to transfer the final 8.49 shares of stock in the Estate to himself, pursuant to R.W.'s will. Andrew, as president of Pennfield, refused to sign the stock certificate, and the attempt to transfer the stock was tabled. In 2000, the Estate made its final tax payment and Bill sought to close the Estate, and again to transfer the final 8.49 shares from the Estate to himself. Andrew again refused to sign the stock certificate. Andrew also refused to call a director's meeting to transfer the stock. On December 28, 2000, Bill, as Pennfield secretary, directed Pennfield's corporate counsel to note, on the corporation's stock register, that the 8.49 shares held by the Estate had been transferred to Bill. On January 23, 2001, Bill notified Andrew that he was calling a special meeting to amend the company bylaws and conduct other business; on the same date, Andrew filed a notice of redemption by Pennfield of the 8.49 shares.

On February 7, 2001, Andrew directed the filing of a petition in the district court on behalf of Pennfield, against Bill in his individual capacity and as personal representative of the Estate, seeking declaratory and injunctive relief and an order requiring redemption of the shares. Pennfield later filed an amended petition naming Andrew as an additional defendant. The district court temporarily enjoined all the parties from taking any action to vote or transfer the disputed shares. Andrew filed an answer and cross-claims, generally alleging breaches of contract and fiduciary duties by Bill. Bill filed an answer in which he alleged that the action on behalf of Pennfield was not authorized by Pennfield's board of directors. Both Andrew and Bill attempted to direct the retention of counsel for Pennfield; the dispute over which attorneys were authorized to represent Pennfield resulted in an interlocutory appeal that we dismissed because it was not

taken from a final, appealable order. See *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

After the appeal was dismissed, the matter went to a bench trial in the district court. Shortly before trial, Bill and his wife, in their capacities as directors of Pennfield, filed a "Complaint in Intervention" seeking to have the action dismissed or, in the alternative, a declaration that "Pennfield does not have a right, obligation, or opportunity to redeem the 8.49 shares of stock currently held by [Bill], individually." The "Complaint in Intervention" was ultimately dismissed without prejudice by the court.

At the conclusion of the trial, the district court entered an order denying Pennfield's and Andrew's requests for relief. The district court found that at the time of R.W.'s death, the 1960 agreement was controlling, and the 1960 agreement required a meeting of shareholders within 30 days of a shareholder's death to establish the book value of the stock. The district court concluded that

> [b]ecause the meeting to determine the book value of the stock was not held within the contractually required time period . . . the proper method for exercising Pennfield's right of redemption—as indicated under the plain language of the [1960] agreement, was not followed and that Pennfield effectively waived its right of redemption. . . . Accordingly, [Bill] has not breached any fiduciary or contractual duties with respect to that agreement.

The district court did not discuss the effect of the 1988 or 1990 agreements with respect to its conclusion that Pennfield had waived the right of redemption under the 1960 agreement. However, the district court did conclude that even if Pennfield had a right of redemption under the 1960 agreement, "the intent of the parties in creating the agreement renders its enforcement in the present case improper." The court found that from "the plain language of the [1960 agreement,]" it was the intent of the parties to the 1960 agreement to keep the corporation's shares in Bill's ownership. The court found that Andrew was never intended to become a majority shareholder and that R.W. intended Bill to have his Pennfield stock. The court found that "fundamental fairness requires that [Bill] maintain ownership of the 8.49 shares." However, the court also found that "Andrew did

not act improperly" in instituting the present action and denied each and every other claim in Bill's and Andrew's pleadings. Andrew appeals the judgment of the district court.

ASSIGNMENTS OF ERROR

Andrew assigns, concisely restated, that the district court erred in holding that (1) the technical failure to have a shareholder's meeting within 30 days of R.W.'s death waived Pennfield's contractual redemption rights and (2) the district court's equitable powers allowed it to ignore the clear language of the parties' contracts because the court had reached a contrary conclusion about the parties' intent concerning Pennfield's stock ownership.

On cross-appeal, Bill assigns that the district court erred (1) in failing to dismiss the petition filed on behalf of Pennfield because the evidence established that the action was initiated by Andrew and not authorized by the board of directors, (2) in failing to hold that Pennfield's and Andrew's claims were barred by the statute of limitations, and (3) in failing to hold that Pennfield's and Andrew's claims were barred by equitable estoppel.

STANDARD OF REVIEW

[1] While the issues presented in this case center on an alleged breach of contract, the relief sought was entirely equitable. To the extent that the meaning of the relevant contractual language is at issue, we are confronted with questions of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. See, *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006); *Hans v. Lucas*, 270 Neb. 421, 703 N.W.2d 880 (2005).

[2] However, given the nature of the relief requested, this action sounds in equity. See *Reichart v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard

and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

Contractual Redemption Rights

The first issue we address is that presented by Andrew's first assignment of error—whether the district court erred in determining that the attempted redemption of the Estate's stock was controlled by the 1960 agreement and that the terms of the 1960 agreement had not been satisfied. We note, initially, that the parties to this case do not dispute that stock transfer restrictions such as those at issue in this case are generally enforceable under Nebraska law. See, Neb. Rev. Stat. § 21-2046 (Reissue 1997); *Elson v. Schmidt*, 140 Neb. 646, 1 N.W.2d 314 (1941). As previously noted, the district court concluded in this case that the 1960 agreement was controlling with respect to stock redemption and that redemption had been waived because a meeting to determine the book value of the stock was not held within 30 days of R.W.'s death, as the 1960 agreement required. The district court erred in its analysis of this issue.

Even if Pennfield could be said to have waived redemption of the Estate's stock by not strictly complying with the terms of the 1960 agreement, the district court erred in not considering the effect and terms of the subsequent stock redemption agreements. Pennfield, Bill, Andrew, and the Estate were all bound by the 1988 agreement, which was expressly intended to "confirm[,] restate, formalize and clarify" the 1948 and 1960 agreements. The 1988 agreement specifically provides for redemption of stock and deference of redemption for tax purposes under circumstances that are effectively identical to the course of action that Pennfield actually pursued. The 1990 agreement expressly confirmed and ratified the 1960 agreement "as restated" in the 1988 agreement.

[3] The terms of a written executory contract may be orally modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration. *Whorley v. First Westside Bank*, 240 Neb. 975, 485 N.W.2d 578 (1992). Whatever the terms of the 1960 agreement may have been, the 1988 agreement clearly allowed the parties to delay

redemption for federal estate tax purposes. Even if Pennfield had waived redemption under the 1960 agreement, that right was extended under the 1988 agreement and further reinforced by the 1990 agreement. The court erred in concluding otherwise.

Bill argues on appeal that there can be no redemption under the 1988 agreement since there has been no "activating event" since the agreement was signed—because R.W. died in 1987, no shareholder has died since the 1988 agreement was reached. Brief for appellee Bill at 9. But it is plain from the 1988 agreement that it was intended to apply to the shares that were, at that time, held by R.W.'s estate. This is also evidenced by the fact that the 1990 agreement specifically invoked the 1948, 1960, and 1988 agreements as the basis for Pennfield's 1990 purchase of stock from the Estate.

Bill further argues that the parties had abandoned the 1960 agreement through their conduct. This argument is without merit for the reasons explained above. The 1960 agreement was confirmed and restated by the 1988 agreement, and Bill offers no argument that the 1988 agreement was ever abandoned. Bill also points out that the 1988 agreement permits Pennfield to waive the right to redeem the stock, if the stock will pass by will or testamentary disposition, to an employee of Pennfield who had endorsed the 1988 agreement. However, the record reflects that while a waiver of Pennfield's right to redeem was prepared, none has been adopted. Whether Pennfield can waive redemption under the 1988 agreement is not an issue in this appeal, given the record before us.

Andrew's second assignment of error takes issue with the district court's further conclusion that even if Pennfield had a right of redemption under the 1960 agreement, it would be "improper" to enforce the agreement in the present case, because of what the court determined to be the intent of the parties to that agreement. The court also erred in this regard.

First, the court correctly concluded that the 1960 agreement was unambiguous, and none of the parties challenge this finding on appeal. Thus, as the court noted, the intent of the agreement should be determined from the plain language of the document. But the court concluded, from the plain language, that the 1960 agreement evidenced an intent to keep the corporation's shares

within the Winstrom family "and, specifically, with [Bill]." There is little support in the 1960 agreement for the conclusion that Bill was to be the favored owner of Pennfield stock. Rather, the 1960 agreement took place when R.W. owned 30 shares of stock, and Bill and Dean each owned 20 shares. The 1960 agreement evinces an intent to keep ownership of the stock among R.W., Dean, and Bill, but does not indicate any preference for Bill. In fact, while the 1960 agreement addresses who were to be the stockholders, it in no way addresses who was to own the majority of stock.

Moreover, the court's analysis again fails to consider the provisions of the 1988 and 1990 agreements, which clearly anticipated that parties other than Bill would come into possession of Pennfield stock. In 1988, all the outstanding Pennfield stock was in the possession of Bill or the Estate. The 1988 agreement was signed by Bill as the then president of Pennfield, Bill in his capacity as a shareholder, and Bill as the personal representative of the Estate. In other words, Bill functionally entered into the 1988 agreement with himself. But the 1988 agreement expressly permitted, notwithstanding the redemption provision, inter vivos transfers from one stockholder to another stockholder who was signatory to the agreement—which Andrew became, in 1990, when he endorsed the 1988 agreement and Pennfield sold Andrew some of the stock it had redeemed from the Estate. The 1988 agreement makes little sense unless it was contemplated that Pennfield stock would be owned by someone other than Bill.

[4] The court also supported its conclusion with the observation that Andrew was never intended to become the majority shareholder. But that observation, whether or not it is correct, is not based upon the plain language of the relevant, unambiguous agreements. Those agreements permit the redemption of stock from the Estate under the circumstances presented here, even if Bill did not expect them to have the effect of making him a minority shareholder; Andrew's desire to become majority shareholder is not an unlawful object. See *Baum v. Baum Holding Co.*, 158 Neb. 197, 62 N.W.2d 864 (1954). Although a party may in retrospect be dissatisfied with a bargained-for provision, an appellate court will not rewrite a contract to provide terms contrary to those which are expressed. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

The district court also found, in essence, that Pennfield's right of redemption under the 1960 agreement was subordinate to what the court determined to be R.W.'s intent, evidenced by his will, that Bill have his stock. We first note that if the court's reasoning were correct, the parties would have acted improperly in 1990, when Pennfield purchased 16.24 shares of stock from the Estate and sold 15.89 shares of that stock to Andrew.

[5] But more important, while R.W. devised his stock to Bill, R.W. was also certainly aware that the stock was subject to the 1960 agreement. The general rule is that while restrictions on the transfer of shares might not be applied to testamentary dispositions in the absence of express terms that refer to such transfers, express share transfer restriction agreements will be enforced. See, e.g., *Sorlie v. Ness*, 323 N.W.2d 841 (N.D. 1982); *Vogel v. Melish*, 31 Ill. 2d 620, 203 N.E.2d 411 (1964); *Taylor's Administrator v. Taylor*, 301 S.W.2d 579 (Ky. 1957); *Kerr v. Porvenir Corp.*, 119 N.M. 262, 889 P.2d 870 (N.M. App. 1994); *Avrett and Ledbetter Roofing and Heating Co. v. Phillips*, 85 N.C. App. 248, 354 S.E.2d 321 (1987); *In re Est. of Riggs*, 36 Colo. App. 302, 540 P.2d 361 (1975); *In re Estate of Martin*, 15 Ariz. App. 569, 490 P.2d 14 (1971). Cf., *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983) (holding that right to purchase stock under stock restriction agreements descended to heirs of third-party beneficiaries of agreements); *F.H.T., Inc. v. Feuerhelm*, 211 Neb. 860, 320 N.W.2d 772 (1982) (concluding, without discussion of issue, that buyout stock transfer provision expressly referring to probate transfers was enforceable). See, also, *F.B.I. Farms, Inc. v. Moore*, 798 N.E.2d 440 (Ind. 2003); *Boston Safe Dep. & Tr. Co. v. North Attleborough Chapt. American Red Cross*, 330 Mass. 114, 111 N.E.2d 447 (1953); *Dixie Pipe Sales, Inc. v. Perry*, 834 S.W.2d 491 (Tex. App. 1992) (holding general restrictions on stock transfer extend to testamentary disposition). See, generally, 12 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 5460 (perm. ed., rev. vol. 2004 & Cum. Supp. 2005).

The 1960 agreement quite specifically provides for redemption of stock in the event of the death of a shareholder, and the 1988 agreement provides even more expressly for redemption of stock that is subject to testamentary disposition. They are

enforceable here against Bill and the Estate, especially given that R.W. and Bill signed the 1960 agreement, and Bill and the Estate signed the 1988 agreement. R.W.'s will evinces an intent to leave his stock to Bill, but both R.W. and Bill also signed an agreement limiting R.W.'s power to devise his stock, and Bill (as both an individual and personal representative of the Estate) signed subsequent agreements disposing of the stock that R.W. meant Bill to have, and reaffirming the restrictions placed upon transfer of the remaining shares.

[6] Finally, Bill argues that he already completed transfer of the disputed shares, since, acting as secretary of Pennfield, he directed that the transfer be recorded on Pennfield's stock ledger. But the fact that Bill was in a position to note a transfer of stock in the corporate records cannot defeat an otherwise effective right to redeem the stock under a valid stock repurchase agreement. A transfer in violation of restrictions on the transfer of corporate stock is voidable in equity. See, e.g., *Groves v. Prickett*, 420 F.2d 1119 (9th Cir. 1970) (applying California law), *F.B.I. Farms, Inc., supra*. See, generally, 12 Fletcher et al., *supra*, § 5453. In other words, Bill's technical completion of the stock transfer does not provide a defense to a claim that the transfer occurred in violation of the relevant stock transfer restriction agreements.

Andrew's assignments of error have merit. The plain language of the stock transfer restriction agreements does not support the construction placed upon them by the district court, and the district court erred in concluding that the terms of R.W.'s will could supersede the specific restrictions on stock transfer due to the death of a shareholder.

CROSS-APPEAL

[7] Since the trial court's reasoning was erroneous, we turn to the alternative bases for affirming the judgment set forth in Bill's cross-appeal. An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005); *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002); *McDonald v. DeCamp Legal Servs.*,

260 Neb. 729, 619 N.W.2d 583 (2000). Here, the court concluded that "Andrew did not act improperly in instituting the present action" and denied the parties' remaining claims, but we consider the issues raised by the cross-appeal that present a basis for affirming the court's judgment on other grounds.

INITIATION OF SUIT

Bill's first assignment of error on cross-appeal is that the court erred in not dismissing Pennfield's petition because it was not authorized by Pennfield's board of directors. Andrew admitted that he initiated Pennfield's petition in this action without direction or authority from Pennfield's board of directors. Andrew contends that this court addressed and rejected Bill's argument that the case should be dismissed with our disposition of the prior appeal in this case, *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

Andrew's argument is without merit. In *Pennfield Oil Co., supra*, a law firm, selected by the board of directors to represent Pennfield, attempted to appeal from the denial of its motion seeking leave to appear on behalf of Pennfield and disqualification of the counsel which had been representing Pennfield on Andrew's authority. However, we concluded that the district court had not entered a final, appealable order. See *id.* "[W]e [had] no jurisdiction over the appeal and [were] unable to reach its merits" and dismissed the appeal. *Id.* at 300, 673 N.W.2d at 567. The only issue we decided in *Pennfield Oil Co.* was whether the district court had entered a final, appealable order. Contrary to Andrew's argument, we did not decide, expressly or impliedly, whether the district court should have dismissed the action because Pennfield's board of directors had not authorized its filing.

[8,9] Nonetheless, we conclude that the district court did not err in reaching the merits of this action. We initially note that although the board of directors of a corporation, under ordinary circumstances, controls an action brought by the corporation, that control is not unconstrained. See *System Meat Co. v. Stewart*, 175 Neb. 387, 122 N.W.2d 1 (1963). A court of equity can and should interfere in the event of usurpation, fraud, gross negligence, or transgression of statutory limitations. See *id.* In particular, a board of directors of a corporation has no right to dismiss an action through collusion with the defendant. *Id.* Here, the

defendant—Bill—was also in effective control of the board of directors. Andrew's cross-claim alleged that Bill was in breach of his fiduciary duties.

But more significantly, regardless of how the action was initiated, the district court had jurisdiction to proceed, because Andrew, as a party to the agreements, also had standing to pursue their enforcement. In *F.H.T., Inc. v. Feuerhelm*, 211 Neb. 860, 320 N.W.2d 772 (1982), we permitted a corporation and its minority shareholder to maintain an action against the majority shareholder to compel enforcement of a redemption clause signed by the shareholders. We explained the policy underlying transfer restriction agreements, stating:

> In [close] corporations, stock restrictions are devices often employed to insure that the management and control of the business remains with the same group of investors or with people well known to them. Such restrictions may be embodied in the articles of the corporation, in the bylaws, or in shareholder agreements, and generally provide that upon the withdrawal or death of a stockholder, his shares will be sold or transferred only to the remaining stockholders or to the corporation, or at least will be offered to them before being sold to any outsider. Such agreements make it possible for shareholders to choose future associates and prevent unwanted outsiders from entering the business if their integrity or business acumen is in doubt.

Id. at 865, 320 N.W.2d at 776. We also explained that

> " '[t]here seems to be no reason in principle why they (the stockholders of a corporation) should not be permitted to retain the control of the corporation in which they have embarked their fortunes among themselves, or such of them as stand by the vessel, where no question of a *bona fide* purchaser without notice is involved. In this court, where the intent of the parties is the thing sought to be enforced, every effort should be made to hold men to agreements into which they have voluntarily entered, where the same are not obnoxious to any law or policy, and upon the strength of which others have changed their position or circumstances, or parted with a valuable consideration. . . .' "

Id. at 866, 320 N.W.2d at 776.

In *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983), we implemented that policy by permitting nonsignatories of a stock transfer restriction to maintain an action to enforce the restrictions, on the theory that they were third-party beneficiaries of the restrictions. "Beneficiaries of a contract may recover thereon, though not named as parties, when it appears by express stipulation or by reasonable intendment that rights and interests of such beneficiaries were contemplated and being provided for thereon." *Id.* at 557, 335 N.W.2d at 526.

[10] The essence of these authorities is that "[t]he intended beneficiaries of a share transfer restriction are entitled to enforce the restriction." 12 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 5460.70 at 169 (perm. ed., rev. vol. 2004 & Cum. Supp. 2005). In other words, the shareholders are all bound by the restriction and thus have standing to enforce the agreement against one another.

In the present case, Andrew brought claims against Bill in his individual capacity, seeking the same relief as Pennfield's petition. Bill and his wife filed a petition in intervention which sought, in part, a declaration that Pennfield had no right or obligation to redeem stock from the estate. The issues presented by the various pleadings were essentially the same: whether Bill's transfer of stock to himself from the Estate violated the stock transfer restriction agreements or whether Pennfield (in the absence of a valid waiver) was required to redeem the stock pursuant to the agreements. Regardless of whether the action was initiated properly, Andrew's cross-claims, and Bill and his wife's petition in intervention, effectively raised the same issues, so the court had before it all the parties to a legal dispute that was ripe for disposition. The court did not err in refusing to dismiss the action because Pennfield's board of directors did not authorize the initiation of the action.

STATUTE OF LIMITATIONS

Bill also argues that Pennfield's and Andrew's claims should have been dismissed as barred by the statute of limitations. Bill's argument is that Andrew was aware in 1992 that Bill did not intend to redeem any more stock from the Estate and that this was when Andrew's cause of action accrued. Bill argues that Andrew was, in 1992, aware of sufficient facts for a cause of

action to accrue pursuant to the "rule regarding discovery." Brief for appellee Bill on cross-appeal at 44. See, e.g., *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996).

This argument is without merit for two reasons. First, as noted above, the 1990 agreement specifically confirmed the 1988 agreement and tolled the statute of limitations "until either party hereto shall notify the other that such statute shall again commence to run." There is no evidence in the record that such a notification was made.

[11-13] Furthermore, it is apparent that the discovery rule is not relevant to this case. "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress. *Id.* But a cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit. *Cavanaugh v. City of Omaha*, 254 Neb. 897, 580 N.W.2d 541 (1998). A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned to him or her. *Id.* In point of fact, the 1988 and 1990 agreements could not be breached until the estate tax was paid and Bill attempted to transfer the stock in the absence of a valid waiver of Pennfield's contractual right to redeem the stock. While Andrew may have been aware that in 1992, Bill did not intend to redeem any more stock, Andrew was also aware that pursuant to the 1988 agreement, Bill could postpone redemption until the balance of the deferred estate tax was paid. Simply stated, no breach of contract had yet occurred in 1992, so what Andrew might have known or suspected is beside the point.

[14,15] While Bill references the "rule regarding discovery," the theory actually being advanced is that of anticipatory breach, since no actual breach of the agreement had yet occurred. The anticipatory breach of a contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evidencing an intention to refuse performance in the future. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000). But anticipatory breach requires an unequivocal repudiation of the contract. See *id.* Here, the evidence does not suggest a repudiation of the agreements

sufficiently unequivocal to constitute an anticipatory breach, particularly because, had Pennfield validly waived redemption, Bill's intent to keep the stock could have been accomplished within the bounds of the agreements.

In short, the district court did not err in rejecting Bill's statute of limitations argument.

EQUITABLE ESTOPPEL

Finally, Bill contends that Pennfield and Andrew are equitably estopped from seeking redemption of the stock, because Bill would not have given stock to Andrew if Bill had known that the stock held by the Estate would eventually be redeemed, instead of being transferred to Bill. Because Bill cites no authority in support of this argument, it is unclear on what theory he believes Andrew should be estopped.

[16-18] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *In re Estate of Bauer*, 270 Neb. 91, 700 N.W.2d 572 (2005). Recovery on a theory of promissory estoppel, on the other hand, is based upon the principle that injustice can be avoided only by enforcement of a promise. *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006). 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. *Id.*

But neither theory is applicable here. In this case, while Bill asserts that Pennfield and Andrew did not timely assert the right

to redemption, he does not allege that Andrew or Pennfield made any promises not to redeem the stock, or otherwise behaved in a way that would be intended or expected to lead Bill to believe that Pennfield would not assert the right of redemption. Bill argues only that Andrew did not reveal an intent to seek redemption of the Estate's stock at the time that Bill gave stock to Andrew. Even if Bill would have acted differently at the time had Andrew informed him of such an intent, in the absence of an affirmative act on Andrew's part reasonably expected to induce action or forbearance on Bill's part, Bill has not proved that Andrew is estopped. Bill's final assignment of error on cross-appeal is without merit.

RELIEF

We have concluded that the court's reasoning for dismissing Pennfield's and Andrew's claims was erroneous, but that the court did not err in rejecting the alternative grounds for dismissing the claims that have been raised by Bill's cross-appeal. The remaining issue, then, is the relief to which Pennfield and Andrew are entitled. Pennfield's petition, and Andrew's cross-claim, sought a variety of declaratory and equitable relief. Generally, they sought a declaration of the parties' rights under the stock transfer restriction agreements, a finding that Bill and the Estate were in breach of the agreements, and injunctive relief directing the Estate to surrender the stock for redemption.

[19-22] Contracts for acquisition of shares of a closely held family corporation, which stock is not obtainable in the open market, are proper subjects for specific performance. *Brown v. Knox*, 219 Neb. 189, 361 N.W.2d 540 (1985). But specific performance is not generally demandable as a matter of absolute legal right; it is addressed to the legal discretion of the court and will not be granted where enforcement of the contract would be unjust. See *Langemeier v. Urwiler Oil & Fertilizer*, 265 Neb. 827, 660 N.W.2d 487 (2003). In decreeing specific performance, courts ordinarily attempt to place the parties in the same position in which they would have been if the contract had been performed at the agreed-upon time. See *III Lounge, Inc. v. Gaines*, 227 Neb. 585, 419 N.W.2d 143 (1988). The party seeking specific performance must show that it has substantially complied with the terms of the contract, including proof that it is ready,

able, and willing to perform its obligations under the contract. *Satellite Dev. Co. v. Bernt*, 229 Neb. 778, 429 N.W.2d 334 (1988).

Here, we are not persuaded that on the record before us, Pennfield and Andrew are equitably entitled to a decree ordering the Estate to surrender the stock for redemption. The 1960 agreement provided that if stock was to be redeemed, Pennfield would buy the stock "at the book value of the stock, determined by a stockholders' meeting within thirty days of the date of demise." Although the 1988 agreement changed the time at which redemption would occur, and explained in more detail what was meant by "book value," there is no indication in the 1988 agreement that it was intended to supplant the requirement, from the 1960 agreement, that the shareholders make the determination of book value at a shareholders' meeting prior to redemption.

[23] The record before us indicates that such a meeting has not taken place. Moreover, the record suggests that Andrew was personally responsible for preventing the board of directors from meeting before Andrew directed Pennfield to demand redemption of the shares. Thus, the record indicates that the redemption was not authorized by the board of directors, nor was the board of directors permitted to consider whether redemption should be waived pursuant to the waiver provision of the 1988 agreement. As a practical matter, a meeting of the board of directors or stockholders could not have taken place, given the district court's temporary injunction preventing the Estate's shares from being voted. Generally, the purpose of a temporary injunction is to protect the subject matter of litigation and preserve the status quo of the parties until a determination of the case on the merits. See, *State ex rel. Beck v. Associates Discount Corp.*, 161 Neb. 410, 73 N.W.2d 673 (1955); *State v. Baker*, 62 Neb. 840, 88 N.W. 124 (1901). Here, while the district court's concern was understandable, the temporary injunction may have had the unintended effect of materially altering the respective positions of the parties.

Based on the reasoning set forth in previous sections of this opinion, we find that Pennfield and Andrew are entitled to declaratory relief, establishing that Bill and the Estate are subject to a valid demand for redemption of the stock pursuant to the stock transfer restriction agreements. But the record does not affirmatively show that Pennfield took all the steps necessary to

redeem the shares, and it appears that the district court's temporary injunction may have prevented Pennfield's shareholders and board of directors from exercising their duties with respect to the redemption agreements. Thus, we conclude on this record, it would be unjust to decree specific performance of the stock transfer redemption agreements.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court, and remand the cause with directions to grant Pennfield and Andrew declaratory relief that is consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

NANCY CASTILLO, APPELLANT, V. MEGAN K. YOUNG AND MARLYS L. SEARS, APPELLEES.

720 N.W.2d 40

Filed August 18, 2006. No. S-04-1354.

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: Damages.** The right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from the negligent act includes the right to recover for an aggravation of the preexisting disease.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
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.
5. **New Trial: Damages.** When no liability issues remain to be litigated, the cause is remanded for a new trial on the issue of damages only.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

Stanley D. Cohen, of Law Office of Stan Cohen, for appellant.

Stephen L. Ahl and Melanie J. Whittamore-Mantzios, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee Megan K. Young.

Timothy E. Clarke, Tracy L. Stoehr, and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Marlys L. Sears.

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

HANNON, Judge, Retired.

NATURE OF CASE

Nancy Castillo was injured as a result of a three-car accident. The defendant Megan K. Young's vehicle skidded out of control and hit Castillo's vehicle head on in Castillo's lane of traffic, and the defendant Marlys L. Sears' vehicle then struck Castillo's vehicle from the rear. Castillo sued both drivers for negligence. A jury awarded Castillo a verdict of $13,058.67 against Young only. Castillo appeals.

We note that Young has not filed a cross-appeal, and we find no plain error with regard to the issue of liability. Therefore, we affirm that portion of the trial court's judgment. We also note that Castillo has abandoned her claim against Sears. The controlling issue presented by this appeal is whether the trial court erred in failing to give a requested jury instruction on damages for personal injuries. The instruction related to what is frequently referred to as an "eggshell-skull plaintiff." We conclude the trial court erred, and we reverse, and remand for a new trial on the issue of damages.

STANDARD 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. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

FACTS

We summarize only those facts that relate to the nature and extent of Castillo's personal injury and damages, and we review

the evidence concerning damages in the light most favorable to Castillo. See *id.*

On December 20, 2000, at approximately 7:30 a.m., Young's vehicle, which was traveling north, crossed the centerline of North 56th Street in Lincoln, Nebraska, and struck Castillo's vehicle head on as she was driving southbound. Castillo's vehicle was equipped with seatbelts, but she was not wearing hers that day. Sears was driving south behind Castillo, and her vehicle came into contact with the rear of Castillo's vehicle when it was stopped by the collision with Young's vehicle.

Castillo stated that as Young's vehicle slid toward her, she saw Young's face, and that Young appeared "terrified." Castillo testified that she closed her eyes at the point of impact and that she heard a crash in the front of her vehicle and another in the back. She was then "jolted awake" and found that her vehicle's airbag had deployed. She had to exit the vehicle through the front passenger door. Photographs show severe damage to the left front and left rear of her vehicle.

After the accident, Castillo's chest was extremely painful and the left side of her jaw became painful. She was taken to the hospital, but released. The next day, her entire upper body was "really painful" and she believed she had broken her jaw again. (Castillo had suffered a broken jaw about 17 years earlier.) On December 22, 2000, she saw her family physician, who prescribed muscle relaxants and referred her to a dentist. The dentist made Castillo a splint, which she was to wear 24 hours a day. Two weeks later, she was given one splint to wear during the day and another to wear at night.

During this period, Castillo reported she had headaches and extreme pain at the base of her skull. She said she felt like her whole back, jaw, and neck were "on fire." She had difficulty opening her mouth and chewing certain foods, including steak, bagels, and apples. She continued treatment with the dentist for about 8 months but quit seeing him because he asked for payment of $110 per month, which Castillo said she could not afford.

In April 2002, Castillo was referred to Daniel Tylka, a doctor of dental medicine, who prescribed another splint and referred her for physical therapy. Tylka, who treated only disorders of the temporomandibular joint and related craniofacial pain problems,

testified that Castillo said her primary complaint was preauricular pain, or pain in front of the ear. She said that it had started about a week after the accident and that it was worse on the right than the left. She said that it was a continuous dull ache and that the pain would occasionally reach 7 or 8 on a scale of 1 to 10. She reported that she began to feel neck pain in January 2001. Her headaches started about a week after the accident, and she described them as dull, achy sensations that occurred two to three times each week. Castillo reported to Tylka that she had fractured her jaw in 1983 but that she had full resolution of that problem prior to the December 2000 accident. Tylka's examination showed that Castillo had full normal lateral movement of her jaw. He found that her jaw was slightly deflected to the right. Tylka diagnosed Castillo as having an articular disk disorder of the left temporomandibular joint. On the right, there was a disk displacement without reduction. She also suffered from myofascial pain involving the jaw and neck muscles.

After an MRI, Tylka determined that Castillo had disk displacement disorders of both temporomandibular joints, and he gave a 5-percent impairment rating to the jaw. Tylka testified:

> [T]here are patients — it's like a truck. If you rear end a truck that's full of bricks, you're probably going to hurt your truck — you're not — you're going to hurt yourself, not the truck. If you rear end a truck full of eggs, you're more likely to do damage than if you rear end a truck full of bricks.
>
> Unfortunately I think in [Castillo's] case, they rear-ended her being full of eggs. She was fragile. . . . Any time you've had injury to a joint that would cause fracture of that bone, there has to be consequence to the system, whether there [are] symptoms provoked at that time or not.

Tylka said he would never know whether Castillo's disk displacement "was a result of that accident or was just there to start with." He stated there was a high probability that Castillo had some disk displacement or problem in the temporomandibular joint prior to the December 2000 automobile accident. However, he said the "symptomatology that she was experiencing was a direct result of the motor vehicle accident."

By May 7, 2002, Castillo reported to Tylka that she was at least 50 percent better. By May 31, Castillo reported that she was

doing much better and was able to laugh and talk without pain. At that time, her neck was her biggest complaint. By June 4, Castillo had reported to Tylka an overall improvement of 70 percent. Tylka last saw Castillo on September 16. By the time Castillo was released by Tylka, she stated that her jaw pain had improved significantly.

Before Tylka moved to Oklahoma and released Castillo from his care, he referred Castillo to Dr. Kathryn Hajj, a physiatrist. Hajj testified that she had evaluated Castillo on July 19, 2002. Castillo reported that she was being treated for temporomandibular joint disorder, or pain in the jaw, and that the pain was referred to her upper back and neck areas. She also had pain in the front of her chest, with numbness and tingling in her right upper extremity that radiated into her right hand, and she had headaches. Castillo told Hajj about the previous broken jaw. Upon examination, Hajj found that Castillo had full range of motion in all directions, no sensory deficits, good strength in her extremities, and a normal gait but that she had deep muscle spasms in her upper back. Hajj diagnosed Castillo as suffering from mild myofascial pain syndrome or muscle pain, and Hajj stated that such pain can be referred to other areas of the body. Hajj believed Castillo had reached maximum medical improvement, and she gave Castillo an 8-percent whole person impairment rating as a result of the accident.

Dr. Michael Huffman, a family practitioner, testified that on March 13, 2003, he saw Castillo for the first time after the accident. She complained of posterior neck and jaw pain and told him she had the pain since she was involved in a motor vehicle accident. He diagnosed her as having cervical neck and temporomandibular joint strain. She visited Huffman again on April 29, and he found her to be in the same condition. Castillo had already seen an oral surgeon and obtained a mouth splint, which she continued to use, and she was continuing neck exercises, physical therapy, and muscle relaxants for the neck pain. On a third visit on October 1, Huffman determined that Castillo had underlying fibromyalgia, which he described as a common but poorly understood pain problem when a person experiences chronic pain in the soft tissues, which are primarily ligaments, tendons, and muscles. Huffman said:

> We don't know why these [ligaments, tendons, and muscles] hurt following these types of injuries. But we know that a person's pain perception in these tissues is greatly enhanced, it does not take much pain to create a lot of discomfort. And when it becomes long term, it's commonly referred to as fibromyalgia.

Huffman said Castillo's injuries were not necessarily permanent and that eventually she should heal. Huffman said he would not disagree with Hajj's 8-percent impairment rating due to myofascial pain or Tylka's 5-percent impairment rating of the jaw. Huffman said he could relate the fibromyalgia to the motor vehicle accident to a reasonable degree of medical certainty, but he did not know whether Castillo had fibromyalgia prior to the accident because he had not seen her between 1999 and 2003.

The record showed that Castillo broke her jaw in 1983 or 1984, at which time, the jaw was wired shut. However, Castillo testified that she had fully recovered and had noticed no problems with her neck or shoulders until after the collision with Young. At the time of trial, Castillo said the pain in her jaw would rate a 2 on a scale of 1 to 10, with 10 being the most severe pain. She testified to difficulties completing her usual office work, home chores, and family activities. However, on cross-examination, Castillo said that she was physically able to complete her job duties and that she was able to do most of the activities she could do before the accident. She said she tried to continue the physical therapy as prescribed, which included biting on a tongue depressor eight times per day for 20 seconds each time. She testified that as a result of the accident, she lost about $135 in salary and her car was totaled.

Castillo alleged that she sustained the following injuries as a result of the collision: thoracic outlet syndrome, "[t]emporomandibular joints bilaterally," upper back and neck pain with a burning sensation in the right shoulder and arm, and headaches. She sought damages for an 8-percent whole person impairment, past and future disability and medical expenses, loss of past working time and future earning capacity, and past and future physical pain, mental suffering, and emotional distress. She alleged that her medical expenses to date totaled $12,814.20. As related below, at the jury instruction conference, Castillo's request for an instruction on damages was refused.

The jury determined that Castillo had met her burden of proof against Young, but not against Sears, and awarded judgment of $13,058.67. Castillo filed a motion for additur, asserting that the jury's verdict included grossly inadequate damages, and a motion for new trial. Both motions were overruled. Castillo appeals.

ASSIGNMENTS OF ERROR

Castillo assigns as error the trial court's failure to submit her proposed jury instruction No. 13 in its entirety. She also asserts that the trial court abused its discretion in overruling her motion for new trial on the basis that the verdict was inadequate as a matter of law and was the result of passion, prejudice, mistake, or some other reason not apparent in the record.

ANALYSIS

JURY INSTRUCTION

Castillo's first assignment of error asserts that the trial court erred in failing to give her proposed jury instruction on damages. Instruction No. 13, as given by the court, stated:

> There is evidence that the Plaintiff had broken her jaw in 1983 and experienced a dis[k] displacement in her jaw prior to the December 20, 2000, accident.
>
> The Defendant(s) is liable only for any damages that you find to be proximately caused by the Defendants' negligence relating to the December 20, 2000, accident.
>
> If you cannot separate damages caused by the pre [sic] existing broken jaw from those caused by the accident of December 20, 2000, then the Defendant(s) are liable for all of those damages.

The instruction requested by Castillo stated:

> There is evidence that the Plaintiff had a broken jaw 20 years before the accident on December 20, 2000. The Defendant(s) is (are) liable only for any damages that you find [were] proximately caused by the accident on December 20, 2000.
>
> If you cannot separate damages caused by the pre [sic] existing broken jaw from those caused by the accident of December 20, 2000, then the Defendant(s) is (are) liable for all of those damages.

> The defendant's [sic] may be liable for bodily harm to Nancy Castillo even though the injury is greater than usual due to the physical condition which predisposed Nancy Castillo to the injury. In short, the defendant's [sic] take the plaintiff as they find her.
>
> Authority: Kett[e]ler v. Dan[i]el, 251 Neb. 287 (1996).

During the jury instruction conference, the trial court considered the paragraph that Castillo sought to include in the instruction. The court declined, stating: "It's designed for the person with the unusual physical characteristic, like the eggshell knee, not an aggravation of a pre-existing injury, so I'm not going to give that. I don't think it's applicable in this case. I think this covers the situation better."

[2] The instruction as given by the trial court was a correct statement of the law as far as it goes, but it does not cover the theory of damages concerning a preexisting condition, which was adopted by this court in *McCall v. Weeks*, 183 Neb. 743, 164 N.W.2d 206 (1969). In *David v. DeLeon*, 250 Neb. 109, 114, 547 N.W.2d 726, 729 (1996), this court reiterated "the theory of the 'eggshell-skull' plaintiff," which was originally adopted in *McCall v. Weeks, supra*. In *David v. DeLeon*, this court stated:

> Under *McCall*, the right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from the negligent act includes the right to recover for an aggravation of the preexisting disease. This holding served as authority in this case for the decision of the trial court to issue the entirety of NJI2d Civ. 4.09 as its instruction on damages.

250 Neb. at 114, 547 N.W.2d at 729-30.

When presenting her proposed instruction to the trial court, Castillo relied on *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996), in which the plaintiff was injured in an automobile accident. There was evidence that prior to the accident, the plaintiff had two preexisting conditions, and the trial court gave an instruction similar to the one requested by Castillo. The instruction stated, in summary, that the jury was to grant an award only for damages proximately caused by the accident. If the jury could not separate the damages caused by the preexisting condition from those caused by the accident, then the defendant was

liable for all of the damages, and the defendant could be liable for bodily harm even though the injury was greater due to a physical condition which predisposed the plaintiff to injury. The instruction provided that a defendant takes a plaintiff as the defendant finds him or her.

In *Ketteler v. Daniel, supra*, the evidence showed that the plaintiff had two preexisting conditions which could have been adversely affected by the collision. In addition to a neck, back, and hip condition, she had breast implants that could have ruptured as a result of the collision. There was also evidence that the implants could have ruptured because of their age. The instruction given to the jury referred to only the neck, back, and hip condition and did not refer to the breast implants. That failure was held to be reversible error.

In *David v. DeLeon, supra*, the plaintiff had preexisting knee and spine conditions which degenerated following the collision. The evidence was in conflict as to whether the degeneration was causally related to the collision or whether it was a natural degeneration. The trial court gave an instruction stating that defendants take plaintiffs as they find them. This was held to be correct, and the trial court's judgment was affirmed.

The holdings of these cases clearly establish the rule that if a plaintiff has a preexisting condition and the defendant's conduct resulted in greater damages because of that preexisting condition, the defendant is nonetheless liable for all damages proximately caused by the defendant's conduct. In this appeal, we must determine whether the evidence supports a finding that the collision aggravated Castillo's jaw condition.

Castillo had broken her jaw several years before the December 2000 collision, but she testified she had a complete recovery and had no symptoms for a number of years. Her testimony concerning the pain in her jaw following the collision is summarized above.

Tylka first examined Castillo on April 3, 2002. He testified that Castillo had an "articular dis[k] disorder of the left temporomandibular joint," which he described as "basically a dis[k] displacement with reduction." He found tenderness in many of the muscles and concluded that Castillo had "myofa[s]cial pain involving the upper quadrant, not only the jaw muscles but

a lot of the neck muscles as well" and "tenderness in the insertion of the temporalis muscle, suggesting the possibility of a secondary temporalis tendonitis." He opined that it was likely Castillo had a joint displacement prior to the accident and that the accident "definitely aggravated what [Tylka] believe[d] was a preexisting displacement."

After relating the course of Castillo's treatment, Tylka opined that Castillo had a 5-percent impairment of her jaw because of her condition as of the day of his deposition. He stated that he did not know if the accident was responsible for the entire impairment, but he testified that he definitely thought part of the 5-percent impairment was related to the accident.

Tylka testified that studies have shown that as many as one-third of the population has an undiagnosed disk displacement. He opined that Castillo's accident might not have caused the joint disorder but that it caused the pain associated with the disorder. He testified that he had explained to Castillo that she was not going to return to a time when she did not have pain in the joint and that she should continue to sleep with an orthodontic device and avoid hard or chewy foods.

Tylka testified that there was at least "an aggravation of a preexisting condition." He then explained his opinion by stating that he has given depositions before concerning trauma patients and that "I think I've had attorneys put it in this way." He then provided the analogy about the truck loaded with eggs as opposed to bricks that is quoted above. He further stated: "Whether this — the dis[k] displacement was a result of that accident or was just there to start with, we'll never know. But yes, I believe the symptomatology that she was experiencing was a direct result of the motor vehicle accident." He stated that his opinion was within a reasonable degree of medical certainty. There is evidence in the record which disputes Tylka's opinion, but his testimony, if believed, would support giving the instruction requested by Castillo, who, as the successful party, is entitled to every reasonable inference deducible from the evidence. See *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[3] This court has often noted that to establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered

instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Id.* 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. *Id.*

In *Ketteler v. Daniel*, 251 Neb. 287, 298, 556 N.W.2d 623, 630 (1996), when this court concluded that an instruction requested by the plaintiff should have been given, the court stated:

> First, the proffered instruction correctly stated the law. Second, the instruction was warranted by the evidence offered by [the defendant's expert witness], who testified that [the plaintiff] suffered from fibromyalgia prior to the accident, and by [the plaintiff's family physician], who testified by deposition that [the plaintiff] had suffered from back and neck conditions prior to the accident which were aggravated by the accident. Finally, refusal by the trial court to submit the entire proposed instruction was prejudicial to [the plaintiff].

For the same reasons, we conclude Castillo was prejudiced by the trial court's failure to give the proffered instruction in this case. We find that a new trial on the issue of damages is warranted.

Inadequacy of Verdict

[4] Castillo's second assignment of error asserts that the trial court abused its discretion in overruling her motion for new trial on the basis that the verdict was inadequate. Because we are ordering a new trial on the issue of damages, a discussion of the adequacy of the verdict is not necessary. 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*, 270 Neb. 286, 702 N.W.2d 355 (2005).

CONCLUSION

[5] Because the trial court erred in its jury instruction on damages, Castillo is entitled to a new trial on that issue. The jury determined the liability issue in favor of Castillo and Sears, and Castillo has abandoned her claim against Sears. When no liability

issues remain to be litigated, the cause is remanded for a new trial on the issue of damages only. See *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973).

Therefore, the judgment of the trial court as to liability is affirmed, the judgment as to damages is reversed, and the cause is remanded for a new trial on the issue of damages only.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

WRIGHT, J., not participating.

GILBERT M. AND MARTHA H. HITCHCOCK FOUNDATION, A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLEES, V. DENMAN KOUNTZE, JR., ET AL., APPELLANTS.

720 N.W.2d 31

Filed August 18, 2006. No. S-04-1385.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **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.
4. **Actions: Corporations: Notice.** The notice requirements in Neb. Rev. Stat. §§ 21-1949 and 21-1977 (Reissue 1997) are intended to recognize the Attorney General as an interested party in actions brought under those statutory sections.
5. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
6. **Actions: Corporations: Notice.** Effective notice to the Attorney General is an essential prerequisite to proceeding in any action involving a public benefit corporation for which such notice is required.
7. **Corporations: Notice: Time: Proof.** Neb. Rev. Stat. § 21-1915 (Reissue 1997) explains how a party can evidence its timely compliance with notice requirements under the Nebraska Nonprofit Corporation Act.
8. **Appeal and Error.** An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded for further proceedings.

David J. Lanphier, of Broom, Johnson, Clarkson & Lanphier, and David A. Domina and Michael C. Stumo, of Domina Law, P.C., for appellants.

Edward D. Hotz and Shawna D. Peterson, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellees.

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

GERRARD, J.

NATURE OF CASE

The appellees, members of the board of trustees (the Board) of the Gilbert M. and Martha H. Hitchcock Foundation (the Foundation), brought a derivative action on behalf of the Foundation against the appellants, also members of the Board, after a series of disagreements among the parties made management of the Foundation effectively impossible. The district court made numerous findings on issues, including the validity of Board meetings held separately by the parties and the requested removal of Board members. The appellants filed a posttrial motion challenging the court's jurisdiction to consider the case absent evidence that the appellees notified the Attorney General as required by statute, which motion the court overruled. Because effective notice to the Attorney General is essential to protecting the public interest in the management of charitable corporations, we conclude that the court erred in exercising jurisdiction without evidence that effective notice was given. We reverse the judgment of the district court.

BACKGROUND

The Foundation was established for charitable, religious, and educational purposes and was principally funded through a bequest in Martha H. Hitchcock's will. Since 1962, the Foundation has donated nearly $16 million to numerous charitable, religious, and educational organizations, including Brownell-Talbot School, Joslyn Art Museum, Omaha Botanical Gardens, Trinity Cathedral, United Way of the Midlands, and Western Heritage Museum. The Foundation is a 501(c)(3) corporation under the Internal Revenue Code and is a public benefit corporation under the Nebraska Nonprofit Corporation Act. See Neb. Rev. Stat.

§ 21-19,177(3) (Reissue 1997). Management of the Foundation is vested in the Board. In January 2002, the Board consisted of Denman Kountze, Jr.; Charles Kountze; and Edward Kountze (collectively the appellants); Neely Kountze; Mary Kountze (Mary); and Tyler Gaines (collectively the Local Trustees); Paul Shirley; and Ron Ruh. Pursuant to the Foundation's bylaws, a majority of the Board constitutes a quorum, provided that such quorum includes Mary Mallory Kountze, Mallory Kountze, or Denman Kountze, Jr. Of the three names specified, Denman was the only one living at the time of trial.

The last valid and undisputed meeting conducted by the Board occurred in January 2002, during which Denman, as president of the Foundation, asked Thomas Burke, the Foundation's secretary, manager, counsel, and registered agent, to resign as secretary of the Foundation. Edward was then elected secretary of the Foundation.

In April 2002, Ruh resigned as trustee of the Foundation. On September 18, 2002, a meeting of the Foundation was commenced at First National Bank. The appellants and the Local Trustees were present, along with Robert Cohen, an attorney with the Kutak Rock law firm, and two First National Bank trust officers. Shirley participated by telephone. During the meeting, the Board agreed to appoint First National Bank as registered agent of the Foundation. In discussing replacements for Ruh on the Board, Charles and Edward suggested Edward's wife and Peter Cunningham as replacements, while Neely suggested John Webster as successor trustee.

Ballots were distributed, and a vote on a replacement took place two times during the meeting. On both occasions, the appellants refused to participate in the vote, claiming that the election was not properly part of the agenda and that the meeting was not a formal meeting at which an election could be conducted. The appellants left the room in protest, but a dispute exists as to whether they were in the room at the time the two votes were conducted. During both votes, the Local Trustees and Shirley voted for Webster to serve on the Board.

In late September 2002, the Nebraska Secretary of State sent a notice of rejection, notifying the Foundation that First National Bank could not serve as registered agent. In December, without

conducting a vote of the Board or informing the Local Trustees, Edward and Denman filed a form changing the registered agent and office of the Foundation to Cohen and the Kutak Rock law firm, respectively. In addition, Denman requested that a $125,000 check on the Foundation's account be issued to Columbia University, without Board approval or authorization. The check was issued by the bank, but payment of the check was promptly stopped by the Local Trustees upon discovery that the check had been issued.

In January 2003, the Local Trustees and Webster (collectively the appellees) distributed notice of an annual meeting for the Foundation at Burke's office on January 14 at 9 a.m. to the trustees of the Foundation, including Denman, Edward, Neely, Gaines, Charles, Mary, and Webster. Shirley had since passed away.

At 8:30 a.m. on January 14, 2003, a meeting commenced at the Kutak Rock law firm, and those present included Charles, Denman, Edward, and David Clark. A court reporter was present to record the meeting. The appellants telephoned Mary and, when she answered, declared a quorum. Despite Mary's questions regarding whether the other trustees were aware of the meeting, Edward called a vote to elect Clark to the Board. Upon hearing this, Mary hung up the telephone. The meeting at the Kutak Rock law firm continued. Charles' term on the Board was renewed, Webster's election to the Board was declared void, Cunningham was elected to the Board, Denman was reelected president and elected treasurer, and Edward was elected vice president and secretary.

Meanwhile, the appellees held their meeting at Burke's office at 9 a.m. on the morning of January 14, 2003, and reelected Charles and Gaines to the Board, reelected Denman as president and Neely as vice president, elected Gaines as secretary, and elected Mary as treasurer. The appellees also amended the quorum requirement to provide that a majority of the trustees constitute a quorum, "provided such quorum includes a current member of the Board of Trustees who is a lineal descendant of Mary Mallory Kountze."

On January 21, 2003, the appellees filed a derivative complaint against the appellants on behalf of the Foundation, making various allegations regarding the events of the previous year

and requesting a declaratory judgment that Webster's election to the Board was valid; that action taken by the appellants at their January 14 meeting was invalid due to deficient notice and lack of a quorum; and that the change of registered agent to Cohen was without the Board's authorization and was, therefore, invalid. In addition, the appellees requested a court-ordered meeting of the Foundation to dispense of the quorum requirement or, alternatively, an order ratifying the appellees' actions at their January 14 meeting. The appellees also requested an injunction preventing the appellants from conducting or attempting to conduct further business of the Foundation. Finally, the appellees asked the court to remove Denman, Edward, and Charles as trustees, for breaching their fiduciary duty to the Foundation, and to award damages.

The appellants denied the allegations of the complaint and affirmatively alleged, in part, that the appellees lacked standing to bring a derivative action. In addition, the appellants asserted a counterclaim making numerous allegations and requesting that the appellees be enjoined from convening any Foundation meeting and that Webster be enjoined from participating in Foundation matters. The appellants also requested a declaratory judgment that Webster's election to the Board was invalid; that the September 2002 meeting of the Foundation was not valid; that Gaines' term on the Board expired on January 14, 2003; and that Neely, Mary, and Gaines were no longer fit to serve as trustees. Further, the appellants requested a declaration that the appellees' January 14 meeting was not a valid meeting. In the alternative, the appellants requested an equitable division of the Foundation assets.

After a bench trial, the district court entered an order determining that the appellees had standing to file the derivative action under Neb. Rev. Stat. § 21-1949 (Reissue 1997). The court noted that the record failed to show any proof of notice to the Attorney General, as required by § 21-1949. However, the court concluded that such lack of notice was not a jurisdictional defect.

The court further concluded that the September 2002 meeting of the Foundation was valid. However, the court determined that Webster was not validly elected to the Board because there was no vacancy to be filled. The court explained that the bylaws of the Foundation provide for seven trustees and that even though

the Foundation had operated for many years with eight trustees, such acquiescence did not amend the bylaws to increase the size of the Board.

The court went on to find that the January 2003 annual meeting attempted by the appellees at Burke's office was not valid because, without Denman in attendance, a quorum was not present. Similarly, the court found that the appellants' attempted annual meeting held the same day at the Kutak Rock law firm was not valid.

The court removed Edward as trustee but declined to remove Denman, Charles, or any of the Local Trustees from the Board. The court found no actionable civil conspiracy on the part of the Local Trustees. The court also determined that the appointment of Cohen as registered agent was void and ordered the bylaws to be amended to remove the requirement that one of three Kountze family members be present in order to establish a quorum.

Subsequently, the parties each filed posttrial motions. The appellants filed a motion to alter or amend or, alternatively, for new trial, arguing in part that the court erred in exercising jurisdiction after finding that the appellants failed to give notice of their action to the Attorney General. The appellees filed a motion to amend the court's findings and judgment, asking the court to find that notice was provided to the Attorney General as required by § 21-1949. In addition, the appellees moved the court to reopen the record to receive evidence of their notice of the action. In their motion, the appellees claimed that they properly gave notice to the Attorney General, but due to an oversight, neglected to offer a copy of the notice to the court at trial. The court overruled all of the motions.

ASSIGNMENTS OF ERROR

The appellants present 19 assignments of error on appeal, which may be summarized, restated, and renumbered as follows: The district court erred in (1) exercising jurisdiction despite the appellees' failure to notify the Attorney General; (2) ordering a meeting of the Foundation in March 2003, dispensing with the quorum requirement for that meeting, and enjoining the Foundation's scheduled January 2004 annual meeting; (3) finding that a valid and formal meeting of the Foundation occurred on September 18, 2002; (4) finding that a trustee can be elected

at a meeting other than the annual meeting of the Board; (5) finding that the designation of a registered agent for the Foundation requires Board action; (6) determining that the appellants' January 2003 meeting was "deceitful and in bad faith" while the appellees' January 2003 meeting was "not valid"; (7) finding that the appellees were motivated by a desire to maintain the smooth operation of the Foundation while the appellants were selfish, not altruistic, and were eleemosynary; (8) ordering that Edward be removed from the Board; (9) ordering that the quorum provision be removed from the bylaws; (10) finding no error in the Local Trustees' correspondence with Burke; (11) failing to find that the Local Trustees' attempt to hold a special meeting was not fraudulent and dishonest; (12) failing to order the removal of Gaines, Neely, and Mary from the Board; (13) overruling the appellants' motion for recusal and/or mistrial; and (14) excluding the testimony of the appellees' expert witness.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005).

ANALYSIS

The first issue we address is the appellants' argument that the district court erred in hearing this case because the appellees failed to provide notice to the Attorney General, as required by statute.

Within the Nebraska Nonprofit Corporation Act, see Neb. Rev. Stat. §§ 21-1901 to 21-19,177 (Reissue 1997 & Cum. Supp. 2004), § 21-1949 provides for an action to be brought on behalf of a corporation and states, in part:

> (f) The complainants shall notify the Attorney General within ten days after commencing any proceeding under this section if the proceeding involves a public benefit corporation or assets held in charitable trust by a mutual benefit corporation.

Further, § 21-1977 states:

> (a) The district court . . . may remove any director of the corporation from office in a proceeding commenced either

> by the corporation, its members holding at least ten percent of the voting power of any class, or the Attorney General in the case of a public benefit corporation . . . .
>
> . . . .
>
> (d) If a public benefit corporation or its members commence a proceeding under subsection (a) of this section, they shall give the Attorney General written notice of the proceeding.

The appellants argue that the appellees failed to demonstrate at trial that they notified the Attorney General of their action against the appellants as required by statute. The appellees argue that failure to notify the Attorney General is not jurisdictional. They also assert that at the hearing on their motion asking the court to amend its findings and judgment, the court was provided with proof that notice was actually provided to the Attorney General. We first consider whether an action under §§ 21-1949 and 21-1977 can proceed without notice to the Attorney General.

[2,3] When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Caspers Constr. Co. v. Nebraska State Patrol*, 270 Neb. 205, 700 N.W.2d 587 (2005). 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. *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

Comments to the Revised Model Nonprofit Corporation Act, upon which the Nebraska act is based, indicate that the notice requirements at issue here provide the Attorney General an opportunity to learn of and evaluate the dispute and the option to join or intervene in the action. Rev. Model Nonprofit Corp. Act §§ 6.30 and 8.10 (ABA 1988). Public benefit corporations are domestic corporations which are formed as public benefit corporations pursuant to §§ 21-1920 to 21-1926 or are required to be public benefit corporations pursuant to § 21-19,177. § 21-1914(26). Such corporations, which usually do not have participants with a sufficient economic interest to ensure oversight, can only be made accountable for their use of assets if

there are broad powers of regulation in a state officer. Thus, statutory authority has been given to the Attorney General to act in the public good in enforcing the requirements applicable to nonprofit corporations, particularly public benefit corporations. In other words, the Attorney General has standing to protect the public interest. See *Summers v. Cherokee Children & Family Serv.*, 112 S.W.3d 486 (Tenn. App. 2002).

In the case of a charitable trust, the Attorney General has long been recognized as having the right to maintain an action for enforcement of the trust or to prevent a misuse of the property. *In re Estate of Grblny*, 147 Neb. 117, 22 N.W.2d 488 (1946), *overruled in part on other grounds, Anoka-Butte Lumber Co. v. Malerbi*, 180 Neb. 256, 142 N.W.2d 314 (1966). See *Wood v. Lincoln General Hospital Assn.*, 205 Neb. 576, 288 N.W.2d 735 (1980) (notice given to Attorney General as attorney for public charities in action commenced by trustee of charitable trust). Further, we have stated that the Attorney General is in any case a proper party in a litigation involving a charitable trust, whether he or she appears as plaintiff or as defendant. *In re Estate of Grblny, supra.*

[4] In that same vein, the notice requirements in §§ 21-1949 and 21-1977 are intended to recognize the Attorney General as an interested party in actions brought under those statutory sections. The privileges provided by law to public benefit corporations, and other charitable institutions, carry a corresponding obligation to be accountable to the public for the actions such institutions undertake. The public, and particularly charitable donors, are entitled to assurance that their interests are represented in actions where a public benefit corporation is concerned. To that end, the Attorney General is notified in order to represent those interests if necessary. § 21-1918(b)(2). The facts of the present case illustrate *why* the Attorney General has been granted statutory authority to oversee such corporations on behalf of the public good.

In other circumstances in which parties to an action failed to notify an interested party, the action could not proceed without notifying such parties. See, *In re Conservatorship of Holle*, 254 Neb. 380, 576 N.W.2d 473 (1998); *Gentsch, Inc. v. Burnett*, 173 Neb. 820, 115 N.W.2d 446 (1962). We find the same result to be

warranted here. As a matter of basic fairness, a court should not enter a decree affecting the rights of an interested party without providing that party the opportunity to appear and be heard. See *id.* In the case of actions involving public benefit corporations, the statutes recognize the interest of the public. For that public interest to be vindicated, it is necessary for the Attorney General to be notified so that he or she can determine if intervention is warranted. The statute requires that the Attorney General be given notice of claims such as those made by the appellees in the instant case, and that requirement would be meaningless if the action could proceed without notice having been given. There would be no consequence for a party's failure to meet the statutory notice requirement.

[5,6] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Salts v. Lancaster Cty.*, 269 Neb. 948, 697 N.W.2d 289 (2005). If the statutory notice requirement is to be meaningful, and the statutory purpose of permitting the Attorney General to protect the public interest is to be accomplished, then the only reasonable conclusion to be drawn from the statute is that effective notice to the Attorney General is an essential prerequisite to proceeding in any action involving a public benefit corporation for which such notice is required.

The appellees also argue that at the hearing on their motion to alter or amend the judgment, they presented sufficient evidence of such notice. The district court, however, concluded that the evidence of notice was insufficient. Section 21-1915 provides:

> Written notice . . . is effective at the earliest of the following:
>
> (1) When received;
>
> (2) Five days after its deposit in the United States mail, as evidenced by the postmark, if mailed correctly addressed and with first-class postage affixed;
>
> (3) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee; or
>
> (4) Thirty days after its deposit in the United States mail, as evidenced by the postmark, if mailed correctly addressed

and with other than first class, registered or certified postage affixed.

[7] Because timely notice is essential for the Attorney General to effectively represent the public interest in these proceedings, § 21-1915 explains how a party can evidence its timely compliance with statutory notice requirements.

[8] The intent of the statutory scheme is clear, both in requiring notice and in prescribing when and how notice can be proven effective. The notice requirement of the statutes would be meaningless if a failure to give notice had no consequences, and it would be equally meaningless if the party with the burden of giving notice was not required to prove, at trial, that notice had been effectively given. But in this case, there was no evidence presented at trial establishing any form of notice, much less any of the forms of notice specified by § 21-1915. Even at the hearing on their posttrial motions, the appellees presented only an affidavit from counsel averring that a copy of the complaint had been sent to the Attorney General at the time of filing. The appellants countered with affidavits tending to suggest that the Attorney General had not been made aware of the action until a few days before trial. Furthermore, the district court specifically rejected the appellees' argument that evidence of notice was provided, and denied the appellees' motion to reopen the record so that such evidence could be admitted. An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005). Here, the district court specifically rejected the arguments upon which the appellees are relying, yet the appellees did not perfect a cross-appeal to preserve any complaint with respect to the district court's reasoning.

In short, it was the appellees' burden, as plaintiffs, to notify the Attorney General in a timely fashion and to provide evidence at trial that notice had been given. Instead, no evidence of notice was admitted at trial, and the record contains only conflicting affidavits belatedly submitted in support of posttrial motions. The appellees have not cross-appealed with respect to the district court's understandable conclusion that the evidence of notice to

the Attorney General was not sufficient, and the appellants correctly contend that in the absence of such evidence, the appellees were not entitled to relief.

Thus, we conclude that the district court erred in proceeding to trial without sufficient evidence that the Attorney General was notified of this action and had an adequate opportunity to intervene on behalf of the public. The stakes of this proceeding are simply too high for the district court, or this court, to decide issues on the merits in the absence of proof that the Attorney General's office had the opportunity to discharge its duty to protect the public interest.

Having so determined, we do not consider the appellants' remaining assignments of error. The remaining issues raised on appeal all relate to determinations that the district court should not have made without evidence that the Attorney General had been given effective notice of the action, and the opportunity to intervene, before the district court made its determinations as to the merits of the dispute.

CONCLUSION

The multiple allegations of fraud, dishonesty, and self-dealing in this case, involving a multimillion-dollar charitable foundation of significant social and community importance, emphasize the need for the Attorney General to have a meaningful opportunity to intervene in the proceedings. This is not a mere technicality. Rather, as the Legislature has directed by statute, and common sense indicates in any event, an effective notice to the Attorney General is essential for the Attorney General to have the opportunity to protect the public interest. Thus, we reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

MICHAEL R. JOHNSON, APPELLANT, V. RICHARD W. JOHNSON, JR., ET AL., APPELLEES.

720 N.W.2d 20

Filed August 18, 2006. No. S-04-1396.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.
3. **Corporations: States.** The internal affairs doctrine is a conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise, a corporation could be faced with conflicting demands.
4. ____: ____. Neb. Rev. Stat. § 21-20,172 (Reissue 1997) was intended to preserve the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation's business and assets are located primarily in other states.
5. **Corporations: Jurisdiction.** The internal affairs doctrine was developed on the premise that in order to prevent corporations from being subjected to inconsistent legal standards, the authority to regulate a corporation's internal affairs should not rest with multiple jurisdictions.
6. **Corporations.** By providing certainty and predictability, the internal affairs doctrine protects the justified expectations of the parties with interests in the corporation.
7. **Corporations: Jurisdiction.** The internal affairs doctrine is a choice-of-law principle, and not a bar to jurisdiction.
8. **Corporations: Jurisdiction: States.** Whether or not a dispute concerning the internal affairs of a foreign corporation should be heard in the courts of Nebraska is not controlled by the internal affairs doctrine, but by the same principles of personal jurisdiction and forum non conveniens that would be applicable to any other suit involving an out-of-state defendant.
9. **Corporations: Jurisdiction.** A court will exercise jurisdiction over an action involving the internal affairs of a corporation unless it is an inappropriate or an inconvenient forum for the trial of the action.
10. **Corporations: Jurisdiction: Equity: Receivers.** Equity has jurisdiction to appoint a receiver for the instate assets of a foreign corporation.
11. **Corporations: States: Parties.** The local law of the state of incorporation applies to internal affairs, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which case, the local law of the other state will be applied.

12. **Corporations: States.** Where "internal affairs" are concerned—the relations among the corporation, its shareholders, directors, officers, or agents—the local law of the state of incorporation will be applied unless application of the local law of some other state is required by reason of the overriding interest of that other state in the issue to be decided.
13. ____: ____. The factors applicable to a choice of law where the internal affairs of a foreign corporation are concerned include (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied.

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

James M. Bausch, Terry R. Wittler, Shawn D. Renner, and Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Gerald P. Laughlin, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., and Steven E. Achelpohl for appellees.

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

GERRARD, J.

The question presented in this case is whether the substantive law of Nebraska or Delaware applies to a complaint alleging oppression of a shareholder of a Delaware corporation, the sole asset of which is all the stock of a Nebraska corporation. Given the allegations made in this case, we conclude that Delaware law controls whether the plaintiff has stated a cause of action, and therefore, we affirm the judgment of the district court dismissing the plaintiff's complaint.

FACTUAL AND PROCEDURAL BACKGROUND

[1,2] A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *State ex rel. Jacob v.*

Bohn, 271 Neb. 424, 711 N.W.2d 884 (2006). Dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005). Because the district court in this case granted the defendants' rule 12(b)(6) motions to dismiss, this statement of facts is taken from the facts alleged in the plaintiff's operative amended complaint.

ALLEGED FACTS

The plaintiff, Michael R. Johnson, is a shareholder of Western Securities, a Delaware corporation. Michael is an employee of Modern Equipment Company, Inc. (Modern Equipment), a Nebraska corporation. The principal place of business for both Western Securities and Modern Equipment is Omaha, Nebraska. Western Securities owns all the stock of Modern Equipment, but no other property.

Richard W. "Dick" Johnson incorporated and was originally the sole shareholder and director of Western Securities. Dick is the father of Michael and Richard W. Johnson, Jr. (Richard), one of the defendants. In 1975, Western Securities acquired Modern Equipment, and Dick became the sole director of Modern Equipment as well.

In 1990, Michael moved to Omaha and began working full time for Modern Equipment. He worked full time until 1992, when he began to work both full and part time while he completed a college degree. He completed his degree in 1996 and became a vice president of Modern Equipment, responsible for quality management. Michael's duties later expanded to include corporate development. He received regular salary increases and excellent performance reviews on an annual basis.

In 1998, Dick transferred shares of stock in Western Securities to his five children: Michael, Richard, William Johnson, Nancy Johnson Holtan, and Thomas Johnson. After the transfers, Dick owned 75 percent of Western Securities stock, Richard 10 percent, Michael 6 percent, William 3.5 percent, Nancy 3.5 percent, and Thomas 2 percent. Dick's stated intent was that Richard would succeed Dick as president and chief executive officer of Modern Equipment and that Michael would in turn succeed Richard. Dick promised Michael and Richard that Dick's Western

Securities stock would be devised to them in equal shares. After October 3, 2000, Western Securities and Modern Equipment each had three-member boards of directors composed of Michael, Richard, and Dick.

Dick became ill in March 2001 and resigned as president of Modern Equipment in October. Richard was elected by Dick, Richard, and Michael to succeed Dick as president. Dick died on November 6, and his will provided that Michael and Richard were each to receive one-half of Dick's shares of Western Securities stock. Richard was appointed personal representative of Dick's estate.

After Dick's death, Richard appointed Modern Equipment's vice president of manufacturing to fill the vacancies on the boards of directors of Western Securities and Modern Equipment, without notice to, meeting of, or the knowledge or consent of the other shareholders. On August 28, 2002, Richard fired Michael and barred him from the premises of Modern Equipment. Since then, Michael has been denied any participation in the operation of Modern Equipment and has not shared in its earnings.

Modern Equipment's before-tax profits have declined from $374,745 in the fiscal year ending August 31, 2001, to $5,367 in the following fiscal year. Richard's 2002 salary was $187,000, which was a 22-percent raise from the previous year. Western Securities has never paid dividends, and between Dick's death and February 28, 2003, no shareholders' meetings for Western Securities or Modern Equipment were held.

On February 28, 2003, Michael notified counsel for Western Securities and Modern Equipment of Richard's conduct. Shortly thereafter, Michael was notified that meetings of the shareholders and boards of directors of Western Securities and Modern Equipment would be held on April 15. At those meetings, Richard, in his capacity as personal representative of Dick's estate, voted all the shares of stock then still held in the estate to ratify his prior conduct. Dick's Western Securities stock was finally distributed by his estate in 2004, after which time, Richard held 48.083 percent of the stock, Michael held 44.083 percent, William and Nancy held 3.5 percent each, and Thomas held five-sixths of 1 percent.

PROCEDURAL HISTORY

Michael filed suit in the district court on May 22, 2003, against Richard, Western Securities, and Modern Equipment (collectively the defendants). According to Michael, Richard had oppressed Michael and misapplied the corporate assets of Western Securities and Modern Equipment by depriving him of his legitimate expectation of full-time employment; depriving him of his right to meaningfully participate in the operation, management, and control of Modern Equipment; operating Modern Equipment for his own benefit to the detriment of Michael; eliminating financial benefits to which Michael had a reasonable expectancy; removing Michael from his employment and denying him the opportunity to serve as president; and failing to keep him fully and fairly informed of the operation of Modern Equipment. Michael alleged that these practices were oppressive because they violated the reasonable expectations of Michael as established by the intentions of Dick and years of past practice, and were also in breach of the fiduciary duties owed to Michael.

Michael prayed that the court require an accounting from Richard and require him to return to Modern Equipment any amounts received by him in excess of the proportionate share of earnings and profits, as well as any amounts attributable to a misapplication or misappropriation of company assets. Michael prayed that the court require Modern Equipment to pay Michael the funds to which he would have been entitled had he not been excluded from employment and participation in Modern Equipment's earnings and profits.

Michael also prayed that the court enter an order requiring Western Securities to cease carrying on business in Nebraska, appointing a receiver to take charge of the corporate assets of Western Securities and Modern Equipment and supervise the sale of those assets, and distributing the proceeds of the sale of Western Securities and Modern Equipment to Michael and the other shareholders of Western Securities. In the alternative, Michael prayed that the court enter an order finding Western Securities to be the corporate alter ego of Modern Equipment and/or imposing a constructive trust on the shares of Modern Equipment for the benefit of Michael, dissolving Modern Equipment, appointing a receiver to supervise the sale of Modern

Equipment's assets, and distributing the proceeds of the sale directly to Western Securities' shareholders in proportion to their ownership interests. Alternatively, Michael prayed for an order finding Western Securities to be the alter ego of Modern Equipment and directing Western Securities or its remaining shareholders to redeem Michael's interests for fair market value.

Richard, Western Securities, and Modern Equipment filed motions to dismiss Michael's complaint. The defendants claimed that the court lacked jurisdiction to dissolve Western Securities, as a Delaware corporation, or to order Western Securities to redeem Michael's interest. Alternatively, the defendants claimed neither dissolution nor a court-ordered buyout was allowed as a matter of law and that Michael lacked standing to seek dissolution of Modern Equipment.

The court granted the defendants' motions. The court reasoned that it could not dissolve or wind up the affairs of Western Securities because it was a Delaware corporation. Even assuming that it had jurisdiction over Western Securities, however, the court further concluded that the case dealt with the internal affairs of the corporation and that under the applicable choice-of-law principles, the need for uniformity regarding internal affairs dictated that Delaware law control the case. Because Delaware law did not permit the dissolution of Western Securities or appointment of a receiver under the facts alleged, the court dismissed Michael's complaint.

ASSIGNMENTS OF ERROR

Michael assigns that the district court erred (1) in concluding that Delaware law applied to the facts of this case and in granting the defendants' motions to dismiss on that basis, thus (a) holding that the internal affairs doctrine prohibited the application of Nebraska law in this case, (b) holding that considerations of uniformity and predictability prohibited the application of Nebraska law in this case, and (c) concluding that Nebraska public policy does not mandate the application of Nebraska law in this case; (2) in concluding that Michael sought dissolution of a foreign corporation and in concluding that the inclusion of a proposed remedy relating to the appointment of a receiver and the winding up of Western Securities' business in Nebraska required dismissal; and (3) in refusing to address the viability of

Michael's remaining proposed remedies and in thereby concluding that the court could not fashion a remedy for Michael in the exercise of its equitable powers.

STANDARD OF REVIEW

A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *State ex rel. Jacob v. Bohn*, 271 Neb. 424, 711 N.W.2d 884 (2006).

ANALYSIS

It is important to note at the outset that the parties frame the issues in this case in different ways. The defendants contend, first, that the Nebraska courts do not have jurisdiction to grant Michael relief in this dispute because Michael effectively seeks judicial dissolution of a foreign corporation. The defendants further contend that even assuming jurisdiction, Delaware law governs this dispute, affording no remedy to Michael under the facts alleged, so Michael has still failed to state a claim upon which relief can be granted.

Michael does not contest the legal proposition that a court cannot order the dissolution of a foreign corporation. Rather, Michael contends that he does not seek the dissolution of Western Enterprises. Nor does Michael take issue with the district court's conclusion that under Delaware law, he is without a remedy. We have no reason to revisit that conclusion; we are not asked to decide that issue. Rather, Michael contends that Nebraska law should be applied to fashion a remedy for him.

[3,4] We begin our analysis of these contentions with an examination of the internal affairs doctrine. The internal affairs doctrine is a conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise, a corporation could be faced with conflicting demands. *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982). The internal affairs doctrine is codified in Nebraska law pursuant to Neb. Rev. Stat. § 21-20,172 (Reissue 1997), which provides:

> (1) A certificate of authority shall authorize the foreign corporation to which it is issued to transact business in this state subject, however, to the right of the state to revoke the certificate as provided in the Business Corporation Act.
>
> (2) A foreign corporation with a valid certificate of authority shall have the same but no greater rights and shall have the same but no greater privileges as, and except as otherwise provided by the act, shall be subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.
>
> (3) *The act shall not be construed to authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.*

(Emphasis supplied.) Section 21-20,172(3) was intended to preserve "the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation's business and assets are located primarily in other states." 4 Model Business Corporation Act Ann. § 15.05(c), official comment at 15-71 (3d ed. 2002). See Restatement (Second) of Conflict of Laws § 302 (1971).

[5,6] The internal affairs doctrine was developed on the premise that in order to prevent corporations from being subjected to inconsistent legal standards, the authority to regulate a corporation's internal affairs should not rest with multiple jurisdictions. By providing certainty and predictability, the internal affairs doctrine protects the justified expectations of the parties with interests in the corporation. *Vantagepoint v. Examen, Inc.*, 871 A.2d 1108 (Del. 2005). See, e.g., *Harrison v. NetCentric Corporation*, 433 Mass. 465, 744 N.E.2d 622 (2001). It has also been held that pursuant to the Due Process Clause, directors and officers of corporations have a significant right to know what law will be applied to their actions and stockholders have a right to know by what standards of accountability they may hold those managing the corporation's business and affairs. *Vantagepoint, supra*. Furthermore, under the Commerce Clause, a state has no interest in regulating the internal affairs of foreign corporations. Therefore, application of the internal affairs doctrine may be mandated by constitutional principles, except in the rare situation when the law of the state of incorporation is

inconsistent with a national policy on foreign or interstate commerce. *Vantagepoint, supra.*

[7-9] But the internal affairs doctrine is a choice-of-law principle, and not a bar to jurisdiction. Therefore, whether or not a dispute concerning the internal affairs of a foreign corporation should be heard in the courts of Nebraska is not controlled by the internal affairs doctrine, but by the same principles of personal jurisdiction and forum non conveniens that would be applicable to any other suit involving an out-of-state defendant. See *Tomran v. Passano*, 159 Md. App. 706, 862 A.2d 453 (2004), *affirmed* 391 Md. 1, 891 A.2d 336 (2006). In other words, the question of what state's law will determine a cause is separate from whether a state's courts have jurisdiction over the cause. A court will exercise jurisdiction over an action involving the internal affairs of a corporation unless it is an inappropriate or an inconvenient forum for the trial of the action. Restatement, *supra*, § 313.

Here, there is no suggestion by the defendants that this is not a convenient place for trial of the action, nor did the defendants file a motion to dismiss based upon forum non conveniens. Instead, the defendants' jurisdictional argument is premised on their claim that Michael's prayer for relief would effectively be a dissolution of the corporation.

[10] However, the defendants' argument is based on their claim that since Western Securities' assets consist of Modern Equipment stock, disposing of those assets would effectively dissolve Western Securities. But while the general rule is that a court of equity cannot appoint a *general* receiver for a foreign corporation, there is an important distinction between the appointment of a general receiver and the appointment of a receiver merely of the corporation's assets and property within the state. See, generally, 17A William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 8555 (perm. ed., rev. vol. 1998 & Cum. Supp. 2005). It is well established, in Nebraska and elsewhere, that equity has jurisdiction to appoint a receiver for the instate assets of a foreign corporation. See, *Starr v. Bankers Union of the World*, 81 Neb. 377, 116 N.W. 61 (1908); 17A Fletcher et al., *supra*. The defendants seem to be implying that if Western Securities had assets in other states, then Nebraska could dispose of the assets that the

corporation has here, but since all of Western Securities' assets are in Nebraska (i.e., shares of a Nebraska corporation), the State of Nebraska actually has *less* power than it would if Western Securities' assets were spread around the world. In fact, a Nebraska court's equitable jurisdiction extends to appointment of a receiver for a foreign corporation's Nebraska assets. See *id.*

Furthermore, Michael's complaint suggested several alternative forms of relief beyond the appointment of a receiver. Among other things, Michael asked for an accounting, an order directing Richard to return money received by him to Modern Equipment, damages in the amount Michael would have received had he not been excluded from Modern Equipment, or an order directing Western Securities to redeem his interest. Thus, we are not persuaded by the defendants' argument that the courts of Nebraska lack jurisdiction over this action. If Michael stated a cause of action for which relief could be granted, a Nebraska court would have the power to grant at least some of the relief sought by Michael's complaint, including the appointment of a receiver. The district court erred in determining otherwise. Therefore, we turn to the dispositive question whether Michael can obtain *any* relief from Nebraska law, or whether Delaware law controls this case and precludes his recovery.

[11,12] Michael does not dispute that his action involves the internal affairs of Western Enterprises and that the internal affairs doctrine is applicable. Rather, Michael contends that under exceptions to that doctrine, Nebraska law should apply here. The Restatement (Second) of Conflict of Laws § 302 (1971) recognizes that the local law of the state of incorporation applies to internal affairs, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which case, the local law of the other state will be applied. Where "internal affairs" are concerned—the relations among the corporation, its shareholders, directors, officers, or agents—the local law of the state of incorporation will be applied unless application of the local law of some other state is required by reason of the overriding interest of that other state in the issue to be decided. See *id.*, comments *a.* and *b.* As previously noted, the rule of § 302 has been adopted in Nebraska by statute. See, § 21-20,172(3);

4 Model Business Corporation Act Ann. § 15.05(c) (3d ed. 2002).

[13] The factors applicable to such a choice of law include (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied. Restatement, *supra*, § 6. Accord, *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005); *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002); *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001). See Restatement, *supra*, § 302(1) (explaining that Restatement, *supra*, § 6, is used to determine applicable law).

Michael is focused on Nebraska public policy and Nebraska's relative interest as the location of the alleged events giving rise to the action. But this overlooks the weight of factors that bear against interference with the internal affairs of a foreign corporation. A single rule for each corporation's internal affairs reduces uncertainty and the prospect of inconsistent obligations; it also enables the corporate venturers to adjust the many variables of the corporate life, confident that they can predict the legal effect of these choices. *Nagy v. Riblet Products Corp.*, 79 F.3d 572 (7th Cir. 1996).

> Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national and international participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 90, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987). As the Restatement explains:

> Application of the local law of the state of incorporation will usually be supported by those choice-of-law factors favoring the needs of the interstate and international systems, certainty, predictability and uniformity of result, protection of the justified expectations of the parties and ease in the application of the law to be applied. Usually, application of this law will also be supported by the factor looking toward implementation of the relevant policies of the state with the dominant interest in the decision of the particular issue.
>
> Uniform treatment of directors, officers and shareholders is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law. To the extent that they think about the matter, these persons would usually expect that their rights and duties with respect to the corporation would be determined by the local law of the state of incorporation. This state is also easy to identify, and thus the value of ease of application is attained when the local law of this state is applied.

Restatement (Second) of Conflict of Laws § 302, comment *e.* at 309 (1971).

Here, Nebraska certainly has an interest in the dispute by virtue of Modern Equipment's location in the state. Nebraska has a declared public policy, pursuant to the Business Corporation Act, see Neb. Rev. Stat. § 21-2001 et seq. (Reissue 1997 & Cum. Supp. 2004), of affording relief upon some of the allegations made by Michael. But Nebraska also has a stated public policy, enacted as part of the same statutory scheme, of not interfering in the internal affairs of foreign corporations, and the conflict of laws principles stated in § 6 of the Restatement generally weigh in favor of applying Delaware law to this dispute. Admittedly, the reasons for applying the local law of the state of incorporation carry less weight when the corporation has little or no contact with the state other than the fact that it was incorporated there. Restatement, *supra*, § 302, comment *g*. But, application of the local law of the state of incorporation also furthers certainty,

predictability, and uniformity of result, ease in the application of the law to be applied, and perhaps most important, protection of the justified expectations of the parties. See *id.* Simply stated, stockholders in a foreign corporation should not be surprised—and under Nebraska statutes have a right to expect—that issues involving the internal affairs of a corporation will be decided pursuant to the law of the state of incorporation. This is simply not the extraordinary case in which the internal affairs doctrine is to be set aside.

Michael also argues that Western Securities and Modern Equipment are alter egos and that Western Securities' corporate veil can be pierced. To the extent that Michael's alter ego theory is intended to address the internal affairs doctrine, however, it is without merit. It is well established that when determining whether to pierce a corporate veil, the local law of the state of incorporation is applied. See *Kellers Systems v. Transport Intern. Pool*, 172 F. Supp. 2d 992 (N.D. Ill. 2001). Stated another way, whether Western Securities and Modern Equipment are alter egos, and the legal effect of such a finding, is determined by Delaware law. While Delaware law permits a corporate veil to be pierced, this is simply a remedy available when a cause of action has been alleged, and as previously noted, Michael does not contest the district court's conclusion that the facts he alleged do not state a cause of action recognized by Delaware law. In other words, even if Delaware law would regard Western Securities and Modern Equipment to be one and the same, Michael has not stated a cause of action against either corporation.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing Michael's complaint is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

STEVEN CROUSE AND JODEAN CROUSE, HUSBAND AND WIFE, APPELLANTS, V. PIONEER IRRIGATION DISTRICT ET AL., APPELLEES.

719 N.W.2d 722

Filed August 18, 2006. No. S-05-402.

1. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) provides that when a matter outside of the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995 & Cum. Supp. 2004).
4. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.
5. **Waters: Property.** The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all landowners within the district upon fair and equitable terms and conditions.
6. **Mandamus: Public Officers and Employees.** Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary.
7. **Mandamus.** A duty or act is ministerial when there is no room for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law.

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

Donald G. Blankenau and Jaron J. Bromm, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellants.

Stanley C. Goodwin, of Goodwin Law Office, for appellees.

Leroy W. Orton, of Orton Law Office, for amicus curiae Nebraska State Irrigation Association.

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

STEPHAN, J.

Steven Crouse and JoDean Crouse brought this action for mandamus to require Pioneer Irrigation District (District) and its individual directors to exclude 200 acres of the Crouses' farmland from the District and to refund taxes which the Crouses paid to the District on that land. Following an evidentiary hearing, the district court for Dundy County sustained a motion to dismiss filed by the District and its directors. The Crouses filed 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). Finding no error, we affirm the judgment of the district court.

I. BACKGROUND

On or about January 1, 1994, the Crouses purchased 545 acres of land in Dundy County, Nebraska, from the Farmers Home Administration (FmHA). Of the land purchased, 301 acres were located within the District in Dundy County. At the time of the Crouses' purchase, the District held water appropriation D-1025, which was a permit to divert water from the North Fork of the Republican River at a specific point in Yuma County, Colorado.

On February 10, 1995, the then Department of Water Resources (Department) gave notice of an adjudication hearing concerning portions of water appropriation D-1025. The Department held a prehearing conference on February 22 for the purpose of reviewing Department records with members of the District board and irrigators appropriating water under D-1025. At the adjudication hearing, the Department considered whether some of the water rights granted by D-1025, including rights attached to 200 unirrigated acres of the Crouses' land, should be canceled under the provisions of Neb. Rev. Stat. § 46-229.04(2) (Reissue 1993), which provided in relevant part:

> If it is determined that such water has not been put to beneficial use or has ceased to be used for such purpose for more than ten consecutive years, the water right shall be declared canceled and annulled, except that . . . sufficient cause for

> nonuse shall be deemed to exist . . . if the landowner used the available water supply on only part of the land under the water appropriation because of an inadequate water supply.

For the sake of completeness, we note that § 46-229.04 has since been amended in ways not applicable to this action. See Neb. Rev. Stat. § 46-229 (Reissue 2004).

Steven Crouse appeared at the Department adjudication hearing and asked that the water rights for the 200 acres remain with the property. Evidence established that from 1985 to 1994, the 200 acres were owned by FmHA following repossession. A representative of FmHA testified that during the time the property was owned by FmHA, it was " 'prevented from being irrigated by government regulations.' " Steven Crouse testified that after he purchased the land, he chose not to use district water for the 200 acres at issue because he felt that there would be too much waste in transporting water from the canal to his property. He further testified that he planted crops which would not need a lot of water. On April 9, 1997, the Department issued an order canceling the Crouses' right to irrigate the 200 acres based upon its finding that the land had not been irrigated within the previous 10 years and that therefore, the nonuse provision set forth in § 46-229.04(2) applied. Notice of the Department's order was sent to the Crouses. The record does not reflect whether they appealed the decision of the Department pursuant to their rights under Neb. Rev. Stat. § 46-229.05 (Reissue 1998).

On or about May 26, 2004, the Crouses filed a petition with the board of directors of the District requesting that the 200 acres at issue be excluded from the District pursuant to Neb. Rev. Stat. §§ 46-174 to 46-184 (Reissue 2004), and further requesting that all taxes paid to the District on such property be refunded pursuant to § 46-184. The Crouses based their request on the District's failure to provide water for irrigation of the 200 acres and upon an anticipated inability of the District to be able to do so in the future because of the loss of water rights. The board of directors held a meeting on the Crouses' petition on or about July 22. No landowners objected to the petition, but the board did not reach a decision on that date.

Meanwhile, pursuant to legislation enacted in 2004, the Nebraska Department of Natural Resources (DNR) provided

notice to the public of its final determination that the Upper Republican Natural Resources District (Upper Republican NRD) was fully appropriated in its entirety and that it had thus placed an "immediate stay on the issuance of any new natural-flow, storage, or storage-use appropriations in the whole of the [Upper Republican] NRD." DNR also imposed stays, effective July 26, 2004, on the issuance of water well construction permits, the construction of certain new water wells, the use of existing water wells to increase the number of acres historically irrigated, and on "any increase, through use of an existing surface water right, of the number of acres historically irrigated." There is nothing in the record to indicate that the Crouses petitioned DNR for reevaluation of the order. See Neb. Rev. Stat. § 46-713(2) (Reissue 2004).

The board of directors held a meeting in September 2004 to consider the Crouses' petition for exclusion from the District, but no action could be taken, as there was not a quorum present. There were no meetings of the District board in October or November.

On December 7, 2004, the Crouses commenced this action against the District and the individuals composing its board of directors, seeking a peremptory writ of mandamus. They alleged that the District had a "clear duty" to exclude the 200 acres and to refund taxes of approximately $41,436 which the Crouses had paid to the District from 1994 to 2004. The District and its directors filed a motion to dismiss on the ground that the Crouses failed to state a cause of action upon which relief could be granted. Thereafter, the Crouses filed a motion for peremptory writ of mandamus and memorandum in support.

The district court conducted an evidentiary hearing on both motions. The parties offered identical evidence, and it was received without objection. Following argument and briefing, the district court entered an order granting the District's motion to dismiss without leave to amend. The court reasoned that the 1997 DNR order canceling the water rights to the Crouses' 200 acres, and the Crouses' failure to appeal that order, "effectively prevent[s the] District from delivering water to the [Crouses] on the lands that they are attempting to remove from the . . . District." The court concluded that the July 2004 DNR declaration that

the water in the Upper Republican NRD was fully appropriated had no effect on whether the Crouses' land was irrigable because the land became nonirrigable upon cancellation of the Crouses' water rights in 1997. Addressing the Crouses' claim that their land could not be irrigated due to natural causes, the court concluded that this court has interpreted that phrase to mean land, which, "because of the character of the land itself," cannot be irrigated. The court concluded that under our case law, a temporary drought or a fully appropriated water right could not be a natural cause that would prevent real estate from being irrigable.

II. ASSIGNMENTS OF ERROR

The Crouses assign three errors which can be restated as two: The district court erred (1) in determining that they were not entitled to a writ of mandamus and (2) in finding that insufficient water supply is not a natural cause of nonirrigable lands for purposes of exclusion under § 46-176.

III. STANDARD OF REVIEW

[1,2] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law. *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002); *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002); Neb. Rev. Stat. §§ 25-2156 to 25-2169 (Reissue 1995 & Cum. Supp. 2004). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Merz v. Seeba*, 271 Neb. 117, 710 N.W.2d 91 (2006); *Magistro v. J. Lou, Inc.*, 270 Neb. 438, 703 N.W.2d 887 (2005).

IV. ANALYSIS

[3,4] As noted, both the motion for peremptory writ of mandamus and the motion to dismiss were submitted to the district court at the same time, and the same evidence was offered and

received on both motions. Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) provides that when a matter outside of the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995 & Cum. Supp. 2004). *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006); *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005); *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). Because all parties rely on the same evidentiary record, we treat the facts as uncontroverted and focus our appellate review on whether the district court erred in holding that the District and its directors were entitled to judgment as a matter of law.

1. Exclusion of Lands From Irrigation District

(a) Statutory Procedure

[5] Neb. Rev. Stat. §§ 46-101 to 46-128 (Reissue 2004) provides for the organization and governance of irrigation districts in Nebraska. The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all landowners within the district upon fair and equitable terms and conditions. *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 286 N.W.2d 426 (1979); *State, ex rel. Clarke, v. Gering Irrigation District*, 109 Neb. 642, 192 N.W. 212 (1923). An irrigation district formed pursuant to the enabling statutes has certain corporate powers, including authority to levy assessments and taxes against land within its boundaries. See, Neb. Rev. Stat. §§ 46-129, 46-130, and 46-131 to 46-144 (Reissue 2004); *State, ex rel Clarke, v. Gering Irrigation District, supra.*

There is a specific statutory procedure by which a landowner may request exclusion of lands from an irrigation district. See §§ 46-173 through 46-184.

> The owner or owners in fee of one or more tracts of land which constitute a portion of an irrigation district may file

> with the board of directors of the district a petition praying that such tracts and any other tracts contiguous thereto may be excluded and taken from the district.

§ 46-174. Upon the filing and service of a petition to exclude lands, the district must publish notice of the filing in order to permit persons wishing to object to any change in boundaries to file written objection. § 46-175. The notice must include the time and place of the board meeting at which the petition will be considered. §§ 46-174 and 46-175. The failure of any person interested in the district to show cause in writing why the tract or tracts of land mentioned in the petition should not be excluded from the district is deemed and taken as an assent by him to the exclusion. § 46-176.

Generally, the board of directors has discretionary authority to order or deny a petition for exclusion based on the best interests of the District. § 46-177. However, § 46-176 expressly denies the board jurisdiction to hold or include any land "which cannot from any natural cause be irrigated thereby." Where the subject land "cannot from any natural cause be irrigated," the District is without jurisdiction to include and tax it, and it must be detached without regard to the best interests of the district. See *Smith v. Frenchman-Cambridge Irrigation Dist.*, 155 Neb. 270, 51 N.W.2d 376 (1952).

(b) Application

[6,7] By initially petitioning the District for exclusion of their property, the Crouses invoked the District's broad discretionary powers to consider exclusion of their land. However, by seeking a peremptory writ of mandamus, the Crouses have significantly narrowed their remedy. Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary. *State ex rel. City of Alma v. Furnas Cty. Farms*, 257 Neb. 189, 595 N.W.2d 551 (1999); *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997). The burden is on the Crouses to prove clearly and convincingly that the act they seek to compel is purely ministerial and that they are therefore entitled to the action. See *Krolikowski v. Nesbitt*, 257 Neb. 421, 598 N.W.2d 45 (1999). A duty or act is ministerial when there is "'"'no room

for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law.' "' . . ." *Pratt v. Nebraska Bd. of Parole*, 252 Neb. at 911, 567 N.W.2d at 187.

(i) Effect of Cancellation of Water Rights

The Crouses argue that they have a clear right to have their land excluded from the District because the District has denied their requests for water. They base their argument on *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 286 N.W.2d 426 (1979), in which we affirmed a peremptory writ of mandamus requiring an irrigation district to deliver water to the highest point on a landowner's land so as to allow all of his property within the district to be irrigated. We rejected a defense that the landowner had lost his water rights for the tracts in question, noting that the Department had original and exclusive jurisdiction to adjudicate water rights pertaining to irrigation and that there was no evidence that the Department had ever suspended or canceled any of the landowner's water rights. We concluded that the irrigation district had no power to cancel or terminate the landowner's water rights and that it could not suspend delivery of water except for nonpayment of taxes and assessments, as provided by statute and the bylaws of the district.

Based upon *State ex rel. Blome*, the Crouses argue that if the District cannot meet its obligation to provide water to their property, it has a clear duty to exclude the property from the District. However, this case is distinguishable from *State ex rel. Blome* because of the 1997 cancellation of the Crouses' water rights by the Department pursuant to § 46-229.04(2). The cancellation was based in part upon evidence that the Crouses chose not to use water available from the District for irrigation when they acquired the property from FmHA. The District has not refused to provide water as in *State ex rel. Blome*, but, rather, is legally prevented from doing so because of the cancellation of water rights due at least in part to the Crouses' own voluntary decision not to exercise their rights. Thus, *State ex rel. Blome* provides no support for the Crouses' argument that the District has a clear duty to either provide water or exclude their land from its boundaries.

(ii) § 46-176

As noted above, land which "cannot from any natural cause be irrigated" cannot lawfully be included in an irrigation district and taxed. § 46-176; *Smith v. Frenchman-Cambridge Irrigation Dist.*, 155 Neb. 270, 51 N.W.2d 376 (1952). See, *Birdwood Irrigation District v. Brodbeck*, 148 Neb. 824, 29 N.W.2d 621 (1947); *Andrews v. Lillian Irrigation District*, 66 Neb. 458, 97 N.W. 336 (1903) (on rehearing). Whether such land should be included in an irrigation district and taxed " 'does not depend on what is for the best interest of the district, nor on the consent of those holding bonds issued by the district, because the statute is mandatory that it should not be thus held and taxed.' " *Smith v. Frenchman-Cambridge Irrigation Dist.*, 155 Neb. at 277, 51 N.W.2d at 381, quoting *Andrews v. Lillian Irrigation District, supra*. On the other hand, if the land is irrigable or is nonirrigable for reasons other than natural causes, then the exclusive remedy for detaching lands after an irrigation district has been duly organized is found at §§ 46-174 to 46-184, and the decision regarding whether or not to exclude the land from the District is discretionary under § 46-177. See, *Sowerwine v. Central Irrigation District*, 85 Neb. 687, 124 N.W. 118 (1909); *Andrews v. Lillian Irrigation District, supra*. Thus, in order to have a clear legal right to exclusion of their lands from the District, the Crouses must establish that the land cannot from any natural cause be irrigated. § 46-176.

The Crouses contend that the land was made nonirrigable from a natural cause by the determination of DNR in 2004 that the Upper Republican NRD is "fully appropriated," which they regard as a finding that natural conditions do not provide a supply of water sufficient to meet the demand. They contend that because of the stay on the issuance of any new surface water appropriations and the lack of any unappropriated water in the basin, the absence of water is a natural cause which precludes the District from irrigating their land, thereby creating a clear duty to exclude the land from the District under § 46-176.

In determining whether particular agricultural land must be excluded from an irrigation district pursuant to § 46-176, our cases look to the intrinsic characteristics of the land itself, not to external factors. In *Andrews v. Lillian Irrigation District*, 66

Neb. at 467-68, 97 N.W. at 338, this court construed the language currently set forth in § 46-176 as follows:

> Evidently the legislature meant to exclude from the irrigation district, and from taxation in support thereof, lands that were not susceptible of irrigation. If, because of the natural conformation of the surface, lands within the irrigation district lay so high as to render it impossible to conduct water thereon by means of irrigation ditches for the irrigation of the land, it would hardly be contended that such lands were not, within the meaning of the section of the statute to which attention has been directed, land "which can not from any natural cause be irrigated thereby," and therefore could not lawfully be held in such district, and taxed to support the system.

However, if land "is such as can be watered," it may be included in an irrigation district. *Wight v. McGuigan*, 94 Neb. 358, 362, 143 N.W. 232, 234 (1913).

In *Smith v. Frenchman-Cambridge Irrigation District, supra*, this court addressed the question of whether certain land should be excluded from an irrigation district under § 46-176. The land was described as "very rough and rolling," with

> innumerable slopes and grades and none that continue much over 150 feet in any direction. There are ditches, depressions, hills, and mounds. The topsoil is from two inches thick on the higher parts to two feet on the better parts of the land. . . . The subsoil is fine river sand down to shale.

155 Neb. at 275-76, 51 N.W.2d at 380. We found the record "convincing that this land cannot from natural causes be irrigated" by the district and ordered that it be excluded and prior taxes be canceled. *Id.* at 276, 51 N.W.2d at 380.

In *Sowerwine v. Central Irrigation District*, 85 Neb. 687, 124 N.W. 118 (1909), this court also examined the intrinsic characteristics of the land in question to determine whether it should be excluded from an irrigation district under the statutory language currently codified in § 46-176. The evidence established that during approximately 3 months of the year, a slough running through the land was "practically full of water" and another portion of the land was "more or less wet and spongy," with standing water in some places. *Id.* at 692, 124 N.W. at 119.

During the rest of the year, however, the slough was "practically dry" and the remaining land was dry. *Id.* We held that in order to defeat the jurisdiction of the board to hold lands in an irrigation district, it must be "clearly shown, and in like manner found by the court, that the lands embraced within the district are, in fact, nonirrigable." 85 Neb. at 693-94, 124 N.W. at 120. We further held that if, under the facts, there is any doubt on the subject, such doubt must be resolved in favor of the jurisdiction of the board, and the parties left to the remedy provided by statute. We concluded that from the facts summarized above, it could not be determined as a matter of law that the land was nonirrigable and that thus, exclusion was within the discretionary authority of the board.

In the case at bar, there has been no claim or showing that the intrinsic characteristics of the land in question are such that it "cannot from any natural cause be irrigated" within the meaning of § 46-176. We agree with the district court that the 2004 DNR determination is not a factor which may be considered in this analysis. Accordingly, the Crouses have not established a clear duty to exclude the land from the irrigation district which would be enforceable by mandamus. Their sole remedy is to petition for exclusion under the provisions of §§ 46-174 to 46-184, as they have apparently done.

2. Refund of Irrigation Taxes

The Crouses also contend that § 46-184 entitles them to a refund of taxes which they have paid to the district on the 200 acres in question. The statute upon which they rely provides in part: "In case of the exclusion of any lands under the provisions of sections 46-173 to 46-183, there shall be refunded to any and all persons who have paid any assessment or assessments to such district, or any land so excluded, any sum or sums so paid." Because we conclude that the Crouses have no clear right enforceable by mandamus to have their property excluded from the District, it follows that they have no right in this action to a refund of taxes under § 46-184.

In reaching this conclusion, we do not address the merits of any refund claim under § 46-184 which may be asserted in the event that the board of directors of the District were at some

point to exercise its discretionary power under § 46-177 to exclude lands. We further note that § 46-141 affords a separate procedure whereby a landowner who pays irrigation district assessments under protest may claim a refund upon a showing of one of three grounds stated in the statute. See *Morrow v. Farmers Irrigation District*, 117 Neb. 424, 220 N.W. 680 (1928). This case presents no issue regarding a refund claim under § 46-141.

V. CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ERICK FERNANDO VELA, APPELLANT.
721 N.W.2d 631

Filed September 8, 2006. No. S-06-595.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Appeal dismissed.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, and Mark Albin for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

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

PER CURIAM.

The defendant, Erick Fernando Vela, took the above-captioned appeal from an order of the Madison County District Court overruling his "Amended Verified Motion to Preclude Imposition of Death Sentence Because of Mental Retardation." On our own motion, we entered an order to show cause, by simultaneous briefing, why the appeal should not be dismissed for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001). Those briefs have now been filed, and for the reasons stated

below, we conclude that the court's order was not a final, appealable order and dismiss the appeal.

The defendant was charged by information in the district court with five counts of murder in the first degree and five counts of use of a deadly weapon to commit a felony. The information also contained the notice of aggravation necessary for the prosecution to seek the death penalty. See Neb. Rev. Stat. § 29-1603 (Cum. Supp. 2004). The defendant had previously been charged by information with one count of robbery, one count of burglary, and another count of use of a deadly weapon to commit a felony. Pursuant to guilty pleas, the defendant was convicted of all 13 charges against him. A jury trial was had on aggravating circumstances, and the jury found that all the alleged aggravating circumstances were proved beyond a reasonable doubt for each of the five murders.

Neb. Rev. Stat. § 28-105.01 (Cum. Supp. 2004) provides, in relevant part:

> (2) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation.
>
> (3) As used in subsection (2) of this section, mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.
>
> (4) If (a) a jury renders a verdict finding the existence of one or more aggravating circumstances . . . the court shall hold a hearing prior to any sentencing determination proceeding . . . upon a verified motion of the defense requesting a ruling that the penalty of death be precluded under subsection (2) of this section. If the court finds, by a preponderance of the evidence, that the defendant is a person with mental retardation, the death sentence shall not be imposed. A ruling by the court that the evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under subsection (2) of this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing determination proceeding

. . . or to argue that such evidence should be given mitigating significance.

The defendant filed a verified motion to preclude imposition of the death sentence because of mental retardation. See, § 28-105.01(2); *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (execution of mentally retarded criminal is cruel and unusual punishment prohibited by Eighth Amendment). An evidentiary hearing was held, and the district court found that the defendant had not proved that he was mentally retarded within the meaning of § 28-105.01(3) or *Atkins, supra*. The district court overruled the defendant's motion to preclude imposition of the death sentence, and the defendant filed a notice of appeal.

It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001). For an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken. See *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

A judgment entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending. *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006). In a criminal case, the judgment is the sentence. *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995). The trial court must pronounce sentence before a criminal conviction is a final judgment. See *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000). It is apparent from the record in this case that the defendant has not been sentenced. Consequently, this court's jurisdiction, if any, is premised on the existence of a final, appealable order.

The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860

(2005). Because the order from which the defendant is attempting to appeal in this case neither in effect determined the action and prevented a judgment nor was made on summary application after a judgment was rendered, the issue is whether the order appealed from both affected a substantial right and was made during a special proceeding.

We first address whether the order affected a substantial right. A substantial right is an essential legal right, not a mere technical right. *In re Guardianship of Sophia M., supra.* 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. *Id.*

In criminal proceedings, orders affecting substantial rights include the denial of a motion to discharge based upon speedy trial grounds, and the denial of a plea in bar made on double jeopardy grounds. See, *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997) (speedy trial); *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996) (double jeopardy). But rulings on several other comparable motions in criminal cases are not final, appealable orders, because they do not affect a substantial right. See, e.g., *Loyd, supra* (overruling of motion based on statute of limitations); *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005) (denial of motion to discharge violation of probation); *State v. Lauck*, 261 Neb. 145, 621 N.W.2d 515 (2001) (overruling of plea in abatement claiming that alleged facts did not constitute crime); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000) (overruling of motion to quash claiming that alleged facts did not constitute crime); *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999) (overruling of plea in abatement claiming violation of due process because of preindictment delay); *State v. Cisneros*, 14 Neb. App. 112, 704 N.W.2d 550 (2005) (overruling of motion to withdraw no contest pleas).

The distinction among these cases is in the nature of the allegedly substantial right at issue. A substantial right can be affected by an order if the right is irrevocably lost by operation of the order, while a substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment. In *Jacques*, for instance, we explained that the denial

of a motion to discharge made on speedy trial grounds affected the subject matter of the litigation because denial of such a motion effectively denied a defendant's speedy trial rights. *Id.*, citing *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997). Similarly, if a criminal defendant is to avoid exposure to double jeopardy, his or her double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs. *Sinsel, supra*, citing *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

But in *Lauck, supra*, we held that a substantial right of the defendant had not been affected, because the defendant could still present all the defenses that he could have presented before the overruling of his plea in abatement. He could still argue that he was not guilty of the crime charged, make a motion to dismiss, or present affirmative defenses, and if convicted, he could raise on direct appeal the issue initially presented by his plea in abatement. See *id.* See, also, *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005). Similarly, in *Meese, supra*, we explained that whether a substantial right was affected depended on whether the defendant's right to a fair trial could be vindicated in an appeal from the final judgment, or whether the right could be protected only if the defendant was allowed to appeal directly from the denial of her pretrial motion. See, also, *Pruett, supra*; *Cisneros, supra*.

The right at issue in the instant case is both statutory and constitutional. See, § 28-105.01(2); *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). However, both the statutory mandate and constitutional rule are based on the determination that "mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes," but "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 526 U.S. at 306. See, also, Introducer's Statement of Intent, L.B. 1266, Judiciary Committee, 95th Leg., 2d Sess. (Feb. 13, 1998). As the introducing senator explained on the floor of the Legislature, in introducing the bill that would become § 28-105.01(2),

> clearly we already prohibit the death penalty for persons under the age of 18. That's currently the law. One of the thoughts is at that youthful age the maturity makes it difficult to have the judgment to know fully what you're doing. Is it any more difficult for that situation than it is for an individual who has an IQ below 70, thus being mentally retarded? And the feeling is obviously not. The mental capacity as individuals makes it very difficult for them to understand the rightness and wrongness of what they do, the consequences of their actions. It is already a mitigating circumstance that can be used in the sentencing process. But the thought tha[t] somebody who is mentally retarded with that sort of limitation of the mental capacity should be subject to the most severe punishment, that being the death penalty, is something that is objectionable to those of us who support this measure.

Floor Debate, 95th Leg., 2d Sess. 15769 (Apr. 6, 1998).

Section 28-105.01(2) and the Eighth Amendment prohibit the execution of mentally retarded persons because of what the U.S. Supreme Court describes as a "widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty." *Atkins*, 536 U.S. at 317. The purpose of the statutory and constitutional prohibition is to ensure that "the offender gets his 'just deserts' " and that the punishment imposed is commensurate with the culpability of the offender. 536 U.S. at 319. In other words, the right protected by § 28-105.01 and the Eighth Amendment is the right not to be *executed*—rather than the right not to be *sentenced*—where the culpability of the defendant is insufficient to justify the death penalty. Stated more simply, it is the right not to be subjected to punishment that is excessive when compared to the defendant's culpability.

This right is not lost by virtue of proceeding to final judgment prior to appellate review, and can be effectively vindicated in an appeal after judgment. Appellate review of the court's finding pursuant to § 28-105.01(4) is not foreclosed, and any prejudice resulting from an erroneous ruling can be mitigated by a timely appeal after sentencing. See, *State v. Lauck*, 261 Neb.

145, 621 N.W.2d 515 (2001); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000); *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999); *State v. Cisneros*, 14 Neb. App. 112, 704 N.W.2d 550 (2005).

Furthermore, impairment of the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law, as a result of mental defect, remains a statutory mitigating circumstance in a capital sentencing proceeding. Neb. Rev. Stat. § 29-2523(2)(g) (Cum. Supp. 2004). A ruling by the court that the death penalty is not precluded by § 28-105.01(2) does not restrict the defendant's opportunity to introduce evidence of diminished intelligence as it is relevant to § 29-2523(2)(g). See § 28-105.01(4). Thus, the defendant can still defend himself by presenting evidence that his culpability is mitigated by his mental capacity. Compare, *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); *Lauck, supra.*

In short, the order overruling the defendant's motion to preclude imposition of a death sentence does not diminish a claim or defense available to the defendant at the sentencing hearing, and any prejudice resulting from the erroneous imposition of a death sentence can be protected in an appeal from final judgment. Thus, the court's order overruling the defendant's motion did not affect a substantial right.

Furthermore, the hearing on mental retardation provided by § 28-105.01(4) is not a special proceeding. Where the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term "special proceeding." *Loyd, supra.* A special proceeding is, by definition, not part of an action. *Id.* An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not. *Id.* A hearing on mental retardation pursuant to § 28-105.01(4) is a part of the action, not a special proceeding.

Special proceedings, in criminal cases, include motions to discharge made on speedy trial grounds and pleas in bar made on double jeopardy grounds. See, *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990). A proceeding may be special, even if

the proceeding is connected with a pending action. *Jacques, supra.* An application to enforce the constitutional right to avoid double jeopardy, for instance, is a special proceeding because it "is not made as a step in determining the merits of any issue in the criminal prosecution itself." *Milenkovich*, 236 Neb. at 48, 458 N.W.2d at 751. Similarly, a motion to discharge on speedy trial grounds is a special proceeding because it does not prosecute alleged rights between parties or end in final judgment. *Jacques, supra.* " ' "[I]t is not an integral part of or a step in the action[,] or as it is sometimes referred to in such a situation[,] part of the 'main case.' " ' " *Id.* at 254, 570 N.W.2d at 336. " ' "None of the many steps or proceedings necessary or permitted to be taken in an action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of the statute." ' " *Id.* at 253-54, 570 N.W.2d at 336.

But a § 28-105.01(4) hearing on mental retardation, while expressly provided by statute, takes place in the context of a specialized sentencing proceeding for capital cases, the purpose of which is to guide the sentencing panel in the rational imposition of the death sentence. See Neb. Rev. Stat. § 29-2519(1) (Cum. Supp. 2004). As previously noted, in a criminal case, the judgment is the sentence. *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995). The hearing provided by § 28-105.01(4) is simply one step in the process of determining whether the death sentence should be imposed. Generally, when imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006). As explained above, mentality is particularly pertinent in capital sentencing because of the categorical determination that mental retardation mitigates the defendant's culpability. See *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

Thus, the issue of mental retardation is necessarily part of the merits of the sentencing proceeding. As such, a hearing pursuant

to § 28-105.01(4) is part of the process used to decide the merits of the action and determine the judgment that should be imposed. In short, a motion pursuant to § 28-105.01(4) addresses moral culpability, and thus the merits of the State's case against the defendant; a hearing and order overruling such a motion is part of the action, not a special proceeding. See *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

Because it neither affected a substantial right nor was made in a special proceeding, the court's order overruling the defendant's motion to preclude imposition of the death sentence because of mental retardation was not 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. *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006). When an appellate court is without jurisdiction to act, the appeal must be dismissed. *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006).

The court, on its own motion, hereby dismisses the above-captioned appeal. See rule 7A(2).

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. GREG LEMON, APPELLEE AND CROSS-APPELLANT, V. THE HONORABLE JOHN A. GALE, NEBRASKA SECRETARY OF STATE, APPELLANT AND CROSS-APPELLEE.

721 N.W.2d 347

Filed September 15, 2006. No. S-06-909.

1. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
2. **Constitutional Law.** Constitutional interpretation is a question of law.
3. **Supreme Court: Appeal and Error.** On questions of law, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
4. **Constitutional Law.** A constitution represents the supreme written will of the people regarding the framework for their government.
5. ____. In adopting the Nebraska Constitution, the people have imposed upon themselves limitations on their ability to amend this fundamental law.
6. **Constitutional Law: Courts: Intent.** In ascertaining the intent of a constitutional provision from its language, the court may not supply any supposed omission, or add words to or take words from the provision as framed.

7. **Constitutional Law: Intent.** The words in a constitutional provision must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests that they are used in a technical sense. It is permissible to consider the historical facts in determining the meaning of the language of the Nebraska Constitution. It is also appropriate and helpful to consider, with the historical background, the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy its terms imply.
8. **Constitutional Law.** It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose.
9. **Legislature: Initiative and Referendum.** The Legislature and the electorate are concurrently equal in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual.
10. **Constitutional Law: Initiative and Referendum.** The power of initiative must be liberally construed to promote the democratic process.
11. **Courts: Initiative and Referendum.** The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.
12. **Constitutional Law: Initiative and Referendum.** The resubmission clause is found in the same section of the state Constitution in which the people reserved to themselves the power of the initiative, Neb. Const. art. III, § 2. It serves to define the scope of the initiative power.
13. **Constitutional Law: Courts: Initiative and Referendum.** The people's reserved power of the initiative and their self-imposed limitation on the power through the resubmission clause are of equal constitutional significance. Just as the courts must respect and give effect to the power the people have reserved to themselves to amend the constitution or enact legislation through initiative measures, the courts are obliged to give meaningful effect to their self-imposed limitations on that power, such as that represented by the resubmission clause.
14. **Constitutional Law.** The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions.
15. **Constitutional Law: Initiative and Referendum.** The right to a state initiative process is not a right guaranteed by the U.S. Constitution, but is a right created by state law.
16. ____: ____. States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process. But if a state has conferred the right of initiative and referendum, it is obligated to do so in a manner consistent with its constitution.
17. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed in part, and in part reversed and vacated, and cause remanded with directions.

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

Alan E. Peterson, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and W. Scott Davis and Jacob P. Wobig, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

PER CURIAM.

Nebraska Secretary of State John A. Gale refused to place two initiative measures on the ballot for the November 7, 2006, general election, finding that the measures were so similar to three initiative measures submitted at the 2004 election that they contravened the resubmission clause in article III, § 2, of the Nebraska Constitution. Appellee Greg Lemon brought this action in the district court for Lancaster County pursuant to Neb. Rev. Stat. § 32-1412 (Reissue 2004), seeking a writ of mandamus to require Gale to place both measures on the ballot at the 2006 general election. The district court held that one of the measures, referred to as the "K-12 Initiative," was barred by the resubmission clause, but the other, referred to as the "3 Casinos Initiative," was not. The court entered an order requiring Gale to proceed with signature verification on the 3 Casinos Initiative and to forward it to the Attorney General for ballot title preparation. We expedited Gale's timely appeal, and Lemon cross-appealed. We conclude that a justiciable issue is presented and hold that the resubmission clause bars both initiative measures from being placed on the ballot for the November 7, 2006, general election and enter orders accordingly.

I. BACKGROUND

Lemon, a resident of and registered voter in Lancaster County, Nebraska, is the president of the Committee for Better Schools and More Jobs in Nebraska, Inc., a Nebraska nonprofit corporation serving as a ballot committee. Prior to July 7, 2006, the committee submitted to Gale three initiatives for consideration by the people of Nebraska at the general election to be held on November 7. One initiative, the 3 Casinos Initiative, proposes to amend article III, § 24, of the Nebraska Constitution to permit one casino in each of Nebraska's three congressional

districts. Each casino would be authorized, regulated, and licensed by the State. The second initiative, the K-12 Initiative, would statutorily earmark the use of tax proceeds from constitutionally authorized casino gambling by providing that a preponderance of the proceeds be used to support K-12 education in Nebraska. The third initiative was subsequently withdrawn and is not at issue in this action.

The committee contends that it has obtained sufficient valid signatures from registered voters, sufficiently distributed by county, to qualify each of the two initiative measures for consideration by the people at the November 7, 2006, election. On July 12, Gale refused to commence the verification process of the signatures on the initiative petitions and refused to place the initiative measures on the November 7 ballot. Gale determined that the 2006 initiatives were so similar to three initiatives presented to voters at the November 2004 election that they violated the resubmission clause found in the Nebraska Constitution, which clause provides: "The same measure, either in form or in essential substance, shall not be submitted to the people by initiative petition, either affirmatively or negatively, more often than once in three years." Neb. Const. art. III, § 2. The three initiatives submitted to the voters in 2004 were numbered 417, 419, and 420. Only Initiative 419 was approved by the voters.

Initiative 417 proposed to amend article III, § 24, of the Nebraska Constitution, which generally prohibits the Legislature from authorizing games of chance which are not specifically permitted in the constitution, by adding the following language:

> (5) This section shall not apply to laws enacted by the people by initiative measures by which the people may, contemporaneously with the adoption of this subsection or at any time thereafter, provide for the authorization, operation, regulation, and taxation of all forms of games of chance.

Initiative 419 dealt with taxation of games of chance conducted at casinos and other locations. Initiative 420 proposed a statute to (1) authorize all games of chance at casinos in metropolitan class cities within 2 miles of the Nebraska border; (2) authorize the use of electronic, mechanical, or other gaming devices at "strategic premises" where at least 250 such devices were

operated, as well as at racetracks; and (3) authorize the use of "[l]imited gaming devices" at casinos, "strategic premises," racetracks, and establishments selling alcoholic liquor for consumption on the premises. Initiative 420 also sought to establish the numbers of such casinos and gaming devices to be operated at various locations and to create a commission to regulate gaming. Initiatives 417 and 420 were defeated by the voters at the 2004 election, but Initiative 419 was approved. See Nebraska Blue Book 2004-05 at 1020-23. See, also, Neb. Rev. Stat. §§ 9-901 to 9-904 (Supp. 2005).

Lemon subsequently filed a petition for writ of mandamus in the district court for Lancaster County pursuant to § 32-1412. The operative petition sought a writ ordering Gale to verify the signatures on the 2006 initiative petitions, to obtain ballot language from the Attorney General, and to place the initiative measures on the November 7, 2006, ballot. On August 17, the district court entered an order granting in part and denying in part the relief sought by Lemon. The court concluded that Gale improperly interpreted the resubmission clause to require a comparison of the "fundamental essence" of the 2004 and 2006 initiative measures, reasoning that this interpretation of the clause failed to give effect to the plain and ordinary meaning of the constitutional language and ignored the "same measure" portion of the clause. The district court reasoned that the language of the resubmission clause instead required a consideration of whether the 2006 initiatives were "substantially the same" as the 2004 measures after examining the important and significant aspects of the measures, including their purposes, objects, and effect. Based on this rationale, the district court concluded that the 3 Casinos Initiative was not the same measure presented to the voters in 2004 and thus ordered Gale to proceed with signature verification and to obtain a ballot title from the Attorney General. The court concluded, however, that the K-12 Initiative was the same measure as Initiative 419 enacted by the electorate in 2004 and refused to order Gale to take any action on it. The court did not reach the First Amendment issues raised by Lemon. Gale perfected this appeal. We moved the appeal to our docket on our own motion and set an expedited briefing and oral argument schedule. See, Neb. Rev. Stat.

§ 24-1106(3) (Reissue 1995); § 32-1412. Lemon subsequently filed a cross-appeal.

II. ASSIGNMENTS OF ERROR

Gale assigns, restated and consolidated, that the district court erred in failing to find that the 3 Casinos Initiative was legally insufficient and unconstitutional on its face because it violated the resubmission clause of article III, § 2, of the Nebraska Constitution.

On cross-appeal, Lemon assigns, restated and consolidated, that the district court erred in (1) finding that the K-12 Initiative violated the resubmission clause; (2) failing to find that the resubmission clause, as applied in this case to the K-12 Initiative, violated state and federal First Amendment free speech and free political association rights; and (3) denying costs and attorney fees.

III. STANDARD OF REVIEW

[1-3] A jurisdictional question which does not involve a factual dispute is a matter of law. *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003). Constitutional interpretation is a question of law. *Keef v. State*, 271 Neb. 738, 716 N.W.2d 58 (2006); *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006). On questions of law, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. See *id.*

IV. ANALYSIS

1. JUSTICIABILITY

In our order setting an expedited briefing schedule, we directed the parties to brief the issue of whether this appeal presents a justiciable controversy that is ripe for determination. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001); *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). We must initially decide whether we can reach the constitutional challenge to the proposed ballot measures prior to the election at which voters will be asked to approve or reject them.

Two prior decisions of this court bear on this question. *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996), involved a challenge to an initiative measure which would have amended the Nebraska Constitution to limit the number of terms in office which could be served by specific state and federal officeholders in Nebraska. One day prior to the election at which the measure was to be submitted to the voters, the district court dismissed the action, in part based on its conclusion that the constitutionality of the proposed amendments was not justiciable unless and until the initiative measure was adopted. The measure remained on the ballot and was adopted by a majority of the electorate. The plaintiffs then filed a motion for new trial, asserting that the results of the election established justiciability, but the motion was denied. On appeal, this court held that the district court was correct in declining to rule on the constitutionality of the measure prior to the election, noting that "[t]o the degree that appellants sought a declaration that [the measure], if adopted, would enact amendments which violated the U.S. or the Nebraska Constitution, appellants were seeking an advisory opinion." *Duggan*, 249 Neb. at 424, 544 N.W.2d at 77. However, we held that the question became justiciable when the measure was adopted by the voters and the challengers filed a motion for new trial seeking declaratory relief.

Loontjer v. Robinson, 266 Neb. 902, 670 N.W.2d 301 (2003), was an appeal from an order enjoining the placement of an initiative measure on the ballot, based upon the determination of the district court that it violated the single subject rule of Neb. Const. art. III, § 2. The district court had rejected a contention that the initiative petition was defective because it failed to include a sworn statement listing the names and addresses of its sponsors in violation of Neb. Rev. Stat. § 32-1405(1) (Reissue 1998), finding that there had been substantial compliance with the statutory requirement. This determination was assigned as error on cross-appeal. *Loontjer* held that the sworn statement issue was justiciable because § 32-1412(2) (Reissue 1998) permitted a court to hear and decide a challenge to the legal sufficiency of an initiative petition prior to an election and that "[q]uestions dealing with statutory provisions concerning the form of a petition and the technical requirements of the sponsors affect the

legal sufficiency of an initiative." *Loontjer*, 266 Neb. at 908-09, 670 N.W.2d at 307. Based upon a determination that the failure to comply with the sworn statement requirement rendered the initiative legally insufficient, we, in *Loontjer*, affirmed the district court's award of injunctive relief without reaching the constitutional issue of whether the measure complied with the single subject rule.

Chief Justice Hendry concurred in the *Loontjer* result, reasoning that the single subject issue was justiciable and that the district court was correct in its conclusion that the initiative violated the single subject requirement. In a separate concurrence, two justices similarly reasoned that the "determination of whether the measure contains more than one subject is a justiciable issue." *Id.* at 925, 670 N.W.2d at 317 (Wright, J., concurring; Gerrard, J., joins). This concurrence distinguished the holding with respect to preelection justiciability in *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996), noting that *Duggan* involved an attempt "to litigate the substantive constitutionality of the measure before it was adopted," whereas the single subject rule contained in Neb. Const. art. III, § 2, was a "procedural requirement" affecting the legal sufficiency of the measure. *Loontjer*, 266 Neb. at 920, 925, 670 N.W.2d at 314, 317 (Wright, J., concurring; Gerrard, J., joins).

The parties agree and we conclude that the constitutional issue presented in this case is justiciable. We are not asked to decide whether the measures, if adopted, would violate one or more substantive provisions of the state or federal Constitution. Rather, the issue is whether each measure complies with the requirement of our state Constitution that it not be the same, "either in form or in essential substance," as another measure submitted to the voters within a preceding 3-year period. Neb. Const. art. III, § 2. The question is whether the measure is legally sufficient to be submitted to the voters. See *Loontjer, supra*. In addition to determining the validity and sufficiency of signatures on a filed initiative petition, the Secretary of State is required in the first instance to "determine if constitutional and statutory requirements have been met" before placing the measure on the ballot. Neb. Rev. Stat. § 32-1409(3) (Reissue 2004). This determination is subject to judicial review, by which

a court may order the Secretary of State to place a measure on the ballot if it finds the measure to be legally sufficient, or enjoin the placement of the measure on the ballot if it is found to be legally insufficient. § 32-1412(2). This is the process by which the constitutional issue has reached us, and we now decide it.

2. Resubmission Clause

[4] A constitution represents the supreme written will of the people regarding the framework for their government. *Duggan, supra.* The people have the power to amend the Nebraska Constitution by the initiative process pursuant to article III, § 2, which provides in part: "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature."

[5] In adopting the Nebraska Constitution, however, the people have imposed upon themselves limitations on their ability to amend this fundamental law. *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994). The dispositive issue in this action is the application of the limitation on the initiative power found in article III, § 2, which provides that "[t]he same measure, either in form or in essential substance, shall not be submitted to the people by initiative petition, either affirmatively or negatively, more often than once in three years." By its terms, the resubmission clause does not prevent resubmission or reconsideration by the voters, but merely postpones for 3 years reconsideration of the "same measure." Although this provision has been a part of our state Constitution since 1912, this court has not previously construed or applied it to a specific initiative measure. In construing the provision, we are guided by familiar general principles.

[6-8] In ascertaining the intent of a constitutional provision from its language, the court may not supply any supposed omission, or add words to or take words from the provision as framed. *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006); *DeCamp v. State*, 256 Neb. 892, 594 N.W.2d 571 (1999). The words in a constitutional provision must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text

suggests that they are used in a technical sense. See *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000). It is permissible to consider the historical facts in determining the meaning of the language of the Nebraska Constitution. *Pig Pro Nonstock Co-op v. Moore*, 253 Neb. 72, 568 N.W.2d 217 (1997). It is also appropriate and helpful to consider, with the historical background, the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy its terms imply. *Id.* It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose. *Day v. Nelson*, 240 Neb. 997, 485 N.W.2d 583 (1992).

[9-11] The Legislature and the electorate are concurrently equal in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual. *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003). The power of initiative must be liberally construed to promote the democratic process. *Id.* The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter. *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999); *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984).

[12,13] The resubmission clause is found in the same section of the state Constitution in which the people reserved to themselves the power of the initiative. Neb. Const. art. III, § 2. It serves to define the scope of the initiative power. We ascertain the purpose of the resubmission clause from its language. The people in their constitution reserved the power to reconsider a previously submitted initiative measure, but not more frequently than once in 3 years. The people's reserved power of the initiative and their self-imposed limitation on the power through the resubmission clause are of equal constitutional significance. Just as we must "respect and . . . give effect to the power the people have reserved to themselves" to amend the constitution or enact legislation through initiative measures, we are obliged to give meaningful effect to their "self-imposed limitations" on that power, such as that represented by the resubmission clause. See *Duggan v. Beermann*, 249 Neb. 411, 421-22, 544 N.W.2d

68, 75 (1996). Accord *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994).

The parties agree and we conclude that the 2006 initiative measures are not the same in form as the 2004 measures. This case thus requires us to determine whether the two initiative measures submitted for inclusion on the 2006 general election ballot are the "same . . . in essential substance" as initiative measures which appeared on the ballot in 2004. All of the measures in question pertain to gaming. However, the parties have differing views on the appropriate test to determine whether a proposed 2006 measure is the same "in essential substance" as a measure submitted in 2004. Lemon takes a narrow view, arguing that the language of the resubmission clause "is designed to prevent the same initiative measure from being resubmitted using synonyms or mere rewording of language." Brief for appellee at 11. Gale has employed a broader comparison, arguing that the resubmission clause "precludes the submission of measures which share the same fundamental nature or essence more than once every three years." Brief for appellant at 24. The district court concluded that "the resubmission clause prevents the submission of a measure that is substantially the same as a measure submitted in the previous three years. This requires one to consider the important and significant aspects of the measure, including its purpose, object and effect."

If we were to apply the "substantially the same" standard utilized by the district court, Nebraska's resubmission clause would become similar to that of the New Jersey Constitution, which provides that if a proposed constitutional amendment is not approved by voters, "neither such proposed amendment nor one to effect the same or substantially the same change in the Constitution shall be submitted to the people before the third general election." N.J. Const., art. IX, ¶ 7. Applying New Jersey's constitutional language, a New Jersey court held that a proposed constitutional amendment pertaining to casino gambling was not "substantially the same" as a proposed amendment which had been defeated by voters 2 years earlier. *Young v. Byrne*, 144 N.J. Super. 10, 364 A.2d 47 (1976). The court noted that the first proposed amendment provided for state ownership and operation of casinos, while the second permitted private ownership; the first

amendment would have permitted casinos throughout the state, while the second limited casino locations to Atlantic City, New Jersey; and the two measures differed with respect to the treatment of gambling revenues. *Id.*

Applying the principle that each and every clause within a constitution has been inserted for a useful purpose, we do not interpret the phrase "same . . . in essential substance" in the Nebraska Constitution to mean "substantially the same." The latter phrase invites the type of discrete comparison employed by both the New Jersey court in *Young* and the district court in this case to determine if specific provisions in one measure differ from those of the other. Instead, we interpret the phrase "essential substance" in the Nebraska Constitution to require a broader, conceptual analysis and comparison of the fundamental theme and purpose of each initiative measure to determine if they are the "same" for purposes of the resubmission clause.

(a) 3 Casinos Initiative

Both the 3 Casinos Initiative and Initiative 417, rejected by the voters in 2004, propose an amendment to article III, § 24, of the Nebraska Constitution, which concerns gaming and begins with a general prohibition:

> (1) Except as provided in this section, the Legislature shall not authorize any game of chance or any lottery or gift enterprise when the consideration for a chance to participate involves the payment of money for the purchase of property, services, or a chance or admission ticket or requires an expenditure of substantial effort or time.

Paragraphs (2) and (3) of article III, § 24, provide that the Legislature may authorize a state lottery and certain other lotteries. Paragraph (4) of article III, § 24, permits the Legislature to authorize wagering on the results of parimutuel horseracing and certain bingo games conducted by nonprofit associations. There is no exception for other games of chance, including those conducted at a casino, and such gaming is therefore prohibited under article III, § 24(1).

If it had been approved by the voters in 2004, Initiative 417 would have added a provision to article III, § 24, consisting of the following language:

> (5) This section shall not apply to laws enacted by the people by initiative measures by which the people may, contemporaneously with the adoption of this subsection or at any time thereafter, provide for the authorization, operation, regulation, and taxation of all forms of games of chance.

As was the case with Initiative 417, the 3 Casinos Initiative would also add a provision to article III, § 24, consisting of the following language:

> (5) Nothing in this section shall be construed to prohibit state-authorized, state-regulated and state-licensed casino gambling. The casino gambling that is authorized is as follows:
>
> (a) To the extent not prohibited by the laws of the United States, any traditional form of casino gambling and any additional form permitted by laws, rules and regulations established by the State of Nebraska;
>
> (b) There shall be no more than one casino gambling establishment in each congressional district that existed on January 1, 2006, for a maximum of three casino gambling establishments; and
>
> (c) This subsection shall not be construed to extend to political subdivisions the power to authorize, regulate, or license casino gambling or be construed as a prohibition of any form of any game of chance, lottery, or gift enterprise authorized under or pursuant to this Constitution.

The 3 Casinos Initiative would explicitly remove the present constitutional prohibition of casino gambling by authorizing three casinos in the state. Although it does not specifically mention casinos, Initiative 417 would also have removed the constitutional barrier to their operation by providing that article III, § 24, would not apply to laws enacted by initiative which authorized the "operation, regulation, and taxation of all forms of games of chance." The consequence of this proposed amendment is apparent from Initiative 420, also rejected by voters in 2004, which would have enacted a statute providing for the operation of games of chance at various locations, including casinos located in a city of the metropolitan class. We conclude that the essential substance of the 3 Casinos Initiative submitted for 2006 and Initiative 417 submitted to the electorate in 2004

is the same: amending the constitution to authorize enactments permitting the operation of games of chance. We therefore determine that the district court erred in ruling that inclusion of the 3 Casinos Initiative on the 2006 general election ballot would not violate the resubmission clause and in ordering Gale to proceed with signature verification and to submit the measure to the Attorney General for ballot title preparation. We find merit in Gale's appeal from this ruling.

(b) K-12 Initiative

Neither party questions the conclusion of the district court that the K-12 Initiative must be compared to Initiative 419, now enacted into law, because "[t]he resubmission clause does not distinguish between measures rejected and those that are approved." We agree with this reasoning.

The K-12 Initiative proposed for the 2006 general election ballot would enact a statute which directs or "earmarks" the use of tax proceeds derived from constitutionally permitted, state-authorized casino gambling. After providing funds to a state agency to control and regulate gaming; contributions to the Compulsive Gamblers Assistance Fund, see Neb. Rev. Stat. § 71-817 (Supp. 2005); and funds for live horserace purse offerings, the K-12 Initiative requires a minimum of 95 percent of all remaining tax receipts to be used to provide financial assistance in the manner determined by the Legislature for elementary and secondary education.

Initiative 419 was a statutory initiative measure approved by a majority of the electorate in the 2004 general election. See Nebraska Blue Book 2004-05 at 1022. Its provisions are codified at §§ 9-901 to 9-904. Section 9-902 provides:

> There shall be an annual gaming tax imposed by the State of Nebraska on gross gaming revenue generated at permitted locations by authorized operators from the operation of all games of chance, except for games of chance authorized under Chapter 2 or Chapter 9, as follows:
>
> (1) With respect to the operation of all games of chance operated by an authorized operator at a permitted location, a gaming tax equal to thirty-six percent of the first fifteen million dollars of the gross gaming revenue thereof and

twenty percent of the gross gaming revenue thereof in excess of fifteen million dollars;

(2) Of the gaming tax so imposed on gaming revenue at a casino, seventy-five percent thereof shall be payable to the General Fund and twenty-five percent thereof shall be payable to the community which authorized such games of chance at such casino; and

(3) Of the gaming tax so imposed on gaming revenue at any other permitted location, twenty-five percent thereof shall be payable to the General Fund and seventy-five percent thereof shall be payable to the community, or the communities, pro rata, which authorized such games of chance at such permitted location.

Section 9-903 provides for an annual gaming license fee to be paid by authorized operators of games of chance, and § 9-904 provides that gaming taxes and fees "shall be in lieu of all other taxes, fees, franchise payments, occupation taxes or excise taxes levied or imposed by the State of Nebraska, but shall not be in lieu of such other fees, income taxes, sales taxes, or property taxes levied or imposed against the public generally."

The statutes which resulted from the voters' approval of Initiative 419 in 2004 deal with the collection and distribution of revenue which would have been derived from the "community authorized" gaming contemplated by failed Initiatives 417 and 420. We recognize that the K-12 Initiative differs from the 2004 initiatives in that it would create a method of distributing revenue from the "state authorized" gaming operations which would result from approval of the 3 Casinos Initiative, as distinguished from "community authorized" operations. Initiative 419 and the K-12 Initiative also differ with respect to the specific manner in which gaming revenue would be distributed. While we acknowledge these differences, we conclude that they do not go to the essential substance of the measures under comparison. The fundamental theme and purpose of each measure is the distribution of new gaming revenues which would result if the current constitutional prohibition of games of chance were amended to permit casinos to operate in this state. We therefore conclude that Initiative 419 and the K-12 Initiative are the same in essential substance, and we agree with the district court that

the resubmission clause bars submission of the K-12 Initiative at the 2006 general election.

3. Free Speech and Political Association Claims

[14] Lemon contends on cross-appeal that in interpreting the resubmission clause, this court must consider the First Amendment concepts of "overbroad administrative discretion" and "balancing the actual burdens on speech and association against proven interests of government." Brief for appellee on cross-appeal at 47-48. He contends that "[o]nly a narrowly tailored and necessary remedy is available to the government under this test." Brief for appellee on cross-appeal at 48. Although the district court did not reach this issue, we do so here because of Lemon's claim that any interpretation of the resubmission clause which would prevent the two initiative measures from being placed on the ballot in 2006 would violate his rights of free speech and political association guaranteed by the First Amendment to the U.S. Constitution and article I, § 5, of the Nebraska Constitution. The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions. *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006); *State v. Rabourn*, 269 Neb. 499, 693 N.W.2d 291 (2005).

[15,16] "[T]he right to a state initiative process is not a right guaranteed by the United States Constitution, but is a right created by state law." *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997). See, also, *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993). " 'States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process.' " *Pony Lake Sch. Dist.*, 271 Neb. at 190, 710 N.W.2d at 624, quoting *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999). "But if a state has conferred the right of initiative and referendum, it is 'obligated to do so in a manner consistent with the Constitution.' " *Pony Lake Sch. Dist.*, 271 Neb. at 190, 710 N.W.2d at 624, citing and quoting *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

Buckley held that Colorado's requirements that circulators be registered voters and wear identification badges violated free

speech principles. *Meyer* held that a prohibition against paid circulators violated First Amendment protections of free speech. Unlike *Buckley* and *Meyer*, this case does not involve statutes or procedures affecting the exercise of the initiative power conferred by a state constitution. As we have noted, the resubmission clause is a self-imposed limitation on the constitutionally reserved power of initiative which defines its scope. In that sense, it is analogous to constitutional requirements regarding the number of signatures required to place an initiative measure on the ballot.

In holding that our resolution of that issue in *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994), did not violate the free speech rights of petition organizers, the Court of Appeals for the Eighth Circuit noted that the organizers "can claim no constitutionally-protected right to place issues before the Nebraska electorate; any opportunity to do so must be subject to compliance with state constitutional requirements." *Dobrovolny*, 126 F.3d at 1113. See, also, *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996). In a memorandum and order affirmed by the court of appeals in *Dobrovolny*, the U.S. District Court for the District of Nebraska noted "an important categorical difference between granting and defining the right to an initiative process in the state constitution and statutory procedures enacted to implement the right so defined by the state constitution." *Dobrovolny v. Moore*, 936 F. Supp. 1536, 1541 (D. Neb. 1996), *affirmed* 126 F.3d 1111 (8th Cir. 1997). The federal district court concluded that our opinion in *Duggan* did not "interpret a regulation or statute that would limit the right to the initiative procedure," but, rather, "ascertained what the right itself meant and what the will of the people was" in enacting the constitutional amendment interpreted. *Id.* at 1542.

The resubmission clause as interpreted herein is a limitation on the initiative process itself, but does not restrict speech or expression because it does not regulate the process of advocacy itself by dictating who can speak or how they must go about speaking. See *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006). We conclude that its application does not impair any rights to free speech under the federal or state Constitution. Nor are we persuaded that the application of

the resubmission clause presents a ballot access issue implicating a First Amendment right to political association.

In this regard, Lemon relies on *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983), in which the U.S. Supreme Court applied a flexible balancing test in determining that a state statute which required an independent candidate for the office of President of the United States to make certain filings in March in order to appear on the November 1980 ballot placed an unconstitutional burden on voting and associational rights of his supporters. Lemon argues that the same test should be applied here. However, because the question whether an initiative measure should appear on the ballot is determined solely by a state's constitution, we conclude that *Anderson* is inapplicable. See, *Initiative and Referendum Institute, supra*; *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997); *Biddulph, supra*; *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993). Accordingly, we reject Lemon's assignments of error on cross-appeal relating to First Amendment issues.

4. Costs and Attorney Fees

[17] Lemon assigns in his cross-appeal that the district court erred in denying him costs and attorney fees. This assignment of error is not argued in his brief. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Cole v. Isherwood*, 271 Neb. 684, 716 N.W.2d 36 (2006); *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006). We do not reach the issue in this appeal.

V. CONCLUSION

We affirm that portion of the judgment of the district court concluding that the resubmission clause contained in article III, § 2, precludes placement of the K-12 Initiative on the ballot for the 2006 general election because it is the same in essential substance as Initiative 419 submitted in 2004. However, based on our determination that the 3 Casinos Initiative is the same in essential substance as Initiative 417 submitted in 2004, we reverse the determination made by the district court that the 3 Casino Initiative did not violate the resubmission clause and vacate that portion of its order requiring Gale to proceed with

signature verification on the 3 Casinos Initiative and further directing him to forward that initiative measure to the Attorney General for ballot title preparation. We find merit in Gale's appeal and no merit in Lemon's cross-appeal. We remand the cause to the district court with directions to dismiss Lemon's verified complaint for writ of mandamus.

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

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

STATE OF NEBRASKA, APPELLEE, V.
JAY E. BRUNA, APPELLANT.
721 N.W.2d 362

Filed September 22, 2006. No. S-05-529.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and CASSEL, Judges, on appeal thereto from the District Court for Sarpy County, JAMES T. GLEASON, Judge. Judgment of Court of Appeals affirmed.

Lawrence G. Whelan for appellant.

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

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

PER CURIAM.

Having reviewed the briefs and record and having heard oral arguments, we conclude on further review that the decision of the Nebraska Court of Appeals in *State v. Bruna*, 14 Neb. App. 408, 710 N.W.2d 329 (2006), is correct and accordingly affirm the decision of the Court of Appeals.

AFFIRMED.

HENDRY, C.J., not participating.

IN RE INTEREST OF FEDALINA G., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. EDWIN M., APPELLANT.

721 N.W.2d 638

Filed September 22, 2006. No. S-06-235.

1. **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.
2. **Fees: Appeal and Error.** Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004) generally provides that an appeal may be taken by filing a notice of appeal and depositing the required docket fee with the clerk of the district court.
3. **Affidavits: Fees: Appeal and Error.** A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal.
4. **Jurisdiction: Affidavits: Appeal and Error.** An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty.
5. **Affidavits.** An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.
6. ____. A document subscribed and sworn to before a person not authorized by law to administer oaths is not an affidavit and is void as such.
7. **Public Officers and Employees.** The power of a notary to perform notarial functions is limited to the jurisdiction in which the commission issued.
8. **Affidavits: Public Officers and Employees: States.** An affidavit may be used in support of a motion in a court of this state if the affidavit is made and authenticated, out of state, before a person authorized to administer oaths in the place where the affidavit is made.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and CARLSON, Judges, on appeal thereto from the County Court for Cheyenne County, THOMAS H. DORWART, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Donald J.B. Miller, of Matzke, Mattoon & Miller, for appellant.

Douglas D. Palik, Special Cheyenne County Attorney, for appellee.

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

GERRARD, J.

Edwin M., the appellant, seeks further review of the decision of the Nebraska Court of Appeals dismissing his appeal, from the

termination of his parental rights, on jurisdictional grounds. The issue in this appeal is whether the appellant's poverty affidavit, notarized by a notary public of the State of Utah, was properly submitted in support of the appellant's application to proceed in forma pauperis in a Nebraska court.

BACKGROUND

The appellant's parental rights to his daughter, Fedalina G., were terminated in an order filed by the trial court on January 30, 2006. The appellant filed a timely notice of appeal and motion to proceed in forma pauperis in the trial court, accompanied by a poverty affidavit. The poverty affidavit was sworn and signed by the appellant in Salt Lake County, Utah, and notarized by a notary public commissioned by the State of Utah. The trial court granted the appellant's motion to proceed in forma pauperis.

On April 18, 2006, the Court of Appeals issued an order, on its own motion, to show cause why the appeal should not be dismissed for lack of jurisdiction because of a defective poverty affidavit. Specifically, the order stated as follows:

> The court has reviewed the file sua sponte. The court notes that the poverty affidavit, filed in lieu of the statutory docket fee, was notarized in Utah by a Utah notary public. A document subscribed and sworn to before a person not authorized by law to administer oaths is not an affidavit and is void as such. *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995). The power of a notary to perform notarial functions is limited to the jurisdiction in which the commission is issued. *Id.*
>
> Appellant is given 14 days from the date of this Order to Show Cause to show why this cause should not be dismissed for lack of jurisdiction.

On May 1, 2006, the appellant filed a response alleging that he was a resident of the State of Utah and physically located in Utah at the time he executed the poverty affidavit. The appellant also filed an affidavit from the notary public who had authenticated his poverty affidavit, averring that the appellant had personally appeared before the notary public in Salt Lake City, sworn under oath that the information in the poverty affidavit was true, and signed the poverty affidavit. Finally, the

appellant filed a copy of the notary public's certificate of notarial commission, indicating that the notary public had been duly commissioned as a notary public for the State of Utah on November 28, 2005, and that the commission would not expire until November 26, 2009.

On May 18, 2006, the Court of Appeals summarily dismissed the appeal, citing *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995). See *In re Interest of Fedalina G.*, 14 Neb. App. lxvii (No. A-06-235, May 18, 2006). The appellant filed a timely petition for further review, which we granted.

ASSIGNMENT OF ERROR

The appellant assigns, consolidated and restated, that the Court of Appeals erred in dismissing his appeal.

STANDARD OF REVIEW

[1] 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. *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

ANALYSIS

[2-4] Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004) generally provides that an appeal may be taken by filing a notice of appeal and depositing the required docket fee with the clerk of the district court. See *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004), *cert. denied* 544 U.S. 986, 125 S. Ct. 1858, 161 L. Ed. 2d 744 (2005). A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal. *Glass, supra.* See, generally, Neb. Rev. Stat. ch. 25, art. 23 (Reissue 1995 & Cum. Supp. 2004). An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). In the instant case, the Court of Appeals concluded that no poverty affidavit had been filed, since the appellant's purported poverty affidavit had not been notarized in accord with what the Court of Appeals believed Nebraska law to require.

[5-7] However, the Court of Appeals' reliance on *Haase, supra*, was misplaced. In *Haase*, a criminal defendant filed a notice of

appeal from an order of the district court refusing to modify his sentence, along with a motion to proceed in forma pauperis and a purported poverty affidavit. The purported affidavit represented that it was signed before a deputy Hall County public defender, but it bore no notarial seal. Upon an order to show cause, a motion was filed for an extension of time to file another affidavit, asserting that the seal had been inadvertently omitted. We issued another order, inquiring whether at the time the purported affidavit was signed, the deputy Hall County public defender was a duly qualified notary public in the State of Nebraska. It was revealed that the public defender was an Iowa notary, but not a Nebraska notary. We stated:

> In connection with the means by which evidence may be taken, Neb. Rev. Stat. § 25-1240 (Reissue 1989), the Legislature has defined an affidavit as a "written declaration under oath, made without notice to the adverse party," Neb. Rev. Stat. § 25-1241 (Reissue 1989). For the purposes of more general use, we define an affidavit as a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. . . .
>
> Obviously, a document subscribed and sworn to before a person not authorized by law to administer oaths is not an affidavit and is void as such. . . .
>
> Just as manifestly, the power of a notary to perform notarial functions is limited to the jurisdiction in which the commission issued. . . . Thus, it is clear that the original document filed as a poverty affidavit in this case was no such thing.

State v. Haase, 247 Neb. 817, 819-20, 530 N.W.2d 617, 618-19 (1995). Because the purported poverty affidavit was a nullity, we dismissed the appeal for lack of jurisdiction. See *id.*

However, the dispositive fact in *Haase* was not that the appellant tried to file a document notarized by an out-of-state notary, but that the document was purportedly notarized *in Nebraska* by a person who was not authorized to do so *in this state*. Our opinion in *Haase* indicates, and an examination of the transcript from that case confirms, that the document in question

was signed and sworn in Hall County, Nebraska, but not notarized by a Nebraska notary public.

The issue in *Haase* was not the notarization of an affidavit by an out-of-state notary; rather, it was the purported notarization of an affidavit in Nebraska before a person who was not authorized to do so in Nebraska. We held in *Haase* that the power of a notary to perform notarial functions is limited to the jurisdiction in which the commission issued—i.e., an Iowa notary may not, by virtue of that commission, perform notarial functions outside the State of Iowa. Thus, in *Haase*, the purported affidavit was a nullity because the Iowa notary was not authorized to administer an oath in Nebraska, and the appeal was correctly dismissed.

That holding is inapplicable when an affidavit is authenticated in another state by a duly commissioned notary of that state. In *Browne v. Palmer*, 66 Neb. 287, 92 N.W. 315 (1902), we held that an affidavit taken before a notary of a sister state or foreign government is properly received in support of a motion in the courts of this state. We relied upon the antecedent to Neb. Rev. Stat. § 25-1245 (Reissue 1995), which provided in part, then as now, that "[a]n affidavit may be made in and out of this state before any person authorized to take depositions, and must be authenticated in the same way." See Comp. Stat. § 5945 (1901). Comp. Stat. § 5949 (1901) provided that "[d]epositions may be taken out of the state by a . . . notary public . . . ." We concluded that taken together, "[a] reading of these two sections makes it evident that an affidavit taken before a notary public either in or out of the state of Nebraska may be used in support of a motion or other procedure in court where necessary." *Browne*, 66 Neb. at 290-91, 92 N.W. at 316.

The statutory framework upon which *Browne* was based remains effectively the same today. As noted, § 25-1245 provides that an affidavit may be made out of state before any person authorized to take depositions, and must be authenticated in the same way. Neb. Ct. R. of Discovery 28(b) (rev. 2000) provides that depositions may be taken in other states "before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending."

[8] Taken together, § 25-1245 and rule 28(b) provide that an affidavit may be used in support of a motion in a court of this state if the affidavit is made and authenticated, out of state, before a person authorized to administer oaths in the place where the affidavit is made. See *Browne, supra*. Generally, a notary public is authorized to administer oaths. See, generally, Michael L. Closen, *The Public Official Role of the Notary*, 31 J. Marshall L. Rev. 651 (1998). As pertinent to this case, a notary public of the State of Utah is authorized to administer oaths in Utah. See Utah Code Ann. § 46-1-6(4) (Supp. 2006). Because the affidavit in this case was duly authenticated in Utah by a person authorized to administer oaths in the State of Utah, it may be submitted in support of a motion made in a Nebraska court. See *Browne, supra*. The Court of Appeals erred in concluding otherwise.

At oral argument, the State contended for the first time that the appellant's poverty affidavit was defective because the acknowledgment recited that the affidavit was "subscribed and sworn" to before the notary, and not "acknowledged." The State seems to be contending that because of this form, there is no evidence, on the face of the affidavit, that the person who made the affidavit was actually the appellant, and thus, the affidavit is insufficient. This argument is without merit.

"An affidavit is a written declaration under oath, made without notice to the adverse party." Neb. Rev. Stat. § 25-1241 (Reissue 1995). Under both Nebraska and Utah law, the certificate of the notary, also known as a jurat, confirms that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit. See, *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); Utah Code Ann. § 46-1-2(5) (Supp. 2006). The form of the jurat on the appellant's affidavit in this case was sufficient to meet the requirements of both Utah and Nebraska law. See, *id.*; *Moore v. Peterson*, 218 Neb. 615, 358 N.W.2d 193 (1984); *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969).

CONCLUSION

The Court of Appeals erred in dismissing the appellant's appeal on the basis that his poverty affidavit was authenticated

by a Utah notary, and that decision must be reversed. Generally, upon granting further review which results in the reversal of a decision of the Court of Appeals, we may consider some or all of the assignments of error the Court of Appeals did not reach. See *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004). However, in this case, the Court of Appeals dismissed the appeal before the appellant's brief was filed, so there are no issues beyond jurisdiction to consider. Given those circumstances, we conclude that briefing and argument on the merits of this appeal should proceed in the Court of Appeals, with the briefing schedule to be set after the issuance of this court's mandate.

The judgment of the Court of Appeals dismissing this appeal is reversed, and the cause is remanded to the Court of Appeals for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

CAROLYN BRONSEN, APPELLANT, V. DAWES COUNTY, NEBRASKA, A NEBRASKA POLITICAL SUBDIVISION, AND FUR TRADE DAYS, INC., A NEBRASKA CORPORATION, APPELLEES.

722 N.W.2d 17

Filed September 29, 2006. No. S-04-237.

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. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Statutes: Judicial Construction: Legislature: Appeal and Error.** The lack of a legislative amendment to a statute following a judicial construction of the statute cannot preclude an appellate court from concluding that its earlier construction of the statute was incorrect.
5. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
6. **Recreation Liability Act: Immunity: Case Overruled.** The limited immunity afforded to owners of land by the Recreation Liability Act, Neb. Rev. Stat. §§ 37-729

to 37-730 (Reissue 2004), was intended to apply only to private landowners who make their property available to the public for recreational purposes, and not to governmental entities. The following cases holding that the Recreation Liability Act applies to governmental entities are hereby overruled: *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); and *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987). To the limited extent the following cases can be read as implicitly holding that the Recreation Liability Act applies to governmental entities, they are also overruled: *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005); *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 592 N.W.2d 155 (1999); *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

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 Dawes County, BRIAN SILVERMAN, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellee Dawes County.

Neleigh N. Korth and Tim W. Thompson, of Kelley, Scristmier & Byrne, P.C., for appellee Fur Trade Days.

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

HENDRY, C.J.

NATURE OF CASE

Appellant, Carolyn Bronsen, sustained personal injuries when she stepped into a hole or depression in the Dawes County, Nebraska, courthouse lawn. Bronsen was attending a historical celebration organized by Fur Trade Days, Inc. (FTD), a Nebraska not-for-profit organization. After complying with the notification requirements of Nebraska's Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997 & Cum. Supp. 2002), Bronsen filed a negligence action against Dawes County and FTD.

In response to defendants' motions for summary judgment, the district court found that under Nebraska's Recreation Liability Act (RLA), Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 2004), Bronsen was using the courthouse lawn for a recreational purpose and that both Dawes County and FTD were owners under the RLA. Having determined that the RLA applied, the district court concluded that Dawes County and FTD were not liable for Bronsen's injuries because their conduct did not rise to the level of willful or malicious failure to act, a required showing for landowner liability under the RLA. The Nebraska Court of Appeals affirmed. *Bronsen v. Dawes County*, 14 Neb. App. 82, 704 N.W.2d 273 (2005). We granted Bronsen's petition for further review.

BACKGROUND

The relevant facts taken from the Court of Appeals' opinion are set forth below:

> Bronsen's injuries occurred during the Fur Trade Days celebration in Chadron[, Nebraska] in July 2002. The celebration is arranged by FTD [and] takes place in Chadron each year on the second weekend of July. . . . Events and activities are held on the Dawes County courthouse lawn . . . . Fur Trade Days also includes a parade, softball games throughout the weekend, and many other activities.
>
> The summary judgment record shows that at the time of Fur Trade Days in 2002, Bronsen, a resident of Utah, was visiting her parents in Chadron. Bronsen had not attended Fur Trade Days or visited the courthouse lawn prior to the July 2002 celebration. On July 13, Bronsen and her family watched the parade, walked through the flea market, and purchased buffalo burgers and beverages for lunch. Bronsen and her family sat at a picnic table on the courthouse lawn to eat their lunch, after which they planned to view the "[Native American] powwow." After lunch, Bronsen and her father went across the street to get bowls of homemade ice cream for the family to eat. Bronsen and her family visited while they ate the ice cream. As she walked across the courthouse lawn prior to her accident, Bronsen was able to feel that the lawn was uneven. Bronsen was also aware that her father had stepped in a hole in the courthouse lawn before the family first arrived at the picnic table. When

Bronsen and her family were done eating, Bronsen picked up some paper plates and bowls that had blown off the picnic table, intending to throw them away in a nearby trash can. On her way to the trash can, Bronsen stepped into a hole or uneven area and fell, breaking her ankle. Since the accident, Bronsen has had several surgeries to repair the break. At the time of her deposition in November 2003, Bronsen still had pain in her ankle. . . .

. . . .

Bronsen filed her operative complaint on May 12, 2003, setting forth a negligence claim against both the County and FTD. Specifically, Bronsen alleged that on July 13, 2002, she suffered personal injuries when she fell after stepping in a hole in the courthouse lawn while attending Fur Trade Days. Bronsen alleged that her fall was proximately caused by the negligence of the County in that it failed to (1) inspect the courthouse lawn for dangerous conditions, (2) maintain the lawn in a manner suitable for pedestrian traffic, (3) repair holes as they appeared in the lawn, (4) warn pedestrians of the existence of the hole, or (5) restrict traffic in the area of the hole so as to prevent pedestrians from falling there. Bronsen alleged that her fall was also proximately caused by the negligence of FTD as the occupier of the courthouse lawn on July 13. Bronsen alleged that FTD was negligent in the same respects as was the County. Bronsen further alleged that her injuries required treatment from health care providers, that she incurred medical expenses exceeding $1,000, and that she would continue to incur future medical expenses. Bronsen also sought recovery for disability, pain and suffering, and lost income, both past and future. Finally, Bronsen alleged that she had filed a tort claim on October 21 with the Dawes County clerk pursuant to Nebraska's [PSTCA], that more than 6 months had passed without response, and that she had withdrawn her claim on April 23, 2003. Bronsen sought judgment for her special damages in an amount to be proved at trial and for such general damages as were allowable by law.

In its answer, the County denied that any defect existed in the lawn at the county courthouse other than the inherent

uneven condition of the lawn itself due to the natural settling and rising of the soil. The County admitted that Bronsen fell on the lawn of the courthouse but alleged that Bronsen's fall was proximately caused by her own negligence. The County also contended that Bronsen's injuries "may not have been as she has alleged" and that Bronsen may have failed to mitigate her damages. The County alleged that it may be immune from liability because the premises were being used for recreational purposes as defined by § 37-729. . . . FTD filed an answer and subsequently an amended answer, making similar allegations and denials to those made by the County.

The County and FTD filed motions for summary judgment, which were heard by the district court on December 22, 2003. In addition to the evidence set forth above, the record at the summary judgment hearing included deposition testimony [and affidavit evidence from a number of witnesses].

. . . .

The district court entered an order on February 4, 2004, granting both motions for summary judgment. The court found that it was clear Bronsen "was using [the courthouse lawn] for picnicking, viewing historical events or recreations (pow wow) or otherwise using the land for purposes of the user" and that those uses would qualify as recreational purposes under § 37-729(3). The court found that the facts adduced showed that FTD qualified as an owner as defined by § 37-729(2), in that it was an occupant or person in control of the premises. The court found that the evidence showed that Bronsen was allowed to use the courthouse lawn without charge. The court stated that FTD was thus immune from liability unless there was a willful or malicious failure on its part. The court found that FTD had no knowledge of the hole and did not create the hole and that thus, there was no willful or malicious action on the part of FTD.

The district court concluded that the County's actions would also place it within the protection of the RLA. The court stated that in order to establish liability on the part

> of the County, Bronsen was likewise required to show that its actions would amount to a willful or malicious failure. . . . The court concluded that there was no willful or malicious action on the part of the County.
>
> The district court found no genuine issue as to any material fact and concluded that the County and FTD were entitled to judgment as a matter of law. Accordingly, the court granted the motions for summary judgment.

Bronsen v. Dawes County, 14 Neb. App. 82, 84-89, 704 N.W.2d 273, 277-80 (2005).

ASSIGNMENTS OF ERROR

Bronsen assigns, restated, that the Court of Appeals erred in concluding that Dawes County, which was sued under the PSTCA, was immune from suit by application of the RLA. Bronsen also assigns that the Court of Appeals erred in affirming the district court's conclusion that her conduct fell within the definition of "picnicking," a recreational use of property under the RLA. Bronsen does not assign as error the district court's determination that FTD was an owner under the RLA.

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. *Cole v. Isherwood*, 271 Neb. 684, 716 N.W.2d 36 (2006).

[2,3] Statutory interpretation presents a question of law. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *In re Estate of Mousel*, 271 Neb. 628, 715 N.W.2d 490 (2006).

ANALYSIS

MEANING OF "OWNER OF LAND" UNDER RLA

Bronsen argues, simply stated, that the RLA should not be applied to governmental entities. Bronsen specifically requests this court to reexamine its decision in *Watson v. City of Omaha*,

209 Neb. 835, 312 N.W.2d 256 (1981). In *Watson*, this court held that the limited immunity from liability afforded to owners of land under the RLA applies to governmental entities as well as private landowners. On three occasions since *Watson*, this court has explicitly reaffirmed its determination that the RLA's protection applies to governmental entities. *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987); *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984). The *Watson* rule, however, was not unanimously embraced by this court. See, *Thies, supra* (White, J., dissenting); *Bailey, supra* (Grant, J., dissenting; White and Shanahan, JJ., join); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984) (Shanahan, J., dissenting; White and Grant, JJ., join); *Watson, supra* (White, J., dissenting; McCown, J., joins). Beginning with *Watson*, a recurring issue presented to this court by RLA cases is whether the Legislature intended the RLA's protection to apply to governmental entities. We begin with a synopsis of the RLA.

The Legislature's stated purpose in enacting the RLA "is to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon." § 37-730. Accordingly, under the RLA, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." § 37-731. This protection applies to landowners who directly or indirectly invite others to use their land for a recreational purpose so long as the owner does not charge a fee for the use of the land. § 37-732. The protection also applies to landowners who lease their property to the state for recreational purposes. § 37-733. Landowners are not, however, protected from liability "for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." § 37-734(1). In considering willful and malicious conduct under the RLA, this court has stated:

> In order for an action to be willful or wanton, the evidence must show that [a landowner] acted with actual knowledge that a danger existed and that [the landowner] intentionally failed to act to prevent the harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences. To constitute willful misconduct there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.

Garreans, 216 Neb. at 493, 345 N.W.2d at 314. Thus, if the RLA applies, landowners are protected from all but intentional or recklessly indifferent acts committed against persons entering onto their land.

After Bronsen filed her brief with the Court of Appeals on June 8, 2004, this court issued its opinion in *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005) (holding that football spectating is not "recreational purpose" within RLA's protection). As in earlier dissents, the *Iodence* concurrence concluded that this court in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), had incorrectly extended the RLA's protection to governmental entities. *Iodence, supra* (Hendry, C.J., concurring; Gerrard and McCormack, JJ., join). In deciding Bronsen's appeal, the Court of Appeals recognized the *Iodence* concurrence's "reservations about the continued application of *Watson*," but concluded that "[e]ven if this court were inclined to agree with the arguments raised by Bronsen," it was bound by the *Watson* rule as that decision had not been overturned. *Bronsen v. Dawes County*, 14 Neb. App. 82, 94, 704 N.W.2d 273, 283 (2005). In her petition for further review, Bronsen urges this court to adopt the rationale of the *Iodence* concurrence.

The main conflict related to applying the RLA to governmental entities stems from the RLA's definition of "owner" in § 37-729(2): "Owner includes tenant, lessee, occupant, or person in control of the premises." Subsection (2) does not explicitly define "owner" to include only private landowners; neither does the model act upon which the RLA was based. However, for the reasons stated in the *Iodence* concurrence, which we reiterate in part below, we now conclude that the RLA's protection was never intended to apply to governmental entities.

First, the Legislature's expressed purpose in granting limited immunity to landowners—to encourage them to make their land available to the public for recreational purposes—is historically not applicable to publicly owned recreational or park property. A governmental entity's primary purpose in owning such land is to make it available for public use. It needs no incentive to perform this traditional function. See, *Conway v. Town of Wilton*, 238 Conn. 653, 671-72, 680 A.2d 242, 252 (1996) ("[b]ecause [municipalities] are in the business of providing parks, pools, ball fields, etcetera, the legislature had less incentive to dangle the carrot of immunity to encourage municipalities to do what they historically have always done"); *City of Pensacola v. Stamm*, 448 So. 2d 39 (Fla. App. 1984) (concluding that recreational use statute is not intended to apply to governmental entities already charged with responsibility of acquiring and maintaining recreational property for general welfare of citizens). See, also, *National League of Cities v. Usery*, 426 U.S. 833, 851, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976) (listing police protection, fire prevention, and parks and recreation as examples of typical activities performed by state and local governments "in discharging their dual functions of administering the public law and furnishing public services"), *overruled on other grounds, Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) (rejecting traditional function test for determining whether state and local government activities are immune from federal regulation). Compare Neb. Rev. Stat. § 2-3229 (Reissue 1997) (providing purposes of natural resource districts, including "development and management of recreational and park facilities"). Any governmental incentive was particularly unnecessary in 1965 when,

as discussed *infra*, governmental entities already enjoyed sovereign immunity.

Second, the term "owner of land" under § 37-729(2) cannot be consistently construed to include governmental entities. Under § 37-733,

> [a]n owner [of land] who leases land to the state for recreational purposes shall not by giving such lease (1) extend any assurance to any person using the land that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of a person who enters upon the leased land.

A landowner's leasing of land to the state under § 37-733 includes the leasing of land to political subdivisions. See *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 652, 592 N.W.2d 155, 160 (1999) ("[i]f the landowner charges for the use of the land, then the landowner is not protected by the [RLA] unless the land is leased to the state or a subdivision thereof"). But, if "owner of land" under § 37-729(2) includes governmental entities, then § 37-733 must be read to authorize a governmental entity to lease land to itself and, by doing so, avoid liability for ordinary negligence. This reading is nonsensical, supporting our conclusion that the Legislature did not intend for an "owner of land" to include governmental entities. See, *In re Petition of SID No. 1*, 270 Neb. 856, 867, 708 N.W.2d 809, 819 (2006) ("[i]t is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language"); *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 352, 701 N.W.2d 379, 384 (2005) ("[s]tatutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision"). See, also, *Conway v. Town of Wilton*, 238 Conn. 653, 665, 680 A.2d 242, 249 (1996) (concluding that lease provisions of recreational use statute, based on model act, created latent ambiguity by suggesting that "the legislature did not intend public and private 'owners' to be treated identically under the statute").

Third, as noted by the dissent in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), the Legislature had no

reason to believe that governmental entities were in need of liability protection under the RLA when it was enacted in 1965 because, at that time, governmental entities were already immune from liability under the common-law doctrine of sovereign immunity. It was not until 1968, 3 years after the passage of the RLA, that this court partially abrogated the doctrine as a defense against tort liability arising out of governmental operations, specifically the ownership, use, and operation of motor vehicles. *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968) (holding that because doctrine was originally common-law rule, this court may modify it in absence of legislative action to contrary). See, also, *Stadler v. Curtis Gas, Inc.*, 182 Neb. 6, 151 N.W.2d 915 (1967) (discussing lack of immunity for governmental propriety activities). It was not until 1969, 4 years after the passage of the RLA, that the Legislature waived sovereign immunity for the State of Nebraska and its political subdivisions pursuant to the State Tort Claims Act, see Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2003), and the PSTCA. Simply stated, in 1965, sovereign immunity was an extant defense to tort liability related to the recreational use of public land. Therefore, the Legislature could not have intended to include governmental entities as landowners in need of liability protection under the RLA.

Fourth, construing "owners of land" to include governmental entities allows those entities to treat claimants differently depending upon whether their injuries were incurred during recreational or nonrecreational activities. *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005) (Hendry, C.J., concurring; Gerrard and McCormack, JJ., join). For claims related to nonrecreational activities on public property, a governmental entity's duty would be determined under the PSTCA or the State Tort Claims Act, while claims related to recreational activities would be determined under the RLA. This court has previously dealt with the difficulty presented by a plaintiff's subjective intent in using public property in *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998).

In *Veskerna*, this court held that the RLA could not exempt a city from its duty to maintain a public street based on the subjective intent of a member of the public when the city allegedly

failed to close the street to traffic during an automobile show event. Thus, when public property is primarily intended for a nonrecreational purpose, "[m]erely changing the use to which public lands are put cannot change the liability of the owner to members of the public who use the property." *Id.* at 544, 578 N.W.2d at 28. This court reasoned that the Legislature could not have intended to create separate classes of plaintiffs based upon the individual subjective intent of the plaintiffs in using public property. *Id.*

This case presents a similar issue, except that here the public property was, arguably at least, available for both recreational and nonrecreational purposes. The following hypothetical illustrates the unreasonableness of allowing a claimant's fortuitous purpose in using public property to become an outcome-determinative factor in deciding whether to apply the liability standard of the PSTCA or the RLA.

In the 1970's, the Nebraska State Capitol Building was listed on the National Register of Historic Places, and the Nebraska State Capitol landscape was added in 1999. Given that the Capitol is a historical site, assume the following: As frequently occurs in late spring, groups of children from across the State of Nebraska arrive in schoolbuses to tour and visit the State Capitol. After exiting their buses and entering the Capitol through the east vestibule, a piece of the Capitol's facade breaks loose, striking and seriously injuring two of the children. The same piece of facade also strikes and seriously injures an individual coming to the Capitol with the intent of testifying at a legislative hearing. As to the children who came to the Capitol for a recreational purpose, see § 37-729(3) (defining recreational purpose to include "visiting, viewing, or enjoying historical . . . sites"), the State's liability to them would be limited to its "willful or malicious failure to guard or warn against a dangerous condition." § 37-734. See, also, *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984). As to the individual coming to the Capitol to testify at a legislative hearing, whose purpose would clearly not be recreational under the RLA, the State's liability would be determined under the rubric of ordinary negligence, i.e., the duty to conform to the legal standard of reasonable conduct in light of the apparent risk. See, e.g., *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999).

If the RLA were interpreted to apply to public property serving dual purposes, it takes little effort to envision numerous circumstances in which substantially different liability standards would apply to the same incident or injury depending upon the claimant's reason for using the property. See, e.g., *Hovland v. City of Grand Forks*, 563 N.W.2d 384 (N.D. 1997) (noting that if recreational use statute were interpreted to include governmental entities as owners, outcome would be different for bicyclist using bike trail to go to work versus skater using trail for recreation). As in *Veskerna v. City of West Point*, 254 Neb. 540, 543, 578 N.W.2d 25, 27 (1998), "we cannot presume that the Legislature intended to create separate classes of plaintiffs based upon the individual subjective intent of [such] plaintiffs in using the property."

Fifth, as noted in the concurrence in *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005), interpreting the PSTCA as incorporating the RLA's limited immunity is essentially a revocation of the state's general waiver of immunity in the PSTCA. Dawes County argues that because § 13-908 provides that a governmental entity's liability is the same as an individual's liability, it is entitled to the same limited immunity that would be afforded to a private landowner under the RLA.

In relevant part, § 13-908 provides: "Except as otherwise provided in the [PSTCA], in all suits brought under the act the political subdivisions shall be liable in the same manner and to the same extent as a private individual under the circumstances . . . ." See, also, § 81-2,215 (providing same language in waiver section of State Tort Claims Act). We recognize that courts have applied recreational use immunity to governmental entities through similar language in a tort claims act. See, e.g., *DiMella v. Gray Lines of Boston, Inc.*, 836 F.2d 718 (1st Cir. 1988); *Johnson v. New London*, 36 Ohio St. 3d 60, 521 N.E.2d 793 (1988). However, this case amply illustrates how the concept of "derivative immunity" in this circumstance conflicts with Nebraska's PSTCA because it involves a claim that clearly falls within the state's waiver of immunity under the PSTCA.

The PSTCA was enacted to "abolish the long existing doctrine of sovereign or governmental immunity which has prevented recovery from Nebraska's [political subdivisions] for the

torts of [the political subdivision's] officers, agents, and employees." Introducer's Statement of Purpose, L.B. 155, Committee on Judiciary, 80th Leg., 1st Sess. (February 3, 1969). This court has recognized that the quoted language in § 13-908 sets forth a general waiver of immunity subject to specified exemptions in § 13-910. *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002); *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998) (contrasting PSTCA's general waiver of immunity, subject to limited exceptions, with statute conferring general grant of immunity, subject to specified exceptions). One of the PSTCA's exemptions limits claims against a political subdivision for its

> failure to make an inspection or making an inadequate or negligent inspection of any property *other than property owned by or leased to such political subdivision* to determine whether the property . . . contains a hazard to public health or safety unless the political subdivision had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety.

(Emphasis supplied.) § 13-910(3). See, also, § 81-8,219(7) (providing same exemption under State Tort Claims Act).

In this exemption, the Legislature clearly contemplated claims involving the failure of governmental entities to conduct inspections of property it does not own or lease. See, e.g., Neb. Rev. Stat. §§ 14-102(31) to (33) (Cum. Supp. 2004), 48-418.10 and 48-722 (Reissue 2004), and 71-1,147.64 and 71-1559 (Reissue 2003). In those circumstances, a claim is precluded unless the claimant can prove that the governmental entity's failure to inspect, or properly inspect, amounted to a reckless disregard for public safety or occurred despite its knowledge of a hazard to the public. This heightened liability standard is comparable to what a plaintiff must meet in order to hold a landowner liable under the RLA. If the Legislature had intended to impose this higher liability standard in claims against governmental entities for their failure to inspect property they owned or leased, it would not have specifically excluded such property from § 13-910(3). By excluding public property in this fashion and reading the statute as a whole, the Legislature has shown

an intent to be liable for ordinary negligence with respect to publicly owned or leased property. Our past interpretation of the RLA is simply inconsistent with the Legislature's intent in § 13-910(3) to include liability for "negligent inspection" of publicly owned property within its general waiver of immunity.

Finally, applying the RLA to governmental entities ignores the purpose of the RLA, which was to provide an incentive to *private* landowners to open their *private* land to the public for recreational purposes. As noted in the concurrence in *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005), the RLA's intended application to only private landowners is clearly shown by its legislative history. See, *Conway v. Town of Wilton*, 238 Conn. 653, 680 A.2d 242 (1996) (overruling prior decision holding that "owner" included municipalities and concluding that definition of "owner," which was identical to model act, was ambiguous when court considered legislative history and public policy underlying statute); *Monteville v. Terrebonne Par. Con. Gov't*, 567 So. 2d 1097 (La. 1990) (noting that state legislature had adopted model act almost without change, including definition of owner; concluding that act applied only to private owners); *Stamper v. Kanawha County Bd. of Educ.*, 191 W. Va. 297, 298 n.4, 445 S.E.2d 238, 239 n.4 (1994) (concluding that state legislation fashioned after model act was intended to benefit private landowners despite legislature's slight modification to specify that owner " 'shall include, but not be limited to, tenant, lessee, occupant or person in control of the premises' "). See, also, *Hovland v. City of Grand Forks*, 563 N.W.2d 384 (N.D. 1997).

The model act, which the Legislature adopted almost verbatim, contains an introductory commentary specifically providing that the act is " 'designed to encourage availability of *private* lands . . . .' " (Emphasis in original.) *Iodence*, 270 Neb. at 72, 700 N.W.2d at 570 (setting out introductory commentary in its entirety), quoting 24 Council of State Governments, Suggested State Legislation 150 (1965). This purpose precludes applying the RLA's immunity to governmental entities through § 13-908. Even if governmental entities are entitled to be treated the same as private individuals by virtue of the PSTCA, they cannot own *private* land. Governmental entities own only *public* land.

In arguing that *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), was correctly decided, FTD contends that (1) the Legislature has acquiesced in this court's holdings that the RLA's protection applies to governmental entities and (2) the doctrine of stare decisis is entitled to great weight.

[4] It is true that ordinarily, where a statute has been judicially construed and that construction has not evoked an amendment from the Legislature, it will be presumed that the Legislature has acquiesced in the court's determination of its intent. *State v. Neiss*, 260 Neb. 691, 701, 619 N.W.2d 222, 229 (2000). However, this proposition of statutory construction cannot preclude an appellate court from concluding that its earlier construction of a statute is incorrect. The proposition is normally applied when an appellate court has concluded that its earlier construction is accurate. If the proposition were applied as a rule in every case involving statutory construction, no judicial construction of a statute could be overruled in the absence of legislative action.

[5] Similarly, the doctrine of stare decisis was never intended to indefinitely perpetuate erroneous decisions. See *Holm v. Holm*, 267 Neb. 867, 678 N.W.2d 499 (2004). The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. *Id.* The doctrine is not absolute because no court is infallible. *Stonehill College v. Com'n Against Discrim.*, 441 Mass. 549, 808 N.E.2d 205 (2004).

For the reasons stated above, we conclude that our decision in *Watson, supra*, was manifestly wrong, and it is overruled. Therefore, the district court's judgment granting summary judgment to Dawes County must be reversed.

Meaning of "Picnicking" Under RLA

As noted, the district court also concluded that FTD qualified as an owner as defined by § 37-729(2) in that it was an occupant or person in control of the premises. Bronsen does not dispute this classification. She assigns, however, that her conduct did not fall into the category of "picnicking," a protected recreational purpose under § 37-729(3). We have reviewed the district

court's findings and the Court of Appeals' analysis of those facts. Viewing the evidence in the light most favorable to Bronsen, and giving her the benefit of all reasonable inferences, we cannot say the Court of Appeals erred in affirming the district court's finding that Bronsen was picnicking. This assignment of error is without merit.

CONCLUSION

[6] We conclude that the limited immunity afforded to owners of land by the RLA was intended to apply only to private landowners who make their property available to the public for recreational purposes, and not to governmental entities. Accordingly, we overrule our prior holdings in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); and *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987). To the limited extent the following cases can be read as implicitly holding that the RLA applies to governmental entities, they are also overruled: *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005); *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 592 N.W.2d 155 (1999); *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

Thus, we conclude that the Court of Appeals' decision must be reversed with respect to Dawes County and the cause remanded with directions to the Court of Appeals to remand the cause to the district court for further proceedings consistent with this opinion.

With respect to FTD, the Court of Appeals' determination that the district court did not err in granting its motion for summary judgment is affirmed.

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

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROBERT H. BEACH, RESPONDENT.

722 N.W.2d 30

Filed September 29, 2006. Nos. S-04-1399, S-05-1116.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____: ____. When neither party files written exceptions to the referee's report, the Nebraska Supreme Court may consider the referee's findings final and conclusive.
3. **Disciplinary Proceedings.** Under Neb. Ct. R. of Discipline 4 (rev. 2004), the Nebraska Supreme 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.
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 and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
5. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
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 disciplinary proceeding.
7. **Attorneys at Law.** Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability and adversely reflects on one's fitness to practice law.
8. **Disciplinary Proceedings.** An attorney's conduct which includes progressively abusive language, demeanor, and threats violates disciplinary rules that prohibit engaging in conduct prejudicial to the administration of justice and engaging in conduct that adversely reflects on one's fitness to practice law.
9. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.

Original actions. Judgment of disbarment.

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

No appearance for respondent.

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

PER CURIAM.

These two attorney disciplinary actions involve separate formal charges filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent Robert H. Beach. In each case, a hearing was held before a referee and neither party filed exceptions to the referee's report. We granted the relator's motion for judgment in each case and ordered briefing and oral argument on the limited issue of sanctions. The cases were briefed and argued separately. We now consider the issue of what discipline should be imposed.

FACTS

BACKGROUND

Respondent was admitted to the practice of law in the State of Nebraska on June 22, 1964. In previous disciplinary proceedings, he received two private reprimands for misconduct similar in nature to that which is the subject of these cases. The first private reprimand was issued on February 24, 1991, and the second on March 26, 1996.

CASE NO. S-04-1399: FORMAL CHARGES

Formal charges were filed on December 13, 2004. Respondent filed an answer admitting some allegations, denying others, and requesting dismissal of the formal charges. A referee appointed by this court conducted a hearing on April 12, 2005, and filed a report on May 26. We summarize the findings and recommendations of the referee.

At all relevant times, respondent was engaged in private practice in Omaha, Nebraska. In March 2004, respondent met J.N., who was a waitress at a truckstop near her home in Brownville, Nebraska. J.N. was 21 years old and married. In March or April, J.N. hired respondent to represent her in a felony probation revocation case in Nemaha County, Nebraska. Thereafter, respondent sent three letters to the Nemaha County Attorney regarding the case. Respondent also requested that the county attorney initiate mental health proceedings against J.N., but the county attorney took no action in this regard. On August 12, respondent sent a fourth letter to the county attorney, stating in part:

> My client lives a block from the Brownville bridge and we will all feel rotten if she jumps. She informed her stupid

> husband a year ago that she was leaving him and he proceeded to get drunk and jumped off the bridge into the Mo. River. Unfortunately for [J.N.] and county authorities he survived.

Respondent sent this letter without the knowledge or consent of his client.

On August 18, 2004, also without the knowledge or consent of J.N., respondent sent a letter to J.N.'s husband in which he wrote: "I believe [J.N.] at long last realizes what a useless piece of shit you are and her worst enemy. . . . Try the Brownville Bridge again - - face first." On August 25, without any request from his client, respondent sent her a divorce petition with directions to sign it. In his transmittal letter, he stated in part:

> Deep in your heart, you know that [your husband] is bad for you and always has been. You also know that for you to have a good life this sub human has to go. . . . He is scum and always will be. Honey, you can have a future. Let's make it a good future. [The judge assigned to the probation revocation case] will know you are sincere if you dump your hubby.

Respondent's representation of J.N. was terminated on August 26.

Respondent received notice on August 28, 2004, that a grievance had been filed with the relator regarding his August 12 and 18 letters. Respondent then sent a letter to J.N. stating: "Your dip shit husband did, in fact, file a grievance with the Counsel for Discipline. . . . Not a big deal - just an inconv[en]ience."

While J.N. was on probation and ordered not to consume alcohol, respondent accompanied her to bars and purchased alcoholic beverages for her. Respondent testified that he was paternalistic and fond of J.N., whom he referred to as his "black sheep daughter." He believed that her husband was bad for her and that breaking the relationship would be good for her well-being and would impress the judge in her probation revocation case. He also believed that J.N. was a danger to herself and should be placed in protective custody.

The referee found that respondent had violated Canon 1, DR 1-102(A)(5) and (6), and his oath of office as an attorney. Noting that respondent had twice previously been sanctioned for

similar conduct, the referee recommended a public reprimand and a 6-month suspension of respondent's license.

Temporary Suspension

On June 17, 2005, the chairperson of the Committee on Inquiry of the Second Disciplinary District filed an application pursuant to Neb. Ct. R. of Discipline 12 (rev. 2002), requesting this court to temporarily suspend respondent from the practice of law. The application was supported by the affidavit of Kent L. Frobish, Assistant Counsel for Discipline. Frobish averred that after receiving a copy of the referee's report summarized above, respondent sent letters to the president of the Nebraska State Bar Association, an attorney representing J.N., and the Counsel for Discipline which violated Canon 4, DR 4-101B(1), and DR 1-102(A)(5), and adversely reflected on his fitness to practice law in violation of DR 1-102(A)(6). Copies of the letters were attached to the affidavit.

This court entered an order requiring respondent to show cause why his license to practice law should not be temporarily suspended based upon the allegations set forth in the application. In his response, respondent stated that he had "done nothing that will cause serious damage to the public or to the legal profession." Finding this response inadequate, we entered an order on July 13, 2005, temporarily suspending respondent's license to practice law in this state until further order of the court.

Case No. S-05-1116: Formal Charges

Formal charges were filed on September 19, 2005, alleging essentially the same facts set forth in the application for temporary suspension. Respondent filed an answer admitting some factual allegations, denying others, and asserting affirmative defenses, including an allegation that his statements reflected "strongly held personal opinions, and were made after suffering a stroke which occurred within weeks of receiving [the referee's report and recommendations] in S-04-1399." A second referee appointed by this court conducted a hearing on January 10, 2006, at which hearing respondent did not appear personally or through counsel. On January 19, the referee filed a report including findings of fact and recommendations for disciplinary sanctions, which we summarize here.

On June 1, 2005, respondent sent a letter to the Nebraska State Bar Association requesting a termination of his membership. The letter revealed confidential information about J.N. It also stated that the disciplinary proceeding in case No. S-04-1399 was the "result of a complaint filed by [J.N.], 22, with direction and assistance by a very dangerous woman attorney." It further stated that during the hearing in case No. S-04-1399, "[t]ruth mattered little" to the Assistant Counsel for Discipline and the referee and that it "took about 10 seconds . . . to realize this was going to be a jam job, [respondent's] being the jamee." The letter indicated that copies were sent to "[t]en judges, the Counsel [for Discipline], [the referee], several other lawyers, a few civilians and my pals." Respondent also sent a copy of the letter to the attorney mentioned therein, with a handwritten notation stating: "The practice was more enjoyable before feminazi bitches like you came on the scene."

On June 6, 2005, respondent sent a letter to the Counsel for Discipline regarding the disciplinary hearing in case No. S-04-1399. The letter stated: "People who know more about your outfit inform me Frobish is your hitman." It also stated: "Your rules suck in situations like this. I didn't try to screw her or steal her money. The letter I wrote to her disgusting husband had to be written and [J.N.] needed a coupleof [sic] beers on occasion to balance her wacky head." On July 14, relator notified respondent that it had filed a grievance against him regarding his conduct in sending the aforementioned letters. Respondent answered with a letter dated July 26, 2005, in which he stated:

> You and your people, Frobish, [referee], [attorney] what's her name and the Chief [of the Nebraska Supreme Court] have succeeded in ruining my livelihood, my reputation, my dignity and, finally, my health.
>
> I suffered a stroke a few days ago the proximate cause of which is the bull shit case filed against me by your office.
>
> All I have wanted out of life the past few years is to watch my grandchildren grow up. Now, thanks to you pricks, that wish will likely be denied me.
>
> I have several pissed off friends who are meaner than junk-yard dogs and have good memories.

> All this over a crazy, alcoholic, drug addict who will never have a normal life.

On December 26, 2005, respondent sent a letter to the referee appointed to hear the proceedings in case No. S-05-1116 and the relator. The letter generally criticized the state of the legal profession and specifically criticized the disciplinary process. The letter concluded: "Do to me what you will. I submit on the pleadings and waive oral argument. The aforementioned should be submitted to the chief. This, likely, is only the beginning."

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. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005); *State ex rel. Counsel for Dis. v. Chapin*, 270 Neb. 56, 699 N.W.2d 359 (2005). However, because neither party has taken exception to the findings of the referees in these cases, our task is limited to a determination of appropriate discipline. See *State ex rel. Counsel for Dis. v. Janousek*, 267 Neb. 328, 674 N.W.2d 464 (2004).

ANALYSIS

[2] When neither party files written exceptions to the referee's report, the Nebraska Supreme Court may consider the referee's findings final and conclusive. See *State ex rel. Counsel for Dis. v. Kleveland*, 270 Neb. 52, 703 N.W.2d 244 (2005). Based upon the findings in the referees' reports, which we consider to be final and conclusive, we conclude the formal charges in both cases are supported by clear and convincing evidence.

[3-6] 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. *State ex rel. Counsel for Dis. v. Jones, supra.* 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 and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's

present or future fitness to continue in the practice of law. *Id.*; *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005). Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005); *State ex rel. Counsel for Dis. v. Janousek, supra*. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases. *Id.* To determine the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the disciplinary proceeding. *State ex rel. Counsel for Dis. v. Widtfeldt, supra*; *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002).

[7,8] While these cases do not involve theft or misappropriation of client funds, the misconduct is nevertheless very serious in nature. The referee in case No. S-04-1399 specifically found that respondent's client, J.N., "was a drug addicted, psychologically impaired woman in need of legal and personal help." She retained respondent to represent her with respect to a probation revocation case. Before she finally discharged him as her lawyer, respondent accompanied her to bars and purchased alcoholic beverages for her, in violation of the terms of her probation; urged her estranged husband to commit suicide; and directed her to sign a divorce petition which he had drafted without being requested to do so. When disciplinary charges were filed against him, respondent directed his verbal fury at the Counsel for Discipline, court-appointed referees, the attorney representing J.N., the bar association, and this court. Some of his letters disclosed confidential information about J.N. to persons having no association with these proceedings. Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability and adversely reflects on one's fitness to practice law. *State ex rel. Counsel for Dis. v. Janousek*, 267 Neb. 328, 674 N.W.2d 464 (2004); *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001). An attorney's conduct which includes progressively abusive language, demeanor, and threats violates disciplinary rules that prohibit engaging in conduct prejudicial to the administration of justice and engaging in conduct that

adversely reflects on one's fitness to practice law. *State ex rel. Counsel for Dis. v. Lopez Wilson, supra.*

[9] 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. Janousek, supra*; *State ex rel. Counsel for Dis. v. Cannon*, 266 Neb. 507, 666 N.W.2d 734 (2003). The records in these two cases reflect numerous acts of hostile, threatening, and disruptive conduct which is similar in nature to that for which respondent was previously disciplined. His 1991 private reprimand resulted from a letter he wrote to a female attorney then representing his former client in which he referred to the client as a "crazy bitch" and closed with an even more crude and degrading remark about women. Respondent's 1996 private reprimand resulted from his verbal harassment of a female client who had terminated his services. We agree with the determination of the referee in case No. S-05-1116 that "[r]espondent's implied threat of vigilante justice administered by his [angry] friends clearly demonstrates complete and total disrespect for the rule of law and those that administer the law." In light of this pattern of highly unprofessional conduct marked by a "serial disregard for our disciplinary rules," a significant sanction is necessary to maintain the reputation of the bar as a whole, deter others from similar conduct, and protect the public. See *State ex rel. Counsel for Dis. v. Janousek*, 267 Neb. at 338, 674 N.W.2d at 473.

Respondent's attitude in light of the evidence does little to warrant leniency. As noted by the referee in case No. S-05-1116, respondent has failed "to acknowledge that any of his conduct is outside the bounds of conduct governed by the Code, let alone outside the bounds of human decency." In his final communication with the referee, respondent stated: "The status of my license means nothing in the big picture. You and all those involved in kangaroo proceedings of this nature mean absolutely nothing in the big picture." In mitigation, respondent asserted at various times in the proceedings that he had suffered a stroke soon after receiving the referee's report in case No. S-04-1399 and that his actions thereafter were affected by this medical condition. However, respondent presented no medical evidence to substantiate this claim.

In other cases involving a pattern of abusive conduct by an attorney, we have imposed severe sanctions. *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. 545, 316 N.W.2d 46 (1982), involved a lawyer who made repeated unsubstantiated derogatory statements about other attorneys during a political campaign. After disciplinary charges were filed, he filed documents in which he "continue[d] to vilify certain attorneys, the bar generally, and the Nebraska Supreme Court." *Id.* at 561, 316 N.W.2d at 55. Noting that the attorney demonstrated "no remorse, change in attitude, or desire to cease his scurrilous attacks upon the bar and bench of this state," we concluded that the pattern of conduct demonstrated a lack of fitness to practice law and entered a judgment of disbarment. *Id.* at 562, 316 N.W.2d at 56.

In *State ex rel. Counsel for Dis. v. Janousek*, 267 Neb. 328, 674 N.W.2d 464 (2004), a lawyer engaged in a pattern of harassment directed at a former client with whom he had had a personal relationship which ended. The conduct included degrading and threatening letters written to the former client and the attorney then representing her. One of the letters was "composed entirely of degrading, vile racism and obscenity." *Id.* at 337, 674 N.W.2d at 472. Determining that the lawyer's conduct constituted a "deliberate campaign to discredit the complainant, deprive her of legal counsel, interrupt her education, and terrorize her," we concluded that the lawyer's conduct was "not only disgraceful, but shows disrespect for the law, the legal profession, the legal process, the authority of the courts, and basic principles of justice, fairness, and human dignity." *Id.* at 336-37, 338, 674 N.W.2d at 472, 473. The lawyer had three prior disciplinary reprimands for dissimilar conduct. We entered a judgment of disbarment.

The evidence in these cases, considered in conjunction with the two prior reprimands for similar misconduct, leads to the conclusion that respondent is presently unfit to practice law. In the absence of any persuasive mitigating factors, or any acknowledgment by respondent that his conduct in these cases deviates from ethical standards to which attorneys are held, we conclude that disbarment is the appropriate sanction.

CONCLUSION

There is clear and convincing evidence in case No. S-04-1399 that respondent violated DR 1-102(A)(5) by engaging in conduct prejudicial to the administration of justice and that he violated DR 1-102(A)(6) by engaging in other conduct that adversely reflects on his fitness to practice law. Likewise, there is clear and convincing evidence in case No. S-05-1116 that respondent violated DR 1-102(A)(5) and (6) by engaging in additional conduct prejudicial to the administration of justice and reflecting adversely on his fitness to practice law. There is also clear and convincing evidence in case No. S-05-1116 that respondent violated DR 4-101(B)(1) by revealing confidences and secrets of a client without justification. It is therefore the judgment of this court that respondent, Robert H. Beach, is disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent 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. Respondent 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 10(P) (rev. 2005) and 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF DISBARMENT.

HENDRY, C.J., participating on briefs in No. S-05-1116.

PAUL SCHUMACHER AND LINDA AERNI, APPELLANTS AND CROSS-APPELLEES, V. MICHAEL JOHANNS, GOVERNOR OF THE STATE OF NEBRASKA, ET AL., APPELLEES AND CROSS-APPELLANTS, AND FRANK E. LANDIS, JR., IN HIS CAPACITY AS COMMISSIONER (DISTRICT 1, NEBRASKA PUBLIC SERVICE COMMISSION), ET AL., APPELLEES, AND NEBRASKA TELECOMMUNICATIONS ASSOCIATION ET AL., INTERVENORS-APPELLEES AND CROSS-APPELLANTS.

722 N.W.2d 37

Filed September 29, 2006. No. S-05-375.

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. **Statutes: Abatement, Survival, and Revival: Appeal and Error.** Statutory provisions relative to abatement and revivor of actions apply to cases in the appellate courts.
3. **Constitutional Law: Legislature: Statutes: Presumptions.** In every constitutional challenge, there attaches the presumption that all acts of the Legislature are constitutional, with all reasonable doubts resolved in favor of constitutionality.
4. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
5. **Constitutional Law: Statutes.** Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner such that it is consistent with the constitution.
6. **Taxes: Words and Phrases.** A tax is an enforced contribution of money or other property, assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses.
7. **Taxes.** The essential characteristics of a tax are that it is not a voluntary payment but an enforced contribution and, in its essential characteristics, is not a debt.
8. **Constitutional Law: Legislature.** It is a fundamental general principle that the Legislature may not delegate legislative power to an administrative or executive authority. The Legislature does, however, have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all departments. The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act. Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available.
9. ____: ____. Where the Legislature has provided reasonable limitations and standards for carrying out delegated duties, there is no unconstitutional delegation of legislative authority.
10. **Legislature.** Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision.
11. **Constitutional Law: Public Service Commission: Jurisdiction: Legislature.** The Public Service Commission is an independent regulatory body under the Nebraska Constitution, and its jurisdiction to regulate common carriers may be restricted by the Legislature only through specific legislation.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law, P.C., for appellants.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees Michael Johanns et al.

Paul M. Schudel and James A. Overcash, of Woods & Aitken, L.L.P., for appellees Alltel Communications of the Midwest, Inc., et al.

Jack L. Shultz and Gregory D. Barton, of Harding, Shultz & Downs, for appellees Stanton Telecom, Inc., and Three River Telco, and intervenor-appellee Nebraska Telecommunications Association.

Deonne L. Bruning for appellee Cox Nebraska Telecom, L.L.C.

Daniel E. Klaus, Timothy F. Clare, and Mark A. Fahleson, of Rembolt, Ludtke & Berger, L.L.P., for appellee Nebraska Technology and Telecommunications, Inc., and intervenors-appellees Wauneta Telephone Company et al.

Steven G. Seglin, of Crosby Guenzel, L.L.P., for appellee GCC License Corporation.

Eric B. Eisenhart, of Eisenhart Law Office, for appellees Cambridge Telephone Company and Pinpoint Communications, Inc.

Jill Vinjamuri Gettman, of Gettman & Miller, L.L.P., for appellee Qwest Communications International, Inc.

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

STEPHAN, J.

Three individuals who subscribe to telecommunications services in the State of Nebraska brought this action against various state officials seeking a declaratory judgment that the Nebraska Telecommunications Universal Service Fund Act (NTUSFA), now codified at Neb. Rev. Stat. §§ 86-316 to 86-329 (Cum. Supp. 2004), is unconstitutional and further seeking an injunction against the continued implementation and enforcement of the NTUSFA. Various entities which provide telecommunications services in Nebraska intervened in opposition. Following a trial on stipulated facts, the district court for Lancaster County upheld the constitutionality of the NTUSFA and denied the declaratory and injunctive relief requested. We affirm.

BACKGROUND

PARTIES

Terrell R. Cannon, one of the plaintiffs below, died on August 16, 2006, after submission of this appeal. The remaining appellants, Paul Schumacher and Linda Aerni, have formally notified the court of Cannon's death and stated their intention to proceed with the appeal in their names. Schumacher and Aerni are citizens and residents of Nebraska who subscribe to and receive telecommunications services from various telecommunications service providers in Nebraska. Since July 1, 1999, these telecommunications service providers have included on appellants' telephone bills a surcharge of 6.95 percent of appellants' intrastate telephone service revenues. This surcharge was implemented by the Nebraska Public Service Commission (PSC) pursuant to the NTUSFA. Appellants have remitted the surcharge to these telecommunications service providers as part of their payment of their bills for telecommunications services. Effective October 1, 2005, the PSC apparently reduced the surcharge from 6.95 percent to 5.75 percent of intrastate telephone service revenues.

At the time the action was filed, appellee Michael Johanns was the duly elected and qualified Governor of the State of Nebraska. He has been succeeded in office by current Governor David Heineman. Appellees Frank E. Landis, Jr.; Anne C. Boyle; Lowell C. Johnson; Rod Johnson; and Gerald L. Vap are the duly elected and qualified commissioners of the PSC. Appellee Andy Pollock is the duly appointed and qualified executive director of the PSC.

The remaining appellees are various entities generally engaged in the business of providing telecommunications services in Nebraska, and many of them intervened in this action. Each of these appellees has collected and remitted the NTUSFA surcharge on intrastate telecommunications services revenues. Most of the appellees are eligible to receive financial assistance from the fund created by the surcharge moneys.

TELECOMMUNICATIONS ACT OF 1996

In 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended

at scattered sections in title 47 of the U.S. Code). The express purposes of the Telecommunications Act are to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996). Prior to the passage of the Telecommunications Act, local telephone service was generally provided by carriers that provided such service as a regulated monopoly. Under the act, these carriers, known as "incumbent local exchange carriers," are, either through negotiated or arbitrated agreements, required to provide interconnection and access to their facilities to requesting telecommunications carriers, known as "competitive local exchange carriers." 47 U.S.C. §§ 251 and 252 (2000). The Telecommunications Act also seeks to foster competition by removing barriers to entry by an entity seeking to provide interstate or intrastate telecommunications service. 47 U.S.C. § 253 (2000).

While seeking to promote competitive markets for the provision of telecommunications services, Congress also sought to preserve the goal of "universal service" as defined in the Telecommunications Act. 47 U.S.C. § 254(c) (2000). Congress directed the Federal Communications Commission (FCC) to establish a federal-state joint board to assist in implementing the universal service principles found in the Telecommunications Act. 47 U.S.C. § 254(a). These principles include the following: (1) "Quality services should be available at just, reasonable, and affordable rates"; (2) "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation"; (3) "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas"; (4) "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service"; and (5) "[t]here should be

specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b). The Telecommunications Act mandates that "only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support" and that "[a]ny such support should be explicit . . . ." 47 U.S.C. § 254(e). An "eligible telecommunications carrier" (ETC) should be designated by the "State commission." 47 U.S.C. § 214(e) (2000). "State commission" is defined as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operation of carriers." 47 U.S.C. § 153(41) (2000). In Nebraska, that entity is the PSC. See Neb. Const. art. IV, § 20; Neb. Rev. Stat. §§ 86-101 to 86-124, 86-126, and 86-128 to 86-163 (Cum. Supp. 2004). Section 254(f) permits states to "adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service." This subsection further provides that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State." *Id.* The FCC has implemented the Telecommunications Act through the adoption of rules, including parts 51 and 54 in title 47 of the Code of Federal Regulations, and the issuance of various orders.

Relevant FCC Orders

The primary FCC orders implementing the Telecommunications Act are a trilogy of orders commonly known as the Local Competition Order, the Universal Service Order, and the Access Charge Reform Order. The Universal Service Order is particularly relevant to this case because it establishes rules to implement the universal service provisions of 47 U.S.C. § 254 of the Telecommunications Act. *In the Matter of Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776 (Supp. 1997). In this order, the FCC explained that it and state commissions had historically provided for affordable telephone service to all individuals through a combination of implicit and explicit subsidies. These subsidies were designed to benefit persons in "high

cost" areas, primarily rural, where it was expensive for carriers to provide telephone service. *Id.* at 8784. The subsidies also were designed to benefit those with low incomes who otherwise might not be able to afford telephone service. According to the Universal Service Order, "[s]tates traditionally have promoted universal service by, among other things, assuring affordable residential access by explicitly and implicitly subsidizing and pricing basic telephone service at levels associated with very high telephone subscribership rates . . . ." *Id.* at 8783. To accomplish the goal of universal service, "[s]tates have maintained low residential basic service rates through, among other things, a combination of: geographic rate averaging, higher rates for business customers, higher intrastate access rates, higher rates for intrastate toll service, and higher rates for vertical features." *Id.* at 8785. These implicit subsidy mechanisms were designed to "shift costs from rural to urban areas, from residential to business customers, and from local to long distance service." *Id.* at 8784. The Universal Service Order recognized that the system of largely implicit subsidies in existence prior to the enactment of the Telecommunications Act could not be maintained in the competitive environment mandated by the act. The FCC explained that

> [i]mplicit subsidies were sustainable in the monopoly environment because some consumers (such as urban business customers) could be charged rates for local exchange and exchange access service that significantly exceeded the cost of providing service, and the rates paid by those customers would implicitly subsidize service provided by the same carrier to others.

12 F.C.C.R. at 8786-87. "By adoption of the [Telecommunications] Act, Congress has provided for the development of competition in all telephone markets." 12 F.C.C.R. at 8787. According to the Universal Service Order, "[i]n a competitive market, a carrier that attempts to charge rates significantly above cost to a class of customers will lose many of those customers to a competitor." *Id.* Thus, the "pillars of implicit subsidies—high access charges, high prices for business services, and the averaging of rates over broad geographic areas" cannot be maintained in the competitive telecommunications environment mandated by federal law. *Id.*

In the Universal Service Order, the FCC addressed federal universal service support. The FCC explicitly noted that it was not attempting to identify implicit universal service support effected through intrastate rates and would not "attempt to convert such implicit intrastate support into explicit federal universal service support." *Id.* at 8785. Instead, the FCC noted that the "[s]tates, acting pursuant to sections 254(f) and 253 of the [Telec]ommunications Act, must in the first instance be responsible for identifying intrastate implicit universal service support." 12 F.C.C.R. at 8785.

NTUSFA

In response to the Telecommunications Act, the Nebraska Legislature enacted the NTUSFA. 1997 Neb. Laws, L.B. 686, now codified at §§ 86-316 to 86-329. The purpose of the NTUSFA is to authorize the PSC "to establish a funding mechanism which supplements federal universal service support mechanisms and ensures that all Nebraskans, without regard to their location, have comparable accessibility to telecommunications services at affordable prices." § 86-317. The NTUSFA creates a fund, known as the Nebraska Telecommunications Universal Service Fund (the Fund), that "shall provide the assistance necessary to make universal access to telecommunications services available to all persons in the state consistent with the policies set forth in the [NTUSFA.]" §§ 86-320 and 86-324(1). Under the NTUSFA, telecommunications companies receiving support from the Fund "shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." § 86-324(1). "Any such support should be explicit and sufficient to achieve the purpose of the [NTUSFA]." *Id.*

The NTUSFA contains the Legislature's declaration of policy "to preserve and advance universal service" based on the following principles:

> (1) Quality telecommunications and information services should be available at just, reasonable, and affordable rates;
>
> (2) Access to advanced telecommunications and information services should be provided in all regions of the state;

(3) Consumers in all regions of the state, including low-income consumers and those in rural and high-cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas;

(4) All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service;

(5) There should be specific, predictable, sufficient, and competitively neutral mechanisms to preserve and advance universal service. Funds for the support of high-cost service areas will be available only to the designated eligible telecommunications companies providing service to such areas. Funds for the support of low-income customers, schools, libraries, and providers of health care to rural areas will be available to any entity providing telecommunications services, maintenance, and upgrading of facilities. The distribution of universal service funds should encourage the continued development and maintenance of telecommunications infrastructure;

(6) Elementary and secondary schools, libraries, and providers of health care to rural areas should have access to advanced telecommunications services as described in the Telecommunications Act of 1996. . . .

(7) The implicit support mechanisms in intrastate access rates throughout the state may be replaced while ensuring that local service rates in all areas of the state remain affordable; and

(8) The costs of administration of the . . . Fund should be kept to a minimum.

§ 86-323. The NTUSFA sets forth various powers to be exercised by the PSC, including that the PSC:

(a) Shall have authority and power to subject eligible telecommunications companies to service quality, customer service, and billing regulations. . . .

> (b) Shall have authority and power to issue orders carrying out its responsibilities and to review the compliance of any eligible telecommunications company receiving support for continued compliance with any such orders or regulations adopted pursuant to the act;
>
> . . . .
>
> (d) Shall require every telecommunications company to contribute to any universal service mechanism established by the commission pursuant to state law. The commission shall require, as reasonably necessary, an annual audit of any telecommunications company to be performed by a third-party certified public accountant to insure the billing, collection, and remittance of a surcharge for universal service.

§ 86-324(2).

In addition, the NTUSFA provides: "The [PSC] shall determine the standards and procedures reasonably necessary, adopt and promulgate rules and regulations as reasonably required, and enter into such contracts with other agencies or private organizations or entities as may be reasonably necessary to efficiently develop, implement, and operate the fund." § 86-325. The NTUSFA requires the PSC to annually

> hold a public hearing to determine the level of the fund necessary to carry out the [NTUSFA]. The [PSC] shall publish notice of the hearing in at least one newspaper of general circulation in the state at least once each week for two consecutive weeks before the hearing. After the hearing, the [PSC] shall determine the amount of the fund for the following year, including a reasonable reserve.

§ 86-328. The NTUSFA also provides that "[i]n the initial year of the fund's operation, the [PSC] shall determine the amount of the fund to be equivalent to the amount which, in the [PSC's] judgment, after careful analysis, is necessary to keep approximately ninety-six percent of Nebraska households subscribed to local telecommunications service." § 86-328.

PSC Implementation of NTUSFA

On January 13, 1999, the PSC issued its findings and conclusions concerning access charge reform and universal service

in application No. C-1628, captioned "In the Matter of the Application of the Nebraska Public Service Commission, on its own motion, seeking to conduct an investigation into intrastate access charge reform." In the C-1628 order, the PSC acted to implement the NTUSFA by establishing a transition process during which implicit subsidies contained in intrastate access charges would be removed from the rate structures of ETC's, basic local exchange rates would be adjusted to PSC-approved benchmark rates, and the support of an ETC from the NTUSFA would equal the implicit support removed through revenue reductions created by access charge reductions less additional revenue realized from basic local service rate increases and less any support received from the federal universal service fund that expressly offset intrastate implicit support. Each ETC was required to file a "transition plan" for approval by the PSC in order to implement the directives of the C-1628 order. The rate rebalancing and restructuring effected pursuant to the C-1628 order was to be revenue neutral for the ETC's. The C-1628 order, as modified by a subsequent ruling of the PSC on February 2, 1999, directed that this implicit support be replaced through the funding mechanism created by the NTUSFA by providing for a surcharge on retail end-user revenues from intrastate telecommunications services.

In an order dated June 2, 1999, the PSC, after publishing notice and conducting a hearing, directed all affected telecommunications companies to collect and remit a surcharge of 6.95 percent on retail end-user revenue from intrastate telecommunications services to be deposited in the Fund. The surcharge was to commence July 1. In establishing the amount of the surcharge, the PSC considered several factors, including: (1) proposed and estimated access charge reductions, (2) local rate changes, (3) company earnings, (4) state support for low-income customers, and (5) administrative expenses. Since June 1999, the PSC has annually held a public hearing to determine the surcharge required to meet the funding level necessary to implement the NTUSFA.

On March 20, 2001, the PSC entered a progression order continuing the calculation of NTUSFA support mechanisms under the transitional plan set forth in C-1628. At the time of trial, the PSC was in the process of establishing a long-term universal

service funding mechanism. On April 2, 2002, the PSC approved rules and regulations for the administration of the Fund. These rules and regulations became effective on September 16, 2002, and are codified in the Nebraska Administrative Code as title 291, chapter 10.

FUND OPERATION

Since July 1, 1999, and the consequent reduction of intrastate access rates charged by ETC's, interexchange carriers as a group have been required by the PSC to flow through to their customers reductions in long distance charges equivalent to such intrastate access charge reductions. Since July 1, 1999, appellants have been users of intrastate long distance services and have accepted the benefits of reductions in long distance service rates.

JUDGMENT OF DISTRICT COURT

In its order denying declaratory and injunctive relief, the district court concluded that the surcharge imposed under the NTUSFA was not a tax because "it is not a forced contribution intended to raise revenue for the maintenance of government or governmental services offered to the general public," but, rather, is a "regulatory measure" designed to replace revenues lost by telecommunications providers "as a result of the removal of implicit support previously contained in their rates and access charges" with explicit support authorized by the NTUSFA. The district court also rejected appellants' contention that the NTUSFA lacked sufficient standards to guide the PSC in establishing and administering the Fund.

ASSIGNMENTS OF ERROR

Appellants assign that the district court erred in failing to find the NTUSFA to be unconstitutional and in denying declaratory and injunctive relief. In a cross-appeal, certain appellees assign that the district court erred in not finding (1) that appellants failed to "pursue adequate legal remedies" and (2) that appellants' claims were barred by the doctrines of waiver and/or laches.

STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court

below. *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006); *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006).

ANALYSIS

[2] As a preliminary matter, we note that Cannon's death during the pendency of this appeal does not affect our ability to reach the merits. Statutory provisions relative to abatement and revivor of actions apply to cases in the appellate courts. See *Keefe v. Grace*, 142 Neb. 330, 6 N.W.2d 59 (1942). Neb. Rev. Stat. § 25-1403 (Reissue 1995) provides:

> Where there are several plaintiffs or defendants in an action and one of them dies, or his powers as a personal representative cease, if the right of action survive to or against the remaining parties, the action may proceed, the death of the party or the cessation of his powers, being stated on the record.

The rights of action and assignments of error asserted by Schumacher and Aerni are the same as those asserted by Cannon, and therefore survive his death. Pursuant to § 25-1403, Schumacher and Aerni are entitled to a resolution of their appeal.

[3-5] Familiar general principles provide the framework for our analysis. In every constitutional challenge, there attaches the presumption that all acts of the Legislature are constitutional, with all reasonable doubts resolved in favor of constitutionality. *Le, supra*; *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006). Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner such that it is consistent with the constitution. *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000); *Daily v. Board of Ed. of Morrill Cty.*, 256 Neb. 73, 588 N.W.2d 813 (1999).

Is Surcharge a Tax?

Appellants contend that the surcharge imposed by the PSC is an unconstitutional tax. Pursuant to Neb. Const. art. VIII, § 1, only the Legislature has the power to impose taxes. Appellants argue that although the Nebraska Constitution confers some

powers on the PSC in article IV, § 20, the power to tax is not among them. They also contend that the surcharge violates constitutional provisions prohibiting deprivation of property without due process of law. See Neb. Const. art. I, § 3. Appellees argue that the surcharge is not a tax, but, rather, is "an explicit and revenue neutral regulatory charge implemented to replace the implicit support for universal service previously provided by access charges." Brief for appellees at 42.

[6,7] In *Nebraska P. P. Dist. v. Hershey School Dist.*, 207 Neb. 412, 418, 299 N.W.2d 514, 518 (1980), quoting Black's Law Dictionary (5th ed. 1979), we defined a tax as: " 'An enforced contribution of money or other property, assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses.' " We further stated that the "essential characteristics of a tax are that it is not a voluntary payment but an enforced contribution and, in its essential characteristics, is not a debt." *Nebraska P. P. Dist.*, 207 Neb. at 418, 299 N.W.2d at 518. Although these concepts appear relatively simple, as another court has noted, the "definition of 'tax' in the abstract is a metaphysical exercise." *Brock v. Washington Metropolitan Area Transit Auth.*, 796 F.2d 481, 489 (D.C. Cir. 1986). The term really gains meaning only from the factual and legal context in which the issue comes before the court. See *id.* Thus, to determine whether the surcharge at issue in this case is properly characterized as a tax, it is helpful to examine opinions addressing similar circumstances.

In *Citizens' Utility Ratepayer Bd. v. State Corporation Comm'n*, 264 Kan. 363, 956 P.2d 685 (1998), the Kansas Supreme Court addressed issues arising after Kansas enacted legislation in response to the Telecommunications Act of 1996. The Kansas legislation established a universal service fund and authorized the Kansas Corporation Commission to assess all telecommunications carriers, public utilities, and wireless service providers a surcharge for support of the fund. The act also authorized the providers to collect from their customers an amount equal to the required contributions to the fund. Pursuant to these mandates, the commission required all intrastate telecommunications providers to pay into the fund 14.1 percent of their

intrastate retail revenues. The commission then authorized the providers to pass this assessment through to their customers over a 3-year period, with the highest charge being $3.21 per month.

One provider challenged the assessment, arguing that it was a tax which the commission lacked constitutional authority to impose. The provider argued that the express purpose of the Kansas act was to secure access to telecommunications for the general public, and that thus the revenue raised by the assessment was a tax for the public purpose. The Kansas court disagreed, reasoning that the surcharge was not a tax because it did not raise revenue. The court noted that prior to the passage of the Kansas act, local exchange carriers charged high access rates to all companies which sought to use their services. The rates were higher than the cost of providing services, and the extra money was used to build and maintain land lines. After the passage of the Telecommunications Act of 1996 and pursuant to the Kansas act, local exchange carriers were only allowed to charge access rates which approximated the cost of providing service. To make up for this lost income, the commission imposed the surcharge to fund the universal service fund, from which money was distributed to local exchange carriers for their use in building and maintaining land lines. The Kansas Supreme Court concluded:

> As such, the implicit land line subsidy once found in high access rates is now explicit through the [Kansas Universal Service Fund] surcharge and distribution. All the [fund] surcharge does . . . is manipulate the movement of the same money (extra access rate money) to the same parties (from companies purchasing access to the [local exchange carriers]) to be used for the same reasons (to build and maintain land lines). Thus, the purpose of the [fund] surcharge . . . is not to raise revenue. As such, the surcharge is not a tax.

Citizens' Utility Ratepayer Bd., 264 Kan. at 400, 956 P.2d at 709-10.

Appellants argue that *Citizens' Utility Ratepayer Bd.* is not well reasoned and should not influence our determination of whether the surcharge is a tax. However, the distinction between generating revenue and regulating activity has been utilized by other courts in determining whether an assessment, charge, or

similar measure imposed by an administrative agency constituted a tax. *Rural Telephone Coalition v. F.C.C.*, 838 F.2d 1307 (D.C. Cir. 1988), involved a challenge to certain FCC orders that allocated local exchange costs between interstate and intrastate regulatory jurisdiction. The effect of the orders was to shift certain costs from intrastate to interstate telephone service, with the partial objective of "avoiding large increases in local telephone rates" after the breakup of the monopolistic system and "advancing the goal of universal telephone service." *Id.* at 1310. The FCC orders allocated 25 percent of the local exchange costs to interstate jurisdiction. This allocation transferred those local exchange costs to the rate bases of interstate carriers and forced them to recover those costs through their rates. An interstate carrier challenged the allocation as "an exercise of taxing power that Congress has not delegated to the [FCC]." *Id.* at 1314. Reasoning that a regulation is a tax "only when its primary purpose judged in legal context is raising revenue," the court concluded there was no "reasonable way to construe the . . . cost allocation as having the primary purpose of raising federal revenue." *Id.* The court further concluded that an agency's exercise of a power to allocate costs among state and federal jurisdictions for purposes of ratemaking was not equivalent to an exercise of the power to tax.

In *State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874 (4th Cir. 1983), the court addressed whether the U.S. Secretary of Agriculture impermissibly imposed a tax on milk producers when he exercised his statutory discretion to impose a deduction of 50 cents per hundredweight from the proceeds of the sale of all milk marketed commercially. The deduction was to encourage dairy farmers to reduce milk production and to offset a portion of the cost of a milk price support program. The court reasoned that the "mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised." *Id.* at 887. Instead, the "imposition of assessments have long been held to be a legitimate means of regulating commerce." *Id.* "If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax." *Id.* Noting that the clear language and structure of the authorizing statute indicated its primary purpose

was to reduce overproduction of milk, the court concluded that the deduction "bears the indelible imprimatur of the commerce power and is not an unconstitutional exercise of the taxing power." *Id.*

In *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. 657, 446 S.E.2d 332 (1994), the North Carolina Supreme Court upheld a statute authorizing a utility commission to create a fund for the expansion of natural gas service to unserved areas. One statutorily mandated source of the fund was refunds payable from interstate pipeline suppliers to local distribution companies. The refunds occurred at random times, whenever rates charged on an interim basis to local distribution companies by their interstate pipeline suppliers were later found to be too high by a federal agency; the excess amounts already paid were then required to be refunded. Traditionally, the refunded amounts were passed along to consumers. Pursuant to its statutory authority, the commission ordered approximately $5 million in supplier refunds to be deposited into the expansion fund. A citizens' group challenged this order, arguing that the capture of the supplier refund constituted a tax and that because the funds were not used for a public purpose, it was an improper exercise of the taxing power under the North Carolina Constitution. The court disagreed, concluding that the capture of the supplier refunds was not a "charge levied upon the general citizenry for the general maintenance of the government," and thus was not a tax under North Carolina law. 336 N.C. at 683, 446 S.E.2d at 347.

In *Consumers Power v. ABATE*, 205 Mich. App. 571, 518 N.W.2d 514 (1994), a private power company sought permission to impose rate surcharges to recover costs associated with its participation in an energy assistance program. The surcharges were expressly authorized by statute. A watchdog group contended that the surcharges amounted to a tax on qualifying ratepayers. The court disagreed, finding the surcharges were intended to benefit only the participating utilities and were not intended for the general public. The court reasoned that the surcharges were not a mandatory revenue raiser, as they only became recoverable after the assistance program agreements were voluntarily established. See, also, *Brock v. Washington Metropolitan Area Transit Auth.*, 796 F.2d 481 (D.C. Cir. 1986) (holding payments into

workers' compensation fund not a tax even though they raised revenue, because primary purpose was regulation).

The NTUSFA includes a provision not found in any of the cases from other jurisdictions involving regulatory surcharges or assessments. Section 86-324(4)(a) permits the State Treasurer to transfer funds from the Fund to the General Fund when cash balances in the General Fund and the Cash Reserve Fund are inadequate to meet current obligations. Such a transfer cannot reduce the Fund balance below that needed to meet its obligations for a 60-day period. § 86-324(4). A transfer must be reversed when sufficient funds are available, but in no event later than June 30, 2007, when the provision of the NTUSFA allowing transfers from the Fund terminates. § 86-324(4)(a) and (d). After 30 days, transfers accrue interest which is credited to the Fund. § 86-324(4)(b). Any transfer which has not been reversed with accrued interest is considered an encumbrance against the General Fund. § 86-324(4)(c). The record does not indicate whether this temporary transfer provision has ever been used.

Notwithstanding this ancillary and temporary provision, we conclude that the primary purpose of the NTUSFA is not to generate revenue for governmental purposes, but, rather, to regulate the telecommunications industry through a rebalancing and restructuring of rates. The funding mechanism established by the NTUSFA enables the replacement of implicit subsidies with explicit subsidies in order to achieve universal service under the new, competitive market environment brought about by the Telecommunications Act. The NTUSFA directs that "[t]he implicit support mechanisms in intrastate access rates throughout the state may be replaced while ensuring that local service rates in all areas of the state remain affordable[.]" § 86-323(7). The rate rebalancing and restructuring achieved by the PSC's C-1628 order is intended to be revenue neutral. The surcharge is imposed only on end-user revenues from telecommunications services, and payments from the Fund are made only to eligible telecommunications companies for the sole purpose of "provision, maintenance, and upgrading of facilities and services for which the support is intended." § 86-324(1). Based upon our independent review, we conclude that the surcharge assessed by the PSC pursuant to the NTUSFA is not a tax.

DOES NTUSFA UNCONSTITUTIONALLY DELEGATE LEGISLATIVE AUTHORITY TO PSC?

Appellants contend that the NTUSFA violates the separation of powers provision of article II, § 1, of the Nebraska Constitution, which states:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Appellants argue that in enacting the NTUSFA, the Legislature improperly delegated legislative power to the PSC, an administrative agency.

[8-10] It is a fundamental general principle that the Legislature may not delegate legislative power to an administrative or executive authority. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). The Legislature does, however, have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. *Id.* Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all departments. *Id.* The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act. *Id.* Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available. *Id.* Where the Legislature has provided reasonable limitations and standards for carrying out delegated duties, there is no unconstitutional delegation of legislative authority. *Id.*; *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994). In addressing this issue, we have noted:

> "The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court

> should be reluctant to interfere with such discretion. Such standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations . . . The modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases."

Ponderosa Ridge LLC, 250 Neb. at 951-52, 554 N.W.2d at 157, quoting *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision. *Ponderosa Ridge LLC, supra.*

[11] Unlike most administrative agencies, the PSC is a regulatory body created by the Nebraska Constitution. Neb. Const. art. IV, § 20. Its powers are constitutionally defined to include "the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." *Id.* PSC authority over telephone rates is rooted in legislative, judicial, and electoral activities during the early 1900's. *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989). Constitutional amendments granted the PSC, formerly known as the Railway Commission, regulatory power over telephone rates which was "previously exercisable only by the Legislature." *State ex rel. Spire*, 233 Neb. at 275, 445 N.W.2d at 293. The PSC is an independent regulatory body under the Nebraska Constitution, and its jurisdiction to regulate common carriers may be restricted by the Legislature only through "specific legislation." See *State ex rel. Spire, supra*, citing Neb. Const. art. IV, § 20. See, also, *Myers v. Blair Tel. Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975) (constitutionally prescribed powers and duties of PSC are plenary and self-executing in absence of any specific legislation on subject.)

The NTUSFA is specific legislation on a subject which the state Constitution generally entrusts to the PSC, namely, the regulation of telecommunications rates and services. It authorizes the PSC to establish a new means of achieving a longstanding goal of universal service by replacing subsidies which had previously been implicit in rates set by the PSC with explicit subsidies administered through the Fund. In their stipulation, the parties characterize the implementation of the NTUSFA by the PSC as "rate rebalancing and restructuring." In determining whether the Legislature included adequate standards to guide the PSC in implementing this new type of rate structure, we cannot ignore the fact that the PSC has powers granted to it by the Nebraska Constitution. We also are guided by the principle that, generally, regulation of telecommunications is a matter within the expertise of the PSC and involves a breadth of judgment and policy determination to which considerable deference is given even by a reviewing court. See, e.g., *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000).

The issue of whether similar legislation enacted in other jurisdictions provided sufficient standards to authorize an administrative agency to create and administer a universal service fund as a component of telecommunications rate regulation has been considered by at least two other state appellate courts. In *Citizens' Utility Ratepayer Bd. v. State Corporation Comm'n*, 264 Kan. 363, 956 P.2d 685 (1998), the Kansas Supreme Court rejected a contention that the Kansas statute authorizing the Kansas Corporation Commission to administer a universal service fund was an unconstitutional delegation of legislative power to an administrative agency because it did not include sufficient standards to guide the commission in exercising its power. Applying analytical principles very similar to those articulated in Nebraska cases and set forth above, the court concluded that the standards in the Kansas act were sufficiently definite to pass constitutional muster. Specifically, the court noted that the standards identified "which telecommunications rates should be reduced, when they should be reduced, and over what time period they should be reduced." 264 Kan. at 402, 956 P.2d at 711. The standards also identified "which rates may be increased, how much rates may be increased by," "the initial balance of the [Kansas Universal

Service Fund], who must pay into the [fund]," "who qualifies for [fund] distribution, how much distribution an entity should receive, if the [fund] surcharge can be passed along to customers, when and how supplemental funding occurs, and the [fund's] administrator's duties." *Id.* The court noted that these standards were sufficient even though they left "some discretion to the [commission] to determine exactly how a [fund] assessment and payout should occur." *Id.* It noted that due to the complexity of the subject matter and the specialized knowledge of the [commission] in the field of telecommunications regulation, "[t]o require more explicit or definite standards than the Kansas [a]ct provides would severely impede, if not make impossible, the regulation of the telecommunications industry." 264 Kan. at 403, 956 P.2d at 711.

In *Nextel West Corp. v. Indiana Utility Reg.*, 831 N.E.2d 134 (Ind. App. 2005), the Indiana Court of Appeals considered an argument that the Indiana Utility Regulatory Commission lacked statutory authority to establish and administer the Indiana Universal Service Fund. Indiana's statute recognized the maintenance of universal telephone service as a " 'continuing goal' " of the commission and further stated that the public interest required that

> "the [c]ommission be authorized to formulate and adopt rules and policies as will permit the [c]ommission, in the exercise of its expertise, to regulate and control the provision of telephone services to the public in an increasingly competitive environment, giving due regard to the interests of consumers and the public and to the continued availability of universal telephone service."

Nextel West Corp., 831 N.E.2d at 141-42, quoting Ind. Code Ann. § 8-1-2.6-1 (LexisNexis 1998). However, the statute did not specifically authorize the commission to establish the fund. Rejecting a claim that the commission lacked authority to establish the fund, the court concluded that such authority was implicit in the statutory language quoted above and the commission's general purpose to ensure that public utilities provided constant, reliable, and efficient service to the citizens of the state. The court concluded: "We simply cannot believe the legislature would expressly charge the [c]ommission with ensuring the continuing availability of universal service without also conferring

the authority necessary to effectuate that goal." *Nextel West Corp.*, 831 N.E.2d at 143.

The standards for establishment and operation of the Fund under the NTUSFA are somewhat less specific than those of the Kansas statute, but obviously far more so than under the Indiana statute. The stated purpose of the NTUSFA "is to authorize the [PSC] to establish a funding mechanism which supplements federal universal service support mechanisms and ensures that all Nebraskans . . . have comparable accessibility to telecommunications services at affordable prices." § 86-317. In § 86-323, the Legislature stated that it is "the policy of the state to preserve and advance universal service" based on eight principles. The principles generally provide that consumers in all areas of the state should have reasonably priced access to telecommunications services, that all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation of universal service, and that there should be "specific, predictable, sufficient, and competitively neutral mechanisms to preserve and advance universal service." § 86-323(1) through (5). The principles also provide that funds for the support of high-cost areas will be available only to designated ETC's providing service in such areas and that the "distribution of universal service funds should encourage the continued development and maintenance of telecommunications infrastructure." § 86-323(5). The principles state that universal service rules should not preclude the sharing of facilities supported by universal service funds with other local users and that the "implicit support mechanisms in intrastate access rates throughout the state may be replaced while ensuring that local service rates in all areas of the state remain affordable." § 86-323(6) and (7). The principles also articulate that the cost of administrating the Fund should be kept to a minimum. § 86-323(8).

In § 86-324, the Legislature specified that a telecommunications company receiving support from the Fund "shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purpose of the act." In addition, § 86-324(2)(a) grants to the PSC the authority to subject ETC's to service quality, customer service,

and billing regulations. Section 86-324(2)(b) authorizes the PSC to issue orders carrying out its responsibilities and to review the compliance of ETC's with such orders. Section 86-324(2)(c) allows the PSC to withhold all or a portion of the funds to be distributed for failure to comply with orders or regulations. Section 86-324(2)(d) authorizes the PSC to "require every telecommunications company to contribute to any universal service mechanism established by the [PSC] pursuant to state law." It further requires the PSC to obtain an annual audit of any telecommunications company to ensure the billing, collection, and remittance of "a surcharge for universal service." § 86-324(2)(d). Section 86-324(2)(e) requires the PSC to obtain an audit of information provided by a telecommunications company for purposes of calculating universal service fund payments to the company. Section 86-324(2)(f) allows the PSC to fine any person who violates the NTUSFA.

Section 86-325 grants to the PSC the authority to "determine the standards and procedures reasonably necessary, adopt and promulgate rules and regulations as reasonably required, and enter into such contracts with other agencies or private organizations or entities as may be reasonably necessary to efficiently develop, implement, and operate the [F]und." Pursuant to § 86-328, the PSC is required to hold an annual public hearing to determine the level of the Fund necessary to carry out the NTUSFA and a reasonable reserve, and is required to publish notice of such hearing at least once each week for 2 consecutive weeks prior thereto. Section 86-328 also provides that in the initial year of the Fund's operation, the PSC "shall determine the amount of the [F]und to be equivalent to the amount which, in the [PSC's] judgment, after careful analysis, is necessary to keep approximately ninety-six percent of Nebraska households subscribed to local telecommunications service."

We conclude that these provisions of the NTUSFA constitute reasonably adequate, sufficient, and definite standards for the guidance of the agency in the exercise of the power conferred upon it, and to enable those affected to know and understand their rights and obligations. See *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). Regulation of the telecommunications industry is a complex field as to which the

PSC has special expertise and constitutional authority. The fact that the standards set forth in the NTUSFA permit the exercise of discretion by the PSC in its implementation reflects this reality. To require more explicit and definite standards could impede or prevent effective regulation. See *Citizens' Utility Ratepayer Bd. v. State Corporation Comm'n*, 264 Kan. 363, 956 P.2d 685 (1998). The NTUSFA is not an unconstitutional delegation of legislative authority to the PSC.

Other Constitutional Claims

Appellants argue that the NTUSFA violates their due process and equal protection rights. This argument is based on the premise that the surcharge constitutes an unlawful tax, which we have rejected. We conclude that the NTUSFA does not violate appellants' state or federal rights to due process or equal protection.

Appellants also argue that the NTUSFA violates article IV, § 20, of the Nebraska Constitution which sets forth the powers and duties of the PSC "in the absence of specific legislation" on a subject. However, as noted above, the NTUSFA is specific legislation on a subject within the regulatory jurisdiction of the PSC, and its enactment does not in any way violate article IV, § 20.

Conclusion

Based upon our independent review, we find no merit in any of appellants' claims that the NTUSFA violates the federal or Nebraska Constitution. We therefore do not address the issues raised in the cross-appeal and affirm the judgment of the district court.

Affirmed.

Wright, J., participating on briefs.

In re Interest of Veronica H., a child under 18 years of age. State of Nebraska, appellee, v. Arnoldo T. and Melinda O., appellees, and Nebraska Department of Health and Human Services, appellant.

721 N.W.2d 651

Filed September 29, 2006. No. S-05-425.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required

to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling.

2. **Juvenile Courts: Minors.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the juvenile code must be construed to assure the rights of all juveniles to care and protection.
3. ____: ____. The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of juveniles who come within the provisions of the act.
4. **Juvenile Courts: Child Custody.** Juvenile courts are accorded broad discretion in their determination of the placement of children adjudicated abused or neglected and to serve the best interests of the children involved.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and MOORE, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, ELIZABETH G. CRNKOVICH, Judge. Judgment of Court of Appeals affirmed.

Jon Bruning, Attorney General, Royce N. Harper, and John M. Baker, Special Assistant Attorney General, for appellant.

No appearance for appellee.

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

WRIGHT, J.

NATURE OF CASE

In this case arising under the Nebraska Juvenile Code, the separate juvenile court of Douglas County ordered the Nebraska Department of Health and Human Services (DHHS) to replace a case manager with a more experienced case manager who had knowledge of cases involving allegations of incest. DHHS appealed, and the Nebraska Court of Appeals affirmed the judgment of the juvenile court in its entirety. See *In re Interest of Veronica H.*, 14 Neb. App. 316, 707 N.W.2d 29 (2005). This court granted the petition for further review filed by DHHS.

SCOPE OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In

reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

BACKGROUND

On July 26, 2002, a petition was filed in the juvenile court alleging that Veronica H., a minor, was a child as described in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). The petition alleged that Veronica had been subject to inappropriate sexual contact by her stepfather and that her natural mother had taken insufficient steps to protect Veronica. DHHS was given temporary custody of Veronica. Her mother admitted the allegations within the petition, and her stepfather entered no contest pleas. Veronica was subsequently adjudicated as a child within the meaning of § 43-247(3)(a). Temporary custody of Veronica remained with DHHS, and the matter was set for disposition.

The first of several disposition and permanency planning hearings was held on June 6, 2003. The juvenile court ordered that Veronica remain in the temporary custody of DHHS. The juvenile court found that the permanency objective was reunification and that reasonable efforts were being made to return Veronica to the parental home. Additional review and permanency planning hearings were subsequently held, the details of which are set forth in *In re Interest of Veronica H., supra.*

At a review and permanency planning hearing on March 10, 2004, the juvenile court expressed its concern for "a real concrete and coordinated recommendation for what kind of treatment [and] what issues are to be addressed and by whom." Following this hearing, Veronica's placement was changed to an enhanced treatment group home in Omaha, Nebraska. The case was assigned to DHHS' "Integrated Care Coordination Unit," and a new case manager was assigned.

Another review and permanency planning hearing was held on November 16, 2004, at which a case plan prepared by the new case manager was introduced. The juvenile court expressed dissatisfaction with the reports that were offered and referred the case to the "LB 1184 Treatment Team," indicating that the team was to review the case from its inception and that "somebody has to get a grip on this case from a case management standpoint."

At a January 14, 2005, hearing, the juvenile court again expressed frustration with the professionals involved and with Veronica's lack of progress. The juvenile court subsequently ordered DHHS "to reassign this case to an experienced case manager with demonstrated knowledge of incest cases and the needed treatment protocol to address these cases." The court stated it wanted to approve the name of the new case manager, who was to have an understanding of the dynamics of a case involving intrafamily sexual abuse.

DHHS appealed from that order, alleging that the juvenile court erred when it ordered DHHS to remove the case manager and to reassign the case to a case manager with experience and knowledge of incest cases. The Court of Appeals concluded that the juvenile court did not abuse its discretion and had properly exercised its authority in ordering DHHS to replace the case manager. It reasoned that because juvenile courts have been given the power by the Legislature to assent and, by implication, to dissent from decisions of DHHS, including the placement of juveniles, the juvenile court properly exercised that power when it ordered DHHS to replace the case manager. We granted further review.

ASSIGNMENT OF ERROR

DHHS assigns as error the Court of Appeals' determination that the juvenile court could order the removal of a case manager from a pending case.

ANALYSIS

DHHS argues that the Court of Appeals erred in affirming the order of the juvenile court because the juvenile court is a court of limited jurisdiction and there is no statute or provision in the Nebraska Constitution which permits the juvenile court to order the removal of a case manager. Thus, DHHS contends the juvenile court had no authority to order that the case manager be replaced in the present case.

Neb. Const. art. V, § 27, provides that "the Legislature may establish courts to be known as juvenile courts, with such jurisdiction and powers as the Legislature may provide." As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by

statute. *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002).

In this case, Veronica was adjudicated as a child within the meaning of § 43-247(3)(a) after her mother admitted the allegations in the petition and her stepfather entered no contest pleas. The juvenile court placed Veronica in the temporary custody of DHHS, and the order of custody was continued throughout the proceedings. Section 43-247(5) provides that the juvenile court has jurisdiction over "[t]he parent, guardian, or custodian who has custody of any juvenile described in this section." Therefore, the juvenile court had jurisdiction over DHHS as the custodian of Veronica. The question is whether, pursuant to its jurisdiction regarding custody, the juvenile court could direct the removal of the case manager.

Neb. Rev. Stat. § 43-285(1) (Reissue 2004) provides in part:

> When the court awards a juvenile to the care of [DHHS], an association, or an individual in accordance with the Nebraska Juvenile Code, the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department, association, or individual to whose care he or she is committed. Any such association and the department shall have 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 juvenile committed to it.

The Court of Appeals concluded that the provision "by and with the assent of the court" gave the juvenile court the authority to issue orders such as the one entered in the instant case. The Court of Appeals reasoned that through § 43-285(1), the Legislature gave the juvenile courts the power to assent and dissent from decisions of DHHS, including those related to the placement of juveniles. The appellate court concluded that the Legislature intended to remove from DHHS complete control of a minor whose care was given to DHHS under the juvenile code.

We agree with the reasoning of the Court of Appeals. Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court

reaches a conclusion independent of the lower court's ruling. *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

[2-4] The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the juvenile code must be construed to assure the rights of all juveniles to care and protection. *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995). The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of juveniles who come within the provisions of the act. See *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). Juvenile courts are accorded broad discretion in their determination of the placement of children adjudicated abused or neglected and to serve the best interests of the children involved. See *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

In the case at bar, the juvenile court's order directed DHHS to replace the case manager. Such order is consistent with § 43-285(2), which provides that after a child is adjudicated under § 43-247(3), the juvenile court may order DHHS to prepare and file with the court a proposed plan for the care and placement of the child. The court has authority to disapprove or modify the plan, order that an alternative plan be developed, or implement another plan that is in the juvenile's best interests. § 43-285(2).

We conclude that pursuant to § 43-285, the juvenile court has the authority to order DHHS to remove a case manager under the circumstances as set forth herein. Section 43-285 provides that when a juvenile's care is awarded to DHHS, the care and placement is "by and with the assent of the court." This provision implicitly gives the juvenile court the authority to dissent from a determination made by DHHS and to direct the removal of a case manager when the facts and circumstances require a change for the best interests of the juvenile.

Because juvenile courts have broad discretion concerning placement of children, see *In re Interest of Amber G. et al., supra*, the validity of the juvenile court's order in this case is subject to review for abuse of discretion. DHHS has not demonstrated that the juvenile court abused its discretion or exceeded

its authority. The exercise of such discretion by the juvenile court is in accord with the broad discretion given to juvenile courts in the determination of the care and placement of abused and neglected children.

CONCLUSION

For the reasons set forth herein, we affirm the judgment of the Court of Appeals in all respects.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. THE COUNTY OF LANCASTER, APPELLEE.

721 N.W.2d 644

Filed September 29, 2006. No. S-05-520.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
2. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
3. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision.
4. ____. If a conflict exists between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes.
5. ____. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
6. **Statutes: Presumptions: Words and Phrases.** Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. When the word "may" appears, permissive or discretionary action is presumed.
7. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.

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

Jon Bruning, Attorney General, and Ronald L. Sanchez, Special Assistant Attorney General, for appellant.

Gary E. Lacey, Lancaster County Attorney, and Kristy Mundt for appellee.

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

GERRARD, J.

Neb. Rev. Stat. § 29-1823(1) (Cum. Supp. 2004) authorizes a district court in a criminal proceeding, when it appears the defendant may be mentally incompetent to stand trial, to order a mental examination of the accused at county expense. The question presented in this appeal is whether, if the examination is performed by a state hospital, the cost of the examination can be billed directly to the county or whether the claim must first be submitted to the district court for certification to the county board.

BACKGROUND

The underlying facts of this case are not disputed. Travis M., a resident of Lancaster County, Nebraska, was charged in the Lancaster County District Court with four counts of terroristic threats and one count of fleeing to avoid arrest. The district court, in the criminal proceeding, ordered on March 10, 2003, that Travis be committed to the Lincoln Regional Center (LRC) for a competency evaluation. The LRC is a psychiatric hospital owned by the State and administered and operated by the Nebraska Department of Health and Human Services (DHHS), a state agency. See Neb. Rev. Stat. § 83-305 (Cum. Supp. 2004).

Travis was admitted to the LRC, pursuant to the district court's order, on March 18, 2003, and remained there until June 4, when the court found that Travis was mentally incompetent to stand trial. However, the district court found a substantial probability that Travis would become competent in the foreseeable future and ordered commitment to the LRC for appropriate treatment until the disability was removed.

Between March 18 and April 30, 2003, a total of 44 days, Travis was held in the "forensic unit" of the LRC. No other time period is at issue in this appeal. The State billed Lancaster County for Travis' care during that time at the rate of $286 per day, for a total of $12,584. That represented the standard rate established by DHHS for such care and was not based on any individualized record of the care Travis received.

The claim was submitted to the Lancaster County clerk and considered by the Lancaster County Board of Commissioners on May 27, 2003. The board denied the claim, having been advised by a deputy county attorney that the State's claim should have been submitted to the district court in the criminal case for its review, instead of being sent directly to the county.

The State filed a separately docketed petition in error in the district court with respect to the denial of its claim. The State argued that pursuant to Neb. Rev. Stat. § 83-365 (Reissue 1999), DHHS was authorized to set the costs for treatment of patients in state institutions, including the LRC. The county, however, argued that the relevant statute was § 29-1823(1), which provides, in relevant part, that

> [i]f at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or by any person for the accused. The judge of the district court of the county where the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial. The district judge may also cause such medical, psychiatric, or psychological examination of the accused to be made as he or she deems warranted and hold such hearing as he or she deems necessary. *The cost of the examination, when ordered by the court, shall be the expense of the county in which the crime is charged. The district judge may allow any physician, psychiatrist, or psychologist a reasonable fee for his or her services, which amount, when determined by the district judge, shall be certified to the county board which shall cause payment to be made.*

(Emphasis supplied.) The county insisted that pursuant to § 29-1823(1), the State was required to submit its claim to the district court in the criminal proceeding and the district court could then certify a reasonable fee to the county.

The district court, in the error proceeding, agreed with the county. The court determined that when an individual is committed for evaluation pursuant to § 29-1823(1), the cost associated with that evaluation is to be submitted to the district court that ordered the commitment. The court noted that while it might

be that DHHS cannot practically separate out its billing time on an individualized basis, that issue should initially be addressed to the district court in the criminal proceeding. Therefore, the court affirmed the decision of the county board.

ASSIGNMENT OF ERROR

The State assigns, as consolidated, that the district court erred by holding that § 29-1823(1) required the State's claim for an inpatient competency evaluation to be submitted to the district court in the criminal proceeding, thus failing to enter judgment in favor of the State.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Reed v. State, ante* p. 8, 717 N.W.2d 899 (2006).

ANALYSIS

As previously noted, § 29-1823(1) provides, in relevant part, that when the district court in a criminal proceeding orders a competency evaluation, the examination is performed at county expense and "[t]he district judge may allow any physician, psychiatrist, or psychologist a reasonable fee for his or her services, which amount, when determined by the district judge, shall be certified to the county board which shall cause payment to be made." It is apparent that as a general matter, the fee to be assessed for a competency evaluation is determined by the district court in the criminal proceeding and certified to the county board for payment. The county does not dispute that it ultimately must pay a reasonable fee for the cost of the evaluation. The issue here is procedural—whether § 29-1823(1) is the exclusive provision by which the State can obtain payment from the county or whether § 29-1823(1) is applicable at all when a competency evaluation is performed by a state hospital.

[2] The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of

the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004), *cert. denied* 544 U.S. 986, 125 S. Ct. 1858, 161 L. Ed. 2d 744 (2005). The Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 71-901 to 71-962 (Cum. Supp. 2004 & Supp. 2005), expressly addresses who is responsible for the expenses associated with the involuntary confinement and subsequent treatment of the mentally ill, and it is in that context that § 29-1823(1) should be considered.

In most instances, the process of involuntary commitment is initiated when the county attorney determines that a subject is mentally ill and dangerous, such that there is a substantial risk of serious harm to the subject or another person or persons, and a treatment order from the county mental health board is necessary to prevent the harm. In such cases, the county attorney can file a petition in the district court to initiate proceedings before the county mental health board. See § 71-921. When there is probable cause to believe that the harm may occur before mental health board proceedings may be initiated to obtain custody of the subject, then the subject can be placed in emergency protective custody. See §§ 71-919 and 71-922. "Each county shall make arrangements with appropriate medical facilities inside or outside the county for such purpose and shall pay the cost of the emergency protective custody of persons from such county in such facilities." *Id.* At the conclusion of a mental health board hearing, if the board determines that the subject should remain in custody pending the entry of a treatment order, the subject can be retained in custody at county expense. The county is similarly directed to make arrangements in advance for such confinement. See § 71-926.

A mental health board, in determining whether a subject is mentally ill and dangerous, may request the assistance of DHHS or any other person or private entity, and may require the subject to submit to reasonable psychiatric or psychological evaluation to assist the board in preparing a treatment order. See § 71-925(7). "Any mental health professional conducting such evaluation at the request of the mental health board shall be compensated by the county or counties served by such board at a rate determined by the district judge . . . ." *Id.*

Similarly, when counsel is appointed to represent an indigent subject in proceedings under the Nebraska Mental Health Commitment Act, appointed counsel "shall apply to the court in which his or her appointment is recorded for fees for services performed." See § 71-947. The court shall fix reasonable fees, to be paid by the county in the amount determined by the court. See *id.* Counsel may also apply for a separate professional examination for the subject and "shall be reimbursed for costs incurred in securing such separate examination or examinations or in having other professional persons as witnesses before the mental health board" in an amount fixed by the court. See *id.*

Alternatively, an indigent subject or his or her counsel can apply to a mental health board for the expenses necessary to effectively represent the subject, including an independent evaluation of the subject's mental condition. See § 71-948. "The board shall then fix reasonable fees and expenses, and the county board shall allow payment to such person in the full amount fixed by the board." See *id.*

When a subject is committed to custody by a mental health board for mental health treatment at a state hospital, the cost is borne by the patient and his or her relatives. See Neb. Rev. Stat. § 83-364 (Cum. Supp. 2004). When the full cost is not paid by the patient or his or her relatives within 30 days of the receipt of such care, the county of the patient's residence pays a portion of the unpaid cost, in an amount specified by statute. See Neb. Rev. Stat. § 83-376 (Cum. Supp. 2004). With respect to the LRC, the county pays the first $15 per day of the unpaid cost and the balance of the unpaid cost is borne by the State. See *id.*

Pursuant to § 29-1823(1), if the district court in a criminal proceeding determines that the accused is mentally incompetent to stand trial, but there is a substantial probability that the accused will become competent in the foreseeable future, the court orders the accused to be committed to a state hospital for the mentally ill or some other state-owned or state-operated facility for appropriate treatment until the disability is removed. The State is responsible for the cost of the maintenance and care for the accused during the period of time ordered by the court for treatment to remove the disability. See § 29-1823(3). A review

hearing is held within 6 months, and every 6 months thereafter, to determine whether the accused is still incompetent to stand trial or whether there is a substantial probability that the accused will become competent within the foreseeable future. See § 29-1823(2). Should it be determined at any time that there is *not* a substantial probability that the accused will become competent within the foreseeable future, then the State is required to either release the accused or commence civil commitment proceedings. See § 29-1823(3).

In arguing that § 29-1823(1) does not apply to it, the State relies in large measure on § 83-365, which provides in relevant part:

> The Department of Health and Human Services shall periodically determine the individual cost, exclusive of the cost of education, for the care, support, maintenance, and treatment of the patients in each state institution and for persons receiving treatment prescribed by an institution following release or without being admitted as a resident patient. In making such determinations, the department may use averaging methods for each institution if, in the judgment of the director, it is not practicable to compute the cost for each patient.

The State argues that § 83-365 is part of a legislative policy empowering the executive branch of government to establish the rate to be charged for the care provided by state hospitals. The State also argues that there is no indication that § 29-1823 is intended to preclude the State's use of the general county claims provision, Neb. Rev. Stat. § 23-135 (Cum. Supp. 2004).

But § 29-1823 is part of a comprehensive scheme for allocating the costs of mental health treatment and evaluation, and contrary to the State's suggestion, there is no aspect of that scheme which permits the State to unilaterally determine the financial liability of another responsible party. For the general costs of care, the county is required to make arrangements with mental health care providers for emergency confinement and confinement pending a mental health board treatment order, which arrangements allow the county to determine in advance where subjects will be confined and what the confinement will cost the county. When other costs of mental health commitment

proceedings are allocated to the county, in each instance, those costs are subject to judicial or administrative approval.

[3,4] Thus, the statutory scheme clearly evinces the Legislature's intent to require judicial or administrative approval when the county is charged for expenses it did not incur. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision. *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005). The only interpretation of § 29-1823 consistent with the statutory scheme is that it requires the court to approve the expense of a competency evaluation—a liability incurred, not by the action of the county, but solely by an order of the court. The State's reasoning, that § 83-365 overrides § 29-1823(1) and that § 23-135 remains available as a means of demanding payment, would have the effect of nullifying § 29-1823(1) and many of the other provisions of the Nebraska Mental Health Commitment Act. Furthermore, if a conflict exists between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes. *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004). Here, the general power of the State to establish rates at state hospitals, and the general provision for claims made to a county board, are subject to the specific provisions of § 29-1823(1).

[5] The State also argues that § 29-1823(1) does not apply to the LRC because the statute provides that the court may allow "any physician, psychiatrist, or psychologist a reasonable fee for his or her services" and, according to the State, the LRC is not a physician, psychiatrist, or psychologist. This, however, is not a reasonable reading of the statutory language. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Salts v. Lancaster Cty.*, 269 Neb. 948, 697 N.W.2d 289 (2005). The statute's purpose is to allow the court to initiate a professional mental evaluation of an accused who may be incompetent to stand trial—in other words, to obtain professional mental services from a physician, psychiatrist, or psychologist. The statute obviously encompasses payment for such services,

regardless of whether the payment is issued directly to a "physician, psychiatrist, or psychologist," or his or her employer.

[6] Finally, the State argues that since § 29-1823(1) provides that the court "may allow" a fee for the competency evaluation, the statute is permissive, and not mandatory. Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. When the word "may" appears, permissive or discretionary action is presumed. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005). But the State misunderstands the nature of the discretion afforded by the statute. The district court may decide to allow a requested fee for a competency evaluation, or, on the other hand, the court may decide not to allow the fee requested. The fact that the court has discretion in ordering payment, however, does not give the *parties* discretion with respect to whether they are required to follow the provisions of the statute. Nothing in the statute's use of the word "may" suggests that the State has the discretion not to follow the procedure established for obtaining payment.

[7] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). The State's arguments provide us with no basis to set aside the plain meaning of § 29-1823(1); thus, we find no merit to the State's sole assignment of error.

CONCLUSION

Pursuant to § 29-1823(1), payment for a competency evaluation, performed pursuant to a district court's order in a criminal proceeding, is determined by the court and certified by the court to the county board. The State's general authority to establish rates to be charged by state hospitals does not override the specific provisions of § 29-1823(1), which both the county board and the court in this error proceeding correctly understood to require that the costs of a competency evaluation be determined in the criminal proceeding by the court that ordered the evaluation. The judgment of the court in this proceeding is, therefore, affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

JENNIE L. YOUNG AND THOMAS J. YOUNG, WIFE AND HUSBAND, APPELLANTS, V. MIDWEST FAMILY MUTUAL INSURANCE COMPANY, APPELLEE.

722 N.W.2d 13

Filed September 29, 2006. No. S-05-540.

1. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Insurance: Judgments: Statutes: Attorney Fees.** Read together, Neb. Rev. Stat. §§ 44-359 (Reissue 2004) and 25-901 (Reissue 1995) prohibit an award of attorney fees to a plaintiff, in a suit against the plaintiff's insurer, who rejects an offer to allow judgment and later fails to recover more than the amount offered.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Judgments: Statutes: Compromise and Settlement.** Neb. Rev. Stat. § 25-901 (Reissue 1995) applies to offers to allow judgment against a defendant, which, under the plain meaning of the statute, are not equivalent to settlement offers.
5. **Insurance: Judgments.** For an insurer to take advantage of the protection of Neb. Rev. Stat. § 25-901 (Reissue 1995), it must expressly comply with the requirement that an offer to allow judgment be made.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded for further proceedings.

Thomas J. Young for appellants.

William E. Gast and Gene M. Eckel, of Gast & McClellan, for appellee.

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

CONNOLLY, J.

Under Neb. Rev. Stat. § 44-359 (Reissue 2004), a prevailing plaintiff can recover attorney fees against an insurance company. But under Neb. Rev. Stat. § 25-901 (Reissue 1995), an insurance company can shield itself from an award of attorney fees if it makes an offer to allow judgment and the plaintiff later fails to recover more than the amount offered. Midwest Family Mutual Insurance Company (Midwest) made written settlement offers to Jennie L. Young and Thomas J. Young, but not offers to allow judgment. This appeal requires us to decide whether under

§ 25-901, a written settlement offer is equivalent to an offer to allow judgment. The district court denied the Youngs attorney fees because it determined that Midwest's settlement offers complied with the statute. We reverse, because a written settlement offer is not the same as an offer to allow judgment. Because Midwest did not comply with § 25-901, the Youngs have the opportunity to pursue attorney fees.

BACKGROUND

Midwest issued a homeowner's insurance policy to the Youngs. In April 2001, the Youngs' home sustained hail damage. Although the parties differed greatly as to the damage, Midwest estimated damages of $790 and issued a check to the Youngs for $561.02 ($790 less a deductible). The Youngs, however, claimed damages of $27,500.

After the Youngs sued Midwest for breach of contract, Midwest sent the Youngs several letters offering to settle the dispute. The first offer was termed as "an offer of $22,000 in full settlement of this claim"; the second was a "settlement offer in the amount of $2,000.00, in consideration for a complete and final release"; the third was "an offer in the amount of $3,000, in lieu of going back to trial"; and the fourth was a "final offer of settlement to [the Youngs] in the amount of $9,000." The Youngs refused all of the settlement offers, and the case proceeded to trial. A jury returned a $940 verdict for the Youngs.

The Youngs moved for attorney fees under § 44-359. The district court denied their request stating that § 25-901 precluded an award of attorney fees because the Youngs failed to obtain a judgment for more than the offers made by Midwest.

ASSIGNMENTS OF ERROR

On appeal, the Youngs assign that the district court erred in (1) determining that Midwest made any offers to allow judgment to be taken against it, (2) determining that the settlement offers complied with § 25-901, and (3) failing to award attorney fees to the Youngs.

STANDARD OF REVIEW

[1] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent,

correct conclusion irrespective of the determination made by the court below. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

ANALYSIS

The Youngs contend that the settlement offers made by Midwest are not offers to allow judgment as required by the language of § 25-901 and thus did not preclude an award of attorney fees under § 44-359.

Section 44-359 provides that when judgment is entered against an insurance company, the court

> shall allow the plaintiff a reasonable sum as an attorney's fee . . . except that if the plaintiff fails to obtain judgment for more than may have been offered by such company, person, or association in accordance with section 25-901, then the plaintiff shall not recover the attorney's fee provided by this section.

Section 25-901 provides, in pertinent part:

> The defendant in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff, or his attorney, an offer in writing to allow judgment to be taken against him for the sum specified therein. If the plaintiff accepts the offer and gives notice thereof to the defendant or his attorney, within five days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the offer verified by affidavit; and, in either case, the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly.

[2] Read together, these statutes prohibit an award of attorney fees to a plaintiff, in a suit against the plaintiff's insurer, who rejects an offer of judgment and later fails to recover more than the amount offered. See *Wendt v. Cavalier Ins. Corp.*, 197 Neb. 622, 250 N.W.2d 243 (1977). For this rule to apply, however, there must be an "offer in writing to allow *judgment*." (Emphasis supplied.) § 25-901.

We have not previously considered whether an offer to settle is equivalent to the offer to allow judgment contemplated by § 25-901. But courts in other jurisdictions interpreting similar

statutes have held that they are distinguishable. See, *Haberkorn v. Chrysler Corp.*, 210 Mich. App. 354, 533 N.W.2d 373 (1995); *B & H Const. v. Tallahassee Com. College*, 542 So. 2d 382 (Fla. App. 1989); *Becker v. DeLeone*, 78 Or. App. 530, 717 P.2d 1185 (1986).

In *Haberkorn*, the Michigan Court of Appeals held that an offer to settle did not fall within the scope of a similar Michigan rule permitting a party to offer " 'to stipulate to the entry of a judgment in a sum certain.' " *Haberkorn v. Chrysler Corp.*, 210 Mich. App. at 379, 533 N.W.2d at 386, quoting Mich. R. Civ. P. 2.405(A)(1). There, the defendant had made an offer of settlement using language similar to the offers at issue here. Most notably, the offer did not contain any language explicitly permitting judgment against the defendant. It stated that it was a " 'new settlement offer in the above-entitled case, in the amount of $500,000.00.' " *Haberkorn v. Chrysler Corp.*, 210 Mich. App. at 378, 533 N.W.2d at 386.

The Michigan court determined that this offer clearly did not fall within the plain language of its rule which required an offer of judgment, not just an offer to settle. *Id.* The court distinguished offers to settle, stating:

> An offer of judgment is not the same as an offer to settle. An agreement to settle does not necessarily result in a judgment. Although it usually results in a stipulated order of dismissal with prejudice, such an order does not constitute an adjudication on the merits. It merely "signifies the final ending of a suit, not a final judgment on the controversy, but an end of that proceeding."

Id. at 378, 533 N.W.2d at 385.

Similarly, the Oregon Court of Appeals addressed whether an offer of settlement would satisfy Oregon's equivalent of § 25-901. *Becker v. DeLeone, supra.* Oregon's rule contains the nearly identical " 'offer to allow judgment' " language at issue here. *Id.* at 534, 717 P.2d at 1188, quoting Or. R. Civ. P. 54 E. The court declined to apply the rule to an informal settlement offer, reasoning that to do so would be to judicially expand the scope of the rule. *Id.*

Midwest cites *Wendt v. Cavalier Ins. Corp., supra*, for the proposition that a trial court may refuse to award fees regardless

whether an offer is phrased as one to settle or to allow judgment to be taken. In *Wendt*, however, the issue whether an offer to settle is the equivalent of an offer to allow judgment was not presented to the court. Instead, the question was whether the plaintiff could be awarded attorney fees when the judgment obtained was equal to, not greater than, the offer made by the defendant. Further, the offer in *Wendt* had actually been accepted, not rejected, by the plaintiff and the resulting judgment was based on that offer. *Wendt* is not persuasive.

[3-5] Statutory language is to be given its plain and ordinary meaning. We will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. See *24th & Dodge Ltd. Part. v. Acceptance Ins. Co.*, 269 Neb. 31, 690 N.W.2d 769 (2005). Section 25-901 is clear—it applies to offers to allow judgment against a defendant, which, under the plain meaning of the statute, are not equivalent to settlement offers. Here, Midwest made several offers to settle. None of them, however, contained any language expressing a willingness to allow a judgment against it. For Midwest to take advantage of the protection of § 25-901, it must expressly comply with the requirement that an offer to allow judgment be made. This is particularly important when application of § 25-901 would result in the denial of fees that would otherwise be mandatory under § 44-359.

CONCLUSION

The district court erred in applying § 25-901 to deny the Youngs' motion for attorney fees because Midwest did not offer to allow judgment to be taken against it. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

NEBRASKA LIQUOR DISTRIBUTORS, INC., APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

722 N.W.2d 10

Filed September 29, 2006. No. S-05-890.

1. **Administrative Law: Statutes: Appeal and Error.** The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Administrative Law: Liquor Licenses: Appeal and Error.** The Administrative Procedure Act governs appeals from Nebraska Liquor Control Commission decisions.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes: Presumptions: Words and Phrases.** Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. When the word "may" appears, permissive or discretionary action is presumed.
5. **Administrative Law: Appeal and Error.** Under Neb. Rev. Stat. § 84-917(6)(b) (Reissue 1999), a district court has discretion concerning the disposition of an appeal from an administrative agency.

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

Jon Bruning, Attorney General, J. Kirk Brown, and Milissa Johnson-Wiles for appellant.

Michael J. Lehan for appellee.

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

CONNOLLY, J.

On remand from our decision in *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005), the district court reversed the decision of the Nebraska Liquor Control Commission (Commission) that denied a wholesale liquor license to Nebraska Liquor Distributors, Inc. (NLD). Under Neb. Rev. Stat. § 84-917(6)(b) (Reissue 1999), in an appeal from an administrative agency, a district court "may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings." This case presents the question whether the district court should have remanded the matter to the

Commission for further proceedings, instead of reversing the Commission's decision. The district court chose to reverse, as permitted by the statute. We affirm.

PRIOR PROCEEDINGS

On September 6, 2001, NLD applied for a class X wholesale liquor license from the Commission. The Commission denied the license, concluding that NLD was disqualified because of a business relationship prohibited by Neb. Rev. Stat. § 53-169.01 (Reissue 2004). The Commission found that NLD's sole shareholder, Mitchell Johnson, had a continuing business relationship with his brother, Lynn Johnson, who is chairman of the board of Johnson Brothers Liquor Company (Johnson Brothers).

The Commission had previously denied Johnson Brothers a wholesale liquor license because of its relationship with United States Distilled Products Company (USDP), a liquor manufacturer. The Nebraska Court of Appeals affirmed that decision in *Johnson Bros. Liquor Co. v. Nebraska Liquor Control Comm.*, No. A-99-1182, 2000 WL 1725059 (Neb. App. Nov. 21, 2000) (not designated for permanent publication). In that case, the evidence showed that Lynn was a de facto officer or employee of USDP. This created a prohibited relationship between Johnson Brothers and USDP, requiring the denial of Johnson Brothers' application.

The Commission relied on the *Johnson Bros. Liquor Co.* decision to establish a connection between USDP and Mitchell as well, and denied NLD a liquor license. NLD appealed the Commission's decision, and the district court affirmed. In its affirmance, the district court took judicial notice of the *Johnson Bros. Liquor Co.* decision and found that Mitchell had an interest in USDP through Johnson Brothers. The case was then appealed to this court. We held that it was inappropriate for the district court to rely on *Johnson Bros. Liquor Co.* in affirming the Commission's decision. *Nebraska Liq. Distrib., supra.* We reversed the judgment and remanded the cause with directions to the district court to complete its de novo review of the record.

DISTRICT COURT'S DECISION

On remand, after a de novo review, the district court found that the record did not establish a prohibited relationship between

NLD and USDP. The district court found that there was no evidence of a business interest between Johnson Brothers and USDP and the *Johnson Bros. Liquor Co.* opinion could not be considered. The district court reversed the Commission's decision and directed the Commission to issue a wholesale liquor license to NLD. The Commission now appeals, arguing that the district court should have remanded the matter to the Commission so it could produce evidence of the relationship between NLD and USDP that was inappropriately established through judicial notice.

ASSIGNMENT OF ERROR

The Commission assigns that the district court erred in failing to remand this matter to the Commission for further proceedings.

STANDARD OF REVIEW

[1] The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *Arndt v. Department of Motor Vehicles*, 270 Neb. 172, 699 N.W.2d 39 (2005).

ANALYSIS

The Commission contends that after this cause was remanded to the district court, the court should have remanded the matter to the Commission for further proceedings. It argues that because the district court relied on the Court of Appeals' decision in *Johnson Bros. Liquor Co.* without knowledge that it was incorrect to do so, the court should have allowed it another opportunity to adduce evidence of the relationship it attempted to establish through judicial notice.

[2] The Administrative Procedure Act governs appeals from Commission decisions. See § 84-917. Section 84-917(6)(b) provides, "When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings." Because the statute does not provide a standard for determining when remand would be appropriate, the Commission has asked this court to adopt one. The Commission proposes the following standard:

> When certain evidence has been found on appeal to have been inappropriately received and weighed in the original agency decision, a remand to that agency for further proceedings would serve the interests of justice if: (1) additional evidence on a pivotal issue can be shown to be available either on the existing record or by an affirmative post-remand showing by a party; and (2) there is no showing that the party that offered the evidence which was found on appeal to be inappropriately considered in the original proceeding did so in bad faith.

Brief for appellant at 9. The Commission argues that the public interest would be best protected by applying this standard and remanding the matter to the Commission. *Id.*

[3-5] We decline to adopt the Commission's proposed standard. Under § 84-917(6)(b), a district court hearing an appeal from an agency "*may* . . . remand the case for further proceedings." (Emphasis supplied.) Statutory language is to be given its plain and ordinary meaning. We will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. See *24th & Dodge Ltd. Part. v. Acceptance Ins. Co.*, 269 Neb. 31, 690 N.W.2d 769 (2005). Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. When the word "may" appears, permissive or discretionary action is presumed. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005). Thus, under § 84-917(6)(b), a district court has discretion concerning the disposition of an appeal from an administrative agency.

Here, the district court, in its discretion, chose to reverse the Commission's decision, as it was empowered by the Legislature to do. The Commission does not argue that the district court incorrectly decided the case, nor does it argue that the court abused its discretion by failing to remand the matter. Instead, it requests an exception which would allow it another opportunity to produce additional evidence. The Commission had the opportunity in its original hearing to present evidence to support its denial of a liquor license to NLD. It failed to do so, and we see no reason why it should get a "second bite at the apple."

CONCLUSION

We conclude that the district court did not err in failing to remand the matter to the Commission for further proceedings. Therefore, we affirm.

AFFIRMED.

HENDRY, C.J., not participating.

KEITH BOHABOJ, APPELLANT, V.
ERIN RAUSCH, APPELLEE.
721 N.W.2d 655

Filed September 29, 2006. No. S-05-1504.

1. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** Where the trial court's decision on a motion to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) is based upon the complaint and its own determination of a disputed factual issue, the factual finding is reviewed under the "clearly erroneous" standard.
2. ____: ____: ____: ____: ____. Aside from factual findings, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) is subject to de novo review.
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 conclusion reached by the trial court.
5. **Courts: Paternity: Adoption.** Although under Neb. Rev. Stat. § 43-104.05 (Reissue 2004) a father who fails to petition for an adjudication of paternity in county court within 30 days after filing his notice of intent to claim paternity would be precluded from claiming paternity in an adoption proceeding, such father would not be precluded from seeking to establish paternity under the paternity statutes in district court where there is no consent or relinquishment by the mother and no adoption proceeding is pending.
6. **Statutes: Appeal and Error.** In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded for further proceedings.

Anthony W. Liakos, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellant.

Jeffrey A. Wagner and Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Keith Bohaboj filed an action pursuant to the parental support and paternity statutes found in Neb. Rev. Stat. § 43-1401 et seq. (Reissue 2004), in the district court for Douglas County, seeking to establish his paternity of a child born to Erin Rausch. Rausch moved to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) for lack of subject matter jurisdiction. The court found, inter alia, that "Rausch intends to relinquish the child for adoption" and, based on this finding, concluded that the matter was governed by the adoption statutes, Neb. Rev. Stat. § 43-101 et seq. (Reissue 2004), over which the county court has jurisdiction. The district court therefore concluded that it lacked subject matter jurisdiction, granted Rausch's motion, and dismissed the action. Bohaboj appeals the dismissal. We reverse.

STATEMENT OF FACTS

On February 24, 2005, Rausch gave birth to a son in Omaha, Douglas County, Nebraska. The Nebraska Children's Home Society, located in Omaha, sent a letter dated February 28, 2005, to Bohaboj informing him that Rausch intended to execute a relinquishment of the child for adoption. The notice informed Bohaboj that as a possible biological father, he had the right to deny paternity and waive parental rights, relinquish his parental rights and consent to adoption, or file a notice of intent to claim paternity and obtain custody of the child within 5 days of the child's birth or the date of the letter, whichever was later. The letter was received by Bohaboj on March 3, and on March 7, Bohaboj filed a notice of intent to claim paternity and obtain custody with the Nebraska Department of Health and Human Services.

During the period April 15 to May 24, 2005, Bohaboj filed three complaints seeking to establish paternity. Each complaint indicated that Bohaboj and Rausch resided in Colfax County, Nebraska, and that the child was found in Omaha, Douglas County. One complaint was filed in the county court for Colfax County; one complaint was filed in the district court for Colfax

County; and one complaint was filed in the county court for Douglas County. Each complaint was dismissed for lack of jurisdiction.

On July 28, 2005, Bohaboj filed the action that is the subject of this appeal in the district court for Douglas County. Bohaboj fashioned the action as a complaint to establish paternity pursuant to § 43-1401 et seq. Rausch filed a motion to dismiss under rule 12(b)(1) for lack of subject matter jurisdiction and under rule 12(b)(6) for failure to state a claim. The record contains the child's birth certificate, the letter sent to Bohaboj by the Nebraska Children's Home Society, and the notice of intent filed by Bohaboj. Although, the parties stipulated that there had been no actual relinquishment of parental rights to the child by Rausch, the record indicates that there was a dispute as to whether Rausch intends to relinquish the child.

In its order filed December 6, 2005, the district court found that "the record clearly shows that Rausch intends to relinquish the child for adoption." For completeness, we note that elsewhere in its order, the district court found that "Rausch has consented to relinquishment of the minor child." Based on these findings, the district court reasoned that the matter was not a paternity matter under § 43-1401 et seq., as asserted by Bohaboj. Instead, the district court determined that the matter was governed by the adoption statutes and concluded that the case should have been filed in county court. The district court therefore concluded that it lacked subject matter jurisdiction, granted Rausch's motion, and dismissed Bohaboj's action. Bohaboj appeals the dismissal of his action by the district court for Douglas County.

ASSIGNMENTS OF ERROR

Bohaboj claims that the district court erred in determining that it lacked subject matter jurisdiction and in dismissing his action.

STANDARDS OF REVIEW

[1] As discussed above, this action was filed on July 28, 2005, and thus, we apply the new rules for notice pleading. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). This court has not previously discussed the standard of review for a motion to dismiss for lack of subject matter jurisdiction filed under rule 12(b)(1) where the trial court has made a finding of a disputed

issue. Because the new rules are modeled after the Federal Rules of Civil Procedure, we look to the federal decisions for guidance. See, similarly, *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005); *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005). We do hereby determine, as did the Court of Appeals for the Eighth Circuit, that where, as here, the trial court's decision is based upon the complaint and its own determination of a disputed factual issue, we review the finding under the "clearly erroneous" standard. See, *KCCP Trust v. City of North Kansas City*, 432 F.3d 897 (8th Cir. 2005); *Harris v. P.A.M. Transport, Inc.*, 339 F.3d 635 (8th Cir. 2003).

[2] Aside from factual findings, the granting of a motion to dismiss for lack of subject matter jurisdiction under rule 12(b)(1) is subject to de novo review. See *Anderson, supra*.

[3,4] The meaning of a statute is a question of law. *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

Bohaboj claims on appeal that the district court erred in finding that Rausch had relinquished the child for adoption or, in the alternative, that Rausch intends to relinquish the child for adoption. Bohaboj further claims on appeal that the district court erred in concluding that the present action was an adoption matter subject to the adoption statutes, § 43-101 et seq., rather than a general paternity action subject to the general paternity statutes, § 43-1401 et seq. Bohaboj urges this court to reverse the district court's order concluding that it lacked subject matter jurisdiction, thus granting Rausch's motion under rule 12(b)(1) and dismissing the complaint. In response, relying on the adoption statutes, specifically § 43-104.05, Rausch claims that Bohaboj's paternity action under consideration was filed out of time and that because Rausch intends to relinquish the child, the district court did not err in concluding that the matter belonged in county court. We find merit to certain of Bohaboj's arguments and conclude that the district court erred when it ruled it lacked subject matter jurisdiction. Accordingly, we reverse.

In its order, the district court found in one instance that "Rausch has consented to relinquishment." However, the parties stipulated that no actual relinquishment of Rausch's parental rights had been made and there was no evidence to support this finding. The court's finding of relinquishment was unwarranted and for purposes of further analysis we ignore this finding.

Elsewhere in its order, the district court found that Rausch intends to relinquish the child for adoption. Whether Rausch intends to relinquish was a disputed fact, and because there was some evidence to support this finding, we cannot say it was clearly erroneous; and for purposes of analysis, we will accept this finding. However, the district court reasoned that because Rausch may be considering relinquishing the child for adoption, this matter must be considered an adoption case where subject matter jurisdiction is placed in the county court. Given the controlling statutes which we discuss below, the district court erred as a matter of law in concluding that an intention to relinquish for adoption converted this general paternity case, filed in district court under § 43-1401, into an adoption case. Contrary to the district court's ruling, the case remained a paternity action for which the district court had subject matter jurisdiction.

Consideration of several statutes is necessary to our resolution of this case.

Section 43-1411 of the paternity statutes provides in relevant part:

> A civil proceeding to establish the paternity of a child may be instituted, in the court of the district where the child is domiciled or found or, for cases under the Uniform Interstate Family Support Act, where the alleged father is domiciled, by . . . the mother or the alleged father of such child, either during pregnancy or within four years after the child's birth, unless consent or relinquishment has been made pursuant to sections 43-104.08 to 43-104.24 or section 43-105 for purposes of adoption . . . .

Section 43-104.05 of the adoption statutes provides:

> If a notice of intent to claim paternity and obtain custody is timely filed with the biological father registry pursuant to section 43-104.02, either the claimant-father, the mother, or her agent specifically designated in writing shall,

> within thirty days after filing the notice, file a petition for an adjudication of the claim of paternity and right to custody. The petition shall be filed in the county court in the county where such child was born or, if a separate juvenile court already has jurisdiction over the child, in such separate juvenile court. If such a petition is not filed within thirty days after filing the notice, the claimant-father's consent to adoption of the child shall not be required, he is not entitled to any further notice, and any alleged parental rights of the claimant-father shall not be recognized thereafter in any court. After the filing of such petition, the court shall set a trial date upon proper notice to the parties not less than twenty nor more than thirty days after such filing. If the mother contests the claim of paternity, the court shall take such testimony as shall enable it to determine the facts. The claimant-father's rights and the custody of the child shall be determined pursuant to section 43-104.22. The court shall appoint a guardian ad litem to represent the best interests of the child.

We have previously considered these two statutes in relation to each other and the proper application of each statute.

In *Armour v. L.H.*, 259 Neb. 138, 144, 608 N.W.2d 599, 604 (2000), we acknowledged the "obvious tension" between §§ 43-1411 and 43-104.05. In *Armour*, we concluded that a petition to adjudicate paternity filed pursuant to § 43-104.05 is a matter of adoption over which the district courts have no subject matter jurisdiction. We further noted that under § 43-1411, a general paternity proceeding should be brought in district court "unless consent or relinquishment has been made pursuant to sections 43-104.08 to 43-104.24 or section 43-105 for purposes of adoption," § 43-1411, in which case the paternity issue is to be resolved in connection with the adoption matter in county court or under certain circumstances, a separate juvenile court.

Notwithstanding our discussion in *Armour*, Rausch urges us to conclude that Bohaboj's complaint is not only filed in the wrong court but is out of time in any event. We decline to so conclude. In *Armour*, we anticipated and effectively rejected the argument urged by Rausch in the instant case which if accepted would have us conclude that where the father files a notice of

intent to claim paternity with the biological father registry, as Bohaboj did herein, a father seeking to establish paternity would in all cases thereafter be subject to the 30-day limitation period in § 43-104.05, regardless of whether the mother had in fact relinquished or consented to adoption and regardless of the fact that no adoption proceeding was pending.

[5] Contrary to Rausch's argument, we determine that although under § 43-104.05 a father who fails to petition for an adjudication of paternity in county court within 30 days after filing his notice of intent to claim paternity would be precluded from claiming paternity in an adoption proceeding, such father would not be precluded from seeking to establish paternity under the paternity statutes in district court where there is no consent or relinquishment by the mother and no adoption proceeding is pending.

[6] In *Armour*, we noted that § 43-1411 provides generally that a biological father of a child born out of wedlock has 4 years to commence a paternity action in district court. In *Armour*, we stated:

> In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998). We can conceive of no reason why the Legislature would create a procedure whereby the general [4-year] statute of limitations applicable to paternity actions would be drastically shortened [to 30 days] by a biological father's stated intent to bring such an action.

259 Neb. at 144, 608 N.W.2d at 604.

In the instant case, Bohaboj filed a complaint in the district court within 4 years after the child's birth to establish paternity under the general paternity statutes, § 43-1401 et seq. This proceeding was proper "unless consent or relinquishment has been made pursuant to sections 43-104.08 to 43-104.24 or section 43-105 for purposes of adoption." See § 43-1411. There is no claim or evidence of consent to adopt in this case. As noted above, there was a stipulation that Rausch had not relinquished the child and the district court's finding to the contrary was in error. The district court also found that Rausch intends to

relinquish the child and reasoned that such intention converted the action into an adoption matter. This reasoning was an error of law. Given the plain language of § 43-1411, consent or relinquishment must have "been made," not merely contemplated, to exclude the general paternity action from the subject matter jurisdiction of the district court. The district court erred as a matter of law when it concluded that Rausch's intention to relinquish the child transformed the instant action into an adoption matter, thereby depriving the district court of subject matter jurisdiction of this case. The district court's order granting Rausch's motion to dismiss for lack of subject matter jurisdiction must therefore be reversed.

CONCLUSION

On the record before us, the district court for Douglas County had subject matter jurisdiction over Bohaboj's complaint seeking to establish paternity under § 43-1401 et seq. We conclude the district court erred when it granted Rausch's motion to dismiss for lack of subject matter jurisdiction and dismissed Bohaboj's complaint. We reverse the order of dismissal and remand the cause to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

JEFFERY J. MARKSMEIER ET AL., APPELLANTS AND CROSS-APPELLEES, V. MCGREGOR CORPORATION, NOW KNOWN AS MCGREGOR II, L.L.C., A DELAWARE LIMITED LIABILITY COMPANY, ET AL., APPELLEES AND CROSS-APPELLANTS.

722 N.W.2d 65

Filed October 6, 2006. No. S-05-423.

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 appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom

the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Products Liability: Limitations of Actions.** For products manufactured outside of Nebraska, a product liability action must be commenced within the time allowed by the applicable statute of repose, if any, of the state or country where the product was manufactured, but in no event less than 10 years.
4. **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.
5. **Summary Judgment.** Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed.

Daniel P. Bracht, of Law Offices of Daniel P. Bracht, P.C., L.L.O., for appellants.

Lisa M. Meyer, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellees.

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

GERRARD, J.

NATURE OF CASE

Jeffery J. Marksmeier was severely injured when the T-shirt he was wearing caught fire. Marksmeier, Beth Boston, and Harlan Boston (collectively the appellants) brought a product liability claim against McGregor Corporation (McGregor) and various "John Doe" defendants, alleging strict liability and negligence causes of action. After the original complaint had been filed, the appellants amended their complaint to add Delta Apparel, Inc. (Delta), as a defendant. The district court for Cuming County dismissed their amended complaint, and the appellants filed this appeal.

The issues in this appeal are whether the appellants' claims are barred by either the statute of repose or the statute of limitations. Finding that the appellants' claims are barred by the statute of

repose, we affirm the judgment of the district court which had entered summary judgment against the appellants.

BACKGROUND

On April 20, 1999, Marksmeier was seriously injured when the T-shirt he was wearing caught fire while he was placing garbage on a burn pile. The T-shirt Marksmeier was wearing was a one-pocket black T-shirt with the registered trademark of the word "McGregor." The T-shirt was manufactured in Tennessee by Standard Knitting Mills, Inc., pursuant to a licensing agreement with McGregor. The licensing agreement was entered into on September 26, 1983, and granted Standard Knitting Mills permission to manufacture and distribute clothing, including T-shirts utilizing McGregor's trademarks.

In 1986, Standard Knitting Mills stopped manufacturing the type of T-shirt Marksmeier was wearing at the time of the accident. Two years later, Delta merged with Standard Knitting Mills and assumed the licensing agreement. Following the merger, Delta never manufactured one-pocket black T-shirts with McGregor's trademark. The licensing agreement expired on December 31, 1989. Pursuant to the licensing agreement, Delta was prohibited from selling any McGregor-licensed merchandise after June 30, 1990.

Neither Marksmeier nor his mother, Beth Boston, were able to affirmatively state when and how the T-shirt came into their possession. Marksmeier testified in his deposition that he had the T-shirt for "a couple of years" prior to the injury and that the shirt was probably "like a hand-me-down" shirt from "Goodwill." Beth Boston speculated in her deposition that the T-shirt could have come from Marksmeier's aunt. However, when specifically asked about the shirt's origin, she testified she did not know when or where she acquired the shirt.

On April 18, 2003, the appellants filed their original complaint, naming McGregor as a defendant and also naming various "John Doe" defendants. The "John Doe" defendants were alleged to be participants in the manufacture, sale, and distribution of the T-shirt at issue. The appellants alleged a product liability claim based upon theories of negligence and strict liability. The appellants eventually discovered the identity of Delta

and on August 25, 2003, filed an amended complaint naming Delta as an additional defendant.

Delta and McGregor filed motions for summary judgment alleging that the appellants' claims were barred by the 10-year product liability statute of repose and 4-year statute of limitations. McGregor also argued that it was entitled to summary judgment, since it did not manufacture the T-shirt in question. The district court sustained McGregor's motion for summary judgment, finding that McGregor was not the manufacturer of the T-shirt. The court therefore dismissed all claims against McGregor.

Delta's motion for summary judgment was denied. In so doing, the district court concluded that the unrefuted evidence showed that the T-shirt was manufactured in Tennessee no later than 1986 by Standard Knitting Mills. The court determined that the statute of repose in Tennessee for strict liability actions is 10 years from the date on which the product was first purchased or used for consumption. The court concluded that Tennessee's 10-year product liability statute of repose applied to strict liability theories of recovery but did not extend to product liability actions based on negligence. The court concluded that questions of fact existed and overruled Delta's motion.

Delta filed a motion for leave to reopen summary judgment, which was granted. After Delta submitted additional evidence, the district court sustained Delta's second motion for summary judgment. The court determined that pursuant to Neb. Rev. Stat. § 25-201.02(2) (Cum. Supp. 2004), the amended complaint filed by the appellants naming Delta as a defendant did not relate back to the original complaint and was therefore barred by the statute of limitations.

With regard to Delta's 10-year statute of repose argument, the district court found that Delta had offered uncontroverted evidence that the latest possible date the T-shirt could have been placed in commerce for sale to the consumer was June 30, 1990, approximately 13 years before the appellants filed their complaint. The court determined that Delta had presented a prima facie case that the 10-year statutory period of repose had expired prior to the appellants' filing of their complaint. The burden then shifted to the appellants to show that the first retail sale to the

original consumer occurred within the 10-year statute of repose. The district court determined that the appellants failed to produce any such evidence, and as a result, the court concluded that the 10-year statute of repose had expired on the appellants' strict liability claim.

In sum, the district court dismissed the appellants' amended complaint in its entirety as to all the defendants. The appellants then appealed the judgment of the district court, and Delta cross-appealed.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred (1) in determining that the appellants' claims set forth in their amended complaint were barred by the applicable statute of limitations because, pursuant to § 25-201.02(2), the amended complaint did not relate back to the date the original complaint was filed and (2) in finding that there were no genuine issues of material fact relating to Delta's statute of repose and statute of limitations affirmative defenses.

In a cross-appeal, Delta assigns as error the district court's determination that Tennessee's statute of repose applied only to the appellants' strict liability theory of recovery and not to the appellants' negligence theory of recovery. We note that the appellants do not contend that it was error to dismiss McGregor, and thus, we do not consider any issues relating to McGregor in this appeal.

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. *Didier v. Ash Grove Cement Co., ante* p. 28, 718 N.W.2d 484 (2006).

[2] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003).

ANALYSIS

The first issue we address is Delta's argument raised in its cross-appeal that the district court erred in finding that the Tennessee statute of repose does not apply to negligence causes of action. We conclude, based on the relevant Tennessee statute and case law, that Tennessee's statute of repose does apply to negligence claims.

[3] In the present case, the undisputed facts show that the T-shirt in question was manufactured in Tennessee. Nebraska's product liability statute provides in relevant part that for products manufactured outside of Nebraska, the product liability action must be commenced "within the time allowed by the applicable statute of repose, if any, of the state or country where the product was manufactured, but in no event less than ten years." Neb. Rev. Stat. § 25-224(2)(a)(ii) (Cum. Supp. 2004). Thus, the applicable statute of repose is Tennessee's statute of repose which provides:

> Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within [the applicable Tennessee statute of limitations], but notwithstanding any exceptions to these provisions, it must be brought within . . . ten (10) years from the date on which the product was first purchased for use or consumption . . . .

Tenn. Code. Ann. § 29-28-103(a) (2000).

Tennessee courts have interpreted this statute to apply to both negligence and strict liability claims. See, *Greene v. Brown & Williamson Tobacco Corp.*, 72 F. Supp. 2d 882, 887 (W.D. Tenn. 1999) (explaining that "reference to 'any action' in § 29-28-103 has been interpreted broadly, and certainly encompasses Plaintiff's negligence and strict tort liability claims"); *Electric Power Bd. of Chattanooga v. Westinghouse*, 716 F. Supp. 1069, 1073 (E.D. Tenn. 1988) (stating that "[c]laims based on strict liability, negligence, warranty or 'any other substantive legal theory in tort or contract whatsoever' are subject to the statutory limitations prescribed in . . . § 29-28-103(a)"); *Jones v. Methodist Healthcare*, 83 S.W.3d 739 (Tenn. App. 2001) (finding that plaintiffs' negligence cause of action was barred by § 29-28-103(a)). In light of this well-reasoned authority, we conclude the Tennessee

statute of repose does apply to the appellants' strict liability and negligence claims.

We next address whether the district court correctly granted Delta's motion for summary judgment with regard to the expiration of the 10-year statutory period of repose. The appellants contend that genuine issues of material fact exist and that Delta failed to present evidence sufficient to make a prima facie case for summary judgment.

[4] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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. *Didier v. Ash Grove Cement Co., ante* p. 28, 718 N.W.2d 484 (2006). 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 Tennessee statute of repose begins to run on "the date on which the product was first purchased for use or consumption." § 29-28-103(a). This statute is consistent with statutes of repose from Nebraska and other jurisdictions that provide that the statute of repose begins to run on the date the product is sold or delivered to a consumer as opposed to a sale or delivery to a dealer or intermediary. See, e.g., *Wilson v. Studebaker-Worthington, Inc.*, 699 F. Supp. 711 (S.D. Ind. 1987); *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985); *Chicopee, Inc. v. Sims Metal Works*, 98 N.C. App. 423, 391 S.E.2d 211 (1990); *Willis v. Herman Holtkamp Greenhouses, Inc.*, No. 01A01-9011-CV-00429, 1991 Tenn. App. LEXIS 467 (June 7, 1991).

In the present case, neither party was able to affirmatively state when the T-shirt was first sold to a consumer. Marksmeier testified in his deposition that he had the T-shirt for "a couple of years" prior to the injury and that the shirt was probably "like

a hand-me-down" shirt from "Goodwill." Beth Boston speculated that the T-shirt could have come from Marksmeier's aunt. However, when specifically asked, she testified she did not know when or where she acquired the shirt.

Like the appellants, Delta was also unable to point to the specific date the T-shirt was sold to a consumer. However, through the affidavit of Delta's vice president of sales, Delta presented uncontroverted evidence that it did not sell any McGregor-licensed products, including black T-shirts, through any trade channel after June 30, 1990. In light of this evidence, the district court found that the last possible date in which Delta could have delivered the T-shirt to a retailer for sale was June 30, 1990. The court determined that this evidence was sufficient to satisfy Delta's prima facie case for summary judgment, and the burden then shifted to the appellants to show that the first sale to a consumer occurred within 10 years of the filing of the complaint, i.e., within the 10-year window provided by the Tennessee statute of repose. The appellants were unable to do so, and as a result, the district court granted Delta's motion for summary judgment.

The appellants contend that summary judgment was improperly granted because there exists a genuine issue of material fact as to when the T-shirt was first sold to a consumer. Specifically, the appellants speculate that Delta could have sold the T-shirt to a retailer on or before June 30, 1990, and that the T-shirt could have remained, unsold, on the retailer's shelf until finally being sold to a consumer at some point within the 10-year period prior to the filing of their complaint. The appellants did not present any evidence to prove that the T-shirt indeed sat on a retailer's shelf for an extended period of time.

The Seventh Circuit in *Schamel v. Textron-Lycoming*, 1 F.3d 655 (7th Cir. 1993), addressed a similar argument. In *Schamel*, the plaintiff brought a wrongful death action against the defendant, a manufacturer of aircraft parts. The trial court granted the defendant's motion for summary judgment, finding that the plaintiff's product liability action was barred by the Indiana statute of repose. On appeal, the Seventh Circuit Court of Appeals affirmed the district court's judgment. The court found that the uncontradicted evidence showed the defendant had stopped manufacturing

the product 25 years before commencement of the action, the product was sold exclusively by the defendant's distributors, the product was last sold to a distributor 19 years before commencement of the action, and the latest date the product could have been sold was 16 years before the commencement of the action. *Id.*

In *Schamel*, the plaintiff argued that "a part could have stayed on one of the distributor's shelves to be sold [within ten years of the filing of the complaint] bringing the present action within the ten-year window provided by the Indiana statute of repose." 1 F.3d at 656. The court "reject[ed] the plaintiff's contention that the evidence [did] not support the award of summary judgment because the defendant did not establish that a part was not left on a distributor's shelf even after [the defendant] discontinued [the product]." *Id.* at 657. The court explained:

> A defendant need not rebut any and every possible factual scenario in order to obtain summary judgment. Rather, once the defendant had shown that it stopped distributing the part [16 years before filing the complaint], it became incumbent upon the plaintiff to create an issue of fact by making an evidentiary showing to the contrary. She did not. Her belated, unsupported hypothesis of parts in the pipeline is, in short, too little, too late.

Id. at 657-58.

We find the reasoning of *Schamel* to be persuasive. Like the defendant in *Schamel*, Delta presented uncontroverted evidence that it had stopped manufacturing one-pocket black T-shirts in 1986, 16 years before the appellants filed their complaint. Furthermore, Delta's evidence showed the last possible date it could have sold the T-shirt through a trade channel was June 30, 1990, approximately 13 years before the appellants filed their complaint. We conclude that this evidence is sufficient to satisfy Delta's burden of presenting a prima facie case for summary judgment.

[5] The burden then shifts to the appellants to produce evidence showing the existence of a material issue of fact that would prevent judgment as a matter of law. We reject the appellants' assertion that a genuine issue of material fact exists as a result of their argument that the T-shirt at issue could have possibly remained unsold on a retailer's shelf until eventually being

purchased by a consumer within the 10-year statute of repose. Similar to the plaintiff in *Schamel v. Textron-Lycoming*, 1 F.3d 655 (7th Cir. 1993), the appellants in the present case have failed to present any evidence to support their contention that the T-shirt sat on a retailer's shelf. In this regard, we have specifically stated that "[c]onclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment." *Richards v. Meeske*, 268 Neb. 901, 909, 689 N.W.2d 337, 344 (2004). Because the appellants have failed to show the existence of a material issue of fact, we conclude the district court did not err in granting Delta's motion for summary judgment. Because the statute of repose bars the appellants' negligence and strict liability claims, the district court did not err in dismissing the appellants' amended complaint as to all their claims.

This ruling is dispositive; therefore, we need not address the appellants' other assignments of error.

CONCLUSION

Delta was entitled to summary judgment because the 10-year statute of repose had expired on the appellants' negligence and strict liability claims. Accordingly, we affirm the judgment of the district court dismissing the appellants' amended complaint.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
NATHANIEL DECKARD, JR., APPELLANT.
722 N.W.2d 55

Filed October 6, 2006. No. S-05-871.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Records: Proof: Appeal and Error.** In appellate proceedings, unless there is proof to the contrary, the journal entry in a duly authenticated record of the trial court imports absolute verity.
3. **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.

4. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
6. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
7. **Postconviction: Effectiveness of Counsel: Presumptions: Appeal and Error.** After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.
8. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.
9. **Postconviction: Constitutional Law: Effectiveness of Counsel.** There is no constitutional guarantee of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel.
10. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Nathaniel Deckard, Jr., pro se.

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

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

STEPHAN, J.

Nathaniel Deckard, Jr., appeals from an order of the district court for Douglas County denying his motion for postconviction relief following an evidentiary hearing. We find no error and affirm the judgment of the district court.

I. BACKGROUND

On June 26, 1973, Deckard was charged by information with first degree murder for a killing in the perpetration of or the attempt to perpetrate a robbery in Douglas County. His appointed counsel filed a motion to suppress all oral, written, or recorded statements taken from Deckard by Omaha police. Deckard escaped from custody before the motion was resolved. He was subsequently located in Georgia, where he was serving a sentence for a robbery conviction. Deckard ultimately entered into a plea agreement in Nebraska in which he pled guilty to a reduced charge of second degree murder and also pled guilty to the escape charge. On April 25, 1974, he was sentenced to life in prison on the second degree murder conviction and to 10 years in prison on the escape conviction. Pursuant to the plea agreement, the sentences were ordered to be concurrent, and it was further ordered that Deckard's time of confinement in Georgia on the robbery conviction would count toward fulfillment of the murder and escape sentences in Nebraska.

Deckard was released on parole after serving 12½ years. His parole was revoked due to a misdemeanor theft charge and drug use in 1995, and he has been incarcerated since that time. On May 7, 2002, he filed a motion for postconviction relief. After conducting an evidentiary hearing, the district court denied postconviction relief. Deckard filed this timely appeal from the order denying postconviction relief, and we removed the appeal 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). Additional facts relevant to the analysis will be discussed therein.

II. ASSIGNMENTS OF ERROR

Deckard assigns, consolidated, restated, and renumbered, that the district court erred in (1) failing to find that his due process rights were violated by the lack of a verbatim record of certain

proceedings held in 1973 and 1974, (2) taking judicial notice of docket entries, (3) failing to find that his trial counsel was ineffective for failing to file an appeal after being requested to do so, (4) failing to find that his trial counsel was ineffective in not securing Deckard's presence at a suppression hearing, (5) failing to find that his trial counsel was ineffective for advising him to plead guilty to an amended charge of second degree murder, (6) failing to find that an admission by his trial counsel was prejudicial to Deckard's defense, (7) failing to address Deckard's claims of ineffective assistance of postconviction counsel, and (8) failing to observe the canon of impartiality by purveying false information in the final order.

III. STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006); *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

IV. ANALYSIS

1. Lack of Verbatim Record

The record establishes that sometime before November 14, 1978, the stenographic notes of the proceedings on Deckard's motion to suppress, plea, and sentencing were inadvertently destroyed. It is therefore impossible to prepare a transcript or bill of exceptions of the criminal proceedings.

The record does, however, contain the docket sheet from the criminal case, which includes the following entry for August 29, 1973: "Plaintiff appeared by counsel . . . . Defendant present with counsel . . . . Evidence adduced by Defendant in support of his Motion to Suppress filed August 29, 1973, and by Plaintiff in opposition thereto." The judge's initials appear next to this entry. A docket entry dated April 15, 1974, provides:

> Defendant present with counsel . . . . Plaintiff represented . . . . With leave of Court plaintiff filed an amended Information charging Second Degree Murder. Defendant waived preliminary hearing and service of a copy of the Information 24 hours heretofore. Defendant was arraigned and after advise [sic] by the Court as to his rights, defendant

> voluntarily, knowingly and intelligently entered a plea of guilty to the amended Information and thereupon was adjudged by the Court to be guilty as charged and a judgment of conviction entered thereon.

The judge's initials appear next to this entry. A docket entry dated April 25, 1974, states: "Defendant present in Court with counsel . . . . Defendant was informed of conviction for the crime of second degree murder and stated no reason why sentence should not be passed against him." The judge's initials appear next to this entry.

Deckard contends that the lack of a verbatim record of the proceedings violates his due process rights. In a similar situation, the U.S. Supreme Court held that no constitutional rights were violated. *Norvell v. Illinois*, 373 U.S. 420, 83 S. Ct. 1366, 10 L. Ed. 2d 456 (1963). The defendant in *Norvell* was convicted of murder in 1941. Although he was indigent, he had counsel at the time of trial. He did not appeal. In 1956, the defendant requested a stenographic record of his trial. The official court reporter had died, and no one could read his shorthand notes. Efforts to reconstruct the trial through the testimony of persons who had attended were unsuccessful, and thus in 1956, it was not possible for Illinois to supply the defendant with adequate appellate review of his conviction. The U.S. Supreme Court reasoned that although *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956), held that an indigent defendant could not be denied a direct appeal, "[w]hen, through no fault of the State, transcripts of criminal trials are no longer available because of the death of the court reporter, some practical accommodation must be made." *Norvell*, 373 U.S. at 424. The Court concluded that under the circumstances, the defendant's right to due process was not violated.

[2] Notably, the instant case involves a postconviction proceeding, not a direct appeal. Moreover, in Nebraska the controlling rule is that in appellate proceedings, unless there is proof to the contrary, the journal entry in a duly authenticated record of the trial court imports absolute verity. *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992). The judge's entries on the docket sheet in the record before us provide an adequate basis for our review of Deckard's postconviction claims.

We conclude that the lack of a verbatim record of the proceedings does not violate Deckard's right to due process.

2. Judicial Notice

During the postconviction evidentiary hearing, the State requested that the court take judicial notice of all the court files and records related to Deckard's postconviction claims. Deckard's counsel did not object, and the court took judicial notice of its files and records. After the conclusion of the evidentiary hearing, Deckard filed pro se objections to the taking of judicial notice. The court allowed him to make a record of his objections. Deckard argued, generally summarized, that judicial notice of the record, particularly the docket sheet, was improper because he disputed its factual accuracy.

[3] In its order denying postconviction relief, the court noted that it was proper for it to take judicial notice of the file, records, and docket sheet in the prior proceeding, as all related to the case upon which Deckard sought postconviction relief. 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. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). Neb. Rev. Stat. § 29-3001 (Reissue 1995) specifically authorizes a district court to review "files and records of the case" in a postconviction proceeding. Although Deckard disputes the factual accuracy of the journal entries, the district court found that his testimony was not credible. We find no error in the decision of the district court to take judicial notice of its docket sheet in the criminal proceeding.

3. Ineffective Assistance of Counsel

[4-6] Deckard contends that he is entitled to postconviction relief because his trial counsel was ineffective. Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005). When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

(a) Failure to Appeal

[7] Deckard's initial contention is that his trial counsel failed to file a direct appeal after being directed to do so. After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). At the evidentiary hearing on the postconviction motion, Deckard testified that he asked his trial counsel to file an appeal on the excessiveness of his sentences within 5 days of the 1974 sentencing. His trial counsel, however, testified that Deckard never requested an appeal and that counsel specifically discussed the effect the plea bargain would have on Deckard's appeal rights. The district court found that the testimony of trial counsel was credible and that the evidence did not support Deckard's claim. We find no clear error in this finding and affirm that there was no ineffective assistance of counsel in this regard.

(b) Attendance at Suppression Hearing

As noted, there is no verbatim record of the suppression hearing. Deckard claims that no suppression hearing occurred and that even if it did, he was not permitted to attend. He alleges that

his trial counsel was ineffective for failing to ensure his attendance at the hearing.

Deckard's trial counsel testified that there was a suppression hearing at which Deckard attended and testified. The docket entry, initialed by the trial judge, states that the suppression hearing was held on "8 29 73" and that "[d]efendant [was] present with counsel." Based on this record, we conclude that the district court was not clearly erroneous in determining that a suppression hearing took place and that Deckard was present at the hearing. Trial counsel was not ineffective in this respect.

(c) Advising Deckard to Plead Guilty to Second Degree Murder

Deckard contends that his trial counsel was ineffective for advising him to plead guilty to the second degree murder charge. His argument is based on the premise that counsel's performance was deficient because he failed to inform Deckard that the motion to suppress was still pending at the time the plea was entered into.

The motion to suppress sought to exclude from evidence "all statements, oral, written or recorded, taken from [Deckard] on or about June 2, 1973, by the Omaha Police Department" on the basis that the statements were involuntary. Shortly after the crimes were committed and after Deckard had been arrested, he gave at least two statements to police. In the first statement, he admitted to the killing but denied that it was committed in the course of a robbery. In the second statement, he admitted that the killing was done in the course of a robbery or an attempted robbery. This second statement was recorded. Although his argument is not clear, Deckard generally contends that both statements were inadmissible evidence that should have been suppressed.

At the evidentiary hearing on the postconviction motion, Deckard's trial counsel testified about what occurred with respect to the statements during the suppression hearing. According to counsel, one police officer swore the initial nonrobbery confession was never recorded, one officer thought it might have been, and one officer testified that it was and that he erased it at the direction of another officer. Trial counsel also testified about the substance of Deckard's testimony at the suppression hearing.

According to trial counsel, Deckard testified that he initially confessed to the murder but in doing so, explained that it did not take place during a robbery. Deckard testified that he later told the police that the murder was committed during a robbery because he was coerced by the police into believing such a confession would result in a lesser charge.

The record reveals that the motion to suppress was never ruled upon. Deckard generally argues that trial counsel was ineffective for advising him to plead guilty prior to the resolution of the suppression motion. At the time the plea was entered, Deckard was facing a charge of first degree murder, with a maximum sentence of death. He also was facing an escape charge and had time remaining on a sentence in Georgia. His trial counsel succeeded in getting the first degree murder charge reduced to second degree murder and in having the sentence on the escape conviction and the Georgia sentence run concurrent to the second degree murder sentence. Deckard was ultimately sentenced to a term of life imprisonment on the murder conviction, which at the time meant a maximum of life imprisonment and a minimum of 10 years' imprisonment prior to the time he would be eligible for parole. See Neb. Rev. Stat. §§ 28-402 (Reissue 1964) and 83-1,105 (Cum. Supp. 1974). The record reflects that he was paroled after serving 12½ years.

We addressed a somewhat similar situation in *State v. Herren*, 212 Neb. 706, 325 N.W.2d 151 (1982). In *Herren*, the defendant was originally charged with first degree murder and attempted first degree murder. A motion to suppress was filed. While the court's decision on the motion was pending, trial counsel succeeded in persuading the State to file an amended information charging the defendant with second degree murder and second degree assault. The defendant entered a plea of no contest to the reduced charges and was ultimately sentenced to a term of 35 years' imprisonment on the second degree murder conviction and to 20 months' to 5 years' imprisonment on the assault conviction. In rejecting the defendant's claim that his trial counsel was ineffective, we cited the significant evidence against the defendant and noted that counsel did a masterful job of significantly reducing the charges. We found that the defendant's contention that trial counsel was ineffective for failing to wait for

the outcome of the motion to suppress was without merit, reasoning that once the defendant entered his plea, "the court's ruling on the motion to suppress was irrelevant." *Herren*, 212 Neb. at 712, 325 N.W.2d at 155.

In this case, considering the magnitude of the sentences Deckard faced, the potential evidence that could have been used against him at trial, and the favorable sentences negotiated in the plea agreement, we conclude that the district court did not err in concluding that trial counsel did not perform deficiently by advising Deckard to accept the plea.

4. Trial Counsel's Admissions

[8] Deckard assigns that the postconviction court erred in failing to recognize what he characterizes as the inherent prejudice to his case which came to light during the evidentiary hearing on the postconviction motion. He contends that this prejudice occurred when his trial counsel testified about the possible destruction of the tape recording of the statement in which he admitted to the killing but claimed it was not done during a robbery. This argument was not raised in his original postconviction motion. Although Deckard filed three additional pro se motions after the evidentiary hearing, none of them raised this argument. An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001).

To the extent the argument is preserved in the record before us, we conclude that it relates to Deckard's assignment that trial counsel was ineffective for advising him to plead prior to resolution of the suppression motion, which we have already concluded is without merit.

5. Postconviction Counsel

Deckard argues that the postconviction court erred in failing to address his complaints against his postconviction counsel. These complaints were made via a series of ex parte letters written by Deckard to the district court after the postconviction evidentiary hearing. Liberally construed, the letters alleged that his postconviction counsel was ineffective for various reasons.

[9] There is no constitutional guarantee of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel. *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005); *State v. Dandridge*, 264 Neb. 707, 651 N.W.2d 567 (2002). Any claim made by Deckard with respect to ineffective assistance of his postconviction counsel is without merit.

6. Judicial Impartiality

The district court gave several reasons for its conclusion that the evidence did not support Deckard's claim that he asked his trial counsel to file a direct appeal, including the following:

> [A]t Deckard's request [trial counsel] assisted Deckard in getting him transferred to Nebraska from Georgia in July of 1977. Thus, within three years of his sentence in this case, Deckard requested and obtained [trial counsel's] professional assistance. Deckard's action in 1977 certainly negates his claim that [trial counsel] failed to comply with any request to file an appeal in 1974.

Deckard argues that there is "absolutely no truth" to this finding and that it calls into question the impartiality of the district judge. Brief for appellant at 28.

Contrary to Deckard's argument, there is some evidence in the record to support the finding. Trial counsel testified that Deckard requested that he attempt to arrange his transfer from Georgia to Nebraska to serve his sentences and that counsel took certain actions in response to this request. Although the record is somewhat ambiguous as to when this occurred, the district court's resolution of this collateral issue does not suggest bias or partiality under an objective standard of reasonableness. See *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). This assignment of error is without merit.

7. Motion for New Evidentiary Hearing

[10] After his appeal was fully briefed and several days before oral argument, Deckard filed a pro se "Motion for a New Evidentiary Hearing" in this court requesting that we remand the cause to the district court in order "to prevent a miscarriage of justice." In his motion, Deckard asserts various arguments and assignments of error which are not included in his brief

and, in some instances, were not raised in the district court. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006). An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001). We conclude that the matters asserted in the motion are not properly before us in this appeal, and we therefore overrule the motion.

V. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court denying Deckard's motion for postconviction relief, and we overrule his pro se motion for a new evidentiary hearing filed in this court.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM WHITE, APPELLANT.
722 N.W.2d 343

Filed October 6, 2006. No. S-05-1028.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.

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

Clarence E. Mock and Matthew M. Munderloh, of Johnson & Mock, for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

William White appeals his convictions in the district court for Phelps County on eight counts of theft by unlawful taking or disposition. White was charged with the theft of grain which was being stored by farmers at a warehouse owned by White. On appeal, White asserts that his convictions should be set aside because the evidence presented at trial was insufficient to prove that the grain at issue was the "property of another" as defined by statute and that the evidence was insufficient to prove that he had the intent to deprive the farmers of their grain. We affirm White's convictions.

STATEMENT OF FACTS

White was the president and owner of Atlanta Elevator, Inc. (AEI), a public grain warehouse located in Atlanta, Nebraska. On March 11, 2002, warehouse examiners from the Nebraska Public Service Commission (PSC) inspected AEI and determined that the quantities of grain actually in storage with AEI were significantly below the amount necessary to cover AEI's apparent storage obligations. As a result of the inspection, AEI voluntarily surrendered its grain warehouse license and the PSC took control of the facilities and assumed title to all grain in storage at the warehouse for the benefit of the owners, depositors, and storers of the grain. There ensued certain claims to the grain. The PSC denied various claims, and we affirmed certain denials after the claimants appealed. *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

The State brought criminal charges against White in connection with events surrounding the insolvency of AEI. These charges gave rise to the instant criminal case. On February 23, 2004, the State filed an information charging White with nine counts of theft by unlawful taking or disposition in violation of Neb. Rev. Stat. § 28-511 (Reissue 1995). Each count alleged that the property involved had a value over $1,500, making each count a Class III felony under Neb. Rev. Stat. § 28-518(1) (Reissue 1995). One of the nine counts was dismissed on the State's motion at trial. The eight remaining counts involved corn and soybeans owned by several farmers. It was alleged in each count that White had unlawfully exercised control over movable property of another with the intent to deprive him thereof, causing monetary loss in excess of $1,500.

At the trial held June 13 through 16, 2005, the State presented evidence intended to prove that each farmer had exclusive ownership of a quantity of corn or soybeans he had deposited. The evidence included a showing that each of the farmers had filed claims with the PSC asserting that he had grain in an "open storage" arrangement with AEI as of March 11, 2002. Pursuant to an "open storage" arrangement, the farmers deposited grain with the warehouse for storage for an agreed-upon fee but retained title and ownership to the grain. Certain of the farmers also testified that they had received scale tickets evidencing their ownership. At trial, White claimed that AEI had "price later" contracts with the farmers which entitled them to the proceeds of the sale of corn or soybeans rather than an ownership of grain. Pursuant to a "price later" contract, title and ownership of grain held in open storage is transferred to the warehouse. Although AEI records indicated that the farmers had "price later" contracts for the grain at issue, none of the price later contracts in AEI's files were signed. Each of the farmers testified at trial that he had an open storage arrangement, that he retained ownership of the grain, and that either he never received a price later contract or he received such contract but never signed it. Each farmer admitted on cross-examination that he had not requested a warehouse receipt from AEI relating to the grain.

The evidence shows that the farmers delivered their grain to AEI in September and October 2001. AEI records showed that

from September 2001 through February 2002, AEI issued significant quantities of collateral warehouse receipts pursuant to which a purchaser advanced 90 percent of the price to AEI and AEI became obligated to ship the grain at a later date. The amount of grain for which AEI issued warehouse receipts exceeded the amount shown by AEI records to be in inventory. A federal warehouse examiner conducted an examination on February 20, and following the examination, the examiner informed White of the shortages. It was during this period, in early 2002, that AEI sent the price later contracts to the farmers in this case. Changing the status of the farmers' grain from open storage to price later, if successful, would allow AEI to reflect the grain as being owned by AEI rather than by the farmers. When the PSC took control of AEI's warehouse in March, AEI records purported to show that the farmers' grain was being held under price later contracts.

Following trial, on July 13, 2005, the district court found White guilty of eight counts of theft. On August 18, the court sentenced White to imprisonment for 6 to 10 years on each count with the sentences to be served concurrently. White appeals his convictions.

ASSIGNMENTS OF ERROR

White generally asserts that there was not sufficient evidence to support his convictions. He specifically asserts that the evidence indicated that he was "privileged to infringe" upon the grain of each farmer and that therefore, the grain was not the "property of another" as those expressions are used in Neb. Rev. Stat. § 28-509 (Reissue 1995) and § 28-511. White also asserts that there was not sufficient evidence to establish that he had the intent to deprive the farmers of their grain.

STANDARD OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the

finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

ANALYSIS

White makes the general assertion that the evidence was insufficient to support his convictions, and he argues that the evidence was insufficient in two specific respects, which we discuss separately.

Evidence Was Sufficient to Support Finding That Grain Was "Property of Another."

White first argues that the evidence was not sufficient to support a finding that the grain at issue was the "property of another" as required to find him guilty of theft under § 28-511. We conclude that there was sufficient evidence for the district court to find that grain was being held by AEI for the farmers under open storage arrangements and that therefore, the grain was the property of the farmers.

Section 28-511(1) provides that one is "guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." In § 28-509(6), "[p]roperty of another" is defined in part as "property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property."

At trial in this case, all the farmers testified that they had grain stored at AEI in an open storage arrangement pursuant to which the farmers retained title and ownership of the quantity of grain they had deposited. The farmers all testified that they had never signed price later contracts that would have transferred title to AEI. For completeness, we note that some of the farmers testified that they had received scale tickets when they delivered the grain and that an employee of AEI testified that part of the routine when receiving grain for open storage was to issue scale tickets. In this regard, we note that pursuant to Neb. Rev. Stat. § 88-535 (Reissue 1999), a scale ticket is "prima facie evidence of the holder's claim of title to the goods described in such ticket."

White argues that he cannot be guilty of theft of the grain because the grain was not the "property of another." White asserts that the grain was under price later contracts pursuant to which he was "privileged to infringe" on the interests of the farmers. Although there was evidence that White prepared and sent price later contracts to the farmers, the contracts were not signed by the farmers. Such grain contracts must be signed by all parties pursuant to the PSC's grain warehouse rules and regulations. See 291 Neb. Admin. Code, ch. 8, § 002.07E6 (1994) (now found at § 002.07H6).

We need not determine whether White would have been "privileged to infringe" on the farmers' interests under price later contracts, because the evidence was sufficient for the district court as finder of fact to have believed the farmers' testimony and other evidence. The court found that the grain was delivered to AEI pursuant to open storage arrangements and that the farmers never agreed to change the arrangements to price later contracts. Under their open storage arrangements, the farmers retained title and ownership and White was not privileged to infringe on their ownership interests by disposing of the grain without their permission. Therefore, there was sufficient evidence from which the district court could have found that the grain was the "property of another," and we reject White's argument to the contrary.

Evidence Was Sufficient to Support Finding That White Had Intent to Deprive Another of Property.

White next argues that the evidence was not sufficient to support a finding that he had the intent to deprive the farmers of their grain as required for a finding of guilt under § 28-511. We conclude that there was sufficient circumstantial evidence for the district court to find that White intentionally disposed of the grain in such a way as to create a substantial risk that the farmers would not recover the quantity of grain to which they were entitled and that therefore, White had the required intent to deprive the farmers of their property.

Under § 28-511(1), theft requires "the intent to deprive" another of property. Under § 28-509(1)(b), one of the definitions of "deprive" is "[t]o dispose of the property of another so as to create a substantial risk that the owner will not recover it in the condition it was in when the actor obtained it."

[2] When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006). There was evidence in the present case from which the district court could have inferred that White intentionally disposed of the grain in such a way as to create a substantial risk that the farmers would not recover the quantity of grain to which they were entitled, and such intent would support a finding of guilt.

Documentary evidence and testimony indicated that after the farmers delivered their grain to AEI, AEI sold the grain and incurred commitments to deliver grain in amounts that exceeded what it had available, causing AEI to be out of position. At the time AEI was out of position, in a flurry of activity, AEI prepared and sent price later contracts to the farmers and also changed its records to purportedly show that such grain was held under price later contracts rather than in open storage. The effect of changing the classification of the farmers' grain was to make AEI records appear to show that the grain was owned by AEI rather than the farmers. Testimony indicated that such actions of AEI were taken at the direction and under the control of White. White's dealings with regard to the grain at a time when AEI was out of position created a substantial risk that the farmers would not recover the quantity of grain to which they were entitled. The court could infer from White's actions that he intentionally took such actions knowing that they would create such substantial risk.

White argues that the evidence is not sufficient to establish that he had the intent to permanently deprive the farmers of the grain. He argues instead that the evidence showed that he knew what was owed to each farmer and that he thought he would be able to rectify AEI's problems and make the proper quantity of grain available to the farmers. However, the statutory definition of "deprive" noted above does not necessarily require that one intend to permanently deprive another of his or her property; instead, it is sufficient if one intentionally creates a substantial risk that the other person will not recover the property in its

original condition. The evidence in this case was sufficient for the court to find that White intentionally created a substantial risk that the farmers would not recover their proper quantity of deposited grain, thus depriving the farmers of their property. We therefore reject White's argument.

CONCLUSION

We conclude that the evidence in this case was sufficient for the court to find that the grain was the "property of another" and that White had the "intent to deprive" the farmers of the quantity of grain to which they were entitled. The evidence was sufficient to support the convictions for theft. We therefore reject White's assignments of error and affirm his convictions.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
CARL M. HUMBERT, APPELLANT.
722 N.W.2d 71

Filed October 6, 2006. No. S-05-1221.

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 Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
4. ____: ____. The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
5. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
6. ____: ____. While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the clause does not prohibit the State from prosecuting a defendant for multiple offenses in a single prosecution.

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

Daniel W. Ryberg for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Carl M. Humbert (Humbert) was charged by information with two misdemeanors and four felonies. He pleaded no contest to the misdemeanor charges and filed a plea in bar asserting that prosecution on the two corresponding felony charges in the information is barred by the Double Jeopardy Clauses of the state and federal Constitutions. The district court overruled Humbert's plea in bar, and he filed this interlocutory appeal.

SCOPE OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law. *State v. Furrey*, 270 Neb. 965, 708 N.W.2d 654 (2006). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

FACTS

The charges against Humbert were filed after his estranged wife, Mayra Humbert (Mayra), claimed that on the evening of April 27, 2005, Humbert had stabbed her and restrained her from leaving the residence the couple had previously shared in Bellevue, Nebraska. Humbert then allegedly tied Mayra to a chair or couch with an extension cord so he could retrieve her cellular telephone from her vehicle. After Humbert returned to the residence, he untied Mayra. At approximately 1:15 a.m., she escaped from the residence and was later treated at an Omaha hospital for her injuries.

Humbert told police that he and Mayra had argued on April 27, 2005. In order to scare Mayra, he picked up a "ceremonial type" knife that was on a counter in the residence. Humbert said that as Mayra approached him, she "walked into the knife." Humbert saw blood on Mayra's pants, but he did not ask her if she was hurt.

Humbert was charged by complaint in county court with four felonies: first degree false imprisonment, second degree assault (domestic violence), terroristic threats, and use of a weapon to commit a felony. After he was bound over to district court, an information was filed charging Humbert with the same four felony counts and two additional misdemeanors: second degree false imprisonment and third degree assault (domestic violence). At arraignment, Humbert stood mute. Counsel informed the district court that Humbert was filing a plea in abatement and a motion to quash on the four felony charges. Humbert then pleaded no contest to the misdemeanor charges.

The district court examined Humbert and determined that he understood the charges, the possible penalties, and his constitutional rights. Upon finding that Humbert's pleas of no contest were voluntarily, freely, and intelligently made, the court then found him guilty of the misdemeanor charges.

After his conviction on the misdemeanor charges, Humbert filed a plea in bar alleging that (1) second degree false imprisonment is a lesser-included offense of first degree false imprisonment; (2) third degree assault (domestic violence) is a lesser-included offense of second degree assault (domestic violence); (3) the charges of first degree false imprisonment and second degree assault (domestic violence) are barred by double jeopardy as set forth in article I, § 12, of the Nebraska Constitution and the Fifth Amendment to the U.S. Constitution; and (4) the use of a weapon to commit a felony charge is moot. The district court overruled the plea in bar.

ASSIGNMENT OF ERROR

Humbert claims the district court erred in overruling his plea in bar.

ANALYSIS

[3,4] In this interlocutory appeal, Humbert argues that his right not to be subjected twice to trial and conviction for the same crime has been violated. The Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protect 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). The

protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *Id.*

[5] The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). Humbert argues that he is being threatened with multiple punishments for the same offense because all of the charges arose from the same incident. Humbert claims that the two misdemeanors to which he pleaded no contest are lesser-included offenses of first degree false imprisonment and second degree assault (domestic violence) and therefore prosecution on the corresponding felony charges is barred by these convictions.

The U.S. Supreme Court addressed this issue in *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). Respondent Kenneth Johnson was indicted by an Ohio grand jury for four offenses: murder, grand theft, involuntary manslaughter, and aggravated robbery, which resulted from the killing of the victim and the theft of property from the victim's apartment. Johnson offered to plead guilty to charges of involuntary manslaughter and grand theft, but he pleaded not guilty to charges of murder and aggravated robbery. The trial court accepted the guilty pleas and dismissed the remaining charges because it concluded that involuntary manslaughter and grand theft were lesser-included offenses of murder and aggravated robbery, respectively. The court determined that continued prosecution of murder and aggravated robbery charges after acceptance of Johnson's guilty pleas on involuntary manslaughter and grand theft was barred by the Double Jeopardy Clause. The Ohio Supreme Court affirmed, and the State appealed to the U.S. Supreme Court.

The U.S. Supreme Court noted the basic protections offered by the Double Jeopardy Clause and stated: "In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion

of courts is confined to the limits established by the legislature." *Ohio v. Johnson*, 467 U.S. at 499.

[6] The Court pointed out that the trial court's dismissal of the more serious charges completely halted the proceedings which would ultimately have led to a verdict of guilt or innocence on those charges. In the event of a guilty verdict, the trial court would have had to confront the question of cumulative punishments, but that stage of the prosecution was never reached because the trial court dismissed the more serious offenses. "While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution." *Ohio v. Johnson*, 467 U.S. at 500.

The Court noted that Johnson had not been exposed to conviction on the charges to which he pleaded not guilty, "nor ha[d] the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial." *Ohio v. Johnson*, 467 U.S. at 501.

> The acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending, moreover, has none of the implications of an "implied acquittal" which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses. [Citations omitted.] There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. On the other hand, ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws.

Ohio v. Johnson, 467 U.S. 493, 501-02, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984).

The Court stated, "Notwithstanding the trial court's acceptance of [Johnson's] guilty pleas, [Johnson] should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Ohio v. Johnson*, 467 U.S. at 502. Thus, the Double Jeopardy Clause did not prohibit the State from continuing its prosecution of Johnson on the more serious charges.

In the case at bar, Humbert pleaded no contest to second degree false imprisonment and third degree assault (domestic violence), which may be lesser-included offenses of two of the felony charges—first degree false imprisonment and second degree assault. See, e.g., *State v. Brownell*, 11 Neb. App. 68, 644 N.W.2d 166 (2002); *State v. Bachelor*, 6 Neb. App. 426, 575 N.W.2d 625 (1998).

The State is not seeking a subsequent prosecution of Humbert for a greater offense after he had previously been tried for the lesser-included offense. There has been no trial on any of the charges. Humbert has pleaded no contest to the above-described misdemeanors, but he has not been sentenced and he has not been subjected to a trial on the felony charges.

This case is analogous to the situation presented in *Ohio v. Johnson, supra*. The State has not yet had an opportunity to prosecute Humbert on all of the charges. Humbert can assert his double jeopardy claims as to cumulative punishments based on convictions for greater and lesser offenses when and if that issue is presented. Based upon *Ohio v. Johnson*, we conclude the facts of this case do not demonstrate a present violation of the Double Jeopardy Clause.

Humbert relies upon *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006), to support his contention that double jeopardy protections apply upon acceptance of a plea. In *Vasquez*, the State filed an exception to the order of the district court. State law provides that when the prosecuting attorney takes exception to a trial court decision pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), the judgment of the trial court "shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy." Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2004).

We stated in *Vasquez* that jeopardy attaches (1) when the jury is impaneled and sworn in a case tried to a jury, (2) when a judge begins to hear evidence as to the guilt of the defendant in a case heard without a jury, or (3) at the time the trial court accepts the defendant's guilty plea. We held that jeopardy attached when the trial court accepted the defendant's guilty plea and that, therefore, the trial court's judgment could not be reversed or affected in any way by the State's filing of an exception to the district

court's order. However, in the case at bar, the point at which jeopardy attaches is not the issue.

Issues regarding the grant or denial of a plea in bar are questions of law. *State v. Furrey*, 270 Neb. 965, 708 N.W.2d 654 (2006). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.* We conclude that the district court properly overruled Humbert's plea in bar. Double jeopardy protects a defendant against cumulative punishments for convictions on the same offense; however, it does not prohibit the State from prosecuting a defendant for multiple offenses in a single prosecution. See *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984).

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

MIKE ROSELAND ET AL., APPELLEES AND CROSS-APPELLANTS, V. STRATEGIC STAFF MANAGEMENT, INC., APPELLANT AND CROSS-APPELLEE.

722 N.W.2d 499

Filed October 20, 2006. No. S-04-627.

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. **Employer and Employee: Wages: Penalties and Forfeitures.** Under Neb. Rev. Stat. § 48-1232 (Reissue 2004), it is in the court's discretion whether to order an employer to pay to the common schools fund an amount equal to the judgment.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and MOORE, Judges, on appeal thereto from the District Court for Douglas County, RICHARD J. SPETHMAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jeffrey A. Silver for appellant.

Mary L. Hewitt, of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O., for appellees.

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

WRIGHT, J.

NATURE OF CASE

The Douglas County District Court determined that four former employees of Strategic Staff Management, Inc. (Strategic), were entitled to compensation for accrued but unused vacation time upon their voluntary resignations. The district court also awarded the employees attorney fees. The Nebraska Court of Appeals concluded that the district court had erred in awarding the compensation and the attorney fees. See *Roseland v. Strategic Staff Mgmt.*, 14 Neb. App. 434, 708 N.W.2d 841 (2006). We granted the employees' petition for further review.

SCOPE 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. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006).

FACTS

Mike Roseland, Tim Brotzki, Tom Lentz, and Loyce Meister (collectively referred to as "the employees") are former employees of Strategic who each resigned voluntarily during the summer of 1998. At the time of their resignations, Roseland and Brotzki each had 3 weeks of accrued vacation, Meister had 2 weeks, and Lentz had 1 week. In March 2000, each of the employees sent a letter to Strategic demanding payment for his unused vacation time, but Strategic refused to make payment.

In April 2000, the employees commenced this action pursuant to the Nebraska Wage Payment and Collection Act (Wage Act), Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1998). They sought wages, attorney fees, and additional relief available pursuant to the Wage Act, including payment to a fund to be distributed to the common schools of this state (which we will

refer to as "the common schools fund"). The matter was eventually submitted to the district court upon a stipulation of facts. Among the exhibits received into evidence was Strategic's employee handbook, which provided for paid vacation for full-time employees depending upon the length of their employment. After 1 year of continuous service, employees were eligible for 1 week of paid vacation. After 2 years, they were eligible for 2 weeks of paid vacation, and after 5 years of continuous service, they were eligible for 3 weeks of paid vacation. However, the handbook stated, "Upon termination, employees will not be paid for unused vacation time." (Emphasis in original.)

The district court found that Strategic's employee handbook directly conflicted with state law and was therefore void. It awarded the employees payment for their unused vacation time and attorney fees equal to 25 percent of the unpaid wages. The court found that there was a reasonable dispute as to whether wages were owed, and it declined to find that Strategic acted willfully. Therefore, the court did not order Strategic to pay an award to the common schools fund.

Strategic timely appealed to the Court of Appeals, which concluded that the district court had erred as a matter of law in awarding the employees compensation for their unused vacation time. The Court of Appeals reversed both the judgment in favor of the employees and the award of attorney fees. The employees filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

In summary, the employees claim that the Court of Appeals erred (1) in concluding that the employee handbook, as opposed to the Wage Act, controlled their entitlement to payment for earned and unused vacation upon termination of their employment and (2) in reversing the award of attorney fees. The employees also question the amount of attorney fees awarded and have preserved for our consideration the question of whether Strategic should be ordered to make payment to the common schools fund.

ANALYSIS

The issue before us is the validity of the provision in Strategic's employee handbook which states: "Upon termination, employees

will not be paid for unused vacation time." (Emphasis in original.) In concluding that such provision was enforceable, the Court of Appeals relied upon our decision in *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004).

Our decision in *Rosno* is not decisive of the issue presented. *Rosno* concerned the enforceability of a noncompetition covenant in a professional employment agreement. Stephen Rosno, an employee of a separate accounting firm, performed the majority of the work in the tax practice area for Professional Business Service Co. (PBS). Eventually, PBS hired Rosno and the parties signed a professional employment agreement which, in addition to the noncompetition covenant, provided that Rosno would receive 3 weeks of paid vacation per year.

When Rosno left his employment with PBS, the company sued for breach of the noncompetition covenant. Rosno counterclaimed for unpaid vacation and sick leave. The trial court found that the covenant was unenforceable and also awarded Rosno payment for 32 hours of vacation and 72 hours of unused sick leave.

One of PBS' arguments on appeal was that the trial court erred in finding that Rosno was owed payment for unused vacation and sick leave. We affirmed the judgment of the trial court and concluded that although Rosno's employment agreement did not define an " 'employee benefit plan,' " the Wage Act defined " 'fringe benefits' " to include " 'sick and vacation leave plans . . . .' " *Professional Bus. Servs. v. Rosno*, 268 Neb. at 114, 680 N.W.2d at 187, quoting § 48-1229(3). Therefore, Rosno was entitled to receive payment for the vacation and sick leave. We did not address whether PBS' handbook conflicted with the Wage Act because the terms of the employee handbook permitted Rosno to receive compensation for earned but unused vacation and sick leave.

Our decision in *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997), is instructive in the case at bar. Brad Moore was employed as a personnel recruiter by Eggers Consulting Company, Inc. (Eggers), from May 1989 to August 1992. His duties included solicitation of, consultation with, and placement of employee prospects. In August 1989, Moore was asked to sign an employment agreement which provided that

employees would not compete with Eggers within a geographic area, namely the continental United States, for a specified time period of 1 year.

Moore left his employment with Eggers and, at the time of the litigation, was the sole proprietor of an executive recruiting firm which placed employees with data processing companies. Moore admitted that in the year after he left his employment with Eggers, he contacted companies he had dealt with while employed by Eggers. Moore sued Eggers for unpaid wages, and Eggers counterclaimed, alleging that Moore had violated the terms of the covenant not to compete between the parties.

In granting a partial summary judgment in favor of Moore, the trial court concluded that certain provisions of the employment agreement were overbroad and could not be enforced. Trial was then held on the issue of what commission was payable to Moore upon termination of his employment. The employment agreement at issue provided:

> "Employee shall be entitled only to those commissions which are due and payable on the final day of employment. A commission is due and payable upon collection of the fee from the client. No commission shall be paid to the Employee until such time as the client pays the commission and the Candidate begins employment. In the event of termination for any reason, the Employee shall not be entitled to any bonus, award, prize or other incentive payment which may be payable at any time after termination."

Id. at 405, 562 N.W.2d at 541. The trial court found that the above-stated provision of the employment agreement was void because it was against public policy, and the court awarded Moore commissions on placements he had made before he left Eggers' employment, finding the commissions to be wages, as defined by the Wage Act.

One issue raised on appeal was whether the employment agreement or the Wage Act controlled the payment of certain commissions after Moore's employment was terminated. The Wage Act provides in part:

> Wages shall mean compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met

> by the employee, whether the amount is determined on a time, task, fee, commission, or other basis. Wages shall include commissions on all orders delivered and all orders on file with the employer at the time of termination of employment less any orders returned or canceled at the time suit is filed.

§ 48-1229(4).

We concluded that the Wage Act controlled the determination of what commissions were payable to Moore as wages defined by the Wage Act. We held that Eggers could not circumvent the statutory definition of wages via provisions in its employment agreement with Moore. We stated: "If an act is prohibited by statute, an agreement in violation of the statute is void." *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 406, 562 N.W.2d 534, 542 (1997).

In the case at bar, paid vacation was a part of the fringe benefits contained in the employment agreement between Strategic and the employees. The amount of paid vacation that regular full-time employees received increased with the length of their employment. The question presented to the district court was whether Strategic could, upon an employee's termination, refuse to pay the employee for vacation time that accrued prior to such termination. We conclude that Strategic cannot. We hold that accrued vacation time, which is part of an employment agreement, is due and payable as wages upon termination of employment.

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. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). Section 48-1229 stated in relevant part:

> (3) Fringe benefits shall include sick and vacation leave plans, disability income protection plans, retirement, pension, or profit-sharing plans, health and accident benefit plans, and any other employee benefit plans or benefit programs regardless of whether the employee participates in such plans or programs; and
>
> (4) Wages means compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been

> met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis.

Pursuant to the Wage Act, the payment of unpaid wages is mandatory. "Whenever an employer, other than a political subdivision, separates an employee from the payroll, the unpaid wages shall become due on the next regular payday or within two weeks of the date of termination, whichever is sooner." § 48-1230. Vacation leave, if provided by terms of the employment agreement between the employer and the employee, is a fringe benefit, which is included in the definition of wages under the Wage Act. See § 48-1229(3) and (4). Upon termination of his or her employment, an employee is entitled to payment for any accrued vacation time that is provided for in the employment agreement.

The district court correctly determined that Strategic's policy of not paying accrued vacation pay upon termination of employment directly conflicted with the provisions of the Wage Act. The payment of vacation pay was an "agreed to" benefit between Strategic and its employees, see § 48-1229(4), and Strategic could not circumvent the payment of wages that had accrued by refusing to disburse accrued vacation pay because employment had been terminated.

The parties stipulated to the amount of vacation time that had accrued for each of the employees prior to their termination. Pursuant to the Wage Act, payment was due on the next regular payday or within 2 weeks of termination, whichever was sooner. To the extent that Strategic's policy of refusing to compensate employees for accrued vacation time upon termination of their employment conflicted with the Wage Act, the policy was void and unenforceable. The district court's order granting judgment in favor of the employees in the amount of $8,788.29 was correct.

In their petition for further review, the employees also claim that the Court of Appeals erred in refusing to consider whether the circumstances warranted an award of attorney fees greater than the 25-percent statutory minimum and in failing to order Strategic to make payment to the common schools fund. See §§ 48-1231 and 48-1232. The district court had entered an award of attorney fees equal to 25 percent of the unpaid wages but declined to award any additional fees. The court also stated

that because there was a reasonable dispute as to whether wages were owed, it would not order Strategic to pay an amount equal to the judgment to the common schools fund. The Court of Appeals did not analyze the issues related to attorney fees or the common schools fund because it reversed the district court's judgment and award of attorney fees. We now affirm the district court's order of attorney fees and its denial of an award to the common schools fund.

The issue of attorney fees is governed by §§ 48-1231 and 48-1232. Section 48-1231 provides that if an employee secures a judgment for unpaid wages under the Wage Act, the employee is

> entitled to recover (1) the full amount of the judgment and all costs of such suit and (2) if such employee has employed an attorney in the case, an amount for attorney's fees assessed by the court, which fees shall not be less than twenty-five percent of the unpaid wages. If the cause is taken to an appellate court and the plaintiff recovers a judgment, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney's fees in such appellate court, which fees shall not be less than twenty-five percent of the unpaid wages.

The employees established a claim for unpaid wages, and thus, they are entitled to attorney fees of not less than 25 percent of the unpaid wages under § 48-1231. However, the employees argue that they should receive a larger award because the employment policy in question clearly violated the Wage Act and Strategic's actions were clearly willful. We conclude the district court did not abuse its discretion in not awarding a fee greater than the minimum 25 percent of the judgment.

We next consider whether the district court erred in failing to order Strategic to pay an amount to the common schools fund pursuant to § 48-1232. Section 48-1232 provides that if an employee establishes a claim and secures judgment under § 48-1231,

> (1) [A]n amount equal to the judgment may be recovered from the employer; or (2) if the nonpayment of wages is found to be willful, an amount equal to two times the amount of unpaid wages shall be recovered from the employer. Any amount recovered pursuant to subdivision (1)

or (2) of this section shall be placed in a fund to be distributed to the common schools of this state.

[2] Under § 48-1232, it is in the court's discretion whether to order an employer to pay to the common schools fund an amount equal to the judgment. *Kinney v. H.P. Smith Ford*, 266 Neb. 591, 667 N.W.2d 529 (2003). We stated in *Kinney* that because the payment provision is in the nature of a penalty, discretion should be exercised only where there is no reasonable dispute as to whether wages are owed or as to the amount of the wages. We held that the trial court had discretion to determine both whether to impose a penalty and the amount of any such penalty, subject to the limitations prescribed by statute. In that case, the trial court found no reasonable dispute as to the wage claim, and we held that the lower court properly exercised its discretion to order the penalty.

Although the district court determined that Strategic's policy of refusing to pay employees for unused vacation time directly conflicted with state law and was void, the court also found that a reasonable dispute existed as to the fact the wages were owed, and it declined to order Strategic to pay an amount equal to the judgment to the common schools fund. We agree with these findings of the district court.

In *Morris v. Rochester Midland Corp.*, 259 Neb. 870, 612 N.W.2d 921 (2000), we affirmed an order declining a request to require an employer to pay an amount equal to or double the amount of the judgment to the common schools fund. We found there were factual issues as to whether an employee had procured contracts and, if he had, whether those contracts constituted orders on file. We stated, "Section 48-1232 should not be invoked where there is a reasonable dispute as to the fact that wages are owed or as to the amount of the wages." *Morris v. Rochester Midland Corp.*, 259 Neb. at 875, 612 N.W.2d at 925.

In the case at bar, there was a reasonable dispute concerning whether payment for unused vacation leave was due to the employees, and the district court did not abuse its discretion in determining that such a dispute existed.

CONCLUSION

The provision in Strategic's handbook stating that employees shall not be paid for unused vacation leave upon termination

conflicts with state law and is void. The district court's order was correct, and the Court of Appeals erred in reversing it. The decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to affirm the judgment of the district court in all respects.

The employees have been required to argue in both the Court of Appeals and this court. We therefore award, in addition to the fees awarded in the district court, attorney fees equal to one-third of the judgment to reflect the appeal to the Court of Appeals and this court.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., not participating.

JOSEPH PEPITONE AND ELIZABETH PEPITONE, APPELLANTS, V. KATHERINE S. WINN AND PETER D. WINN, APPELLEES.

722 N.W.2d 710

Filed October 20, 2006. No. S-05-527.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Statutes: Words and Phrases.** The word "may," when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
3. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
4. ____. That which is implied in a statute is as much a part of it as that which is expressed.
5. **Real Estate: Sales: Attorney Fees.** Attorney fees are mandatory in an action under Neb. Rev. Stat. § 76-2,120(12) (Cum. Supp. 2004).

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded with directions.

James Polack, P.C., L.L.O., for appellants.

Kristina B. Murphree, of Berkshire & Blunk, for appellees.

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

McCORMACK, J.

NATURE OF CASE

The issue in this case is whether attorney fees are mandatory under the provision of Neb. Rev. Stat. § 76-2,120(12) (Cum. Supp. 2004) which provides in part: "If a conveyance of real property is not made in compliance with this section, the purchaser shall have a cause of action against the seller and may recover the actual damages, court costs, and reasonable attorney's fees."

BACKGROUND

Joseph Pepitone and Elizabeth Pepitone purchased a single family residence in Omaha, Nebraska. They subsequently discovered a preexisting sewer backup problem in the basement of the residence and brought suit against Katherine S. Winn and Peter D. Winn as sellers of the home.

The Pepitones alleged a claim against the Winns for fraudulent misrepresentation; for violation of § 76-2,120; and for violation of Nebraska's Consumer Protection Act, Neb. Rev. Stat. § 59-1601 et seq. (Reissue 2004). The Pepitones sought damages, court costs, attorney fees, and, for their claim under the Consumer Protection Act, injunctive relief.

The Pepitones filed a motion for summary judgment. The Winns attempted to raise various material issues of fact, including their allegation that a corporation was the actual seller of the home. However, on November 12, 2004, the district court granted summary judgment in favor of the Pepitones on their first and second causes of action in the amount of $28,758.74. The court later dismissed the Pepitones' third cause of action under the Consumer Protection Act.

The Pepitones filed a motion for attorney fees. However, the Pepitones failed to attach to the motion any affidavit stating the amount of such alleged fees. The court overruled the Pepitones' motion for attorney fees, noting that the Pepitones "recovered all the damages they alleged based on their affidavits, which w[ere] the only evidence I have." At this point, the Pepitones' attorney offered the affidavits supporting attorney fees into the record, which were admitted after the Winns' attorney expressly stated he had no objection to the offer. The affidavits show an expenditure of $7,280 in attorney fees and $394.29 in expenses,

for a total of $7,674.29. Nonetheless, an order file stamped January 3, 2005, was entered reflecting the district court's denial of attorney fees. The Pepitones filed a motion to alter or amend the district court's ruling denying attorney fees. This motion was overruled, and the Pepitones appeal.

ASSIGNMENT OF ERROR

The Pepitones assign that the district court erred in determining that under § 76-2,120, an award of attorney fees for a successful plaintiff is discretionary and not mandatory.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

ANALYSIS

The only issue presented by the Pepitones in their appeal is whether attorney fees for a successful plaintiff are mandatory under § 76-2,120. The relevant statutory provision states in part that "[i]f a conveyance of real property is not made in compliance with this section, the purchaser shall have a cause of action against the seller and may recover the actual damages, court costs, and reasonable attorney's fees." § 76-2,120(12). The issue of whether attorney fees in an action under § 76-2,120 are mandatory is one of first impression for this court.

The Pepitones assert that the Nebraska Court of Appeals' decision in *Lomack v. Kohl-Watts*, 13 Neb. App. 14, 688 N.W.2d 365 (2004), provides support for their argument that fees are mandatory in this case. In *Lomack*, the Court of Appeals concluded that attorney fees were mandatory under the Uniform Residential Landlord and Tenant Act, which provides in relevant part that "the *tenant may recover* the property and money due him or her and reasonable attorney's fees." (Emphasis supplied.) Neb. Rev. Stat. § 76-1416(3) (Reissue 2003). In holding the fees to be mandatory, the court relied on cases from other jurisdictions which focused on the context of the sentence in which the term "may" resided.

For instance, the court in *Bisson v. Ward*, 160 Vt. 343, 628 A.2d 1256 (1993), reasoned that the term "may," as contained in the phrase "tenant may recover," was not intended to give *the court* discretion in awarding attorney fees. The court explained that " 'may' refers to the tenant, not the judge or the court." *Id.* at 347, 628 A.2d at 1259. The court further explained: " 'To the extent that the word "may" connotes discretion, it is a discretion vested in the tenant to elect his remedies, not in the court to deny a remedy clearly provided by the statute.' " *Id.* at 347, 628 A.2d at 1259, quoting *Prevatte v. Asbury Arms*, 302 S.C. 413, 396 S.E.2d 642 (S.C. App. 1990). See, also, *Beckett v. Olson*, 75 Or. App. 610, 707 P.2d 635 (1985). The court in *Bisson* thus found no merit to the landlords' argument that the legislature would have stated "shall" had it intended the award of attorney fees to be mandatory.

We have found similar reasoning from other jurisdictions in cases examining the term "may" in various statutes that use the term in the same way. For instance, the Texas Supreme Court has drawn a general distinction between statutes stating that *a court* "may" award attorney fees and statutes stating that *a party* "may recover" attorney fees. While the former provision is considered discretionary, the latter is considered mandatory. See, *Bocquet v. Herring*, 972 S.W.2d 19 (Tex. 1998) (collecting cases); *Cox v. Wilkins*, No. 03-05-00110-CV, 2006 WL 821202 (Tex. App. Mar. 31, 2006) (unpublished memorandum opinion).

Likewise, the Wisconsin Supreme Court in *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 275 Wis. 2d 1, 13-14, 683 N.W.2d 58, 65 (2004), found mandatory a provision regulating the automobile business which states: " 'Any retail buyer suffering pecuniary loss because of a violation by a licensee . . . may recover damages for the loss in any court of competent jurisdiction together with costs, including reasonable attorney fees.' " The court noted that although the provision did not use the term "shall," the term "may" referred to the buyer/plaintiff and did not refer to the court. This was contrasted with clearly permissive provisions which state that "*the court may* award costs." (Emphasis supplied.) *Id.* at 29, 683 N.W.2d at 72. See, also, *T.W. Morton Builders v. von Buedingen*, 316 S.C. 388, 450 S.E.2d 87 (S.C. App. 1994) (while also examining legislative intent,

concluding that "may" referred to power of claimant, not to discretion of court).

The court in *Kolupar* further noted that alongside "attorney fees," "damages" were stated as an object of "may recover." The court explained: "It would certainly be odd for a circuit judge to decline to impose damages once it has been determined that the plaintiff suffered pecuniary loss as a result of a listed violation . . . ." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 275 Wis. 2d at 14, 683 N.W.2d at 65. The inference the court made was that it would be "odd" to interpret attorney fees as discretionary where damages and attorney fees shared the same grammatical context.

The Winns, in arguing that attorney fees under § 76-2,120(12) are not mandatory, rely on *State v. Dethlefs*, 239 Neb. 943, 479 N.W.2d 780 (1992). Therein, we found the term "may" to be discretionary in the context of Neb. Rev. Stat. § 29-2261(5) (Reissue 1989), which stated that before imposing a sentence, "the court may order the offender to submit to psychiatric observation and examination." That same statutory subsection later stated that "[t]he report of the examination shall be submitted to the court." See § 29-2261(5). We reasoned: "It is evident to us that the Legislature clearly intended a distinction to be drawn when it used both 'may' and 'shall' in the same statutory provision." *State v. Dethlefs*, 239 Neb. at 945, 479 N.W.2d at 782-83.

[2] The Winns argue that since the provision here in question likewise uses both the terms "shall" and "may," then "may" should also be interpreted as discretionary. They also rely on the general proposition stated by this court that the word "may," when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

While § 76-2,120(12) does use both the terms "may" and "shall," the contrasting of those terms does not result in the conclusion that the granting of attorney fees is at the discretion of the court. The statute considered in *Dethlefs* set forth various provisions as to what *the court* "shall" and "shall not" do prior to sentencing. Then, § 29-2261(5) provided that *the court* "may order" a psychiatric observation and examination before sentencing. As we paraphrased, in the event that the court ordered

such a discretionary evaluation, then the evaluation "shall" be submitted to the court.

Here, the "shall" portion of the provision in § 76-2,120(12) establishes a cause of action for the purchaser of real property not made in compliance with the disclosure statement requirements. The other segment of the provision, stating that the purchaser "may recover the actual damages, court costs, and reasonable attorney's fees," uses the term "may" because recovery of damages, court costs, and reasonable attorney fees is dependent upon the purchaser's proving his or her case and proving those elements of recovery.

In other words, the contrasting of the terms "shall" and "may," as well as the general proposition that the word "may" usually connotes discretion, does not resolve the issue presented here. The term "may," insofar as it means that its object is permissive and discretionary, is referring to the purchaser's discretion in pursuing the stated remedies, not to the court's discretion to grant them, once the purchaser's right to them is proved. Compare *State v. County of Lancaster, ante* p. 376, 721 N.W.2d 644 (2006) (focusing on fact that court, not parties, was subject relating to phrase "may allow").

The provision here in issue is analogous to the various provisions discussed in the cases above, because the subject of the sentence is the party and not the court. Thus, while we agree with the Winns that the term "may" is to be understood as discretionary, this does not lead us to the Winns' conclusion that the discretion lies with *the court*. Instead, the discretion lies with "the purchaser."

[3] Furthermore, a court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Salts v. Lancaster Cty.*, 269 Neb. 948, 697 N.W.2d 289 (2005). In enacting § 76-2,120(12), the Legislature provided a purchaser with a new cause of action in addition to other common-law and statutory causes of action available to purchasers of real estate. *Bohm v. DMA Partnership*, 8 Neb. App. 1069, 607 N.W.2d 212 (2000). It follows that in order to achieve the viability of this new cause of action, the Legislature would provide purchasers with a remedy to pursue such a claim without having to bear the burden of

attorney fees. Such a remedy is especially pertinent in disclosure actions because the attorney fees could, in many cases, be more than the underlying damages, thus discouraging purchasers from pursuing claims and sellers from complying with disclosure requirements. The purpose of the statute is best effectuated by the conclusion that once a purchaser's claim is proved, attorney fees are part of the recovery.

[4,5] In addition, we find persuasive the observation in *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 275 Wis. 2d 1, 683 N.W.2d 58 (2004), regarding the fact that "damages" and "attorney fees" share together their position as the objects that "may" be recovered. That which is implied in a statute is as much a part of it as that which is expressed. *State, ex rel. Johnson, v. Consumers Public Power District*, 142 Neb. 114, 5 N.W.2d 202 (1942). Damages is an element that is commonly understood not to be at the court's discretion to grant, once the injury and a plaintiff's legal entitlement to damages have been shown. It can be inferred that "attorney's fees," where they share in the same position as "damages," are likewise not at the court's discretion to grant, when proved. We hold that attorney fees are mandatory in an action under § 76-2,120(12).

No issue has been presented regarding any failure of proof as to the attorney fees in this case, and affidavits supporting those fees are found in the record. Thus, the district court erred in not awarding attorney fees in an amount substantiated by that evidence.

CONCLUSION

We reverse the judgment and remand the cause with directions for the district court to enter an award in favor of the Pepitones for reasonable attorney fees in their cause of action against the Winns under § 76-2,120(12).

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. REGINALD J. ROGERS, RESPONDENT.

722 N.W.2d 505

Filed October 20, 2006. No. S-06-820.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This is an attorney reciprocal discipline case in which the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, filed a motion for reciprocal discipline against respondent, Reginald J. Rogers.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on August 8, 1984. On June 22, 2006, the District of Columbia Court of Appeals disbarred respondent from the practice of law in the District of Columbia. See *In re Rogers*, 902 A.2d 103 (D.C. 2006). The District of Columbia Court of Appeals' opinion reflects that respondent "intentionally, dishonestly and criminally misappropriated more than $260,000 from his client . . . after her husband died." *Id.* at 103. The District of Columbia Court of Appeals disbarred respondent as a result of his misappropriation of his client's funds. *Id.* On July 27, 2006, relator filed a motion for reciprocal discipline, based upon the District of Columbia Court of Appeals' disbarment of respondent. On August 30, this court entered a show cause order directing the parties to show cause why this court should or should not enter an order imposing the identical discipline, or greater or lesser discipline, as the court deemed appropriate, pursuant to Neb. Ct. R. of Discipline 21 (rev. 2001). Respondent did not file a response to our show cause order.

ANALYSIS

We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed

and, if so, the type of discipline appropriate under the circumstances. See *State ex rel. Counsel for Dis. v. Hogan, ante* p. 19, 717 N.W.2d 470 (2006). In a reciprocal discipline proceeding, "a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction." *State ex rel. Counsel for Dis. v. Petersen*, 267 Neb. 176, 177, 672 N.W.2d 637, 638 (2004). We therefore determine that misconduct has occurred and that the imposition of discipline is appropriate in this case. With respect to the type of discipline appropriate in an individual case, we have stated that each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. See *State ex rel. Counsel for Dis. v. Hogan, supra*. Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Horneber*, 270 Neb. 951, 708 N.W.2d 620 (2006). We apply these factors to the instant reciprocal discipline case. We have considered the case file and the applicable law. Upon due consideration, the court finds that respondent should be disbarred from the practice of law in the State of Nebraska, effective immediately.

CONCLUSION

The motion for reciprocal discipline is granted. It is the judgment of this court that respondent should be and is hereby disbarred from the practice of law in the State of Nebraska, and we therefore order him disbarred from the practice of law, effective immediately. Respondent shall forthwith 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. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2005) and 23 (rev. 2001) within

60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

TAJUDDIN MILLATMAL, APPELLANT, V.
PARVEEN MILLATMAL, APPELLEE.
723 N.W.2d 79

Filed October 27, 2006. No. S-05-237.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
3. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
4. ____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.
5. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
6. ____: ____: ____. In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2004), in dividing property and considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation.
7. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2004), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
8. ____. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.

9. ____. Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties.
10. **Property Division: Proof.** The burden to show that a debt is nonmarital is on the party making that assertion.
11. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed in part, and in part vacated.

Kelly T. Shattuck, of Cohen, Vacanti, Higgins & Shattuck, for appellant.

Brian Zdan for appellee.

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

MCCORMACK, J.

I. INTRODUCTION

On January 24, 2005, the district court for Douglas County entered a decree dissolving the marriage of Tajuddin Millatmal (Taj) and Parveen Millatmal. Taj appealed. We moved this case to our docket pursuant to our authority to regulate the dockets of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. BACKGROUND

Taj and Parveen were married in Pakistan in 1984 and have lived in the U.S. for 13 years. Taj and Parveen, as well as their two daughters, Nelam and Naheed, are U.S. citizens. Nelam was born June 25, 1985, and was married via an arranged marriage in Pakistan in late 2002. She currently resides in Omaha, Nebraska, with her husband. Naheed was born November 18, 1986, and in the summer of 2002 was also married via an arranged marriage in Pakistan. Naheed resides in Omaha with Parveen and attends school. Naheed's husband still lives in Pakistan. According to the record, there are currently no divorce actions pending in either the United States or Pakistan with respect to these marriages.

Parveen has been employed as a seamstress for almost 13 years and, at the time of trial, earned $8.25 per hour. Parveen also rents out rooms in the family home, earning approximately $550

per month. In addition, it is apparently customary in Pakistan that working children living at home give part or all of their salaries to their parents. Accordingly, Parveen also receives between $600 and $1,000 per month from Naheed, who, in addition to being a student, has several part-time jobs.

Taj is employed as a telephone interpreter and as a cabdriver. According to Taj, he earns $700 per month as a cabdriver and another $300 per month as an interpreter, for a total income of $1,000 per month. Taj also testified that he volunteers at a nonprofit organization about 20 hours per week.

The parties own a home in Omaha valued by the Douglas County assessor at $159,000. Parveen testified that she believed the property to be worth no more than $180,000, while Taj testified that he believed the property to be worth $220,000. The record indicated that between $101,000 and $109,000 remained unpaid on the mortgage.

There was evidence presented as to certain debts owed by the parties. Parveen testified that at Taj's direction, while in Pakistan preparing for her daughters' weddings, she borrowed $25,000 from her family in order to pay living and wedding expenses. According to Parveen, taking such a loan was necessary because while traveling, Taj had misplaced a briefcase containing cash that was to be used by Parveen to cover those expenses. Parveen testified that there was no contract for repayment because the loan was from family. Taj testified that he did not direct Parveen to borrow the money. He also acknowledged that he had lost a briefcase containing $10,000, but that such event occurred subsequently to the time period referred to by Parveen, and that in any event, he had been acting as a courier, so not all of that money belonged to him and Parveen. In addition, Taj testified that he borrowed a total of $18,907 from friends in order to cover various household expenses.

The couple also owned several vehicles and various personal effects. According to Parveen, the couple owned a 1995 Ford Windstar minivan and a 1990 Toyota Corolla. In addition, since the couple separated, Taj had purchased a 2004 Honda Civic. Both parties testified, however, that the minivan had been sold, though it is not clear from the record when that sale took place. Taj testified that the Toyota was paid for.

At trial, there appeared to be little dispute over the division of personal effects, with the exception of certain items which Parveen testified were part of her dowry, including jewelry, valued at $30,000, and seven rugs, valued at $2,000 to $3,000 each. Parveen alleged that Taj had taken those items, as well as all household items except the furniture, while she was still in Pakistan following the weddings. Taj denied this and testified that when he left the marital home, he took only his clothes, a bed, and a computer desk.

The district court entered its decree on January 24, 2005. In relevant part, that decree concluded that Naheed was not emancipated and accordingly awarded custody of Naheed to Parveen. Taj was ordered to pay $60 per month in child support. The district court's decree placed an equity value of $72,000 on the parties' home and awarded that home to Parveen. In addition, the district court found that the debts owed by Taj were not marital debts, but that the $25,000 which Parveen testified was owed to her family was a joint marital debt. The court ordered Parveen to pay to Taj a total of $23,500, which was Taj's 50-percent interest in the home equity less his 50-percent liability in the marital debt. This amount was to be paid upon the sale of the property or in 5 years, whichever occurred first. The parties were awarded the personal property in their possession. In addition, Taj was awarded several other items if those items could be recovered from the parties' marital home. Parveen was additionally awarded, as nonmarital property, the rugs and jewelry that were part of her dowry, should those items be recovered. Taj was awarded the Honda, and Parveen was awarded the Ford, if the latter vehicle was still in the possession of either party. There was no explicit disposition made by the district court of the Toyota. Finally, Taj was ordered to pay spousal support to Parveen in the amount of $300 per month for 48 months or until Parveen's death or remarriage.

III. ASSIGNMENTS OF ERROR

On appeal, Taj assigns that the district court erred in (1) awarding child support for a child who was married at the time of the entry of the order, (2) awarding alimony, and (3) its division of the marital estate.

IV. STANDARD OF REVIEW

[1] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.*

V. ANALYSIS

1. Child Support

In his first assignment of error, Taj argues that the district court erred in its award of child support. Taj contends that the record is undisputed Naheed was married at the time of the entry of the decree and that pursuant to Neb. Rev. Stat. § 42-371.01(1)(b) (Reissue 2004), he had no obligation to pay child support. That section provides in relevant part that "[a]n obligor's duty to pay child support for a child terminates when . . . the child marries . . . ."

In support of his argument, Taj directs us to Neb. Rev. Stat. § 42-117 (Reissue 2004), which provides that "[a]ll marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state." See, also, *Randall v. Randall*, 216 Neb. 541, 545, 345 N.W.2d 319, 321 (1984) ("validity of a marriage is generally determined by the law of the place where it was contracted"). There is no indication from the record that the marriage was invalid under Pakistani law. Thus, under the plain language of § 42-117, we must deem Naheed's marriage valid in Nebraska.

Although Parveen's brief claims that in a marriage where consent was obtained by force or fraud, the marriage is voidable, the record does not reflect that either Naheed or Parveen have taken any steps to void this marriage. Thus, the marriage is not, for purposes of our analysis, void.

Given that Naheed's Pakistani marriage is considered valid in Nebraska, we conclude that Naheed is emancipated. As a result of her emancipation, the district court abused its discretion in ordering Taj to pay child support to Parveen. Accordingly, we vacate the district court's award of child support.

2. ALIMONY

In his second assignment of error, Taj argues that the district court erred in awarding alimony that was excessive in both amount and duration. Taj argues that he simply cannot afford to pay an alimony award and, further, that the record indicates that Parveen's financial situation is such that she does not require spousal support. Parveen asserts that the amount and duration were reasonable, as the payments would allow her to obtain further education.

[2-4] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id.* The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id.*

[5,6] In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Id.*; Neb. Rev. Stat. § 42-365 (Reissue 2004). In addition to the specific criteria listed in § 42-365, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. See *Ainslie v. Ainslie*, 249 Neb. 656, 545 N.W.2d 90 (1996).

The parties were married for 20 years. From the record, it appears that for at least part of that time, Parveen worked to support the family. In addition, Parveen quit her job to move with the parties' daughters to Pakistan in order to plan and attend the daughters' weddings. Upon her return to the United States, she was able to regain the same employment, but at a lower wage. A review of the record indicates that Parveen receives about $2,570 per month, from all sources of income. The record

further indicates that prior to trial, Parveen had monthly expenses of about $1,460; however, that does not include any mortgage payments, for which she is responsible under the terms of the decree. According to the record, Parveen has expressed an interest in obtaining further education in computer programming.

With respect to Taj, the record shows that he earns about $1,000 per month and apparently runs a monthly deficit of about $400. However, Taj currently holds both a medical degree and a master's degree in public administration and, within the last few years, earned as much as $1,500 per month. Taj has expressed interest in obtaining further education in nursing.

The record would support a finding that Parveen has made certain sacrifices for the family. Moreover, Taj's earning capacity exceeds the income he now makes as a cabdriver and part-time interpreter. Alimony would allow Parveen the opportunity to obtain higher education and a higher-paying job. We will affirm a trial court's award of alimony unless it is so untenable as to deprive a party of a substantial right or just result. We cannot conclude that the award in this case meets this standard. Accordingly, we conclude that the district court's award of alimony was not an abuse of discretion.

3. Property Division

In his third assignment of error, Taj argues that the district court erred in its division of the marital estate. Specifically, he asserts that the court erred (1) in its findings regarding marital and nonmarital debt, (2) in its valuation of the marital home, (3) in allowing Parveen 5 years in which to pay Taj his portion of the equity value of the marital home, (4) by not including in the division of property the parties' Toyota, and (5) in not making an itemized list of the marital property, valuing those items, and then dividing those assets as provided by statute.

[7,8] Under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). Although the division of property is not subject to a precise mathematical

formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Id.*

(a) Division of Marital Debt

Taj first contends that the district court erred in concluding that the $25,000 debt to Parveen's family was a marital debt and also in concluding that certain debts incurred by Taj were nonmarital.

With respect to the $25,000 debt to her family, at trial, Parveen testified that she had borrowed the funds in question from her family in Pakistan and that the debt was incurred to pay living and wedding expenses while she and the parties' daughters were living in Pakistan. Parveen acknowledges that there were no written terms or contract, as the loan was a "matter of trust." Given this lack of documentation, Taj asserts that Parveen did not meet her burden to show that the debt actually existed.

Taj additionally argues that he incurred certain marital debts which the district court erroneously concluded were business debts and thus nonmarital. Taj testified regarding these debts, including their character as marital, and additionally provided canceled checks regarding these debts. Parveen, however, testified that she knew the persons allegedly loaning money to Taj and that for various reasons, she believed those loans to be fraudulent. Parveen specifically testified that at least one of the persons that Taj claimed loaned him money was a business associate of Taj's.

[9,10] Taj's arguments on these points are without merit. Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). The burden to show that a debt is nonmarital is on the party making that assertion. Cf. *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999) (burden of proof to show that *property* is nonmarital remains with person making that assertion). See, also, *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002) (burden of proof to show that debt is nonmarital remains with person making that assertion).

[11] Taj testified that he did not believe that the debt allegedly incurred by Parveen was a marital debt, but that he "couldn't [get] a straight forward answer" from Parveen's family with respect to the debt. We do not read this testimony as directly contradicting

Parveen's testimony that she incurred the debt during the marriage for the joint benefit of the parties. To the extent that it could be read in such a manner, the district court was entitled to accept as true Parveen's testimony that the debt existed. When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Mathews v. Mathews, supra.*

Taj has failed to meet his burden to show that this debt was nonmarital. We therefore conclude that the district court did not abuse its discretion in finding this debt to be a marital debt.

With regard to Taj's debts, we similarly cannot conclude that the district court abused its discretion in concluding that the debts were nonmarital. While Taj did testify to the existence of the debt, Parveen also testified that she believed the debts to be false. Again, the district court was entitled to accept as true one set of facts over another.

We conclude that Taj's arguments regarding the determinations of marital and nonmarital debt are without merit.

(b) Valuation and Award of Marital Home

Taj also asserts that the district court erred in finding that the marital home had an equity value of $72,000 and further in permitting Parveen 5 years to pay Taj his half of that value. Taj's assertions are without merit.

With respect to the district court's valuation, Parveen testified that she valued the property at $180,000 and further estimated that the total remaining mortgage on the property was between $101,000 and $109,000, leaving an equity value of between $71,000 and $79,000. Thus, the record supports the district court's equity valuation of $72,000. We cannot conclude the district court abused its discretion in its valuation.

Taj also argues that the district court erred in allowing Parveen 5 years to pay him his share of the equity value of the home. To support his contention, Taj points to his dire financial situation, as compared to Parveen's. However, our review of the record clearly indicates that Parveen is not able to finance the lump sum of $23,500 necessary to immediately pay Taj his equity share of the home. Again, under these circumstances, we cannot conclude that the district court abused its discretion in

allowing Parveen 5 years to pay Taj his portion of the equity value of the marital home.

(c) Failure to Specifically Value and Divide Marital Property

Finally, Taj argues that the district court erred by not first valuing the assets and liabilities of the marital estate and then dividing the marital estate in accordance with the principles stated in § 42-365. In connection with this argument, Taj notes that the district court failed to dispose of the Toyota owned by the parties.

We first address Taj's contention that the district court failed to dispose of the Toyota. We agree with Taj that no explicit disposition of the Toyota was made in the decree. However, the decree did award to each party the property currently in his and her possession, and Taj's undisputed testimony was that the Toyota was in Parveen's possession. While we agree that it might have been simpler for the district court to have explicitly awarded the Toyota to Parveen, we conclude that such an award is implicit in the court's decree.

With regard to the district court's property division, the record reveals the following: Parveen was awarded the marital home, valued at $180,000, subject to a $108,000 mortgage. As noted above, we can also discern from the decree that she was awarded the Toyota, valued at $1,500. Taj was awarded the Honda Civic, valued at $17,000, subject to a $16,500 encumbrance. The parties were each assessed $12,500 in marital debt. The district court equalized the estate by awarding Taj one-half the equity in the home, totaling $36,000. Without including any personal property in the estate, the marital estate was valued at $49,000 ($72,000 value of the house, plus $500 for the Honda, plus $1,500 for the Toyota, less $25,000 of marital debt).

The decree awarded each party the personal property in his and her possession, and we note that it is not entirely clear who had possession of some of those items of personal property. We also agree with Taj that the decree does not explicitly set forth the value of the personal property in the marital estate. However, a review of the record reveals that Taj assigned a value to the personal property of $8,001, including the $1,500 value for the Toyota, which we previously acknowledged was in Parveen's

possession and thus was awarded to her. We have included that $1,500 above in the estate apart from personal property. Therefore, the total value of the marital estate, using Taj's figures, was $55,501. Assuming that Parveen had all of the personal property in her possession (and it is clear from the record that this was not the case), the decree awarded her $31,501, or 57 percent of the marital estate, while Taj received $24,000, or 43 percent of the marital estate.

Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). We conclude that where Parveen was awarded at most 57 percent of the marital estate and Taj 43 percent, such a division is within the general rule and was not an abuse of discretion. We accordingly conclude that the district court's property division was not an abuse of discretion.

VI. CONCLUSION

The district court erred in concluding that the parties' youngest daughter was not emancipated and ordering Taj to pay child support. The district court's property division and order of alimony, however, were not an abuse of discretion. The district court's decree is vacated as to child support and affirmed in all other respects.

AFFIRMED IN PART, AND IN PART VACATED.

HENDRY, C.J., not participating.

ROBERT G. EIHUSEN, APPELLEE, V.
LINDA K. EIHUSEN, APPELLANT.
723 N.W.2d 60

Filed October 27, 2006. No. S-05-523.

1. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.
2. **Constitutional Law: Jury Trials.** The purpose of Neb. Const. art. I, § 6, is to preserve the right to a jury trial as it existed at common law and under statutes in force when the Nebraska Constitution was adopted in 1875.

3. **Actions: Pleadings: Equity.** The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought.
4. **Courts: Judgments: Fraud: Proof.** In order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in Neb. Rev. Stat. § 25-2001(4) (Cum. Supp. 2004), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law, P.C., for appellant.

Pamela Hogenson Govier and Mark J. Milone, of Govier, Milone & Kinney, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Linda K. Eihusen appeals from an order of the district court denying her petition to vacate a decree previously entered in a marriage dissolution proceeding. She also appeals the district court's denial of her request for a jury trial.

BACKGROUND

Robert G. Eihusen and Linda were married in 1975. At the time of their marriage, both Robert and Linda were working at Chief Industries, Inc., a Nebraska corporation located in Grand Island, Nebraska. During their marriage, Robert became the chairman, president, and chief executive officer of Chief Industries.

In 2000, Robert and Linda talked about ending their marriage and, while still living together, discussed the specifics of dividing their property and establishing financial support for Linda. Their discussions culminated in a settlement agreement which was drafted by the attorney for Chief Industries.

Under the terms of the settlement agreement, Linda was to receive a cash payment of $200,000, one-half of the parties' 401K plan, alimony in the amount of $5,000 per month for 240 months ($1.2 million), a Chevrolet Suburban, bank accounts maintained

in her name, miscellaneous personal property, $10,000 in attorney fees, all Chief Industries' common stock that had been gifted to her during the marriage, and one-half of those shares purchased during the marriage.

The settlement agreement also disposed of a Chief Industries' convertible debenture, which was awarded to Robert subject to the debenture's outstanding debt, which Robert assumed. Robert had held the debenture since 1996, when he loaned Chief Industries $5 million, which he himself had borrowed. Under the terms of the debenture, Chief Industries promised to pay Robert $5 million plus interest on the outstanding principal balance. Alternatively, Robert could elect to convert the debenture into Chief Industries' common stock. With regard to Robert's right of conversion, the debenture could not be converted into common stock until 2002. Thereafter, Robert had the right to convert 20 percent of the debenture into common stock in each of the years 2002 through 2006 at a $100-per-share option price. If Robert failed to exercise his conversion rights for any year, he would lose the right to convert that portion of the debenture into common stock. On appeal, Robert claims that he has not exercised any of his conversion rights. As a result, he has lost his right to convert 80 percent of the debenture into common stock.

In addition, the settlement agreement provided as follows:

> Each of the parties expressly certifies that [he or she has] entered into this Agreement upon mature consideration and after ample opportunity to seek the advice of separate counsel; that consent to the execution of this Agreement has not been by duress, fraud, or undue influence of any person; that no representations of facts have been made by either party to the other except as herein expressly set forth; that both parties have had full access to the books and records of the other and both parties have full knowledge as to the business affairs of each other and the nature, extent and value of the property of the other and that the parties agree that this Agreement is fair and reasonable and not unconscionable.

Linda took a copy of the agreement to a certified public accountant. After reviewing the document, the accountant advised Linda to talk to an attorney before she signed the agreement.

Linda did not do so, however, and on December 1, 2000, the parties' "Separation and Property Settlement Agreement" was signed and notarized.

In January 2001, Robert filed a petition for dissolution of marriage. In February, Linda hired an attorney. Linda's attorney testified that Linda sought his advice on whether the settlement agreement was fair and that no formal discovery was conducted. After Linda retained the attorney, only minor changes were made to the settlement agreement, including an agreement that Linda's stock in Chief Industries would be redeemed at $167 per share, the employee stock option plan (ESOP) price at the time. Linda and her attorney knew, therefore, that the price to redeem her stock, and the price of the ESOP, was $167 per share when the parties appeared before the district court.

In June 2001, Robert and Linda appeared before the district court with their respective attorneys. At that time, Linda testified that she had reviewed all the documents presented, including the separation agreement and property statement setting forth the value of Robert's assets, which had been prepared by Robert. She further testified that she believed the separation agreement to be fair and reasonable. On June 6, the district court entered a decree of dissolution and approved the parties' settlement agreement.

On November 12, 2002, Linda filed the present action with the district court seeking to set aside the divorce decree under Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2004). Linda demanded a jury trial on all triable issues. In her petition, Linda alleged that the settlement agreement had been procured by fraud, coercion, and duress. The crux of Linda's fraud claim is the value the parties assigned to the Chief Industries' debenture. Linda claims that Robert committed a fraud with regard to the value attributed to the debenture. She argues that Robert concealed the true value of the debenture, which she contends is not the $5 million face value of the debenture claimed by Robert in the property statement, but, rather, $8.35 million. Linda computes this figure by multiplying the total number of shares Robert could have converted between 2002 and 2006 by the ESOP price at the time of their divorce in 2001, $167 per share, as opposed to the $100-per-share conversion price set forth in the debenture.

On July 15, 2004, the district court denied Linda's request for a jury trial. The court held that Linda's action to set aside the divorce decree was a continuation of the action to dissolve the parties' marriage and divide their property, which was an equitable action tried to the court. Thereafter, the matter proceeded as a bench trial on the merits. At trial, Linda withdrew her claim of duress and did not present any evidence on her claim of coercion. The case, therefore, was tried solely on the issue of whether the decree should be set aside on the basis of fraud.

On April 13, 2005, the district court found that no fraud had occurred and denied Linda's petition to vacate the decree. Linda filed this appeal.

ASSIGNMENTS OF ERROR

Linda assigns as error, restated, the district court's denial of her request for a jury trial on the issues of fraud and the district court's denial of her petition to vacate the decree of dissolution.

STANDARD OF REVIEW

[1] An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion. *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995).

ANALYSIS

Right to Jury Trial

In her first assignment of error, Linda claims she was entitled to a jury trial on the issue of whether Robert committed fraud when he submitted the separation and property settlement agreement and failed to disclose what she contends to be the true value of the debenture, which she alleges is $8.35 million.

[2,3] Article I, § 6, of the Nebraska Constitution provides that "[t]he right of trial by jury shall remain inviolate . . . ." We have explained that the purpose of this constitutional provision is to preserve the right to a jury trial as it existed at common law and under statutes in force when the Nebraska Constitution was adopted in 1875. *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999); *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986). At common law, legal claims were tried by a jury and equitable claims were tried by a court.

Evans v. General Motors Corp., 277 Conn. 496, 893 A.2d 371 (2006). Accordingly, we have traditionally denied jury trials in equitable actions and provided jury trials as a matter of right in legal actions. *State ex rel. Cherry v. Burns, supra*; *State ex rel. Douglas v. Schroeder, supra*. As we stated in *Schroeder*, our task, therefore, becomes one of determining whether the action is of an equitable or legal nature. We make this determination from the action's main object, as disclosed by the averments of the pleadings and the relief sought. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

While not explicitly part of the *Schroeder* test, our case law requires a court to look to the common law and statutes in force when the Nebraska Constitution was adopted. Decisions from other jurisdictions are in accord with this rule. The U.S. Supreme Court has stated that a court should consider the custom with reference to such questions before the merger of law and equity, the remedy sought, and the practical abilities and limitations of juries. *Ross v. Bernhard*, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970). The Kansas Supreme Court has described the test to determine whether an action is equitable as " 'whether the essential nature of the action is grounded on equitable rights and is one in which equitable relief is sought.' " *Vanier v. Ponsoldt*, 251 Kan. 88, 104, 833 P.2d 949, 961 (1992). The Connecticut Supreme Court has stated:

> "[A] court must ascertain whether the action being tried is similar in nature to an action that could have been tried to a jury . . . when the constitution was adopted. This test requires an inquiry as to whether the course of action has roots in the common law, and if so, whether the remedy involved was one in law or equity."

Evans v. General Motors Corp., 277 Conn. at 510, 893 A.2d at 380. See, also, *Holt v. Parmer*, 106 Cal. App. 2d 329, 235 P.2d 43 (1951) (stating where case involves application of doctrines of equity and relief sought is equitable, parties are not entitled to jury trial).

The existence of the statutory right to vacate a judgment can be traced to 1867, prior to the adoption of the Nebraska Constitution. See Rev. Stat. § 602 (1867). The statutory provision as it read then is substantially similar to the version now in

effect. Since 1867, that provision, as now codified at § 25-2001, has bestowed upon a district court the power to vacate or modify its own judgment for one of nine enumerated reasons, including fraud. Since its enactment, the nature of this action has been equitable. As we described it in *In re Estate of West*, 226 Neb. 813, 833, 415 N.W.2d 769, 783 (1987), an action under § 25-2001 is "equitable in character, available or administered on equitable principles, and extended on equitable terms." Moreover, the relief provided by this statute—the vacation or modification of a judgment—is not legal in nature, but, rather, is equitable. See, e.g., *In re Estate of West, supra*. We conclude, therefore, that an action to set aside a judgment or order under § 25-2001 invokes the equitable powers of the court, for which there exists no constitutional right to a jury trial.

Petition to Vacate

In her second assignment of error, Linda contends that the district court erred by refusing to vacate the decree of dissolution on the basis of fraud.

[4] In order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in § 25-2001(4), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002). Under the rule announced in *McCarson*, it must be clear that the alleged failure to secure a just decision was attributable only to Robert's misrepresentation, and not to any fault or negligence by Linda.

In *Caddy v. Caddy*, 218 Neb. 582, 358 N.W.2d 184 (1984), we affirmed the denial of a motion to vacate or modify a divorce decree, which motion was premised on the appellee's purported submission of a false financial statement that left out certain real property accumulated during the parties' marriage. We concluded that the appellant had failed to exercise due diligence. We noted that the appellant had testified that she was aware at the time of the dissolution proceeding of the existence of the property allegedly concealed, though she was not aware of the exact value of that property. We concluded that the appellant's motion

was properly denied because she "chose to proceed without adequate representation and with at least a general knowledge of the underlying facts, and made no effort to bring before the court the correct information." *Id.* at 584, 358 N.W.2d at 186.

Similarly, the evidence here reveals that during the settlement negotiations and throughout the subsequent divorce proceeding, Linda was aware of the existence of the debenture. Prior to signing the settlement agreement, Linda sought the advice of an accountant who, in turn, advised her to seek legal advice before signing the agreement. Linda elected not to do so. After the agreement was signed and Robert had filed a petition for dissolution, Linda finally hired an attorney, as the attorney later testified, to obtain his opinion on the fairness of the settlement agreement. At that time and all times preceding, Linda had the same avenues of discovery which she has employed in the present appeal, but elected not to utilize them to her advantage. That is not to say, however, that no inquiries were made into the fairness of the agreement or that no modifications were made after the agreement was signed. In fact, Linda and her attorney negotiated for the redemption of her common stock in Chief Industries at the ESOP price of $167 per share, which was not originally provided for in the settlement agreement. It is that price which Linda now uses as the basis for valuing the debenture at $8.35 million.

On her own volition, Linda proceeded through the settlement negotiations and divorce proceeding without making any effort to ascertain what she now asserts to be the true value of the debenture, despite a general knowledge of the debenture and the ESOP price per share. Under these facts, we cannot conclude that Linda exercised the requisite due diligence and, therefore, cannot say that the district court abused its discretion in denying Linda's petition to vacate. Accordingly, we affirm the denial of Linda's petition to vacate the decree of dissolution.

CONCLUSION

For the reasons discussed above, we affirm the decision of the district court in all respects.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

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