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DECIDED BETWEEN

JULY 27, 2007 and FEBRUARY 7, 2008

IN THE

Supreme Court of Nebraska

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VOLUME CCLXXIV

PEGGY POLACEK

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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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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	Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	Papillion
		Max Kelch	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
		William T. Wright	Kearney
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	Brian C. Silverman	Alliance
		Randall L. Lippstreu	Gering
		Kristine R. Cecava	Sidney
		Leo Dobrovolny	Gering

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
		Jeffrey J. Funke	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	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
		Susan Bazis	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
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
		Edward D. Steenburg	Ogallala
		Anne Paine	McCook
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
	Reggie L. Ryder	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
Admitted Since the Publication of Volume 273

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Dennis Lee Althouse
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Carl Norman Anderson III
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Brent William Beller
Christine Clare Benson
Ross Michael Berg
Amy Katz Bonn
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Michael Ernest Boyd
Joseph Charles Bradley
Jonathan Roy Brandt
Alison Marie Breuning
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Kathleen Lee Brundo
Nathan Thomas Bruner
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Mark Wild Buckwalter
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Liah Shitomi Frazier
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Tara Lynn Gardner
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Wendy Stewart Grugle
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Christopher Harkert Hawkins
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Sarah James Hestad

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ERIC WADE WELLS
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ISAIAH WILSON II
GREGORY DEAN WORTH
DARREN STEPHEN WRIGHT
NICHOLAS EDMUND WURTH
DEREK CHARLES ZIMMERMAN

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No. S-06-016: **Petry v. Petry**. Affirmed. Gerrard, J.

No. S-06-287: **Arias v. Bohn**. Affirmed. Per Curiam.

No. S-06-358: **Tenet Healthcare Corp. v. Dankof**. Affirmed. Heavican, C.J.

No. S-06-454: **In re Estate of Rosso**. Affirmed. Stephan, J.

No. S-06-561: **State v. Jones**. Affirmed. Stephan, J. Heavican, C.J., not participating.

No. S-06-622: **State on behalf of Jackson v. Jackson**. Affirmed. Gerrard, J.

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No. S-06-911: **Merida v. Centeno**. Affirmed. Gerrard, J.

No. S-06-1338: **Exchange Bank v. Arp**. Reversed and remanded for further proceedings. Connolly, J.

No. S-07-302: **Foster v. BryanLGH Med. Ctr. East**. Affirmed as modified. Stephan, J.

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No. S-06-412: **Alleman v. Alleman**. Appeal dismissed.

No. S-06-466: **Sjuts v. State ex rel. Bruning**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-06-954: **City of LaVista v. Long**. Appeal dismissed. See rule 8A.

No. S-06-1218: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-06-1224: **Bracht v. Neth**. Affirmed. See, rule 7A(1); *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006); *Moore v. Peterson*, 218 Neb. 615, 358 N.W.2d 193 (1984).

No. S-06-1230: **Farritor v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. S-07-054: **State v. Ball**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

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No. S-07-181: **State ex rel Counsel for Dis. v. Brogan**. Respondent was temporarily suspended on March 21, 2007. Parties have stipulated to respondent's violation of provisions of Nebraska Rules of Professional Conduct, and referee has found that respondent violated those provisions as well as her oath of office as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1995). Court finds that respondent has violated Neb. Ct. R. of Prof. Cond. 1.3 and 8.4(a) and (d) (rev. 2005), as well as her oath of office as an attorney. Court finds that respondent should be and hereby is suspended from the practice of law for 9 months and that the suspension should be retroactive to

March 21, 2007. Respondent must pay costs and expenses if awarded. See, Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1995); Neb. Ct. R. of Discipline 10(P) (rev. 2005) and 23(B) (rev. 2001). Respondent may apply for reinstatement at the end of her suspension period.

No. S-07-250: **State v. McDonald**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

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No. A-05-460: **Perez v. City of Omaha**, 15 Neb. App. 502 (2007). Petition of appellant for further review overruled on August 29, 2007.

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No. A-05-895: **City of Ashland v. Remmen**. Petition of appellee for further review overruled on November 21, 2007.

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No. A-05-1077: **Harris v. Spring Ctr. Mental Health Agency**. Petition of appellant for further review overruled on September 26, 2007.

No. A-05-1084: **Trueblood v. Roberts**, 15 Neb. App. 579 (2007). Petition of appellee for further review overruled on September 20, 2007.

No. A-05-1172: **State v. Frazier**. Petition of appellant for further review overruled on July 18, 2007.

No. A-05-1190: **State v. Brown**. Petition of appellant for further review overruled on August 29, 2007.

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No. A-05-1394: **Classe v. Fitzgerald, Schorr**. Petition of appellant for further review overruled on August 29, 2007.

No. A-05-1399: **Petersen v. Lindsay Mfg. Co**. Petition of appellant for further review overruled on November 15, 2007.

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No. A-06-068: **State v. Wiese**. Petition of appellant for further review overruled on August 29, 2007.

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No. A-06-862: **State v. Hill**. Petition of appellant for further review overruled on November 15, 2007.

No. A-06-863: **State v. Schneider**. Petition of appellant for further review overruled on November 15, 2007.

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No. A-06-998: **State v. Matthies**. Petition of appellant for further review overruled on September 20, 2007.

No. S-06-1001: **State v. Moore**, 16 Neb. App. 27 (2007). Petition of appellee for further review sustained on January 3, 2008.

No. A-06-1036: **State v. Dargeloh**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-1128: **State v. Barns**. Petition of appellant for further review overruled on January 25, 2008, as untimely filed. See rule 2F(1).

No. A-06-1164: **State v. Heil**. Petition of appellant for further review overruled on August 24, 2007, as untimely filed.

Nos. A-06-1182, A-06-1183: **State v. McSwine**. Petitions of appellant for further review overruled on August 29, 2007.

No. A-06-1193: **McKay v. Hershey Food Corp.**, 16 Neb. App. 79 (2007). Petition of appellant for further review overruled on January 16, 2008.

No. A-06-1197: **In re Interest of Mitchell H. et al**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1201: **Trimm v. Trimm**. Petition of appellant for further review overruled on August 29, 2007.

No. S-06-1216: **State v. Stolen**, 16 Neb. App. 121 (2007). Petition of appellant for further review sustained on January 3, 2008.

No. A-06-1223: **Godsey v. Casey's General Stores**, 15 Neb. App. 854 (2007). Petition of appellant for further review overruled on September 26, 2007.

No. A-06-1232: **Ingswersen v. American Tool Cos**. Petition of appellant Irwin Industrial Tool Co. for further review overruled on November 15, 2007.

No. A-06-1235: **State v. Bartholomew**. Petition of appellant for further review overruled on July 18, 2007.

No. A-06-1240: **In re Interest of Jimmy D**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1252: **State v. Pope**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1301: **State v. Salinas**. Petition of appellant for further review overruled on January 3, 2008.

No. A-06-1318: **State v. Rush**, 16 Neb. App. 180 (2007). Petition of appellant for further review overruled on January 3, 2008.

No. A-06-1319: **State v. Baker**. Petition of appellant for further review overruled on August 29, 2007.

No. A-06-1334: **State v. Dober**. Petition of appellant for further review overruled on November 21, 2007.

No. A-06-1356: **Pittman v. Department of Corr. Servs**. Petition of appellant for further review overruled on January 16, 2008.

No. A-06-1357: **In re Guardianship of Charles H. & Natalya H.** Petition of appellee for further review overruled on December 12, 2007.

No. A-06-1362: **State v. Molina-Navarrete**, 15 Neb. App. 966 (2007). Petition of appellant for further review overruled on November 15, 2007.

No. A-06-1371: **In re Interest of Connor S. & Marissa T.** Petition of appellant for further review overruled on October 10, 2007.

No. A-06-1374: **Duerr v. Bohaty**. Petition of appellant for further review overruled on January 24, 2008.

No. S-06-1380: **In re Interest of Destiny A. et al.** Petition of appellant for further review sustained on July 18, 2007.

No. A-06-1382: **State v. Zesatti**. Petition of appellant for further review overruled on October 31, 2007.

No. S-06-1393: **State v. Kuhl**, 16 Neb. App. 127 (2007). Petition of appellant for further review sustained on January 24, 2008.

No. A-06-1407: **State v. Blair**. Petition of appellant for further review overruled on October 16, 2007.

No. A-06-1414: **State v. Jenkins**. Petition of appellant for further review overruled on December 12, 2007.

No. A-06-1435: **Barrett v. Fabian**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-1440: **Morales v. Swift Beef Co.**, 16 Neb. App. 90 (2007). Petition of appellant for further review overruled on December 19, 2007.

No. A-06-1446: **Sullivan v. Superior Street Family Physicians**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-1454: **Classe v. College of Saint Mary**. Petition of appellant for further review overruled on October 24, 2007.

No. A-06-1457: **State v. Roundtree**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-029: **State v. Gonzales**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-040: **State v. Sedoris**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-055: **State v. Ramirez**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-062: **State v. Hobbs**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-072: **Yelli v. Neth**. Petition of appellant for further review overruled on October 16, 2007.

No. A-07-097: **State v. Blakeman**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-098: **State v. Cruz**. Petition of appellant for further review overruled on December 19, 2007.

No. A-07-106: **Timothy T. v. Shireen T.**, 16 Neb. App. 142 (2007). Petition of appellant for further review overruled on January 24, 2008.

No. A-07-123: **Martin v. Lanphier**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-135: **Fittro v. Fittro**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-140: **State v. Roberts**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-143: **Hendrix v. Sivick**. Petition of appellant for further review overruled on October 24, 2007.

No. A-07-148: **State v. Wills**. Petition of appellant for further review overruled on July 18, 2007.

No. A-07-163: **City of Omaha v. Tract 1**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-164: **City of Omaha v. Tract No. 3**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-196: **State v. Hansen**. Petition of appellant for further review overruled on October 24, 2007.

No. A-07-200: **Sherrod v. State**. Petition of appellant for further review overruled on October 24, 2007.

No. A-07-201: **In re Interest of Kolt S. & Ariel R.** Petition of appellee State for further review overruled on November 15, 2007.

No. A-07-205: **City of Omaha v. Tract No. 3**. Petition of appellant for further review overruled on August 29, 2007.

No. A-07-208: **Velehradsky v. Velehradsky**. Petition of appellant for further review overruled on November 21, 2007.

No. A-07-214: **State v. Rott**. Petition of appellant for further review overruled on November 21, 2007.

No. A-07-234: **In re Estate of Carlson**. Petition of appellant for further review overruled on September 12, 2007.

No. A-07-235: **State v. Troyer**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-238: **In re Interest of Harrison H.** Petition of appellant for further review overruled on January 24, 2008.

No. A-07-238: **In re Interest of Harrison H.** Petition of appellee Todd H. for further review overruled on January 24, 2008.

No. A-07-241: **State v. Standley**. Petition of appellant for further review overruled on August 29, 2007.

No. S-07-256: **State v. Brauer**, 16 Neb. App. 257 (2007). Petition of appellant for further review sustained on January 24, 2008.

No. A-07-277: **State v. Latzel**. Petition of appellant for further review overruled on September 12, 2007.

No. A-07-280: **Bellevue Rod & Gun Club v. Sarpy Cty. Bd. of Equal**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-281: **In re Interest of Naif A. et al**. Petition of appellant for further review overruled on November 15, 2007.

No. A-07-291: **State v. Burkhardt**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-307: **Neilan v. Neilan**. Petition of appellant for further review overruled on December 12, 2007.

No. A-07-310: **In re Interest of Jeff D.** Petition of appellant for further review overruled on October 31, 2007.

No. A-07-311: **In re Interest of Mindy D.** Petition of appellant for further review overruled on October 31, 2007.

No. A-07-350: **State v. Balash**. Petition of appellant for further review overruled on December 12, 2007.

No. A-07-356: **Williams v. Neth**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-362: **In re Interest of Lauren B.** Petition of appellant for further review overruled on November 21, 2007.

No. A-07-369: **State v. Poole**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-400: **State v. Barber**. Petition of appellant for further review overruled on September 20, 2007.

No. A-07-405: **State v. Hightower**. Petition of appellant for further review overruled on November 15, 2007.

No. A-07-408: **Spotanski v. Willyard**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-427: **In re Interest of Tyler L. & Alyssa L.** Petition of appellant for further review overruled on October 31, 2007.

No. S-07-447: **Jefferson v. State**. Petition of appellant for further review overruled on October 30, 2007.

No. A-07-451: **Feld Invest. Co. v. Valley West Apartments**. Petition of appellants for further review overruled on August 29, 2007.

No. A-07-461: **State v. Guerrero**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-466: **In re Interest of Tyler N. et al.** Petition of appellant for further review overruled on December 12, 2007.

No. A-07-473: **Waite v. Carpenter**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-478: **State v. Gutierrez-Pizano**. Petition of appellant for further review overruled on January 24, 2008.

Nos. A-07-487 through A-07-489: **State v. Gooch**. Petitions of appellant for further review overruled on December 19, 2007.

No. A-07-513: **In re Interest of Justice S. et al.** Petition of appellant for further review overruled on July 20, 2007, as untimely filed.

No. S-07-519: **Freeburger v. Department of Motor Vehicles**. Petition of appellant for further review sustained on January 16, 2008.

No. A-07-520: **Hokom v. Neth**. Petition of appellant for further review overruled on December 19, 2007.

No. A-07-549: **In re Interest of Morraghan J.** Petition of appellant for further review overruled on December 19, 2007.

No. A-07-581: **State v. Hansen**. Petition of appellant for further review overruled on November 27, 2007.

No. S-07-582: **Metropolitan Utilities Dist. v. Liberty Dev. Corp**. Petition of appellant for further review sustained on December 12, 2007.

No. A-07-590: **State v. Mudloff**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-597: **State v. Greenwood**. Petition of appellant for further review overruled on November 15, 2007.

No. A-07-607: **State v. Rideout**. Petition of appellant for further review overruled on November 15, 2007.

No. A-07-621: **State v. Meyer**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-624: **State v. Sinner**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-651: **Clayton v. Warford**. Petition of appellant for further review overruled on October 10, 2007.

No. A-07-653: **State v. Chae**. Petition of appellant for further review overruled on January 16, 2008.

No. S-07-656: **Norby v. Farnam Bank**. Petition of appellant for further review sustained on August 29, 2007.

Nos. A-07-666, A-07-667: **State v. Clinesmith**. Petitions of appellant for further review overruled on January 24, 2008.

No. A-07-674: **State v. Dvarro**. Petition of appellant for further review overruled on October 16, 2007.

No. A-07-695: **State v. Johnson**. Petition of appellant for further review overruled on January 3, 2008.

No. A-07-696: **State v. Drewes**. Petition of appellant for further review overruled on December 12, 2007.

No. A-07-708: **Clarke v. Dodge Cty. Bd. of Equal**. Petition of appellant for further review overruled on September 20, 2007.

Nos. A-07-716, A-07-717: **State v. McCormick**. Petitions of appellant for further review overruled on January 25, 2008, as untimely filed. See rule 2F(1).

No. A-07-744: **State on behalf of McCowin v. Wells**. Petition of appellant for further review overruled on October 12, 2007, as untimely filed.

No. A-07-750: **In re Interest of Kyle S**. Petition of appellant for further review overruled on January 16, 2008.

No. A-07-783: **State v. Sunday**. Petition of appellant for further review overruled on January 18, 2008.

No. A-07-826: **Hawks v. Williamson**. Petition of appellant for further review overruled on September 24, 2007.

No. A-07-851: **State v. Dockery**. Petition of appellant for further review overruled on October 31, 2007.

No. A-07-940: **In re Interest of Antoine G.** Petition of appellant for further review overruled on January 16, 2008.

No. A-07-956: **In re Interest of Al-Brion L. & Brivaughn L.** Petition of appellant for further review overruled on December 28, 2007, as filed out of time.

No. A-07-1190: **Flemons v. City of Omaha**. Petition of appellant for further review overruled on January 25, 2008, as untimely filed.

Nebraska Supreme Court

In Memoriam

Justice Harry Spencer

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
October 16, 2007
3:00 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

Proceedings

CHIEF JUSTICE HEAVICAN: Good afternoon to everyone. The Nebraska Supreme Court is meeting in special session on this 16th day of October, 2007, to honor the life and memory of former Supreme Court Justice Harry Spencer 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 at the far left is Justice 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 Spencer's family and I will introduce some of you now, and you may stand. First of all, granddaughter, Stephanie Harlan Skrupa. And why don't you all just remain standing for a minute. Frank Skrupa, also, her husband; Leone Spencer Harlan, also a daughter; Terry Spencer, son; and Pat Spencer, the wife of Terry Spencer; Bob Patterson and Mavis Patterson, that would be son's brother-in-law and sister-in-law, according to my information; Scott Spencer, grandson; and Danielle Spencer, wife of Scott. And that's all the family members I have listed. If there are other family members —

MS. SUNDQUIST: Your Honor, I'm Amanda Sundquist, Judge Spencer's great-granddaughter.

CHIEF JUSTICE HEAVICAN: Great. Thank you very much. Anybody else from the family?

You may all be seated, and thank you so much for honoring us with your presence here today.

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

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 C. Thomas White. He is the Chairman of the Supreme Court's Memorial Committee, and he will conduct the proceedings for us today.

Good afternoon, Mr. Chief Justice White.

CHIEF JUSTICE WHITE: May it please the Court, it's my honor to be chair again of a committee to — and I'm not sure about the — how long I — what time I might not be here myself in a different capacity. I had the honor of serving with Harry Spencer from 1977, when I was appointed, to 1979 when he retired. Although there are others who have served with him or know him well, and the first of these speakers, I should like to introduce, Mr. Charles Thone, our former Governor of the State of Nebraska.

Governor Thone.

CHIEF JUSTICE HEAVICAN: Governor Thone, good afternoon.

GOVERNOR THONE: Chief Justice Heavican, members of the Court, may it please the Court, you know, it was George Bernard Shaw who once wisely opined that no remarks from an ex-governor at a judicial setting such as this are all that bad, if they're short enough. So as I like to say in lieu of any brilliance or profundity, I'll confine myself to some brevity here today. But the good Judge asked his granddaughter to see that I came today and offered some remarks, so I like to think that that was probably the last unwise order of the Harry Spencer Court.

As has been documented here and there, Judge Harry Spencer graduated magna cum laude from the Nebraska Law School. And then he later lectured there, a course in Wills and Probate. He was, as I recall, Lancaster County Judge at the time.

I thought I'd kind of take a little different approach. We've got Professor Gradwohl here. He can talk about the academic side. And we've got former Chief Justice Bill Hastings here. He was associated closely with the Judge on the bench. My initial association with Professor Harry Spencer was a little unusual. As I indicated, he taught this course in Wills and

Probate, and my first introduction to him came in 1946. For you math majors, that's about 61 years ago.

I, at the time, was a somewhat bright and bushy-tailed freshman at the Law School. And to be honest, in contrast to the good Judge, I was a magna cum laude goof-off of some respects as far as diligent law school standards were concerned. I was kind of totally involved in campus politics, Inter-fraternity Council, and extra-curricular activities over there, and even some field trips we took occasionally to Omaha or Kansas City, and even New Orleans.

My personal big problem at the time with this Spencer Wills and Probate course was that it was taught on Saturday morning at 10:00. Maybe some of you remember. Well, my weekend at that time, usually started about Thursday at about 5:00 or 6:00, and this was, again, you've got to remember, after the Big War. For the uninitiated to know, that was World War II. And we returned veterans were, we thought, quite worldly wise. We just weren't about to let law school interfere with our extended social life and our overall college education. Well, typical of my academic discipline at the time, I went to the first couple classes and then I skipped two, or three, or four in a row. And as [Professor] Gradwohl will really remember, Judge Spencer was meticulous in roll calls, and he noticed my absence after about the fourth week or so. And he glared down at the class one Saturday morning and he said, "Now, if any of you here know or are a friend of this Charles Thone, that's T-h-o-n-e," and he rang it a couple, three times, "let him know that if he doesn't start showing up here and misses one more class before the semester's over, I'm going to flunk him with the worst grade I can give him." Well, two classmates came over to the Phi Gam house to consult with me a little and deliver the Spencer ultimatum, Roy Sheaff, maybe some of you knew Roy, of course, and Dean Kratz.

Well, the next Saturday, I was there bright and early, and I'd gotten the message loud and clear, and I never missed another of his classes. But as Paul Harvey might say, "Here's the rest of the story."

The first time I showed up, the Judge looked down at me and glared and said, "Well, it's sure nice that Mr. Thone would

spend some of his valuable weekend with us. Would he please stand up and recite for the class here the first assigned case today." Well, of course, I wasn't totally prepared, which he let me know rock right, and although at the end, he kind of was upbeat about it.

Well, this went on for the rest of the semester. The first case recitation all the time was "Mr. Thone will now stand up and recite this case for us." Well, you know, I got kind of smart. I thought, "Well, you know, I'll just read that first case and, boy, I'm all set here." Well, about the third time, he said, "Well, we're going to change the order of the cases a little today and Mr. Thone will review for us the last assigned case." Well, evidently he'd done me a little bit of a favor, because I ended up getting an awful good grade in the exam.

But years later, I talked with him about this. And he looked me right in the eye and he said, "Well, some of you G.I. Bill guys weren't at all appreciative and totally understanding of this U.S. Government-paid and this very short three years, this great opportunity that you all have here in law school. And he says, "I hope I motivated a few of you to straighten up and fly right. Charley," he said, and I remembered this forever, "by the time you really learn how to make the most of life, the most of life is gone." And of course, he was absolutely right.

Years later when I was governor, actually 30 years later as I recall, Judge Spencer was quite often, along with our excellent Attorney General at the time, Paul Douglas, my unofficial advisors on judicial appointments across the board. Now, Paul — and you all know Paul pretty well, he was kind of open and above-board about it. The Judge was much more discreet. But I can assure you, he got his oar in on every one of them with me personally. And frankly, I was helped considerably by it. Judge Spencer knew the judiciary as well as any judge or lawyer in the state, and, of course, Paul Douglas knew the bar awfully well, too.

Later on, when I was out of office, we had a money management group that met in my basement every Wednesday night for years. The Judge never missed a session when he was in town. Now, some of you might equate that money management group with just an old style poker game. That's what it was. In

those years, if there was ever a dispute on anything, all eyes turned to the good Judge. He was our most popular member, and his words settled the issue. There was never, ever a successful appeal of record, I assure you.

Judge Harry Spencer looked like a judge, that curly white hair, kind of rotund. He deeply felt that he honored and that he was honored by the law. He was a superlative student. You all knew that. And he honored the law with high distinction.

He especially enjoyed civic and fraternal work, and he was especially good at it. In my opinion and in the opinion of many others, Nebraska today is a better place because this native of Waltham, England, lived and worked his long adult life here in Nebraska. His three daughters, his three sons, his 13 grandchildren, his 23 great grandchildren, and his one great-great grandchild should be very proud, indeed, of their grand-grand-daddy, the Good Judge Harry Spencer. As they say, he was special. He was a keeper.

Thank you members of the Court, very much.

CHIEF JUSTICE HEAVICAN: Thank you, Governor Thone.

(The following remarks were submitted by former Chief Justice Norman Krivosha who was unable to attend the ceremonial session of the Supreme Court.)

CHIEF JUSTICE KRIVOSHA: May it please the Court, Mr. Chief Justice and Honorable Members of this Court, to be asked to participate in a memorial service for a departed colleague and friend is most often a bittersweet experience. To have been asked to participate when so many more are available and far more qualified is indeed a great honor; yet to have to participate is of deep sadness. It is with such bittersweet feelings that I now participate in a memorial service for our departed former brother on the Court, Judge Harry A. Spencer.

For many, myself included, it seemed as if such an occasion could not ever occur. It seemed for sure that this man of many talents would go on forever, as indeed we hoped he would. Born in 1903 in Bishops Waltham, England, he lived to the incredible age of nearly 104. But it was not just that he had longevity. With that he remained strong of mind and body.

I vividly recall attending his 100th birthday where, dressed in his best, he greeted each of us fully cognizant of who we were and where in his life we had been, even though he may not have seen us for a long time. One by one, as we passed his chair, he acknowledged us, sharing with some of us his current activities, including the fact that he had not lost either his love for, or his knowledge of, poker.

The lives of Judge Spencer and Norman Krivosha crossed many times over the years. While he was still a county judge, I was one of his students in the Wills and Estates course he taught at the University of Nebraska Law School. We learned not only the black letter law, but the way to do it. His may have been the first clinic taught in Law School, simply by reason of his combining the law of the textbook and statutes with the practical knowledge of his courtroom.

As he advanced to the District Court bench and I advanced to the real practice of law, we spent many times together. I specially recall his having appointed me to represent a young man charged in district court with theft. At the sentencing, I had succeeded in locating several uncles who lived in Arkansas, who drove all night to be in court for the sentencing. Recognizing that perhaps all this young man needed was someone who cared about him, he put the young man on probation to the uncles in Arkansas. He had the combination of a no-nonsense but compassionate jurist.

It was therefore with some pleasure that upon being appointed Chief Justice of this honorable Court, I should find Judge Spencer presiding as Chief Justice pro tem. He was extremely helpful and thoughtful to me, and I was most grateful to him for it. Wherever I might travel during the years on the Court and advise that I was from Nebraska, some judge who had attended the National Appellate Judges Conference would inquire about Judge Spencer. He was known throughout the country and today the educational program of the National Appellate Judges Education Program is named in his honor.

He lived a long life. But much more than that, he lived a full life and we are a better place because he passed this way.

CHIEF JUSTICE WHITE: May it please the Court, the next speaker is an academic, Professor John Gradwohl of the

University of Nebraska, was well acquainted with Harry, his scholarship and his study habits.

[Professor] Gradwohl.

CHIEF JUSTICE HEAVICAN: Good afternoon, Professor Gradwohl.

PROFESSOR GRADWOHL: May it please the Court, I am John Gradwohl, very proudly the Judge Harry A. Spencer Professor of Law at the University of Nebraska Law College. The Professorship and a study room in the library of the Law College were established by his daughter and son-in-law, Lee and the late Neal Harlan, in recognition of Judge Spencer's special interests and achievements in the areas of legal and judicial education.

Judge Spencer graduated from the University of Nebraska Law College in 1930 with the highest academic honors given at that time. He had worked in banking before deciding on a career in law. When my classmates and I arrived at the Law College, in 1949, Judge Spencer had been a lawyer for a decade-and-a-half and a county judge for four years. He taught the Wills course at the Law College from 1942 until 1961, his first year as a Justice of this Court, with a couple of years out when the college was closed during World War II. Each of today's speakers was a student at the Law College when Judge Spencer taught the Wills course.

Now, this was just a two-credit course, but it involved a lot of work. The statutes were a jumble, having been cobbled together from the territorial days. Probate practice, as you know, varied greatly throughout Nebraska's 93 counties. The authority of executors and administrators stemmed largely from orders of the Court, so Judge Spencer had acquired an intimate familiarity with all aspects of probate practice, testamentary trusts, and guardianships from intense daily involvement as a supervising judge. There were no "Cliff's Notes," other study aids, computers, or even suitable textbooks available for the Wills course at that time.

Judge Spencer approached the teaching of Wills with the same vigor and in the same rapid speed that he climbed the treacherous steps of Memorial Stadium. Each stair would be dealt with, a direct route would be followed, and no time was

to be wasted. Daily assignments could run more than 15 or 20 items, and the total course assignments probably ran more than 2,000 pages, that is, if a student could find all of the cases and other library books involved in the assignments and if the relevant pages were not too tattered to be read easily.

I'm not sure I believe all of former Governor Thone's statements about his preparation for the Wills course, because I don't think he could ever find all of the materials that Judge Spencer had assigned and we had to go find in the hard covers with all the dust and all in a library that just had limited numbers of copies of these books. The legend was that Judge Spencer had examined cover to cover all of the 150 or so volumes of the Nebraska Reports that there was at that time to find everything related to the law of wills and estates.

Judge Spencer had become a District Judge by the time my class took his Wills course. Vern Hansen, who went on to practice law in Gering; David Downing, who practices in Superior and was a Nebraska State Bar president; and I were enlisted to help Judge Spencer prepare course materials for the Wills course. In addition to all of his other activities, he put together a really excellent collection of commentary, cases, problems, questions, and forms in 415 single-spaced mimeographed pages. The Wills course was still demanding. Judge Spencer was in the forefront of legal education of the time in his preparation of these course materials. There just weren't materials of this sort that were available any place in the country. And additionally, he was far ahead of the times in his understanding and application of probate law.

Judge Spencer's Wills course materials not only helped to standardize probate practice throughout the state, but served as a valuable research vehicle in the 1970s when Nebraska looked at and then adopted the Uniform Probate Code, which was proposed by the National Conference of Commissioners on Uniform State Laws. That Code established the more modern system throughout the country, which actually resembled much of what Judge Spencer had previously taught and done as proper practice and proper policy.

Judge Spencer stopped teaching the Wills course shortly after he became a Supreme Court Justice, but he soon became

enmeshed in American Bar Association activities which led to the development of major national judicial education programs. He'd previously been President of the Lincoln Bar Association and Vice-president and Executive Committee member of the Nebraska State Bar Association.

In the early 1960s he held several key positions, including member of the Executive Committee in what was then the Judicial Administration Section of the American Bar Association. As the Judicial Administration Section evolved into a Judicial Division, Judge Spencer was one of the founders of the Appellate Judges Conference that was established in 1964. And remember, that's just three years after he joined this Court, so he didn't waste a moment in his continuing interest throughout his career at the legal education, and then to judicial education.

Judge Spencer became a pioneer of the educational programs within the Appellate Judges Conference. His name became synonymous with judicial education. Nebraskans active in the American Bar Association were routinely asked, "Do you know Judge Spencer?"

Today the Appellate Judges Conference has a number of continuing education programs. The first of these programs that the Appellate Judges Conference established continues to honor Judge Spencer, the Spencer-Grimes Seminar for Federal and State Appellate Judges. It was established in 1968 when Judge Spencer was Chairman of the Appellate Judges Conference. Justice William Grimes was a long-time New Hampshire Supreme Court Judge who was active in arranging of the inaugural full-scale national program designed expressly for appellate judges. The Chief Justices, Your Honor, would not let the appellate justices go to meetings at the Conference of Chief Justices, so this is one reason prompting Judge Spencer to help form the Conference of Appellate Judges, which exists today.

The Spencer-Grimes program is now well-established and endowed at the SMU Dedman School of Law in Dallas and holds programs at a variety of locations. Last month, the Spencer-Grimes program participated in a four-day major Appellate Judges Education Institute in Washington, D.C. The

program included participation by the Supreme Court of the United States and dealt with many of the country's most important current judicial issues.

Judge Spencer remained a personal friend of the almost 20 years of Nebraska law students for whom he'd been a professor, but he never completely shed that role of professor with his former students. I take it from Governor Thone's remarks today that that included governors as well as the rest of the world. His discussions of the law with former students were likely to be a professional line of questioning, "Have you considered this issue?" Or, "Have you considered this statute or this case?" Now, perhaps Judge Spencer would rule on money issues in Governor Thone's basement, but when some of us talked with him about the Uniform Probate Code, he reverted to his professorial role and he would not express an opinion. He would only say, "Have you thought about . . ." and invariably we had not thought as fully about that issue as we should have.

As a trial judge, Judge Spencer had a reputation for running a tight courtroom, being in charge, and ensuring that proper procedures were meticulously followed. When he became a Supreme Court Settlement Conference judge after retiring as an active Justice in 1979, he was tremendously successful in getting the parties to settle cases even after a district court decision. He thoroughly understood the legal issues and the worth of the litigation, and his reputation was that he had no hesitation in expressing his views clearly and forcefully to the lawyers involved. His professional demeanor, when called upon, was that of gentle encouragement for the learner to do it in his or her own way with just enough assistance from him to enable the learner to accomplish the task. As a Settlement Conference Justice, I think that he enjoyed a different reputation.

Judge Spencer was able to enjoy one accomplishment not achieved by any other University of Nebraska professor or Supreme Court Justice. He celebrated his 100th birthday by inspiring a Cornhusker football victory in a cameo appearance from the special balcony at Memorial Stadium. Thank you.

CHIEF JUSTICE HEAVICAN: Thank you, Professor Gradwohl.

CHIEF JUSTICE WHITE: May it please the Court, our last speaker is Chief Justice William Hastings, who succeeded Judge Spencer to the District Court and then took over his seat when Justice Spencer retired. May I introduce Chief Justice William C. Hastings?

CHIEF JUSTICE HEAVICAN: Thank you. Good afternoon Chief Justice Hastings.

CHIEF JUSTICE HASTINGS: Mr. Chief Justice, members of the Court, may it please the Court, the problem with going last is most everything you've written down to say has been said, but I can't edit that quickly, so I'll just read what I've wanted to say.

Harry Spencer was an uncommon man. The fact that he lived for almost 104 years is uncommon in and of itself. He was elected to the Supreme Court of Nebraska in 1961 and served with distinction until his retirement in 1979. I was privileged to succeed him on this Court.

He was born in England, but lived most of his life in the United States. He attended South High School in Omaha, the University of Nebraska, and University of Nebraska College of Law. After practicing law in Lincoln for a number of years, he was elected to the County Court and served there until his election to the District Court in 1952, where he served until 1961. He was deeply devoted to the law, and as has been previously stated, he was active in the affairs of the State Bar Association as well as American Bar Association. He was one of the founders of the Appellate Judges Conference Educational Program and that program is now named in his honor. He was a regular lecturer at those meetings for a number of years.

Judge Spencer — and this sounds like Governor Thone's experience, but it's mine, too. Judge Spencer taught Wills and Probate at the Nebraska College of Law. I took his course and remember very well that he called on me to recite a case on a Monday following a weekend at home when I had gone pheasant hunting. I had not read the case and had to report that to him. Even though we were fraternity brothers, he called on me for the next six classes and fortunately, I had read all of the cases.

Harry was not one dimensional. He participated in the activities of the Lincoln Council of Churches, the Boy Scouts, Kiwanis, YWCA, and was the first judicial representative on the Board for the Nebraska State Retirement System.

His greatest love outside of the law had to be the Masonic Lodge including all of its bodies. He was Master of his local lodge, Grand Master of Masons in Nebraska, Potentate of the Shrine and a 33rd Degree Scottish Rite Mason. He devoted half or more of his life to the Nebraska Masonic Home in Plattsmouth. He was appointed to the board in 1941 and served until 2004. By reason of his dedicated service, there is a new 24-hour nursing care wing, which was added in 1989 and was appropriately named the Spencer Wing. Harry lived out the remainder of his life at that home.

Mary C. Stapp, Executive Director of the Masonic Home wrote the following: "The employees at the Masonic Home, in every department, had the utmost respect for Judge Harry Spencer. Harry always showed an interest in the employees as individuals and truly cared and respected each of them for the work they carried out on a day-to-day basis. Harry was always a perfect gentleman, as he was his entire life, and freely expressed his appreciation to everyone who attended to his needs. Harry's genuine sincerity, kind nature, and humbleness left the employees in awe." End of quote. Thank you very much.

CHIEF JUSTICE HEAVICAN: Thank you, Chief Justice Hastings.

CHIEF JUSTICE WHITE: The program says that I shall give a few personal remarks. I served with Judge Spencer. As you know, at the time that I joined him, the Constitution of the State of Nebraska and the Constitution of the United States was in great and exciting flux. The rights of prisoners before the Court were being expanded or sometimes retreated, sometimes restrained. And during these conferences with formidable members of the Court like Judge Paul White, Judge Hale McCown, Les Boslaugh, Don Brodkey, the discussions were formidable, polite, courteous, and instructive. Judge Spencer was formidable, a good solid student of the law. His reasoning was persuasive. Sometimes, I did not always agree, but I

always found it formidable. I am pleased to add my voice of a good man, a fine judge, who honored the State of Nebraska by his service. Thank you, Your Honor.

CHIEF JUSTICE HEAVICAN: Thank you, Chief Justice White.

I want to note that among the dignitaries with us here today is Lieutenant Governor Rick Sheehy. And I take this final opportunity to note for those present that this entire proceeding has been memorialized by the Court. After these proceedings have been transcribed, the text will be uploaded to the Supreme Court's website and copies will be distributed to the family members and those of you who have spoken on behalf of Justice Spencer. 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 C. Thomas White who chaired the Court's Memorial Committee, and also again thank you for all of the presenters here today.

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 Spencer to remain in the courtroom for a moment to greet each other on this occasion. The Court will also come down and mingle with you. I thank you all for attending. We are adjourned.

(Ceremonial session adjourned at 3:40 p.m.)

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

BARBARA L. POPPE, PERSONAL REPRESENTATIVE OF THE ESTATE OF HEATHER A. POPPE, DECEASED, APPELLANT, V. ROBIN F. SIEFKER, APPELLEE.

735 N.W.2d 784

Filed July 27, 2007. No. S-05-670.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
3. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
4. **Motions for New Trial: Juror Misconduct.** An application for new trial may properly be based upon allegations of misconduct of the jury.
5. **Motions for New Trial: Juror Misconduct: Proof.** In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence.
6. **Motions for New Trial: Juror Misconduct: Verdicts.** In a motion for new trial based on juror misconduct, the misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict.
7. **New Trial: Jury Misconduct: Proof.** In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.
8. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
9. **Jury Misconduct: Proof.** Extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant.

10. **Jury Misconduct: Appeal and Error.** The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion.
11. **Wrongful Death: Damages.** A plaintiff in an action for wrongful death of a child may recover damages for loss of the deceased's society, comfort, and companionship which are shown by the evidence to have a pecuniary value.
12. ____: ____. In a parent's action for wrongful death of a child, parental loss is not limited to or necessarily dependent upon deprivation of the child's monetary contribution toward parental well-being.
13. ____: ____. In a wrongful death action, damages on account of mental suffering or bereavement or as solace to the next of kin on account of the death are not recoverable.
14. **Damages: Appeal and Error.** An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
15. **Damages.** If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.

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

Robert R. Moodie, of Friedman Law Offices, for appellant.

Cathy S. Trent-Vilim, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

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

GERRARD, J.

NATURE OF CASE

Heather A. Poppe was killed in an automobile accident when her car was struck by a car driven by Robin F. Siefker. Barbara L. Poppe, as personal representative of Heather's estate, filed a wrongful death lawsuit against Siefker. The only issue tried to the jury was the extent of the damages. The jury returned a verdict in favor of the estate for a total sum of $46,925.60. Following the trial, the court staff found in the jury deliberation room a "Personal Financial Slide-Calculator" and an inflation rate written on a "Post-it" note. The estate filed a motion for a new trial, asserting jury misconduct and inadequacy of the damage award. The district court denied the motion. The estate now appeals from the judgment and order of the district court denying the motion for new trial.

BACKGROUND

Heather A. Poppe (Heather) was killed in an automobile accident on November 28, 2002. Heather had been driving west on Interstate 80 when her vehicle was struck head on by a car driven by Siefker while he was driving east in the westbound lane. Barbara L. Poppe (Barbara), Heather's mother, brought a wrongful death lawsuit on behalf of the estate against Siefker. At trial, Siefker admitted the accident was caused by his negligence. The only issue tried to the jury was the extent of the damages.

Heather was adopted by Arthur Poppe (Arthur) and Barbara in 1983, less than 3 days after she was born. Heather was raised in Kearney, Nebraska, in the same residence where Arthur and Barbara currently live. Heather graduated from high school in 2001 and moved from Kearney to Milford, Nebraska, where she began attending classes in automobile body repair at the Milford campus of Southeast Community College. Along with going to school full time, Heather worked Monday through Friday at a fast-food restaurant in Lincoln, Nebraska, and worked at another fast-food restaurant in Kearney on the weekends. Even though Heather was attending school on scholarship, Barbara testified that they had to take out additional school loans to cover some of her expenses. On occasion, Heather's parents would also help her pay other bills.

Although Heather was attending school in Milford, she stayed in frequent contact with her family in Kearney. Barbara testified that she talked to Heather on the telephone, usually every day, and would occasionally drive to Milford to see Heather. Barbara also testified that Heather would come home to Kearney every weekend. It is undisputed that Heather had a loving and caring relationship with her parents.

The record, however, also reflects that Heather had a boyfriend in Kearney whom she had been dating for a number of years. Heather's boyfriend had a daughter from another relationship who, at the time of trial, had just turned 6 years old. Barbara testified that at the same time that Heather was maintaining a relationship with her boyfriend, she was building a relationship with her boyfriend's daughter. Heather would spend

time with her boyfriend and his daughter on the weekends when she was not working.

The evidence further reveals that as Heather became older, she decided she wanted to reconnect with her biological parents. Heather's biological father lives in Fremont, Nebraska, with his current wife, and Heather's biological mother lived in Omaha, Nebraska, but later moved to Alabama. Heather would talk on the telephone with her biological father and would spend time with him as often as their schedules would allow. Heather also began corresponding with her biological mother. While her biological mother was living in Omaha, Heather would frequently visit her on weekends. After her biological mother moved to Alabama, Heather would travel there to visit.

Evidence was also presented at trial relating to the health conditions of Heather's parents. Barbara testified that she recently suffered from a "medical emergency related to a blood clot" that blocked the flow of blood to her liver. As a result of this condition, she spent 2 weeks in the hospital and remains on blood thinners. At the time of trial, the blood clot had not been dissolved. Barbara testified that doctors are "very cautiously making sure that everything is smooth where that is concerned, because if it compromises again, it could cost [her her] life."

In July 1999, Arthur suffered a heart attack that left him with "less than half a functioning heart" and "has had repeated close calls since." As a result of the heart attack, Arthur has had seven stents inserted in his body to help restore the blood flow. Arthur testified that on bad days, he suffers from shortness of breath and chest pain. Arthur has been told by doctors that his heart condition is not going to improve.

At the close of all the evidence, the estate moved for a directed verdict on its claim for funeral and burial expenses. The motion was granted, and the district court directed a verdict in the estate's favor for $6,925.60 on this claim. The court then proceeded to instruct the jury on the estate's claim for damages on behalf of Heather's parents for loss of consortium, services, society, companionship, and counsel resulting from the death of their daughter. With regard to calculating the

present value of any damages, the jury was given instruction No. 8 which stated:

> If you decide the Estate of Heather A. Poppe is entitled to recover damages for any future losses, then you must reduce those damages to their present cash value. You must decide how much money must be given to the estate today to compensate it fairly for future losses.

The case was then submitted to the jury which returned a verdict in favor of the estate for $40,000 regarding the claim on behalf of Heather's parents. Accordingly, judgment was entered by the court in favor of the estate for the total sum of $46,925.60.

Following receipt of the verdict and discharge of the jury, the court staff was cleaning the jury deliberation room and found an item labeled "Personal Financial Slide-Calculator." Attached to the personal financial slide calculator was a "Post-it" note which contained a handwritten inflation rate of 3.5 percent, averaged over 23 years. The court contacted counsel for both parties, marked these items collectively as exhibit 4, and, on its own motion, received them into evidence.

The personal financial slide calculator is divided into three separate sections, each of which performs different calculations. The user adjusts the figures in the calculation by moving an insert. The first section is entitled "One-time investment" and allows the user to calculate the amount of income that will be reinvested monthly on an initial investment based on the number of years invested and the rate of return. This section contains figures for initial investments of $1,000, $10,000, $25,000, and $50,000 over a period ranging from 5 to 25 years, and invested at hypothetical return rates of 6, 8, 10, and 12 percent. The second section is entitled "Initial investment with additional monthly investments." This section performs the same calculations as the first section, using the same initial investment figures and rates of return, except this section calculates the total return based on the assumption that the user is making additional monthly investments of either $100 or $250. The third section is entitled "Retirement income investment." This section allows the user to determine the number of years

a total investment will last based on a range of monthly withdrawals and various rates of return.

The estate filed a motion for new trial, asserting jury misconduct and inadequacy of the damage award. In support of its motion, the estate submitted affidavits of two of the jurors in this case. The district court denied the estate's motion. The court determined that the damages awarded were supported by the evidence and the presence of exhibit 4 in the jury room was not shown, by clear and convincing evidence, to have prejudiced the estate. The estate appealed.

ASSIGNMENTS OF ERROR

The estate assigns that the district court erred in denying its motion for a new trial based on (1) jury misconduct and (2) inadequacy of the damage award.

STANDARD OF REVIEW

[1,2] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.[1] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.[2]

[3] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.[3]

ANALYSIS

Jury Misconduct

The estate argues that the personal financial slide calculator and the inflation rate on the "Post-it" note constitute

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[1] *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[2] *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006).

[3] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

extraneous prejudicial information pursuant to Neb. Rev. Stat. § 27-606(2) (Reissue 1995). The estate contends that given the presence of these items in the jury deliberation room, the district court abused its discretion in denying the estate's motion for new trial.

Section 27-606(2) prohibits a juror from testifying as to information relating to the process of jury deliberations, except that evidence may be adduced "on the question whether extraneous prejudicial information was improperly brought to the jury's attention." The affidavits offered by the estate were relevant to the issue of whether extraneous prejudicial information was improperly brought to the jury's attention. The issue before this court, then, is whether, in light of the evidence presented, the estate has met its burden of proving that prejudice has occurred. We conclude that the estate has not met this burden and therefore affirm the judgment of the district court.

[4-6] An application for new trial may properly be based upon allegations of misconduct of the jury.[4] In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence.[5] The misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict.[6]

[7-10] In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.[7] Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[8] Extraneous material or information considered by a jury may

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[4] See, Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2006); *Leavitt v. Magid*, 257 Neb. 440, 598 N.W.2d 722 (1999).

[5] *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

[6] *Smith, supra* note 5.

[7] *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992).

[8] *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999).

be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant.[9] The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion.[10]

In support of its motion for new trial, the estate offered the affidavits of jurors L.O. and S.W. Juror L.O. averred that exhibit 4 belonged to him and was in his sports coat pocket when the jury began deliberations. Juror L.O. further averred that the "Post-it" note with the inflation rate was also his and was attached to the personal financial slide calculator when it came out of his coat in the jury room. Juror L.O. explained that he "looked at Exhibit No. 4 during the deliberations but did not pass it around to other jurors." Juror S.W. stated in her affidavit that "she did not look at Exhibit No. 4 during the jury deliberations" but she did observe "other jurors looking at Exhibit No. 4 during the course of deliberations."

The estate contends that in light of these affidavits, there is a reasonable possibility that exhibit 4 affected the verdict to its detriment. The court denied the estate's motion for a new trial, concluding that the estate had failed to show by clear and convincing evidence that it was prejudiced by the presence of exhibit 4. We agree. While we do not condone the presence of these nonevidentiary items in the jury deliberation room without the knowledge of the court, we nonetheless cannot say, under these circumstances, that the presence of exhibit 4 in the deliberation room rises to the level of prejudice which warrants setting aside the jury's verdict.

The personal financial slide calculator, in this instance, was nothing more than a device which allowed the user to perform mathematic calculations quickly and easily.[11] It was not itself

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[9] *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004).

[10] *Id.*

[11] See *State v. Lihosit*, 131 N.M. 426, 38 P.3d 194 (N.M. App. 2002).

evidence of a fact at issue, nor did it create evidence that the jury could have considered.[12] A juror referencing the slide calculator would have to decide each and every variable that went into the calculation of the verdict, including the amount of money, rate of interest, and period of time.[13] In reality, all the slide calculator did was perform a mathematical calculation that could have been done with a pencil and paper, except that the slide calculator potentially made the calculation easier and the result more accurate.[14]

In evaluating prejudice, we also note that neither party presented any evidence to the jury with regard to the process by which the jury was to calculate the present value of any damages. In this regard, the only guidance the jury received was given by the court in jury instruction No. 8, which instructed the jury to reduce damages for future losses to their present cash value, but did not explain how this was to be done.

Given that the jury was not provided any evidence on present value, nor instructed as to how present value was to be calculated, the personal financial slide calculator and the handwritten inflation rate could not have contradicted any of the evidence presented at trial. Nor could the jury have given undue weight to these items, while disregarding other evidence adduced at trial, because there simply was no evidence presented on this issue.

We also note that the affidavits are not clear as to how many of the jurors actually saw the personal financial slide calculator and inflation rate during deliberations. The estate offered the affidavits of two jurors. Only one of those jurors looked at exhibit 4. Although juror S.W. stated that "other jurors" looked at exhibit 4, it is unclear whether juror S.W.'s reference to "other jurors" indicated anyone other than juror L.O. Juror

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[12] See, *Imperial Meat Company v. United States*, 316 F.2d 435 (10th Cir. 1963); *Lihosit, supra* note 11.

[13] See *Lihosit, supra* note 11.

[14] See, *Imperial Meat Company, supra* note 12; *Lihosit, supra* note 11. See, also, *Zenda Grain & Supply Co. v. Farmland Industries, Inc.*, 20 Kan. App. 2d 728, 894 P.2d 881 (1995); *Bobbie Brooks, Inc. v. Goldstein*, 567 S.W.2d 902 (Tex. Civ. App. 1978).

L.O.'s affidavit plainly states that he "did not pass [exhibit 4] around to other jurors." The evidence is at best inconclusive as to how many other jurors, if any, viewed exhibit 4 during deliberations.

Furthermore, there is no evidence that exhibit 4 influenced the jury's decision in any way, much less that it influenced the decision in any particular way. While it is possible that the presence of exhibit 4 in the jury deliberation room resulted in a decreased award, it is equally possible that its presence resulted in an increase in the award. We have no basis, other than speculation, upon which to determine how a juror's calculation of present value would be affected by exhibit 4, if it was affected at all.

In short, the record does not contain clear and convincing evidence that prejudicial jury misconduct occurred. Given the circumstances of this case, we cannot say that the estate was prevented from receiving a fair trial. Accordingly, we conclude that the estate has not met its burden of proving prejudicial jury misconduct, and the trial court did not abuse its discretion in denying the estate's motion for a new trial on this basis.

Adequacy of Verdict

[11-13] The estate also contends that the damage award was inadequate. This court has consistently recognized that a plaintiff in an action for wrongful death of a child may recover damages for loss of the deceased's society, comfort, and companionship which are shown by the evidence to have a pecuniary value.[15] The term "society" embraces a broad range of mutual benefits each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, and protection.[16] Parental loss is not limited to or necessarily dependent upon deprivation of the child's monetary contribution toward parental well-being.[17] However, damages on account of mental suffering or

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[15] See *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002).

[16] *Id.*

[17] *Id.*

bereavement or as solace to the next of kin on account of the death are not recoverable.[18]

[14,15] An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.[19] If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.[20]

With regard to the adequacy of a verdict, we have stated that "'[i]t is virtually impossible to "color match" cases' to determine whether a verdict in a particular case was adequate."[21] One common thread runs throughout all wrongful death cases, namely, that damages in any wrongful death case are incapable of precise computation and are largely a matter for the jury.[22]

In the present case, there is uncontroverted evidence of a close and loving relationship between Heather and her parents. The testimony presented at trial shows that Heather was a bright, considerate, dependable, and loving child who had a variety of interests both in and out of school. However, based on the facts and circumstances of this case, we cannot say that the jury verdict was so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. The jury was instructed, without objection, to consider the following factors when arriving at a verdict:

> (1) Any financial support, services, comfort or companionship that Heather Poppe gave to her parents before her death and the prospect that there would have been changes in the future;
>
> (2) the physical and mental health of Heather Poppe had she lived;

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[18] See *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989).

[19] *Brandon, supra* note 15.

[20] *Id.*

[21] *Reiser v. Coburn*, 255 Neb. 655, 660, 587 N.W.2d 336, 340 (1998).

[22] See *id.*

(3) Heather Poppe's life expectancy immediately before her death; and

(4) the life expectancy of Heather Poppe's parents.

At the time of her death, Heather was 19 years old and had moved away from her parents in Kearney to attend school in Milford. Although Heather kept in contact with her family and came home to Kearney every weekend, the evidence reveals that Heather's time with her parents was limited and was becoming increasingly so as a result of the many activities in her life. The jury was also entitled to consider, in its determination of damages, the life expectancy of Heather's parents. A significant amount of testimony was presented at trial indicating that Arthur and Barbara each had a history of health problems that could affect their life expectancies.

The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.[23] Given our standard of review and the record with which we are presented, we conclude that the evidence presented at trial was adequate to support the award of $46,925.60, and therefore, the district court did not abuse its discretion in overruling the estate's motion for new trial.

CONCLUSION

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

AFFIRMED.

HEAVICAN, C.J., not participating.

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[23] *Shipler, supra* note 3.

JUDITH A. HUGHES, IN HER OWN RIGHT, AND JUDITH A. HUGHES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NICKOLAS J. HUGHES, DECEASED, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, A NEBRASKA POLITICAL SUBDIVISION, ET AL., APPELLEES.

JUDITH A. HUGHES, IN HER OWN RIGHT, AND JUDITH A. HUGHES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NICKOLAS J. HUGHES, DECEASED, APPELLANT, V. NEBRASKA COMMUNICATIONS, INC., A NEBRASKA CORPORATION, AND RADIODETECTION CORPORATION, A NEW JERSEY CORPORATION, APPELLEES.

735 N.W.2d 793

Filed July 27, 2007. Nos. S-05-1223, S-06-216.

1. **Summary Judgment.** 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.
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. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions.
4. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. If there is no legal duty, there is no actionable negligence.
5. ____. The question in a negligence action of what duty is owed and the scope of that duty is multifaceted. The question of whether a duty exists at all is a question of law.
6. **Public Utilities: Electricity: Negligence.** A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
7. ____: ____: ____. The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.
8. **Public Utilities: Negligence.** Power companies must anticipate and guard against events which may reasonably be expected to occur, and the failure to do so is negligence.
9. **Public Utilities: Electricity: Negligence.** Where circumstances are such that the probability of danger to persons having the right to be near an electrical line is reasonably foreseeable, power companies may be held liable for injury or death resulting from contact between the powerline and a movable machine. However,

a failure to anticipate and guard against a happening which would not have arisen except under exceptional or unusual circumstances is not negligence.

10. **Negligence.** In determining whether a legal duty exists for actionable negligence, an appellate court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.
11. **Negligence: Words and Phrases.** In the context of whether a legal duty exists, foreseeability refers to the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.
12. ____: ____. As currently codified, "assumption of risk" as an affirmative defense means that (1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger.
13. **Negligence.** The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts.
14. ____. The subjective standard which is applied to assumption of risk involves an inquiry into what the particular plaintiff in fact sees, knows, understands, and appreciates.
15. ____. The doctrine of assumption of risk applies to known dangers and not to those things from which, in possibility, danger may flow.
16. **Negligence: Proof: Circumstantial Evidence.** Knowledge in the context of assumption of risk involves a state of mind or mental process which may be proved by circumstantial evidence.

Appeals from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Judgment in No. S-05-1223 affirmed. Judgment in No. S-06-216 reversed, and cause remanded for further proceedings.

Raymond E. Baker, of Law Offices of Raymond E. Baker, P.C., and Michael W. Heavey, of Colombo & Heavey, P.C., for appellant.

Rex A. Rezac and Russell A. Westerhold, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee Omaha Public Power District.

Daniel P. Chesire, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellee Radiodetection Corporation.

Stephen S. Gealy and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Nebraska Communications, Inc.

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

STEPHAN, J.

Nickolas J. Hughes suffered fatal injuries when he came into contact with an underground electrical line owned by Omaha Public Power District (OPPD) while working in an excavation. Judith A. Hughes, his widow and the personal representative of his estate, brought this personal injury and wrongful death action against OPPD; Nebraska Communications, Inc. (NebCom); and Radiodetection Corporation (RDC). The district court granted OPPD's motion for summary judgment, concluding that it owed no legal duty to Hughes. Subsequently, in a separate order, the court entered summary judgment in favor of NebCom and RDC, determining as a matter of law that by his actions, Hughes had assumed the risk of injury. The personal representative perfected timely appeals from both orders, and we consolidated the appeals. We conclude that the record supports the judgment entered by the district court in favor of OPPD but does not support the judgment in favor of NebCom and RDC.

I. BACKGROUND

1. OMAHA PUBLIC POWER DISTRICT

OPPD is a publicly owned utility company providing electrical power to Omaha, Nebraska, and portions of southeastern Nebraska. It is a political subdivision of the State.[1]

(a) Underground Electrical Powerline

OPPD maintains a buried, 8,000-volt, three-phase powerline in a public utility easement along portions of the east side of 120th Street in Omaha. The installation consists of three individual phase cables and one neutral cable, each housed in unmarked PVC conduit approximately 3 inches in diameter.

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[1] See Neb. Rev. Stat. § 13-903(1) (Cum. Supp. 2006).

The conduits are buried 3 to 4 feet below the surface of the ground. The relevant portions of the powerline along 120th Street were installed in 1980 and 1985.

At the time the powerlines were installed, OPPD had an internal reference drawing which provided design specifications on buried cable trenches. That standard provided that when specified by an OPPD design engineer, a warning or identifying tape may be buried 1 foot below the surface of the ground directly above the buried powerlines. The tape was described as a "thin piece of plastic with some type of verbiage" indicating the presence of a buried cable below. Testimony indicated that the decision on whether to specify the identifying tape is discretionary with OPPD design engineers. When asked the circumstances in which such specification would be made, an OPPD representative testified:

> This particular cable was located in public right away [sic]. The people digging in those types of facilities are, generally, contractors and people in the business. If we were to go across private property, like, the homeowners', we never called in to get a locate. The engineer would have probably specified it or might have specified if he thought it was necessary.

A buried-cable industry standard also existed at the time the powerlines were installed. The relevant standards for the buried powerlines in question were the 1977 and 1984 editions of the American National Standards Institute's National Electrical Safety Code. Both standards specified, among other things, the minimum horizontal clearances between cables and minimum burial depth. However, neither standard required that the conduit or sheathing contain warning markings, nor did either require that warning or identifying tape be buried with the cable.

(b) One-Call Notification System Act

In 1994, the Legislature enacted the One-Call Notification System Act, Neb. Rev. Stat. §§ 76-2301 to 76-2330 (Reissue 1996).[2] As the owner of buried electrical utilities, OPPD is an

[2] See 1994 Neb. Laws, L.B. 421.

operator for purposes of the act.[3] At all relevant times to this action, Diggers Hotline of Nebraska operated the statewide call center providing the buried utility notification services required by the act.[4] In 2001, the act provided:

> (1) A person shall not commence any excavation without first giving notice to every operator. An excavator's notice to the center shall be deemed notice to all operators. An excavator's notice to operators shall be ineffective for purposes of this subsection unless given to the center. Notice to the center shall be given at least two full business days, but no more than ten business days, before commencing the excavation . . . . An excavator may commence work before the elapse of two full business days when (a) notice to the center has been given as provided by this subsection and (b) all the affected operators have notified the excavator that the location of all the affected operator's underground facilities have been marked or that the operators have no underground facilities in the location of the proposed excavation.
>
> (2) The notice required pursuant to subsection (1) of this section shall include (a) the name and telephone number of the person making the notification, (b) the name, address, and telephone number of the excavator, (c) the location of the area of the proposed excavation . . . (d) the date and time excavation is scheduled to commence, (e) the depth of excavation, (f) the type and extent of excavation being planned . . . and (g) whether the use of explosives is anticipated.[5]

The act requires that operators receiving notice from the center of a planned excavation "shall advise the excavator of the approximate location of underground facilities in the area of the proposed excavation by marking or identifying the location of the underground facilities with stakes, flags, paint, or

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[3] See § 76-2313.

[4] See §§ 76-2305 and 76-2318.

[5] § 76-2321.

any other clearly identifiable marking or reference point."[6] The act further specifies that marking or identification of underground facilities

> shall be done in a manner that will last for a minimum of five business days on any nonpermanent surface and a minimum of ten business days on any permanent surface. If the excavation will continue for longer than five business days, the operator shall remark or reidentify the location of the underground facility upon the request of the excavator. The request for remarking or reidentification shall be made through the center.[7]

The act imposes strict liability for property damage on excavators who fail to give notice of an excavation and subsequently damage underground facilities.[8] The act further imposes civil penalties on operators and excavators who violate the notification and marking provisions of the act.[9]

2. Radiodetection Corporation

RDC is a New Jersey corporation which manufactures equipment used to locate underground utilities. One of its products is the "GatorCam System," which includes, among other things, a "Gator Locator," and a "Gator Transmitter." The system can be used in different modes of operation, depending on the type of buried utility that is sought to be located.

3. Nebraska Communications

NebCom is a telecommunications contractor located in Sarpy County, Nebraska. It acts as a general contractor for telecommunications companies requiring installation and maintenance projects. In 2001, NebCom served as a general contractor for Qwest Communications, formerly known as U S West Communications.

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[6] § 76-2323(1).

[7] § 76-2323(2).

[8] See § 76-2324.

[9] See § 76-2325.

On June 14, 2001, Qwest Communications engaged NebCom to clean out an empty PVC conduit buried in the utility easement along the east side of 120th Street in Omaha, south of Miracle Hills Drive. NebCom subcontracted the work to Burton Plumbing Services, Inc. (Burton), a plumbing contractor located in Omaha. NebCom did not notify Diggers Hotline at any time relevant to the project.

4. Nickolas Hughes

Hughes was employed by Burton as a lead drain technician. He had been employed by Burton since about 2000 and was supervised by Bruce Arp and, on specific projects, by Patrick Morse. Arp testified that Hughes had been instructed on how to use the GatorCam system. Other testimony established that Burton employees attended periodic safety training and had generally been instructed that they were not to cut into any object unless the employee was absolutely sure of what it was. One employee testified that he was not specifically instructed on this point by Burton but that he knew from experience and common sense not to cut a line without knowing what it was.

5. Hughes' Accident

Sometime between June 14 and June 22, 2001, Hughes and Steven Sinnett, another Burton employee, began the work of cleaning the buried conduit along 120th Street. They used a specialized commercial pressure washer called a jetter which they inserted into the empty conduit from a manhole access point located on the east side of 120th Street south of Miracle Hills Drive. They extended the jetter through the conduit to the next manhole access point to the north, a distance of about 400 to 500 feet. When the jetter had been completely fed through the conduit, they connected a separate cable to the jetter head and attempted to pull the jetter and cable back through the conduit. During this process, the jetter became stuck. Burton employees used various methods to attempt to dislodge the jetter from the conduit, but were unsuccessful. At some point, Burton informed NebCom of the situation. The NebCom maintenance supervisor testified that she offered to hire an excavation contractor to retrieve the jetter for Burton, but Hughes declined that offer, indicating that Burton was capable of such excavation project.

On or about June 27, 2001, Burton employees Danny Anderson and Richard Griffen were sent to excavate in the area of the stuck jetter. They were under the supervision of Morse. Based on the estimated amount of jetter hose which had been fed into the conduit, they began digging a hole about 300 feet south of Miracle Hills Drive. The evidence reflects that no one from Burton called Diggers Hotline before commencing this excavation. However, Anderson, Griffen, and Morse testified that they saw paint markings along the sidewalk indicating the existence of buried utilities. The record indicates that another excavating contractor had previously called Diggers Hotline regarding excavation work on the east side of 120th Street, south of Miracle Hills Drive, which was unrelated to this action. Because they were aware from markings on the ground that other buried utilities, including electrical lines, were in the area, Anderson and Griffen used shovels and a probe rod, instead of a backhoe, to excavate. Griffen testified: "We hand-excavated all the utilities because there were so many utilities right in that area there is no way that you could safely get a piece of equipment in there to excavate it. So we hand-dug everything." In this manner, they exposed four conduits. Anderson testified that his instructions were not to touch anything, but to "just dig it up, expose it, and leave it."

Morse testified that he and Hughes discussed the situation at the 120th Street jobsite at Burton's shop on June 27, 2001. Morse informed Hughes that he intended to place a request through Diggers Hotline to have the utility companies, including OPPD, come to the site to identify the exposed conduits. Morse testified that he mentioned the risk of electrocution and told Hughes not to cut any of the conduits until they were identified. Morse also testified that on the following morning, while working with Hughes at another jobsite, he again told him not to cut any of the exposed conduits at the 120th Street site until they were identified. Morse told Hughes that he had to go to another site, but that he would meet him at the 120th Street site and that Hughes should not do anything until Morse arrived there.

On the morning of June 28, 2001, Sinnett arrived at the 120th Street site and attempted to use an RDC GatorCam system

owned by Burton to verify that the stuck jetter was located in the excavated area. Sinnett pushed a metal "fish tape" into the conduit as far as it would go, thereby reaching the location at which he assumed the jetter was stuck. He then connected one Gator transmitter lead to the fish tape and the other lead to a grounding rod. Using the Gator locator, Sinnett was able to detect a signal emanating from the fish tape. The signal was not detected by the Gator locator beyond the excavated hole. Sinnett concluded that the jetter was located in one of the exposed conduits in the excavation.

Hughes arrived at the excavation scene later that morning. He used the Gator locator in the same manner as had Sinnett. Standing in the excavation, Hughes then used a multipurpose handtool to tap on each of the four exposed conduits. Sinnett heard Hughes say that one of the conduits sounded hollow, and then Sinnett observed as Hughes began cutting it with the handtool. Another eyewitness, Burton employee Paul Barrett, testified that immediately before cutting the conduit, Hughes joked about the possibility that it might be a sprinkler line and that he could be sprayed with water. Sinnett, Barrett, and Anderson, who was also present at the jobsite, testified that shortly after Hughes began cutting into the conduit, a ball of fire erupted from the excavated hole. After the fire subsided, the three pulled Hughes from the excavation. Hughes suffered severe burn injuries from which he died on the following day.

6. Procedural History

(a) Pleadings

On June 25, 2003, the personal representative filed this action in the district court for Douglas County against OPPD, NebCom, and RDC, seeking damages for Hughes' injuries and death. In her complaint, she alleged, restated, that OPPD was negligent in (1) failing to warn of the presence of the buried electrical transmission line, (2) failing to conspicuously mark the buried lines with warnings, and (3) burying the lines directly adjacent to other utility conduits. She further alleged, restated, that NebCom was negligent in (1) failing to provide precautions regarding the safe conduct of the work, (2) failing to provide a safe workplace, (3) placing its utility conduit directly

adjacent to electrical powerlines, (4) failing to exercise its right to control the safety and supervise the work of Hughes, and (5) failing to provide adequate training and/or equipment to Burton employees. The personal representative also alleged negligence and strict liability claims against RDC.

OPPD answered, denying its negligence and raising several affirmative defenses, including assumption of risk. In their answers, NebCom and RDC also pled assumption of the risk as an affirmative defense.

(b) Summary Judgment as to OPPD: Case No. S-05-1223

All three defendants subsequently moved for summary judgment. After conducting a hearing at which evidence was offered in support of and in opposition to the motions, the district court sustained OPPD's motion for summary judgment but denied those of NebCom and RDC. The district court reasoned that because OPPD did not have notice of the excavation in the area of its buried powerlines as required under the One-Call Notification System Act, it did not owe a duty to warn Hughes of such lines. The court also determined that the personal representative did not present expert testimony on the issue of standard of care. In the same order, the district court denied the motions for summary judgment filed by NebCom and RDC, determining that there were genuine issues of material fact with respect to some claims and defenses, including assumption of risk. Pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004), the district court directed that the judgment in favor of OPPD was final. From that order, the personal representative perfected a timely appeal, which we moved to our docket on our own motion.[10] That appeal is docketed as case No. S-05-1223.

(c) Summary Judgment as to NebCom and RDC: Case No. S-06-216

After conducting additional discovery, NebCom and RDC again moved for summary judgment. Following a hearing at

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[10] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

which additional evidence was received, the district court sustained both motions, determining as a matter of law that the personal representative's claims were barred by the assumption of risk defenses asserted by NebCom and RDC. The court determined that Hughes knew of and understood the specific risk posed to him by the powerline, that Hughes voluntarily exposed himself to the danger, and that Hughes' death occurred as a result of his exposure to the danger. After the district court directed entry of a final judgment pursuant to § 25-1315(1), the personal representative timely appealed. We granted the petitions of the personal representative and NebCom to bypass the Nebraska Court of Appeals and consolidated this appeal with the appeal involving OPPD.[11] The appeal from the order dismissing the action as to NebCom and RDC is before us as case No. S-06-216.

II. ASSIGNMENTS OF ERROR

In the action against OPPD, the personal representative assigns, restated and consolidated, that the district court erred in finding that (1) OPPD did not owe a duty to warn Hughes and (2) she failed to carry her burden of proof by failing to provide expert testimony.

In the action against NebCom and RDC, the personal representative assigns, restated and consolidated, that the district court erred in finding that Hughes knew and appreciated the danger that existed.

III. STANDARD OF REVIEW

[1,2] 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.[12] 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

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[11] See § 24-1106(2).

[12] *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007).

and gives such party the benefit of all reasonable inferences deducible from the evidence.[13]

[3] When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions.[14]

IV. ANALYSIS

1. Case No. S-05-1223: Summary Judgment in Favor of OPPD

[4,5] The personal representative alleged that OPPD was negligent in failing to warn of the existence and location of its underground powerline. The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.[15] If there is no legal duty, there is no actionable negligence.[16] The question of what duty is owed and the scope of that duty is multifaceted.[17] First, and foremost, the question of whether a duty exists at all is a question of law.[18]

(a) Statutory Duty

At the time of the accident, OPPD had certain duties under the One-Call Notification System Act. The act was intended "to establish a means by which excavators may notify operators of underground facilities in an excavation area so that operators have the opportunity to identify and locate the underground facilities prior to excavation."[19] The purpose of the act was "to aid the public by preventing injury to persons and damage to property and the interruption of utility services resulting from

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[13] *Id.*

[14] *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[15] *Washington v. Qwest Communications Corp.*, 270 Neb. 520, 704 N.W.2d 542 (2005); *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003).

[16] *Id.*

[17] *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001).

[18] *Id.*

[19] § 76-2302(1).

accidents caused by damage to underground facilities."[20] The term "underground facility" as used in the act includes buried electric lines.[21] As noted above, the duty is triggered by notice, transmitted through Diggers Hotline, that a person intends to excavate in a particular area.[22] The act requires that operators receiving notice from the center of a planned excavation "shall advise the excavator of the approximate location of underground facilities in the area of the proposed excavation by marking or identifying the location of the underground facilities with stakes, flags, paint, or any other clearly identifiable marking or reference point."[23] The act further specifies that marking or identification of underground facilities

> shall be done in a manner that will last for a minimum of five business days on any nonpermanent surface and a minimum of ten business days on any permanent surface. If the excavation will continue for longer than five business days, the operator shall remark or reidentify the location of the underground facility upon the request of the excavator. The request for remarking or reidentification shall be made through the center.[24]

There is no evidence that OPPD violated its statutory duty imposed by the One-Call Notification System Act. It is uncontroverted that no one from Burton notified Diggers Hotline before commencing the excavation. The record reflects that in response to notices transmitted to Diggers Hotline by other contractors in the weeks preceding the accident, OPPD marked its underground lines in the vicinity of 120th Street and Miracle Hills Drive. There is no evidence or claim that it did so in a manner contrary to the requirements of the act. There is no evidence that OPPD had actual or constructive knowledge that Burton employees had excavated and were working in the area in which the accident occurred.

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[20] § 76-2302(2).

[21] § 76-2317.

[22] See § 76-2321.

[23] § 76-2323(1).

[24] § 76-2323(2).

(b) Common-Law Duty

[6,7] Our jurisprudence defining the duty of electric utilities to protect against electrocution is derived primarily from cases involving inadvertent contact with powerlines situated at or above ground level. In such cases, we have recognized that a power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.[25] The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.[26] However, power companies are not insurers and are not liable for damages in the absence of negligence.[27]

[8,9] Power companies must anticipate and guard against events which may reasonably be expected to occur, and the failure to do so is negligence.[28] Where circumstances are such that the probability of danger to persons having the right to be

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[25] *Marshall v. Dawson Cty. Pub. Power Dist.*, 254 Neb. 578, 578 N.W.2d 428 (1998); *Engleman v. Nebraska Public Power Dist.*, 228 Neb. 788, 424 N.W.2d 596 (1988); *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987); *Roos v. Consumers Public Power Dist.*, 171 Neb. 563, 106 N.W.2d 871 (1961).

[26] *Engleman v. Nebraska Public Power Dist, supra* note 25; *Tiede v. Loup Power Dist., supra* note 25; *Roos v. Consumers Public Power Dist., supra* note 25.

[27] *Marshall v. Dawson Cty. Pub. Power Dist., supra* note 25; *Engleman v. Nebraska Public Power Dist., supra* note 25; *Tiede v. Loup Power Dist., supra* note 25; *Suarez v. Omaha P.P. Dist.*, 218 Neb. 4, 352 N.W.2d 157 (1984); *Lorence v. Omaha P. P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974); *Gillotte v. Omaha Public Power Dist.*, 185 Neb. 296, 176 N.W.2d 24 (1970); *Roos v. Consumers Public Power Dist., supra* note 25.

[28] *Engleman v. Nebraska Public Power Dist., supra* note 25; *Tiede v. Loup Power Dist., supra* note 25; *Suarez v. Omaha P.P. Dist., supra* note 27; *Lorence v. Omaha P. P. Dist., supra* note 27; *Gillotte v. Omaha Public Power Dist., supra* note 27; *Roos v. Consumers Public Power Dist., supra* note 25.

near an electrical line is reasonably foreseeable, power companies may be held liable for injury or death resulting from contact between the powerline and a movable machine.[29] A failure to anticipate and guard against a happening which would not have arisen except under exceptional or unusual circumstances is not negligence.[30]

In *Schmidt v. Omaha Pub. Power Dist.*,[31] we considered the claim of an excavator who was electrocuted when he struck an underground powerline with an auger while digging postholes on commercial property. Before digging, the excavator's employer called Nebraska Underground Hotline to have any buried utilities marked. The hotline passed the information on to utility companies, including OPPD. OPPD then marked the buried powerlines it owned on the property but did not mark any secondary powerlines it did not own. Neither OPPD nor the hotline warned the excavator or his employer of this fact. The excavator subsequently came into contact with an unmarked secondary powerline. This court reversed a summary judgment entered in favor of OPPD on procedural grounds without discussing whether OPPD had a duty to warn beyond marking the underground powerlines that it owned. In discussing whether the hotline owed a duty, we noted: "It is common knowledge that electricity is a dangerous commodity, and it requires little imagination to perceive the risk of electric shock to an individual who digs in an area containing hidden underground electric lines."[32]

[10] Based upon OPPD's reference drawing, the personal representative contends that OPPD had a duty to bury an identifying tape above the powerline to warn of its presence. In determining whether OPPD owed this duty to Hughes and others

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[29] *Engleman v. Nebraska Public Power Dist., supra* note 25; *Tiede v. Loup Power Dist., supra* note 25; *Gillotte v. Omaha Public Power Dist., supra* note 27.

[30] *Roos v. Consumers Public Power Dist., supra* note 25.

[31] *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994).

[32] *Id.* at 786, 515 N.W.2d at 763.

similarly situated, we employ a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.[33]

(i) Magnitude and Nature of Risk

Obviously, electricity is a dangerous commodity.[34] As noted, however, most of our cases involving the duty owed by electric utility companies involve powerlines placed above ground level. Underground powerlines present a somewhat different risk, which we identified in *Schmidt* as "the risk of electric shock to an individual who digs in an area containing hidden underground electric lines."[35] In this case, Hughes was not involved in the excavation which exposed the underground line. Burton employees who performed the excavation were aware of the existence of the buried powerlines from surface markings requested by other contractors. Using a probe and shovels, they carefully exposed the conduits. Once exposed, the powerline sheathed in its PVC conduit posed no risk unless intentionally or accidentally cut.

(ii) Relationship of Parties

The record reflects no employment or contractual relationship between OPPD and Hughes or Burton. At the time of the accident, OPPD had not been given actual or constructive notice that Burton employees had exposed the underground powerline and were working in its vicinity.

(iii) Opportunity and Ability to Exercise Care

The personal representative contends that OPPD had the opportunity to exercise care by simply implementing the internal design standards OPPD had in place at the time it originally

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[33] See, *Fuhrman v. State*, *supra* note 15; *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

[34] See, *Schmidt v. Omaha Pub. Power Dist.*, *supra* note 31; *Lorence v. Omaha P. P. Dist.*, *supra* note 27; *Gillotte v. Omaha Public Power Dist.*, *supra* note 27.

[35] *Schmidt v. Omaha Pub. Power Dist.*, *supra* note 31, 245 Neb. at 786, 515 N.W.2d at 763.

installed the buried powerlines. Those internal standards indicate that OPPD will bury a warning or identifying tape about 1 foot below the surface of the ground directly above the power cables "when specified" by an OPPD design engineer. OPPD asserts that the decision whether to specify the identifying tape is discretionary with its engineers. Furthermore, OPPD argues that the One-Call Notification System Act eliminated the need for OPPD to use the identifying tape.

Clearly, OPPD design engineers could have specified the identifying tape, although there were no code or industry standards mandating its use. It is not clear, however, that identifying tape would have prevented the accident. At most, the presence of the tape would have warned excavators that they were about to encounter an underground powerline. The Burton employees who did the actual excavation knew this and for that reason, carefully exposed the conduits using handtools instead of power equipment. Because Hughes was not present during the excavation, we cannot say on this record that he would ever have been aware of the identifying tape even if it had been specified and used.

(iv) Foreseeability of Harm

[11] In the context of whether a legal duty exists, foreseeability refers to

> "'"the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care."'"[36]

As we noted in *Schmidt*, the risk of accidental harm to a person who excavates in the vicinity of underground electric lines without knowledge of their existence is certainly foreseeable. But that is not the risk at issue in this case. Here, the question is whether the "risk reasonably to be perceived" included

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[36] *Knoll v. Board of Regents*, 258 Neb. 1, 7, 601 N.W.2d 757, 763 (1999) (quoting *Clohesy v. Food Circus Supermkts.*, 149 N.J. 496, 694 A.2d 1017 (1997)).

a contractor's employee intentionally cutting an excavated and exposed underground conduit located in a public right-of-way before it had been identified by a utility company, in violation of his employer's policies. The circumstances of Hughes' fatal injuries are certainly unusual, if not unique. We conclude that these circumstances were not reasonably foreseeable at the time OPPD installed the underground powerline.

(v) Policy Interests

The personal representative argues that because of the dangerous character of electricity, the public has an interest in the prevention of accidents arising from contact with buried powerlines. This argument finds support in *Schmidt*, where we recognized that "[t]he public certainly has a vital interest in preventing accidents from electrical shock."[37] We note, however, that *Schmidt* involved events which occurred before the enactment of the One-Call Notification System Act in 1994, which furthers the policy of the State "to aid the public by preventing injury to persons . . . resulting from accidents caused by damage to underground facilities."[38] In articulating this policy, the Legislature placed the burden on excavators to give notice so that utilities could mark underground facilities before any excavation occurred.

(vi) Conclusion

Upon consideration of the risk-utility factors in light of the facts of this case, we conclude that OPPD did not owe a common-law duty to Hughes. The powerline was situated in a public right-of-way where contractors would reasonably expect to find underground utilities. No statute or code required use of identifying tape at the time the powerline was installed. Most importantly, the circumstances of Hughes' accident do not fall within the "risk reasonably to be perceived" from underground powerlines, as articulated in *Schmidt*. The accident arose from exceptional and unusual circumstances. Because we conclude that OPPD did not owe a common-law duty to Hughes, we

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[37] *Schmidt v. Omaha Pub. Power Dist.*, *supra* note 31, 245 Neb. at 790, 515 N.W.2d at 765.

[38] § 76-2302(2).

need not address the issue of whether the One-Call Notification System Act abrogated any preexisting common-law duty. Nor is it necessary for us to address the district court's ruling with respect to the absence of expert testimony as to the standard of care. We affirm the district court's grant of summary judgment in favor of OPPD.

2. Case No. S-06-216: Summary Judgment in Favor of NebCom and RDC

[12] The issue in this appeal is whether the district court erred in granting the motions for summary judgment of NebCom and RDC based upon the affirmative defense of assumption of risk. As currently codified, "assumption of risk" as an affirmative defense means that (1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger.[39] It is undisputed that Hughes acted intentionally and voluntarily in cutting into one of the exposed underground conduits and that his death was the result of that act. The issue we must decide is whether, as a matter of law, he acted with knowledge and understanding of the specific danger.

(a) Identification of Specific Danger

The district court defined the specific danger as "cutting into a power line causing an explosion or electrocution." While this describes the mechanism by which the fatal injury occurred, we do not accept it as a description of the "specific danger" which confronted Hughes when he stepped into the excavation and observed the exposed conduits. Nor do we accept the personal representative's argument that Hughes could not have assumed the risk of injury unless he knew that the specific conduit which he intentionally cut contained electricity. The record supports a reasonable inference that Hughes believed he had identified the conduit which contained the jetter he was attempting to dislodge. The specific danger was that at least one of the exposed conduits in the excavation actually contained electrical

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[39] Neb. Rev. Stat. § 25-21,185.12 (Reissue 1995); *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004).

current sufficient to cause injury or death. The question, thus, is whether Hughes knew and appreciated this fact when he cut into the conduit in which he believed the jetter was lodged.

(b) Knowledge and Understanding of Specific Danger

[13-15] The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts.[40] This subjective standard involves an inquiry into what the particular plaintiff in fact sees, knows, understands, and appreciates.[41] The doctrine of assumption of risk applies to known dangers and not to those things from which, in possibility, danger may flow.[42] As a respected commentator has explained:

> "Knowledge of the risk is the watchword of assumption of risk." Under ordinary circumstances the plaintiff will not be taken to assume any risk of either activities or conditions of which he has no knowledge. Moreover, he must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger he confronts. . . . If, because of age or lack of information or experience, he does not comprehend the risk involved in a known situation, he will not be taken to consent to assume it. His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence.[43]

In applying this subjective standard, our cases recognize that a plaintiff's knowledge of a general danger inherent in

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[40] *Burke v. McKay, supra* note 39; *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

[41] See, *Dukat v. Leiserv, Inc.*, 255 Neb. 750, 587 N.W.2d 96 (1998); *Williamson v. Provident Group, Inc.*, 250 Neb. 553, 550 N.W.2d 338 (1996); Restatement (Second) of Torts § 496D comment *c.* (1965).

[42] *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000); *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989); *Hickman v. Parks Construction Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956).

[43] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 68 at 487 (5th ed. 1984).

a particular activity is not enough to establish assumption of risk. Rather, the plaintiff must have actual knowledge of the specific danger which caused the injury. For example, in *Pleiss v. Barnes*, we held that the jury should not have been instructed on assumption of risk in a case involving a person who fell from a ladder when it "'flipped, twisted and started to slide'" as he placed shingles on a roof.[44] We reasoned that the plaintiff's admission that he knew that ladders could "'get shaky and fall'" was simply an acknowledgment that he was aware of the general danger involved in using ladders, but did not constitute knowledge of the specific risk that the ladder from which he fell could perform as it did.[45] In *Burke v. McKay*,[46] an action involving a claim that a rodeo stock provider furnished an unusually dangerous bucking horse to a high school rodeo, we noted that the plaintiff rider's acknowledged familiarity with the general risks of injury inherent in rodeo competition could not form the basis of an assumption of risk defense. However, we concluded that the rider had actual knowledge of the specific danger posed by the horse because he had observed a previous incident in which a rider was injured when the same horse performed in the same unusual manner which caused his injury.

[16] The issue in this case is not whether Hughes should have known that one or more of the exposed conduits contained electrical current, but whether he actually knew, understood, and appreciated this specific danger. There is no direct evidence in the form of an admission or other statement by Hughes prior to his death that he had such knowledge. However, knowledge in the context of assumption of risk involves a state of mind or mental process which may be proved by circumstantial evidence.[47] In concluding that Hughes knew and

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[44] *Pleiss v. Barnes, supra* note 42, 260 Neb. at 771, 619 N.W.2d at 827.

[45] *Id.* at 775, 619 N.W.2d at 829.

[46] *Burke v. McKay, supra* note 39.

[47] See, *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991); *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988).

understood the danger, the district court relied primarily on evidence of red markings in the area of the excavation which indicated the presence of underground powerlines, as well as statements made to Hughes by Burton employees about the danger of cutting into unidentified lines.

As we have noted, neither Burton nor NebCom contacted Diggers Hotline to request identification of underground utilities prior to the accident. However, several witnesses testified that there were visible red markings on the ground in the immediate vicinity of the excavation, apparently remaining from previous construction work in the area, which indicated the presence of underground electrical utilities. Arp, Burton's field supervisor, testified that the company held safety meetings at which the significance of "color codes" used to mark underground utilities was discussed with employees. There is evidence that Burton instructed its employees, including Hughes, never to cut into an underground line which had not been identified. Morse, Burton's utility superintendent, testified that on the afternoon prior to the accident, he told Hughes that he intended to call Diggers Hotline to request identification of the exposed conduits and that Hughes was not to cut anything until this was done. Morse repeated these instructions to Hughes on the following morning before Hughes went to the worksite. Although he could not recall exactly what he said, Morse testified: "I'm sure we discussed not cutting into anything until we find out what the lines are. We don't want to get killed, more or less, probably said that." When then asked "[w]hat was said about what could have happened," Morse testified: "It would probably cost us a $100,000 a day until they get it fixed, or could be electrocuted or anything like that. I mean, you just don't break them, you don't cut into them, you don't do that."

This evidence supports an inference that Hughes was aware of the specific danger posed by one or more electrical lines in the excavation. But when considered with other evidence, a contrary inference that Hughes was only aware of the general dangers is also possible. Arp responded affirmatively when asked if Hughes "knew or had the ability to find out what the different color lines signified after the utilities had been marked." Under the subjective standard applicable to assumption of risk, it must

be shown that Hughes had actual knowledge of the specific danger posed by the existence of an electrical powerline in the excavation where he was working.[48] If he did not, whether he could have discovered the danger is not relevant to the defense.

The record reflects that at least one of Hughes' coworkers was unaware of the powerline and that there was no discussion of it at the jobsite prior to the accident. Sinnett, one of Hughes' coworkers who witnessed the accident, testified that he had been employed by Burton for 2 weeks prior to the accident and had received no training on the subject of underground utility markings. Sinnett also testified that he did not realize the significance of the color markings at the time of the accident and did not receive training on this subject until after the accident occurred. He testified that he did not discuss the markings with Hughes on the day of the accident and did not know if Hughes understood their significance. Sinnett further testified that he did not know what any of the conduits contained and that it did not occur to him that cutting into one of them could be hazardous. Barrett, another Burton employee who witnessed the accident, testified that there had been no discussion involving Hughes regarding the presence of an electrical line in the excavation and that Hughes had joked that the line he was about to cut could be a waterline. The conduits all looked the same and were not marked to identify their contents.

The issue before us in this appeal is not whether Hughes was negligent in cutting into one of the conduits before it was identified, but whether he actually knew that his action could have a fatal consequence because of the presence of an electrical line among the conduits in the excavation. From this record, a finder of fact could reasonably infer that Hughes did not have such knowledge. The evidence that Burton instructed its employees not to cut into unidentified underground lines, including Morse's warning that one "could be electrocuted" if he did so, could be viewed as a reference to the general risk of working around unmarked utility lines, as opposed to a specific warning that the excavation at 120th Street and Miracle Hills Drive actually contained an electrical powerline.

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[48] See *Pleiss v. Barnes, supra* note 42.

We are not persuaded by RDC's argument that two of our prior decisions involving injuries caused by overhead electrical powerlines support its position that Hughes assumed the risk of electrocution as a matter of law. In *Rodgers v. Chimney Rock P.P. Dist.*,[49] we affirmed a finding by the trial court that the plaintiff's decedent had assumed the risk of electrocution when he used a long metal pipe to clean a well situated beneath the powerline. Applying a standard of review requiring deference to the factual findings of the trial court, we noted evidence that the powerline had been in place for approximately 15 years prior to the accident and that the plaintiff's decedent knew of its existence and the danger which it posed at the time of the accident. We held that the evidence was sufficient to support the trial court's finding of contributory negligence and assumption of risk. *Rodgers* differs from the instant case both in the procedural posture in which it reached this court and in the uncontroverted nature of the evidence regarding the accident victim's knowledge of the specific danger posed by the electrical lines in the area where he was working. Although our opinion in *Disney v. Butler County Rural P. P. Dist.*[50] mentions the governing principles of assumption of risk, it affirmed the trial court's dismissal of a personal injury claim "primarily on the ground that the plaintiff was guilty of contributory negligence as a matter of law." We noted that the plaintiff was at all times aware of the 7,200-volt powerline traversing his yard and driveway and that he failed to exercise due care in operating power equipment in its vicinity. No issues of contributory negligence are before us in this appeal.

The governing standard of review for an order of summary judgment should be, and continues to be, one favorable to the nonmoving party.[51] Applying this standard, which requires that we view the evidence in a light most favorable to the party against whom the summary judgment is granted and give such

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[49] *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984).

[50] *Disney v. Butler County Rural P. P. Dist.*, 183 Neb. 420, 421, 160 N.W.2d 757, 758 (1968).

[51] *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003).

party the benefit of all reasonable inferences deducible from the evidence, we conclude that there are genuine issues of material fact on the issue of whether Hughes knew and appreciated the specific danger posed by the underground electrical line when he took the action which resulted in his death. For this reason, the district court erred in concluding as a matter of law that by such action, Hughes assumed the risk of fatal injury.

V. CONCLUSION

Because we conclude as a matter of law that OPPD did not owe a duty to Hughes under the circumstances of this case, we affirm the judgment of the district court in case No. S-05-1223. However, because we conclude that there are genuine issues of material fact as to the question of whether Hughes assumed the risk of injury, we reverse the judgment entered in favor of NebCom and RDC in case No. S-06-216 and remand the cause to the district court for Douglas County for further proceedings.

JUDGMENT IN NO. S-05-1223 AFFIRMED.
JUDGMENT IN NO. S-06-216 REVERSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

CONNOLLY, J., dissenting.

The assumption of risk doctrine applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the danger he or she confronts.[1] The assumption of risk defense requires that (1) Nickolas J. Hughes knew of and understood the specific danger; (2) Hughes voluntarily exposed himself to the danger; and (3) Hughes' injury or death occurred from his exposure to the danger.[2]

The majority decision defines the "specific danger" as the danger that at least one of the conduits in the excavation contained electricity sufficient to cause injury or death. I would define the specific danger confronting Hughes differently than

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[1] *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004). See *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

[2] Neb. Rev. Stat. § 25-21,185.12 (Reissue 1995). See, also, *Burke v. McKay*, *supra* note 1.

the majority. I believe the specific danger was that Hughes could be electrocuted or killed if he cut one of the four unidentified conduits in the 120th Street excavation. I disagree that Hughes must have known there would *actually* be electricity in a conduit to have assumed the risk of electrocution or death. I believe Hughes could assume the risk of being electrocuted simply by knowing that any conduit at that particular site, if cut, could be deadly. Further, the evidence shows that Hughes knew of the specific danger involved in cutting the exposed conduit at the 120th Street jobsite and assumed the risk of his actions.

In concluding that genuine issues of material fact exist regarding whether Hughes knew of the risk posed by the electrical line, the majority opinion discusses the deposition testimony of Hughes' colleagues. As the majority opinion acknowledges, Patrick Morse's testimony supports an inference that Hughes was aware of the specific danger. Morse testified that the day before the accident, he warned Hughes not to cut into any line until it had been identified. The morning of the accident, he again warned Hughes not to cut into anything. The record shows the following exchange:

> [Counsel for NebCom:] Did you tell him not to cut into anything or do anything else until after the utilities specifically identified which line was which?
>
> [Morse:] Correct.
>
> Q. He responded by saying I won't do that or what did he say?
>
> A. Yes, I would use them words, yes, he did, he said okay, I won't.
>
> Q. All right.
>
> A. I was pretty adamant about it.
>
> Q. So you believe you made it crystal clear to him that he absolutely should not do that?
>
> A. Yes.
>
> Q. Do you have any question in your mind that he understood what you were telling him?
>
> A. There is no question in my mind. He understood what I told him.

More important, Morse testified that during his conversations with Hughes, they discussed that they would not cut into the lines before they were identified because they would not "want to get killed" and that one "could be electrocuted."

I believe the warnings Hughes received established that he knew of the specific dangers of electrocution or death associated with cutting an unidentified conduit at the 120th Street jobsite. Although the majority opinion suggests that Morse's warning about electrocution could be viewed as a reference to the general risk of working around unmarked utilities, I disagree. The conversations that took place show that Morse's warnings undoubtedly focused on the specific danger at the 120th Street jobsite.

Further, other evidence the majority opinion cites regarding Hughes' knowledge is irrelevant. The majority opinion reasons that because one of the other employees present when the accident occurred did not know that cutting a conduit could be dangerous, a jury might infer that Hughes also did not know of the danger. Another person's knowledge or lack thereof, however, has no bearing on what Hughes knew. Whether the employees discussed the risk among themselves before the accident also does not show what Hughes knew. Hughes' remark that the line he was about to cut could be a water line demonstrates that despite Morse's warnings, Hughes had decided to cut into a line that he had not positively identified. This does not support an inference that he either did or did not understand the risk associated with his decision.

I believe that the evidence concerning Hughes knowledge of the risk he encountered shows that he knew and understood that cutting a conduit before identifying it could have fatal consequences. And the evidence the majority opinion cites to oppose this view is not germane to whether Hughes subjectively appreciated the danger. I would affirm the district court's decision that Hughes assumed the risk of his actions.

HEAVICAN, C.J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. JACK E. HARRIS, APPELLANT AND CROSS-APPELLEE.

735 N.W.2d 774

Filed July 27, 2007. No. S-06-062.

1. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Postconviction.** Postconviction relief is a very narrow category of relief.
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. **Postconviction: Proof: Appeal and Error.** The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
5. **Postconviction: Judgments: Proof: Appeal and Error.** A court making the prejudice inquiry in a postconviction proceeding must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.
6. **Criminal Law: Effectiveness of Counsel: Conflict of Interest: Presumptions: Proof.** Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), there is a limited presumption of prejudice if a criminal defendant can show (1) that his counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance.
7. **Criminal Law: Effectiveness of Counsel: Conflict of Interest.** The possibility of conflict is insufficient to impugn a criminal conviction.
8. **Postconviction: Effectiveness of Counsel: Conflict of Interest: Proof.** In order to obtain relief in a postconviction action based upon the alleged conflict of interest of trial counsel, the defendant must show an actual, as opposed to an imputed, conflict of interest.
9. **Judges: Recusal.** While a defendant may be entitled to an impartial judge, a defendant does not have the right to have his or her case heard before any particular judge.
10. ____: ____. A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.
11. **Judges.** A judge must be careful not to appear to act in the dual capacity of judge and advocate.

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

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

After a trial by jury, Jack E. Harris was convicted of first degree murder and use of a deadly weapon to commit a felony in connection with the killing of Anthony Jones. We affirmed Harris' conviction in *State v. Harris*[1] (*Harris I*). After *Harris I*, Harris filed for postconviction relief. In *State v. Harris*[2] (*Harris II*), we reversed the collateral order of the postconviction court which summarily denied postconviction relief on certain claims, and we remanded the cause for an evidentiary hearing. After an evidentiary hearing, the postconviction court denied Harris' motion for postconviction relief. Harris now appeals from that judgment.

BACKGROUND

The facts surrounding Harris' trial and conviction are fully set forth in *Harris I* and *Harris II*, and are repeated here only as relevant. The principal evidence against Harris at trial was the confession of his accomplice, Howard "Homicide" Hicks, and the testimony of three inmates at the jail where Harris was incarcerated that Harris admitted to killing Jones with the assistance of someone named "Homicide."

An Omaha police detective, Leland Cass, also testified at the trial. Cass described an interview with one of the inmate witnesses during which the inmate first revealed that Harris had admitted to Jones' murder. The State pointed out that the report of the inmate interview did not identify Hicks by his given name, but referred to "Homicide," and foundation was laid to establish that "Homicide" and Hicks were the same person. The State then asked: "And at any point in time, Detective, were you able to establish whether or not this defendant Jack Harris

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[1] *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

[2] *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

knew Howard Hicks as Homicide?" Cass answered, without objection, that he did. Cass did not otherwise elaborate on this statement, but instead went on to testify as to his interview with another of the inmate witnesses.

Upon inquiry during cross-examination, Harris' attorney discovered from Cass that the statement that Harris knew Hicks as "Homicide" was contained in a police report authored by Cass. (the Cass report). It is now undisputed that although the State agreed to provide Harris with a copy of all police reports, the State failed to provide Harris with a copy of the Cass report prior to trial.

The report detailed Harris' statements during an interview with Omaha police officers and the Federal Bureau of Investigation in an unrelated drug trafficking investigation. Harris' statements during the interview were made pursuant to a proffer agreement with the U.S. Attorney's office which stated that Harris' statements during the interview would not be used against him.

The Cass report details that Harris was able to name a number of people involved in drug trafficking, including Hicks. Harris identified Hicks by the nickname "Homicide." Harris did not discuss, in that interview, the Jones murder or any information directly relating to that murder.

Based on the prior nondisclosure and alleged inadmissibility of the report, Harris' counsel argued that he was entitled to a *Jackson v. Denno*[3] hearing on the voluntariness of Harris' statement that he knew Hicks as "Homicide." Counsel also argued that the failure to disclose constituted a violation of *Brady v. Maryland*[4] and that the statement was inadmissible because of the proffer agreement, although he later said he had "misspoke" with regard to the allegation of a *Brady* violation. Counsel moved for a mistrial. Counsel stated that had he been informed of the statement earlier, he would have filed a motion to suppress. Counsel did not move for a continuance.

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[3] See *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

[4] See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

The court denied Harris' motions. The court did, however, express its concern that the statement had been obtained after the proffer agreement. Therefore, despite the court's conclusion that the statement was "innocuous," the court offered Harris the option of either having Cass' testimony stricken from the record or cross-examining Cass on the issue.

Harris chose to cross-examine Cass. On cross-examination, Harris elicited testimony from Cass that Harris had never indicated to Cass that Harris knew Hicks personally. Rather, Harris indicated only that he had heard of Hicks by his nickname. Cass testified that he did not know how Harris had learned Hicks' nickname, and Cass did not have any personal knowledge that Harris was actually acquainted with Hicks.

In the direct appeal of his convictions and sentences, Harris raised the failure of the trial court to conduct a *Jackson v. Denno* hearing on the voluntariness of his statement that he knew Hicks as "Homicide," but we held that the court had not abused its discretion, in the absence of dispositive proof as to whether the prosecution actually failed to provide Harris with the Cass report.[5]

Thereafter, Harris filed a postconviction motion alleging, among other matters, violations of his constitutional rights because of the late disclosure of the Cass report and the jury's having heard the statement that Harris knew Hicks as "Homicide." The postconviction judge granted an evidentiary hearing on some of the issues presented by Harris' postconviction petition, but denied a hearing on others. In an interlocutory appeal, we reversed the postconviction court's denial of an evidentiary hearing on the issue of prosecutorial misconduct relating to the late disclosure of the Cass report.[6] On remand, a full evidentiary hearing was held and the court ultimately denied postconviction relief. Harris now appeals the postconviction court's order.

Further facts will be set forth below, as necessary to our analysis.

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[5] *Harris I, supra* note 1.

[6] *Harris II, supra* note 2.

ASSIGNMENTS OF ERROR

Harris assigns that the trial court erred (1) when the trial judge granted the State's motion for recusal based solely on his comments regarding our decision in *Harris I*; (2) in failing to grant postconviction relief on the basis that Harris had been denied his right to a *Jackson v. Denno* hearing on the admissibility of his statement in the Cass report and on the grounds that his statements were used against him at trial to negate an essential point of the defense, in violation of Harris' statutory right to move for suppression of involuntary statements[7] and the 5th, 6th, and 14th Amendments to the U.S. Constitution; (3) in failing to grant postconviction relief based on prosecutorial misconduct in failing to disclose the Cass report in violation of the Due Process Clause of the 14th Amendment and the decision in *Brady v. Maryland* and its progeny; (4) in failing to grant postconviction relief based on a conflict of interest created by George Thompson, who was an associate at the law firm of Fabian & Thielen, where Harris' trial attorney, Emil M. Fabian, worked, leaving the Fabian & Thielen law firm and joining the Douglas County Attorney's office in violation of the 6th and 14th Amendments; and (5) in failing to grant postconviction relief based on the fact that during the representation of Harris by Fabian & Thielen, one of Fabian's associates left that firm and joined the Douglas County Attorney's office in violation of the Nebraska "bright line" rule.

The State cross-appeals, asserting that the postconviction court erred in permitting Harris to amend his postconviction motion to include the conflict of interest claim because such amendment exceeded the order of remand in *Harris II*. Harris moves for summary dismissal of the State's cross-appeal.

STANDARD OF REVIEW

[1] On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous.[8]

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[7] Neb. Rev. Stat. § 29-115 (Reissue 1995).

[8] *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006).

ANALYSIS

Alleged Prejudice Relating to Cass Report

We first address Harris' assignments of error relating to the Cass report. Harris argues that because of the State's prosecutorial misconduct in failing to disclose the Cass report in a timely manner, the jury was allowed to hear testimony as to Harris' inadmissible prejudicial statement that he knew Hicks by his nickname "Homicide." Harris explains that this statement should have been suppressed before being heard by the jury, but because Harris was unaware of the report, he could not make a timely motion to suppress. Harris asserts that his due process rights under the 14th Amendment to the U.S. Constitution were thus violated. He also asserts his Fifth Amendment rights were violated, apparently in reference to the privilege against self-incrimination. We note that although Harris' amended petition for postconviction relief made several allegations of ineffective assistance of trial counsel, Harris does not assign or argue in this appeal that the postconviction court erred in denying these ineffective assistance claims.

[2-4] Postconviction relief is a very narrow category of relief.[9] 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.[10] The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.[11]

Harris argues that his constitutional rights were violated, rendering his conviction void or voidable, by invoking the principles (1) requiring a voluntariness hearing under *Jackson v. Denno*, (2) prohibiting nondisclosure of exculpatory evidence under *Brady v. Maryland*, and (3) prohibiting late disclosure of material evidence under Neb. Rev. Stat. § 29-1912 (Reissue 1995). The question of whether a constitutional error has occurred may differ depending upon the constitutional principles

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[9] See *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006).

[10] *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

[11] *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001).

invoked. Harris' burden to show that he was prejudiced is the same, regardless of what constitutional provision he is claiming was violated.

Ultimately, the only prejudice which Harris asserts is the fact that the jury heard the statement that Harris knew Hicks as "Homicide." This, in turn, Harris argues, "forced" trial counsel to abandon Harris' theory of defense that Harris and Hicks did not even know each other.[12] Harris does not assert that the late disclosure of the Cass report impeded the ability of defense counsel to timely prepare Harris' defense. Harris' counsel did not make a motion to continue the trial in light of the late-discovered report. In fact, it appears that the contents of the report, if not the existence of the report itself, were already known to the defense. This is only reasonable, given that Harris was a participant in the interview with Cass and presumably knew what happened during it.

Assuming, without deciding, that a constitutional error occurred, Harris has failed to sustain his burden on postconviction review to show that the constitutional error was prejudicial. The statement complained of was that Harris knew Hicks as "Homicide." It is unclear whether this statement was brought forth in an attempt to reconcile testimony as to who "Homicide" was or whether it was meant to establish a relationship between Hicks and Harris. In any event, Harris' attorney, on cross-examination of Cass, clearly established that Harris had indicated to Cass only that he had heard of Hicks and that he knew his nickname was "Homicide." Cass specifically testified during cross-examination that Harris never said he knew Hicks personally. Thus, the cross-examination mitigated any prejudice that might have resulted from the more ambiguous statement made by Cass on direct examination. There is scant evidence that Harris' defense strategy was that Hicks and Harris did not know each other, but, in any event, such a strategy was not irreparably harmed, given the cross-examination.

[5] A court making the prejudice inquiry in a postconviction proceeding must ask if the defendant has met the burden of showing that the decision reached would reasonably likely

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[12] Brief for appellant at 42.

have been different absent the errors.[13] The postconviction court found that there was nothing in the Cass report that could have led to other evidence, to help prepare defense witnesses, or could have been used to impeach a prosecution witness. The postconviction court further concluded that the statement from the report entered into the record did not materially influence the jury. In summary, the postconviction court found that Harris did not suffer any actual prejudice in relation to the late disclosure of the Cass report. We agree. In light of the other evidence presented at trial, including the testimony of Hicks and three witnesses who stated that Harris had admitted to the crime, we conclude that Harris has failed to meet his burden on postconviction to prove that the claimed constitutional errors relating to the Cass report were prejudicial. The postconviction court thus properly denied postconviction relief on the issues pertaining to the Cass report.

Conflict of Interest of Trial Attorneys

Harris also claims that trial counsel's imputed conflict of interest warrants postconviction relief. After our remand of the cause in *Harris II*, the county attorney requested leave to withdraw as counsel for the State and requested the appointment of a special prosecutor. The basis for the request was that Thompson, the associate at the same law firm as the attorney representing Harris at trial, had been hired by the Douglas County Attorney's office. This was the first time that Harris' postconviction counsel was aware of this, and counsel was granted leave to amend the motion for postconviction relief to include claims based on this conflict of interest.

The evidence at the postconviction hearing regarding the conflict of interest was that Thompson was an associate at the firm where Harris' trial attorney worked. Thompson's relationship with the firm was somewhat akin to an office-sharing arrangement. The firm did not actually pay Thompson. Thompson was responsible for bringing his own cases to the firm, and he set his own fee schedule and generated his own income. At the

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[13] *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997), *disapproved on other grounds, State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

end of the month, Thompson would pay half of his earnings to the firm and he would keep the other half.

Thompson testified that although he knew that Fabian had been appointed to represent Harris, Thompson never met with Harris, never did any legal work on Harris' case, and did not recall having any confidential information relating to Harris' case. The only connection Thompson had with the case was voluntarily attending a preliminary hearing, in the courtroom gallery, to learn how such matters were handled. Although both Thompson and Fabian stated that it was possible they had informal conversations about Harris' case, neither specifically recalled any such conversation.

In December 1998, Thompson left Fabian & Thielen to accept employment with the juvenile division of the county attorney's office. Thompson primarily worked on termination of parental rights cases. Thompson had no direct contact with the criminal division of the county attorney's office, which was located in a different building from where Thompson worked. Thompson testified that he never discussed the Harris case with anyone in the county attorney's office.

The postconviction court ultimately found that Thompson did not have any confidential information regarding Harris' case. In addition, the postconviction court found that during the entire period in question, Thompson "was effectively screened off" from the entirely separate criminal division of the county attorney's office, located in a different building. The court thus concluded that no actual conflict of interest of the attorneys involved in Harris' trial existed and that there was no basis for postconviction relief.

[6-8] Harris correctly notes that under *Strickland v. Washington*,[14] there is a limited presumption of prejudice if a criminal defendant can show (1) that his counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance.[15] But

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[14] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[15] *Id.* See, also, *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990).

Harris' reliance on principles of imputed conflict of interests is misguided. The U.S. Supreme Court, in *Cuyler v. Sullivan*, has held that "the possibility of conflict is insufficient to impugn a criminal conviction."[16] In order to obtain relief in a postconviction action based upon the alleged conflict of interest of trial counsel, the defendant must show an actual, as opposed to an imputed, conflict of interest.[17] We determine that the postconviction court did not clearly err in concluding that no actual conflict of interest was present in this case. As such, Harris has no conflict of interest claim which warrants postconviction relief.

The State's cross-appeal asserts that the postconviction court lacked the power to allow Harris' motion to amend the postconviction petition with the conflict of interest allegations. The State argues that issue was not within the purview of our mandate in *Harris II* remanding the cause for an evidentiary hearing. Having affirmed the denial of postconviction relief on other grounds, we need not reach this issue.

Trial Judge's Recusal

Finally, we address Harris' argument that the court committed reversible error in the postconviction proceedings when the trial judge granted the State's motion to recuse himself from presiding. At a hearing on the recusal motion, the State called a witness who testified that the trial judge had previously expressed his view that this court should have reversed for a new trial in *Harris I*. Also, the trial judge's court reporter testified that the trial judge had expressed his view that we should have granted a new trial in *Harris I* and that the trial judge was inclined "to grant a postconviction relief for the defendant." The court reporter was unsure, however, whether the trial judge's statements referred to the ultimate result of postconviction proceedings, or only to the decision to grant an evidentiary hearing on Harris' petition for postconviction relief. The trial judge

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[16] *Cuyler v. Sullivan*, *supra* note 15, 446 U.S. at 350.

[17] See, *Com. v. Padden*, 783 A.2d 299 (Pa. Super. 2001); *Newby v. State*, 967 P.2d 1008 (Alaska App. 1998); *State v. Walden*, 861 S.W.2d 182 (Mo. App. 1993). See, also, *State v. Narcisse*, 264 Neb. 160, 646 N.W.2d 583 (2002); *State v. Schneckloth*, *supra* note 15.

concluded that "a reasonable person might conclude that as the finder of fact in this case, I am predisposed." The trial judge stated that this required him to grant the State's motion, and he accordingly entered an order of recusal. The postconviction action was then reassigned to another judge.

Citing the First Circuit cases of *Blizard v. Frechette*[18] and *In re Union Leader Corporation*,[19] Harris argues that the trial judge had a duty to remain as the judge for the postconviction action absent objective facts requiring his removal. He asserts that the facts alleged at the recusal hearing were insufficient to require his removal. Harris asserts that the trial judge is uniquely situated to understand the issues relating to a postconviction action and that parties must be prevented from too easily obtaining a strategic disqualification.

[9] Because the trial judge is uniquely situated to understand the issues relating to a postconviction action, it is true that we do not condone recusals based on the simple fact that the postconviction judge was also the judge at trial. However, it does not follow that a defendant has a cognizable right to have the trial judge be the judge presiding over a postconviction action. Generally, while a defendant may be entitled to an impartial judge,[20] a defendant does not have the right to have his or her case heard before any particular judge.[21] Harris does not contend that the postconviction judge was not fair and impartial or that the recusal resulted in prejudicial delay.

[10,11] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.[22]

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[18] *Blizard v. Frechette*, 601 F.2d 1217 (1st Cir. 1979).

[19] *In re Union Leader Corporation*, 292 F.2d 381 (1st Cir. 1961).

[20] *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972).

[21] *Palmore v. United States*, 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973); *Sinito v. United States*, 750 F.2d 512 (6th Cir. 1984); *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974); *Padie v. State*, 566 P.2d 1024 (Alaska 1977); *Lane v. State*, 226 Md. 81, 172 A.2d 400 (1961). Cf. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

[22] *State v. Terrell*, 220 Neb. 137, 368 N.W.2d 499 (1985).

A judge must be careful not to appear to act in the dual capacity of judge and advocate.[23] We find no abuse of discretion in the trial judge's decision to recuse himself in this case.

CONCLUSION

For the reasons already stated, we affirm the denial of post-conviction relief. Harris' motion for summary dismissal of the State's cross-appeal is denied.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[23] *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

HANNON, Judge, Retired, concurring in part, and in part dissenting.

I agree with the majority's opinion on all of the points considered by the majority's opinion except one. I must dissent from that portion of the opinion which concludes that the prosecutor's conduct was not prejudicial to Jack E. Harris. I understand that this court is bound by the finding of the trial court that the prosecutor did not deliver the report to the defense counsel and that her failure to do so was not deliberate. However, in my opinion, a combination of that unintentional conduct and the method of the prosecutor's direct examination of Officer Leland Cass enabled the State to get before the jury a crucial admission which appeared to be clearly inadmissible.

On direct examination, Cass was allowed to testify that he learned that Harris knew Howard Hicks by his nickname, "Homicide," which is a crucial fact when Harris was claiming he did not know Hicks. Because the prosecutor had not delivered the report which showed Cass learned of that fact as part of a proffer, defense counsel had no way of preventing that evidence from being presented to the jury, but the prosecutor would have had the report and must have interviewed Cass to learn of the basis of his testimony.

Viewed in the light of the other evidence, in my opinion, the admission of this evidence was very prejudicial. Cass' testimony

was that of a disinterested, reputable, and unimpeachable witness of a nonjudicial admission of a party. In my opinion, that is powerful evidence, usually dispositive of the point admitted by a party. An admonishment by the judge that the jury should disregard such evidence would be useless. Without Cass' testimony, the evidence before the jury was that Harris testified he did not have an association with Hicks at the time that Hicks testified that they murdered Jones together. The State had the unsupported testimony of Hicks that he did. Hicks' testimony on his association was weak and unsupported. The testimony that Harris admitted to the crimes was given by three jail inmates with obvious motives to lie.

Without the evidence obtained by the proffer statement, in my opinion, a jury would have difficulty in finding Harris to be guilty beyond a reasonable doubt. Therefore, I think the prosecutor's conduct was prejudicial to Harris' getting a fair trial.

LOREN W. KOCH, APPELLEE AND CROSS-APPELLANT, V. RONALD E. AUPPERLE AND MARY ANN AUPPERLE, APPELLANTS, AND LOWER PLATTE SOUTH NATURAL RESOURCES DISTRICT, INTERVENOR-APPELLANT AND CROSS-APPELLEE.

737 N.W.2d 869

Filed August 3, 2007. No. S-06-264.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
2. **Pleadings: Appeal and Error.** As a general rule, an appellate court disposes of a case on the theory presented in the district court.
3. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
4. **Jurisdiction: Waters.** Courts have jurisdiction to adjudicate common-law claims involving impairment of water rights.
5. **Administrative Law: Jurisdiction: Claims.** The primary jurisdiction doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special

competence of an administrative body in accordance with the purposes of a regulatory scheme.

6. **Actions: Jurisdiction: Waters.** Exercise of the primary jurisdiction doctrine is inappropriate in cases involving common-law claims for impairment of water rights, because such actions are traditionally cognizable by the courts without reference to agency expertise or discretion.
7. **Interventions.** The interest required as a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006) is a direct and legal interest in the controversy, which is an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
8. **Waters: Real Estate.** The basic concept of riparian rights is that an owner of land abutting a water body has the right to have the water continue to flow across or stand on the land, subject to the equal rights of each owner to make proper use of the water.
9. ____: ____. Riparian rights extend only to the use of the water, not to its ownership; a riparian right is thus said to be usufruct only.
10. ____: ____. One of the most significant maxims of riparianism is that, unlike the rule of the prior appropriation system, there is no priority among riparian proprietors utilizing the supply. All riparian proprietors have an equal and correlative right to use the waters of an abutting stream. Of equal importance with this maxim is that use of the water does not create the riparian right and disuse neither destroys nor qualifies the right.
11. ____: ____. The rights of one riparian landowner vis-a-vis another is determined by examining the reasonableness of each landowner's respective use of the water.
12. **Waters: Proof: Case Disapproved.** To the extent *Brummund v. Vogel*, 184 Neb. 415, 168 N.W.2d 24 (1969), suggests that riparian rights can be asserted without proof of their existence, or that there may be a nonriparian, common-law right to surface water, it is disapproved.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Reversed and remanded with directions.

Steven G. Seglin and Thomas E. Jeffers, of Crosby Guenzel, L.L.P., for appellants and intervenor-appellant.

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

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

STEPHAN, J.

This case involves a water dispute between neighboring landowners. Ronald E. Aupperle and Mary Ann Aupperle, with

the cooperation of the Lower Platte South Natural Resources District (LPSNRD), commenced construction of a small dam to create a farm pond along the banks of an unnamed tributary of Weeping Water Creek in Cass County, Nebraska. Loren W. Koch, a downstream user of the waters of the tributary, sought to enjoin the construction of the dam, and LPSNRD intervened. After a bench trial, the district court for Cass County enjoined the Aupperles from constructing the dam without a device to permit water to pass through the dam so as not to "appreciably diminish" the water which would naturally flow onto Koch's property or materially affect the continuity of such flow. The Aupperles and LPSNRD appeal. Based upon our de novo review, we conclude that Koch was not entitled to injunctive relief.

I. BACKGROUND

In June 2005, Koch filed an action to enjoin the Aupperles from constructing a dam to create a small farm pond on the unnamed tributary. In his verified complaint, Koch asserted that he is a downstream user of the tributary and that in 1989, he dammed the waters of the tributary and developed a pond of approximately 3 acres on his property. The pond is stocked with fish and is appurtenant to Koch's residence. Koch alleged that he also used the stream water to water cattle. He alleged that his pond had been reduced in size over the several years preceding the action due to drought conditions in Cass County. Koch alleged that the Aupperle dam would prevent his pond from filling and deprive him of the use of the stream water for livestock watering. On July 5, the district court entered a temporary injunction preventing the Aupperles from completing construction of their dam. On the same date, Koch posted a $1,000 cash bond.

On July 26, 2005, LPSNRD filed a complaint in intervention and an answer. Koch subsequently filed a motion to strike the complaint in intervention on the basis that LPSNRD lacked a direct and legal interest in the outcome of the controversy. After a hearing on the motion to strike, the district court determined that because LPSNRD had entered into a cost-share arrangement with the Aupperles to provide funds for the dam construction and had been involved in the design and construction stages of

the proposed dam, it had a direct financial interest in the final construction of the dam and pond and was therefore entitled to intervene.

LPSNRD and the Aupperles then filed a motion to dismiss or, in the alternative, to transfer the matter to the Department of Natural Resources (DNR), alleging that that agency had "primary, exclusive, and original jurisdiction to adjudicate the respective surface water rights of the parties." In denying the motion, the district court concluded that it had jurisdiction to determine the action and that the doctrine of primary jurisdiction was not applicable.

At trial, Koch testified that he purchased his property in 1981 and that aside from two brief time periods in the previous 2 years, he had observed a constant flow of water in the tributary. His dam, built in 1989, impounded approximately 40 to 50 acre-feet of water. The pond took approximately a year and a half to fill and seal. In 1990, he stocked the pond with largemouth bass, bluegill, and catfish, and the pond, by the time of trial, had become "one of the best little fishing ponds around."

Koch testified that he used his pond to water his livestock from the time it was constructed until 1997. He had no livestock from 1997 until shortly before trial. He stated that he intended to have a small number of cattle on his property again and that he had recently obtained 7 head; he anticipated having a maximum of 45 head. Although he admitted that he had other water sources for cattle on his property, he testified that he preferred to use the running water from the tributary because "it's the most trouble-free watering you can get for livestock" and was the most convenient source of water for him.

Koch testified that the pond was also used for recreational boating. He also testified that he built his house in 1997 to overlook the pond and had made some improvements on the pond, including the installation of a boat dock. According to Koch, due to drought conditions in the 4 to 5 years preceding the trial, the water level in the pond was down 6 to 8 feet.

Koch testified that he did not obtain permits prior to constructing his dam, but that when he learned that permits were necessary, he made the required permit applications. He was concerned that if the drought continued and the Aupperles were

allowed to construct their pond, no water would pass through to his pond and it would dry up and kill his fish. He requested that the court require a "six-inch draw down" in the Aupperle dam so that water could be passed through the Aupperle structure until Koch's pond was full.

On cross-examination, Koch conceded that he had no appropriative right to use the water in the tributary. He further testified that he wanted all the water in the tributary until his pond was full and that then, the court could authorize upstream impoundment by the Aupperles. He admitted that he had other sources of water that he could use for his livestock, including several other ponds, a well, rural water spigots, and stock tanks. He further admitted that he had not quantified the amount of water he would need for watering his livestock, nor had he analyzed at what point the fish in his pond would be endangered. Koch testified that his dam did not contain a drawdown device similar to the one he sought for the Aupperle dam.

Robert Kalinski testified as an expert on behalf of Koch. Kalinski is a licensed professional civil engineer with bachelor's and master's degrees in geology and a doctorate degree in engineering. Summarized, Kalinski testified that the rate of the ground water-based or spring-based flow in the tributary was greater above the proposed Aupperle dam than it was below the dam. He further testified that the Koch dam had a drainage basin of approximately 260 acres and that the Aupperle basin would take up 178, or approximately 69 percent, of those same acres. Drainage basins are relevant to determining how much precipitation-based runoff will flow into a stream.

Over a continuing foundational objection, Kalinski opined that "significant" spring flows would be eliminated by the construction of the Aupperle dam. He stated that with regard to runoff flows, "just reduction of the drainage basin, particularly during times during years of lower flows, below average precipitation, that that would again significantly reduce the amount of water that was available to flow into . . . Koch's dam." Kalinski testified that during the time the Aupperle pond was filling, there would be little flow to the Koch property.

On cross-examination, Kalinski admitted that the flows in the stream could vary from day to day and location to location and

that the variance could be quite significant. He clarified that his ultimate opinion was that "there's a potential reduction in water that's available to flow to . . . Koch's dam."

The Aupperles and LPSNRD called Michael Jess as an expert witness. Jess has a master's degree in civil engineering and formerly served as the director and deputy director of the Department of Water Resources. Summarized, Jess agreed with Kalinski's calculations regarding drainage basins and streamflows, but disagreed as to the effect of the Aupperle dam. According to Jess, during average precipitation years, the Aupperle dam would not have a significant or substantial effect on the streamflow available to Koch. During times of drought, he opined that neither structure was likely to fill and that thus, the proposed Aupperle dam would not have an adverse effect on Koch's pond. Jess further testified that in times of abundant precipitation, both dams were likely to fill and that the Aupperle dam could serve as flood control. He clarified that his opinions were based solely on precipitation-based runoff and that any spring flows would produce an additional volume of water. Ultimately, Jess testified that based upon a comparison of flow to Koch's dam during drought years, both with the Aupperle dam in existence and without it, the difference in the flow would not be so significant as to make the installation of the Aupperle dam an unreasonable use of the stream water.

Paul Zillig, the assistant manager of LPSNRD, testified that based on data compiled by the Natural Resources Conservation Service, an entity that designed the Aupperle farm pond, there was sufficient water in the tributary to support both ponds. He stated that LPSNRD would not have participated in the Aupperle project had it thought that it would have prevented downstream flows. He testified that virtually all small ponds like the Aupperle pond would at some point reduce downstream flows. He also testified that farm ponds like the Aupperles' are customarily designed without auxiliary passthrough devices, because they are not subject to DNR permit requirements. He explained that the state requires a passthrough device because there is a legal requirement to be able to draw down a pond to 15 acre-feet.

Ronald Aupperle testified that he relied upon the expertise of LPSNRD and the Natural Resources Conservation Service for

the planning and design of his pond. He stated that if he were lawfully directed by the DNR to release flows from his dam, he would comply. On cross-examination, Ronald Aupperle testified that he loved wildlife and trees and that he hoped to eventually establish an arboretum as part of the pond area that school children could visit. He stated that aside from one period during the drought, he had always observed water flowing in the tributary.

On February 10, 2006, the district court entered an order in which it found that both parties intended to use impounded water from the tributary "primarily for aesthetic and recreational purposes with grade stabilization, erosion control, and domestic use (watering cattle) being secondary in nature." The court further found that while both parties intended to use the water for the same purpose, Koch "has priority of appropriation due to the fact that his dam was constructed back in 1989 and has existed since that time." On this basis, the court concluded that "Koch's use of the water from the stream is superior to [the] Aupperles." The district court permanently enjoined the Aupperles from constructing their farm pond "until such time as the dam structure contains a draw-down or similar device which will allow for the passage of water through the dam structure." The Aupperles and LPSNRD filed this timely appeal, and we granted their petition to bypass.[1]

II. ASSIGNMENTS OF ERROR

The Aupperles and LPSNRD assign, restated, that the district court erred in (1) failing to recognize the primary, exclusive, and original jurisdiction of the DNR; (2) failing to apply the doctrine of unclean hands to Koch's claims; (3) granting Koch a surface water appropriation; (4) finding that the Nebraska statutes required them to install an outlet structure in their dam; (5) finding that Koch had a superior right to use the surface water in the unnamed tributary; (6) admitting the expert testimony of Kalinski; (7) finding that Koch met his burden of proof and granting him injunctive relief; (8) failing to award attorney fees, costs, and other damages for an improperly granted injunction; and (9) dismissing LPSNRD's complaint in intervention.

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[1] See Neb. Rev. Stat. § 24-1106(2) (Reissue 1995).

On cross-appeal, Koch assigns that the district court erred in failing to strike LPSNRD's complaint to intervene and corresponding answer.

III. STANDARD OF REVIEW

[1] An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.[2]

IV. ANALYSIS

1. Introduction

This is one of two cases on our docket involving the dispute between Koch and the Aupperles regarding their respective rights to water in the unnamed tributary of Weeping Water Creek. From filings in the other case also decided today,[3] we are aware that after the entry of the injunction in this case, the DNR granted Koch's application to impound up to 50.5 acre-feet of water per year on his property. We are also aware from that case that the Aupperles claim a statutory right to impound up to 10 acre-feet of water behind their proposed dam pursuant to Neb. Rev. Stat. § 46-241(2) (Cum. Supp. 2006). Koch's appropriation was not in existence when this case was tried, and the Aupperles claimed no statutory right in this proceeding.

[2] As a general rule, an appellate court disposes of a case on the theory presented in the district court.[4] This case was tried on the theory that by virtue of his "senior use" of waters in the tributary, Koch had common-law rights "to the continued supply of water for his pond as well as riparian rights in its use for agricultural purposes" and that the upstream impoundment by the Aupperles would impair such rights. We limit our de novo

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[2] *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006); *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

[3] *In re Applications of Koch, post* p. 96, 736 N.W.2d 716 (2007).

[4] *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006); *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006).

review to that common-law theory without consideration of any subsequent appropriative or claimed statutory rights.

2. Subject Matter Jurisdiction

[3] We begin by addressing the Aupperles and LPSNRD's claim that the district court was without subject matter jurisdiction because of the "primary, original, and exclusive jurisdiction" of the DNR.[5] When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.[6]

Since 1895, Nebraska law governing appropriation of surface water has been statutory.[7] The DNR regulates surface water appropriations under this statutory scheme.[8] It has statutory authority to "make proper arrangements for the determination of priorities of right to use the public waters of the state" and to fix "[t]he method of determining the priority and amount of appropriation . . . ."[9] The Legislature has given the DNR jurisdiction "over all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute."[10] In cases involving disputes arising under this statutory scheme, we have noted that the DNR has "original and exclusive" jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation

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[5] Brief for appellants at 26.

[6] *Cumming v. Red Willow Sch. Dist. No. 179*, 273 Neb. 483, 730 N.W.2d 794 (2007); *In re Interest of Michael U.*, 273 Neb. 198, 728 N.W.2d 116 (2007).

[7] See, 1895 Neb. Laws, ch. 69, §§ 1 to 69, pp. 244-69; Neb. Rev. Stat. § 46-201 et seq. (Reissue 2004 & Supp. 2005); Richard S. Harnsberger & Norman W. Thorson, Nebraska Water Law & Administration 69-70 (1984).

[8] See *id.* See, also, Neb. Rev. Stat. § 61-201 et seq. (Reissue 2003 & Cum. Supp. 2004); *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

[9] § 46-226.

[10] § 61-206(1).

and other purposes, including jurisdiction to cancel and terminate such rights.[11]

[4] But prior to the 1895 appropriation law, the common law determined the rights of riparian landowners.[12] The enactment of the appropriation law did not abolish previously vested riparian rights.[13] In this case, Koch asserts a riparian right which he claims to be superior to that of the Aupperles, thereby entitling him to equitable relief. As we have recently noted, courts have jurisdiction to adjudicate common-law claims involving impairment of water rights.[14] The district court correctly concluded that it had subject matter jurisdiction.

[5,6] The district court was also correct in concluding that the primary jurisdiction doctrine was inapplicable to this case. That doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special competence of an administrative body in accordance with the purposes of a regulatory scheme.[15] Exercise of the primary jurisdiction doctrine is inappropriate in cases involving common-law claims for impairment of water rights, because such actions are traditionally cognizable by the courts without reference to agency expertise or discretion.[16] Thus, the district court had jurisdiction over the subject matter of this action, and we likewise have jurisdiction over the appeal.

3. Intervention

In his cross-appeal, Koch contends that the district court erred in not striking LPSNRD's complaint to intervene and answer prior to trial. LPSNRD and the Aupperles contend that the

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[11] *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 103, 286 N.W.2d 426, 431 (1979). Accord *Hickman v. Loup River Public Power Dist.*, 173 Neb. 428, 113 N.W.2d 617 (1962).

[12] See *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966).

[13] *Id.*; Harnsberger & Thorson, *supra* note 7.

[14] See *Spear T Ranch v. Knaub, supra* note 8.

[15] *Id.; In re Interest of Battiato*, 259 Neb. 829, 613 N.W.2d 12 (2000).

[16] See *Spear T Ranch v. Knaub, supra* note 8.

district court erred in dismissing the complaint in intervention in its order of permanent injunction.

Intervention in Nebraska is governed by statute. Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006) provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

The intervention shall be by complaint, "which shall set forth the facts on which the intervention rests."[17]

[7] We have held that these statutes require a party to have a direct and legal interest in the controversy, which is "an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action."[18] In its complaint in intervention, LPSNRD pled that in February 2003, pursuant to its statutory authority to enter into cost-sharing arrangements with landowners, it entered into an agreement with the Aupperles that provided assistance in the planning and design of the proposed farm pond and "also a cost-share arrangement with [LPSNRD's] paying 60% of the construction cost." It alleged that the estimated cost of the project was $20,000 and that as of the date of the complaint, its staff had expended approximately 200 hours in planning and designing the farm pond. Attached to the complaint was the cost-share agreement entered into between LPSNRD and the Aupperles. LPSNRD alleged that it had a financial interest in the construction of the farm pond and that

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[17] Neb. Rev. Stat. § 25-330 (Cum. Supp. 2006).

[18] *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 671, 694 N.W.2d 668, 674 (2005).

it had an interest in promoting the implementation of its cost-share program.

The district court determined that LPSNRD had already invested money in the farm pond in terms of labor it paid in the design and planning stage. It further noted that LPSNRD had at risk a contractual obligation to pay 60 percent of the construction cost and that the injunction prevented it from seeking completion of its project. The court determined that LPSNRD had a direct and legal interest sufficient to allow it to intervene. We agree with the court's reasoning and conclusion.

In its complaint in intervention, LPSNRD prayed for an order vacating the temporary injunction, dismissing Koch's complaint, taxing costs to Koch, and for attorney fees. We regard the dismissal of the complaint in intervention at the conclusion of the case as a denial of such relief, inasmuch as the court decided the case in Koch's favor. Whether this decision on the merits was in error, as LPSNRD and the Aupperles contend, is discussed below.

4. Merits

(a) Did Koch Have Superior Right to Water in Tributary?

[8-10] At common law, persons owning land bounding upon a watercourse were called "riparian proprietors" and possessed certain rights to use the water as an incident of ownership of the land.[19] "The basic concept of riparian rights is that an owner of land abutting a waterbody has the right to have the water continue to flow across or stand on the land, subject to the equal rights of each owner to make proper use of the water."[20] As explained by one commentator:

> The doctrine of riparian rights is based upon the proposition that each riparian has a right to make a beneficial use of the water of the stream for any purpose so long as such use does not unreasonably interfere with the enjoyment of the same privilege by other riparians.[21]

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[19] James A. Doyle, *Water Rights in Nebraska*, 20 Neb. L. Rev. 1, 2 (1941).

[20] 1 Waters and Water Rights § 7.01 at 7-2 (Robert E. Beck ed., 2001).

[21] Doyle, *supra* note 19, at 13.

The riparian theory developed in England, at a time and in a climate where there was little use of water for irrigation.[22] Riparian rights extend only to the use of the water, not to its ownership; a riparian right is thus said to be usufruct only.[23] "One of the most significant maxims of riparianism is that, unlike the rule of the prior appropriation system, there is no priority among riparian proprietors utilizing the supply. All riparian proprietors have an equal and correlative right to use the waters of an abutting stream."[24] Of "equal importance" with this maxim is that "use of the water does not create the [riparian] right and disuse neither destroys nor qualifies" the right.[25]

In *Meng v. Coffee*,[26] a dispute among riparian landowners, this court noted that the common law considered running water "*publici juris*,"

> and while it will not permit any one man to monopolize all the water of a running stream when there are other riparian owners who need and may use it also, neither does it grant to any riparian owner an absolute right to insist that every drop of the water flow past his land exactly as it would in a state of nature.

We further noted that the common-law rule gives a riparian landowner "only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners."[27] The purpose of the common-law rule was "to secure equality in the use of the water by riparian owners, as near as may be, by requiring each to exercise his rights reasonably and with due regard to the right of other riparian

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[22] Harnsberger & Thorson, *supra* note 7.

[23] *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903), *overruled on other grounds, Wasserburger v. Coffee, supra* note 12; Harnsberger & Thorson, *supra* note 7.

[24] Harnsberger & Thorson, *supra* note 7 at 24.

[25] *Id.* at 25.

[26] *Meng v. Coffee*, 67 Neb. 500, 503, 93 N.W. 713, 714 (1903).

[27] *Id.* at 505, 93 N.W. at 714.

owners to apply the water to the same or to other purposes."[28] Under the common law, "[i]f the rights of the upper owner in the water are no more than those of the lower owner, they are at the same time no less."[29]

[11] Applying these principles, we conclude as a matter of law that Koch could not have acquired any "senior" riparian right by constructing his dam in 1989. Any riparian right he may have to use water in the tributary would be equal and correlative to the rights of other riparian proprietors. The rights of one riparian landowner vis-a-vis another is determined by examining the reasonableness of each landowner's respective use of the water.[30]

(b) Did Koch Meet His Burden of Proof for Entitlement to Injunctive Relief?

Our determination that Koch did not have a senior right does not necessarily resolve the appeal. As a part of our de novo review, we must still address the question of whether he proved facts sufficient to entitle him to injunctive relief under the applicable legal principles.

(i) Existence of Riparian Right

The first question we must decide is whether Koch has a riparian right, inasmuch as "a person may not be heard to complain, either in a court of law or before an administrative tribunal, as to the infringement of a right which in fact he does not possess."[31] In *Osterman v. Central Nebraska Public Power and Irrigation District*, parties claiming riparian rights objected to applications made by an irrigation district for the allowance of water rights in the North Platte and Platte Rivers. In an appeal

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[28] *Id.* at 513, 93 N.W. at 718.

[29] *Id.* at 514-15, 93 N.W. at 718.

[30] See, *Meng v. Coffee*, *supra* note 26; Restatement (Second) of Torts § 850A (1979); Harnsberger & Thorson, *supra* note 7.

[31] *Osterman v. Central Nebraska Public Power and Irrigation District*, 131 Neb. 356, 360, 268 N.W. 334, 336 (1936), *overruled on other grounds, Wasserburger v. Coffee, supra* note 12, and *Little Blue N.R.D. V. Lower Platte North N.R.D.*, 206 Neb. 535, 294 N.W.2d 598 (1980).

from an administrative decision granting the applications, the irrigation district argued that the objectors did not in fact possess riparian rights. We noted evidence that the objectors were representatives of titles for lands bordering the Platte River which were initiated by settlement as early as 1857 and for which patents had been issued earlier than 1870. We concluded that the objectors therefore possessed common-law rights of riparian owners of land.

In *Wasserburger v. Coffee*,[32] parties claiming riparian rights sought to enjoin upstream irrigators who held appropriation permits, claiming that the irrigation exhausted streamflow necessary to water cattle. The irrigators denied that the plaintiffs possessed riparian rights. In resolving this issue, we first examined whether the legislative adoption of the prior appropriation doctrine abrogated all riparian rights. We concluded that while the 1895 irrigation act abrogated the common law of riparian rights in favor of the current system of appropriation, it did not abolish existing riparian rights with respect to parcels of land severed from the public domain prior to April 4, 1895, the effective date of the act. Such rights could be established by showing that "by common law standards the land was riparian immediately prior to the effective date" of the act and that it had not subsequently lost its riparian status as a result of severance.[33] Thus, riparian rights which had vested prior to the effective date of the 1895 act were preserved, but no new riparian rights could be acquired after that date.[34] The 1895 act denied "the common law doctrine as to all riparian land not privately owned" as of its effective date.[35]

There is no evidence in this record establishing when Koch's property was severed from the public domain or whether any predecessor in title held vested riparian rights prior to April 4, 1895. Koch argues that such proof is not required under the

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[32] *Wasserburger v. Coffee*, *supra* note 12.

[33] *Id.* at 158, 141 N.W.2d at 745.

[34] Harnsberger & Thorson, *supra* note 7; 1 Waters and Water Rights, *supra* note 20, § 8.02(c).

[35] Doyle, *supra* note 19 at 7.

reasoning of *Brummund v. Vogel*.[36] The plaintiff in that case, claiming riparian rights, sought to enjoin an upstream appropriator from damming a creek which provided the main source of water for the plaintiff's cattle. Our opinion specifically stated that the plaintiff neither pled nor proved

> facts entitling him to vested riparian rights under the common law which might precede April 4, 1895, the effective date of the irrigation act of 1895, which is the cut-off date for the acquisition of riparian rights and the invoking of the law of priority of application giving the better right as between those using the water for the same or different purposes, and preferring domestic use over other uses in cases of insufficient water.[37]

Nevertheless, the opinion goes on to recognize that the right of the downstream user to "use water" from the stream "for domestic purposes" was "superior" to the upstream appropriator's rights.[38] However, because the downstream user failed to meet his burden of proof, injunctive relief was denied.

Brummund has been criticized as the cause of "a good deal of uncertainty to the law of riparian-appropriator disputes."[39] The commentators note:

> If domestic users are protected against all others by virtue of the preference laws, then the value of an appropriator's right is considerably diminished. The situation becomes more aggravated if anyone watering livestock (even a person having no protected interest under any known Nebraska law) is given a valid claim to water and the right to enjoin appropriators.
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> . . . Further, expanding livestock watering rights beyond riparians, as *Brummund* may have done, works a substantial change in Nebraska water law, according to many

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[36] *Brummund v. Vogel*, 184 Neb. 415, 168 N.W.2d 24 (1969).

[37] *Id.* at 420, 168 N.W.2d at 27.

[38] *Id.* at 421, 168 N.W.2d at 28.

[39] Harnsberger & Thorson, *supra* note 7 at 111.

> authorities. Thus, to the extent that *Brummund* suggests such an extension, it is wrong.[40]

[12] We agree. Prior to *Brummund*, we noted that the "dual administration of water resources under the doctrines of riparian rights and of prior appropriation" results in a "hydra of perplexity" and that the "two methods are incompatible."[41] Our case law prior to *Brummund* characterized surface water rights as either appropriative or riparian and required proof of any claimed riparian right.[42] The departure in *Brummund* from that course was unwise. To the extent *Brummund* suggests that riparian rights can be asserted without proof of their existence, or that there may be a nonriparian, common-law right to surface water, it is disapproved.

The record in this case does not establish that either Koch or the Aupperles held riparian rights. They are simply owners of adjoining tracts of land through which the tributary flows, with Koch's land situated downstream of that of the Aupperles. Koch, as the party seeking injunctive relief, had the burden to show that the proposed Aupperle dam would infringe on his rights. Because he has not even demonstrated the existence of a common-law riparian right, he clearly is not entitled to injunctive relief. Accordingly, we need not analyze the reasonableness of the use by each party of the water flowing in the tributary.[43] However, we note that the record fully supports the finding of the district court that both parties intended to use water in the tributary "primarily for aesthetic and recreational purposes with grade stabilization, erosion control, and domestic use (watering cattle) being secondary in nature."

(ii) Flowthrough Device

The district court enjoined the Aupperles from constructing their dam "until such time as the dam structure contains a

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[40] *Id.* at 111-12.

[41] *Wasserburger v. Coffee, supra* note 12, 180 Neb. at 151, 141 N.W.2d at 741.

[42] See, e.g., *Wasserburger v. Coffee, supra* note 12; *Osterman v. Central Nebraska Public Power and Irrigation District, supra* note 31.

[43] See, *Meng v. Coffee, supra* note 26; Harnsberger & Thorson, *supra* note 7.

draw-down or similar device which will allow for the passage of water through the dam structure." To the extent that this reasoning implies that the Aupperle dam was legally required to include a flowthrough device, we examine it as a part of our de novo review of the propriety of injunctive relief.

Section 46-241(1) requires persons intending to construct and operate a storage reservoir to obtain a permit from the DNR. Section 46-241(5) requires that such dams be constructed with a passthrough device. However, § 46-241(2) exempts from the permit requirement "[a]ny person intending to construct an on-channel reservoir with a water storage impounding capacity of less than fifteen acre-feet." The record reflects that the Aupperle dam was designed to fall within this exemption. According to the DNR's regulations, installation of a passthrough device is required only when the dam structure being built is subject to the DNR's review and approval, i.e., when a permit is required to construct the dam.[44] Because the Aupperle dam is, by virtue of its impoundment capacity, exempt from the permit requirement, we conclude that there is no statutory or regulatory requirement that its design must include a passthrough device.

(iii) Conclusion

Based upon our de novo review of the record, we conclude for the reasons discussed that Koch was not entitled to injunctive relief. Accordingly, we need not address the assignments of error pertaining to the doctrine of unclean hands or the admissibility of expert testimony.

5. Damages, Costs, and Attorney Fees

LPSNRD and the Aupperles assign error by the district court in failing "to award attorney's fees, costs and other damages to the [LPSNRD] and [the] Aupperles for an improperly granted injunction." Obviously, the district court could not have addressed this issue because it concluded that injunctive relief was proper and granted such relief. Because we vacate the permanent injunction herein, we remand the cause to the district court with directions to determine in the first instance

[44] See 457 Neb. Admin. Code, ch. 13, § 001 (2005).

whether LPSNRD and the Aupperles are entitled to recover attorney fees and damages from Koch under the injunction bond or otherwise.[45]

V. CONCLUSION

Based upon our de novo review, we conclude that Koch was not entitled to injunctive relief. We therefore reverse the judgment of the district court and remand the cause with directions to vacate the injunction, dismiss Koch's verified complaint, and determine whether the Aupperles and LPSNRD are entitled to recover damages or attorney fees as a result of the injunction issued below.

REVERSED AND REMANDED WITH DIRECTIONS.

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[45] See *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997).

OMAHA POLICE UNION LOCAL 101, IUPA, AFL-CIO, APPELLEE AND CROSS-APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, AND THE CHIEF OF POLICE, THOMAS WARREN, APPELLANTS AND CROSS-APPELLEES.

736 N.W.2d 375

Filed August 3, 2007. No. S-06-403.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Evidence: Appeal and Error.** In an appeal from a Commission of Industrial Relations order regarding prohibited practices stated in Neb. Rev. Stat. § 48-824 (Reissue 2004), an appellate court will affirm a factual finding of the commission if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.
3. **Labor and Labor Relations.** A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as

involving working conditions and is mandatorily bargainable even though there may be some minor influence on management prerogative.

4. ____. Company rules relating to employee safety and work practices involve conditions of employment.
5. ____. Management prerogatives include the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments.
6. **Commission of Industrial Relations: Constitutional Law.** The Commission of Industrial Relations has no authority to vindicate constitutional rights.
7. **Commission of Industrial Relations: Administrative Law.** The Commission of Industrial Relations is not a court and is in fact an administrative body performing a legislative function. It has only those powers delineated by statute, and should exercise that jurisdiction in as narrow a manner as may be necessary.
8. **Labor and Labor Relations: Public Officers and Employees: Civil Rights.** Public employees belonging to a labor organization have the protected right to engage in conduct and make remarks, including publishing statements through the media, concerning wages, hours, or terms and conditions of employment. However, employees lose the statutory protection of the Industrial Relations Act if the conduct or speech constitutes "flagrant misconduct." Flagrant misconduct includes, but is not limited to, statements or actions that (1) are of an outrageous and insubordinate nature, (2) compromise the public employer's ability to accomplish its mission, or (3) disrupt discipline. It would also include conduct that is clearly outside the bounds of any protection, including, for example, assault and battery or racial discrimination.
9. **Commission of Industrial Relations: Labor and Labor Relations: Civil Rights.** The Commission of Industrial Relations must balance the employee's right to engage in protected activity, which permits some leeway for impulsive behavior, against the employer's right to maintain order and respect for its supervisory staff. Factors that the commission may consider, but would not necessarily be determinative, include: (1) the place and subject matter of the conduct or speech, (2) whether the employee's conduct or speech was impulsive or designed, (3) whether the conduct or speech was provoked by the employer's conduct, and (4) the nature of the intemperate language or conduct.
10. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Appeal from the Commission of Industrial Relations. Affirmed in part, and in part reversed and remanded with directions.

Paul D. Kratz, Omaha City Attorney, and Bernard J. in den Bosch for appellants.

Thomas F. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

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

STEPHAN, J.

This appeal presents the issue of whether a public employer engages in a prohibited practice under the Industrial Relations Act (the Act)[1] by taking disciplinary action against public employees belonging to a labor organization for statements made and published by those employees. In this action commenced by Omaha Police Union Local 101 (Union) against the City of Omaha and Omaha chief of police Thomas Warren (collectively the appellants), the Commission of Industrial Relations (CIR) concluded that disciplinary action taken against a police officer who authored an article in a Union publication constituted a prohibited practice. In reaching this conclusion, the CIR used a legal standard applied in private sector labor relations cases. We conclude that the CIR should have applied a different standard utilized by courts and administrative agencies to resolve protected speech issues in public sector employment cases.

I. BACKGROUND

1. ANDERSEN INVESTIGATION

On December 14, 2004, a Union meeting was held for the member police officers of the Omaha Police Department (OPD). During the meeting, OPD Sgt. Timothy Andersen, then president of the Union, was asked a question concerning how OPD calculated 911 emergency dispatch service response times. Andersen opined that the method by which OPD calculated response times was misleading. In expressing his view, Andersen provided a hypothetical example on how police officers were trained by OPD to respond to certain high priority 911 calls that required response by two officers.

Several days after the meeting, reports of Andersen's statements were relayed to Warren. On December 20, 2004, Warren initiated an Internal Affairs (IA) investigation of Andersen in which he sought to determine exactly what Andersen said at the

[1] Neb. Rev. Stat. §§ 48-801 to 48-838 (Reissue 2004).

December 14 meeting and whether Andersen had advised officers to disregard departmental standard operating procedures.

In June 2005, IA determined that Andersen had not violated departmental procedures and had not acted unprofessionally. Warren adopted those findings and took no disciplinary action against Andersen.

2. Housh Investigation and Discipline

In response to the events involving Andersen, OPD Sgt. Kevin Housh wrote an article in the February 2005 issue of the Union newspaper, "The Shield," which is distributed to members of the Union as well as to members of the community. Housh's article was generally critical of the standard operating procedures for two-officer 911 calls and the manner in which the city and OPD calculated response time. Housh characterized city officials as "[a] bunch of grown men and women, supposedly leaders, acting like petty criminals trying to conceal some kind of crime."[2] He also stated that "[t]hey refuse to do it, they know they've screwed up, and rather than admitting guilt, they (whoever they are) will make history and try to control what is said/revealed during union meetings regarding response time."[3]

On February 7, 2005, Warren initiated an IA investigation of Housh based on his article in The Shield. Describing the language from the article as derogatory and inflammatory, Warren alleged that Housh's conduct constituted gross disrespect and insubordination and was unbecoming an officer, in violation of OPD rules of conduct.

After conducting its investigation, IA determined that the unprofessional conduct allegation against Housh should be sustained. On February 24, 2005, Warren adopted that finding. However, contrary to other recommendations for discipline, Warren terminated Housh's employment. The Union subsequently appealed Housh's termination to the city personnel board. Thereafter, the city and the Union reached an agreement whereby Housh was reinstated to OPD but was required to,

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[2] Kevin Housh, *This 'n That*, The Shield (Omaha Police Union Local 101, I.U.P.A., AFL-CIO), Feb. 2005, at 1.

[3] *Id.*

among other things, serve a 20-day suspension without pay and discontinue working on the emergency response unit.

3. Meeting With Warren

On August 22, 2005, two Union representatives met privately with Warren in an attempt to discuss the appropriate methods of handling future Union speech issues as well as OPD's handling of Andersen's case. The Union claims that it sought assurances from Warren that he would not interfere with, investigate, or discipline off-duty officers for their conduct at Union meetings or in Union publications. Warren refused to discuss Andersen's case, as it was still an ongoing controversy. Warren also purportedly stated that he retained the right "to initiate an internal investigation on off duty union activities if he determines they involve either insubordination or gross disrespect of himself or his administration or false comments [or] slander." But, Warren also commented that he was not trying to censor anyone and that he would only initiate an IA investigation of an officer if he believed there was merit to such investigation.

4. CIR Proceedings

On September 2, 2005, the Union filed a petition with the CIR against the appellants. The Union claimed that the appellants' investigations of Andersen and Housh and termination of Housh's employment had "chilled" other Union members' expression of opinions at Union meetings and in the Union publication. As a result, the Union alleged that the appellants had engaged in prohibited labor practices under § 48-824(2)(a) by interfering with, restraining, and coercing Union members in their exercise of rights granted under § 48-837. The Union prayed that the appellants should be restrained from interfering with Union members' rights to express their opinions at Union meetings or in Union publications relating to terms and conditions of their employment, the city's administration, and OPD's management. The Union also sought attorney fees and any other appropriate remedy within the CIR's jurisdiction. The appellants answered by denying the specific allegations in the petition and by raising several affirmative defenses, including a lack of CIR jurisdiction.

After conducting a trial in which testimony was heard and evidence was received, the CIR issued a written order granting a portion of the relief sought by the Union. The CIR found that numerous employees had indicated that Warren's actions had limited their involvement with the Union, including decreased meeting attendance and fewer articles submitted for publication. However, the CIR concluded that the IA investigation of Andersen did not constitute an interference, restraint, or coercion in the exercise of the right to participate in Union activities.

As to Housh, the CIR reasoned that his article was a protected union activity if it was "concerted activity" falling under the protection of § 48-824(2)(a). Looking to federal labor cases for guidance, the CIR noted that employee speech was a protected concerted activity if it related to working conditions. It then determined that Housh's article pertained to officer safety, which was a working condition and a mandatory subject of bargaining. The CIR also found, based on federal labor case law, that an employee only loses protection for speech that is deliberately or recklessly untrue. The CIR concluded that "Housh's statements, while certainly constituting intemperate, abusive and insulting rhetorical hyperbole, fall short of deliberate or reckless untruth. The comments were made in a union publication in the context of a management/union disagreement, and they were therefore protected from interference, restraint or coercion by management."

As a remedy, the CIR ordered the appellants "not to interfere in any way" with statements made by employees in the Union publication which did not violate the standard of deliberate or reckless untruth. The appellants were also ordered to place a statement in the Union newsletter indicating that they would recognize the Union members' rights to protected activity. The appellants perfected this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[4]

[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. ASSIGNMENTS OF ERROR

The appellants assign, restated, that the CIR erred in finding that (1) the calculation of response times was a mandatory bargaining issue and (2) all speech by employees in the Union newspaper is protected unless deliberately or recklessly untrue.

On cross-appeal, the Union assigns, restated, that the CIR erred in failing to (1) find the appellants' investigation of Andersen was a prohibited practice requiring the deletion of all investigation records, (2) make Housh whole for the losses he sustained from the appellants' prohibited practice, and (3) award the Union reasonable attorney fees.

III. STANDARD OF REVIEW

[1] Any order or decision of the CIR may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.[5]

[2] In an appeal from a CIR order regarding prohibited practices stated in § 48-824, an appellate court will affirm a factual finding of the CIR, if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.[6]

IV. ANALYSIS

1. City's Appeal

(a) Mandatory Subject of Collective Bargaining

The CIR has jurisdiction over certain "industrial disputes involving governmental service."[7] As used in the Act, the term

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[5] See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

[6] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002).

[7] § 48-810.

"industrial dispute" includes "any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment."[8] Wages, hours, and other terms and conditions of employment or any question arising thereunder are considered to be mandatory subjects of bargaining under the Act.[9]

In their first assignment of error, the appellants assert that the CIR erred in finding that "[t]he calculation of response times is a working condition which affects safety and is a mandatory subject of bargaining." The appellants contend that the calculation of response time is not a working condition, but, rather, a mechanism for measuring departmental effectiveness. They argue that such calculation is merely a statistical tool that OPD management uses to evaluate OPD's ability to respond to 911 emergency calls. The appellants argue that changing the method of calculation would not affect OPD's service to the public or officer safety, but would impair the ability of OPD to compare future response times with past response times. The appellants thus contend that as an evaluative tool, the response time calculation is solely within management's prerogative.

The Union, on the other hand, argues that calculation of response time has broader implications which affect departmental staffing. The Union contends that if response time is calculated in the manner it claims is proper, the calculations would reveal longer 911 response times, which may indicate that OPD staffing is deficient. The Union contends that these staffing issues have an effect on officer safety, a condition of employment.

[3-5] A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor

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[8] § 48-801(7).

[9] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra* note 6. See § 48-816(1).

influence on management prerogative.[10] Company rules relating to employee safety and work practices involve conditions of employment.[11] Conversely, management prerogatives include the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments.[12] Based on our review of the record, we conclude that the CIR's finding that the calculation of response times implicates officer safety is supported by the evidence. On the surface, both parties are arguing in terms of the calculation of response times. But the essential nature of their arguments is whether an OPD response to a two-officer 911 call is completed when the first officer arrives at the call location or when the second officer arrives at the call location. Thus, the real issue can be understood to involve how officers should respond to two-officer 911 calls, not merely how OPD calculates their response time. Under this broader reading of the issue, which the CIR deemed appropriate, it can be fairly said that response time does relate to officer safety and, thus, the manner in which it is determined affects a condition of employment.

(b) Protected Union Speech

Section 48-824(2) of the Act states: "It is a prohibited practice for any employer or the employer's negotiator to: (a) Interfere with, restrain, or coerce employees in the exercise of rights granted by the Industrial Relations Act." Section 48-837 provides that "[p]ublic employees shall have the right to form, join, and participate in . . . any employee organization of their own choosing [and] shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions

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[10] See *Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area*, 203 Neb. 832, 281 N.W.2d 201 (1979).

[11] See *Norfolk Educ. Assn. v. School Dist. of Norfolk*, 1 C.I.R. No. 40 (1971) (citing *N. L. R. B. v. Gulf Power Company*, 384 F.2d 822 (5th Cir. 1967)).

[12] See, *Lincoln Firefighters Assn. v. City of Lincoln*, 253 Neb. 837, 572 N.W.2d 369 (1998), *overruled on other grounds, Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011, supra* note 5; *School Dist. of Seward Education Assn. v. School Dist. of Seward*, 188 Neb. 772, 199 N.W.2d 752 (1972).

of employment . . . ." As framed by the parties, the prohibited practice issue before the CIR was whether the actions taken by Warren against Andersen and Housh and the comments made by Warren to Union leadership interfered with, restrained, or coerced employees from exercising their right to participate in the Union.

(i) NLRA Speech Standard

The CIR determined that § 48-824(2)(a) is "almost identical" to § 8(a)(1) of the National Labor Relations Act (NLRA).[13] Recognizing that decisions under the NLRA can be helpful in interpreting the Act, but are not binding,[14] the CIR looked to decisions by the National Labor Relations Board for guidance.

Under the NLRA, employees have the right to engage in "concerted activities for the purpose of . . . mutual aid or protection."[15] The National Labor Relations Board construes this right to extend protection to employee speech which relates to working conditions.[16] While not condoned by the board, employees may use "'intemperate, abusive, or insulting language without fear of restraint or penalty if the speaker believes such rhetoric to be an effective means to make a point.'"[17] But protection of speech under the NLRA is not unrestricted; it is lost when work-related speech constitutes a "deliberate or reckless untruth."[18]

Importantly, the scope of NLRA coverage is limited. By its own terms, the NLRA does not apply to the federal government or any state or municipal governments in their capacities

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[13] See 29 U.S.C. § 151 et seq. (2000).

[14] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra* note 6.

[15] 29 U.S.C. § 157.

[16] See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978).

[17] *Phoenix Transit System*, 337 N.L.R.B. 510, 514 (2002) (citing *Letter Carriers v. Austin*, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974)).

[18] *Id.* (citing *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966)).

as employers.[19] Instead, it applies only to private sector employment.[20]

(ii) Public Sector Employees

In this case, the CIR applied the NLRA "deliberate and reckless untruth" standard in determining whether Housh's speech exceeded the protections granted under the Act. But, public sector employees, like OPD police officers, are not guaranteed the rights and protections of the NLRA. Thus, we are presented with the legal question of whether the Act guarantees similar rights and protections to public sector employees in Nebraska. While the language of the Act is broad enough to encompass the rights granted under the NLRA, we are not persuaded that the "deliberate or reckless untruth" standard is the appropriate method to analyze the speech of public sector employees.

The Act has a somewhat different focus than the NLRA. Although couched in broad Commerce Clause language, the NLRA attempts to rectify the "inequality of bargaining power between employees . . . and employers" by providing certain rights to employees.[21] The Act, on the other hand, focuses almost exclusively on protecting the public.

> The continuous, uninterrupted and proper functioning and operation of the governmental service . . . to the people of Nebraska are hereby declared to be essential to their welfare, health and safety. It is contrary to the public policy of the state to permit any substantial impairment or suspension of the operation of governmental service . . . by reason of industrial disputes therein. It is the duty of the State of Nebraska to exercise all available means and every power at its command to prevent the same so as to protect

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[19] See 29 U.S.C. § 152(2).

[20] See *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 91 S. Ct. 1746, 29 L. Ed. 2d 206 (1971) (holding political subdivision exemption limited to entities either (1) created directly by state, so as to constitute departments or administrative arms of government, or (2) administered by individuals responsible to public officials or to general electorate).

[21] 29 U.S.C. § 151.

> its citizens from any dangers, perils, calamities, or catastrophes which would result therefrom. It is therefor further declared that governmental service . . . are clothed with a vital public interest and to protect same it is necessary that the relations between the employers and employees in such industries be regulated by the State of Nebraska to the extent and in the manner hereinafter provided.[22]

While the Act does provide public employees some of the same rights granted under the NLRA, it also explicitly removes other rights utilized by private sector employees, most notably the right to strike.[23] Therefore, we view the Act not only as an attempt to level the employment playing field, but also as a mechanism designed to protect the citizens of Nebraska from the effects and consequences of labor strife in public sector employment. As a result, we believe the NLRA's "deliberate and reckless untruth" standard is inappropriate in the context of public sector employment.

We are also cognizant of the fact that the labor conflict in this case involves parties serving a special purpose to the public. As a police department, OPD operates as a paramilitary organization charged with maintaining public safety and order.[24] Federal courts have recognized this special purpose, finding that these employers should be given "more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer."[25]

For instance, in *Tindle v. Caudell*,[26] a police officer was disciplined for wearing an offensive costume to an off-duty, union-sponsored Halloween party. In upholding the officer's discipline, the court recognized that members of police departments "may be subject to stringent rules and regulations that could not apply

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[22] § 48-802(1).

[23] See § 48-802(2) and (3).

[24] See *Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995).

[25] *Id.* at 971. Accord *Crain v. Board of Police Com'rs*, 920 F.2d 1402 (8th Cir. 1990). See *Hughes v. Whitmer*, 714 F.2d 1407 (8th Cir. 1983).

[26] *Tindle v. Caudell, supra* note 24.

to other government agencies."[27] Likewise, in *Crain v. Board of Police Com'rs*,[28] a police officer was discharged for violating the police department's sick leave regulations. In analyzing the regulations, the court noted that "[r]egulations limiting even those rights guaranteed by the explicit language of the Bill of Rights are reviewed more deferentially when applied to certain public employees than when applied to ordinary citizens."[29] Moreover, in *Hughes v. Whitmer*,[30] a state trooper was transferred in order to resolve a debilitating morale problem created in part by the trooper's accusations involving superior officers. Acknowledging the state patrol's paramilitary status, the court found that "[m]ore so than the typical government employer, the Patrol has a significant government interest in regulating the speech activities of its officers in order 'to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution.'"[31] We agree with the reasoning of the federal courts and conclude that the NLRA's "deliberate or reckless untruth" standard is inappropriate for determining whether the Housh article constituted protected speech under the Act. Its utilization by the CIR was therefore contrary to law.

(iii) Appellants' Proposed Speech Standard

[6] In their second assignment of error, the appellants argue that this is actually a First Amendment free speech case and that the proper standard is the balancing test espoused by the U.S. Supreme Court in *Pickering v. Board of Education*.[32] As the basis for this argument, the appellants contend that both the U.S. Constitution and the Nebraska Constitution already provide protection to public employees for engaging in work-related

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[27] *Id.* at 973.

[28] *Crain v. Board of Police Com'rs, supra* note 25.

[29] *Id.* at 1408.

[30] *Hughes v. Whitmer, supra* note 25.

[31] *Id.* at 1419 (quoting *Gasparinetti v. Kerr*, 568 F.2d 311 (3d Cir. 1977)).

[32] *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

speech. Under the appellants' theory, the Union members would be required to assert their First Amendment rights by means of claims against the appellants pursuant to 42 U.S.C. § 1983 (2000). But, the CIR has no authority to vindicate constitutional rights.[33] Therefore, the CIR would have no jurisdiction to hear a case of this nature.

[7] While we agree with the appellants that public employees do have First Amendment speech rights, we are not persuaded that the *Pickering* balancing test is the appropriate method to determine whether union speech is protected under the Act. The CIR is not a court and is in fact an administrative body performing a legislative function.[34] It has only those powers delineated by statute, and should exercise that jurisdiction in as narrow a manner as may be necessary.[35] Allowing the CIR to decide cases based on constitutional jurisprudence would blur the jurisdictional boundaries between that administrative body and the courts of law. Therefore, we reject the appellants' overture to apply the *Pickering* balancing test to prohibited practice cases under the Act.

(iv) Federal Employee Speech Standard

Although by its terms, the NLRA does not apply to public sector employment,[36] federal employees are afforded labor protections under the Federal Service Labor-Management Relations Act.[37] In 5 U.S.C. § 7116(a) of those statutes, it provides that "it shall be an unfair labor practice for an agency . . . (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right" under these statutes. Likewise, 5 U.S.C. § 7102 states:

> Each employee shall have the right to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal, and each employee shall be protected

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[33] *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999).

[34] *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

[35] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra* note 6.

[36] See 29 U.S.C. § 152(2).

[37] 5 U.S.C. § 7101 et seq. (2000 & Supp. IV 2004).

> in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—
>
> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
>
> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

While these statutes are not identical to the comparable provisions of the Act in Nebraska, the language is substantively similar. Because of this similarity to the federal act, we find it helpful to consider Federal Labor Relations Authority (FLRA) cases interpreting § 7102.

In *U.S. Dept. of Veterans Affairs Med. Ctr. Jamaica Plain, Mass.*,[38] a police officer was suspended for insubordination for making threatening remarks in a letter to the chief of police. The FLRA noted that under § 7102, employees had the right to present labor organization views to management. It further recognized that "employee action to publicize labor disputes or issues that have a direct bearing on conditions of employment is protected activity" and that such protection "extends to the publicizing of such disputes or issues through the media."[39] However, it acknowledged that "an agency has the right to discipline an employee who is engaged in otherwise protected activities for actions that 'exceed the boundaries of protected activity such as flagrant misconduct.'"[40] Such flagrant misconduct includes remarks or actions that are of an "'outrageous and insubordinate nature'" and which "compromise an agency's ability to accomplish its mission, disrupt discipline or are disloyal."[41]

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[38] *U.S. Dept. of Veterans Affairs Med. Ctr. Jamaica Plain, Mass.*, 50 F.L.R.A. 583 (1995).

[39] *Id.* at 586.

[40] *Id.*

[41] *Id.*

In *Department of the Air Force Grissom Air Force Base, Ind.*,[42] an employee, who was also a union representative, was suspended for directing offensive language at the employer's representative during collective bargaining negotiations. The FLRA recognized that employee conduct may "'"exceed the boundaries of protected activity such as flagrant misconduct."'"[43] In determining whether an employee has engaged in flagrant misconduct, the FLRA

> balances the employee's right to engage in protected activity, which "permits leeway for impulsive behavior, . . . against the employer's right to maintain order and respect for its supervisory staff on the jobsite." . . . Relevant factors in striking this balance include: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct.[44]

In *Department of the Navy Naval Facilities Eng. Command W. Div. San Bruno, Cal.*,[45] an employee, also a union steward, was reprimanded for using derogatory and insulting language about other personnel in a letter sent to other union employees. The FLRA found many of the employee's remarks to be offensive and did not condone them. However, it recognized that the employee's comments in the letter were protected unless they constituted "'flagrant misconduct.'"[46]

In *American Fed. of Govt. Employees Nat. Border Patrol Council*,[47] a border patrol agent, also a union representative, was suspended for disrespectful conduct toward his supervisor. The

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[42] *Department of the Air Force Grissom Air Force Base, Ind.*, 51 F.L.R.A. 7 (1995).

[43] *Id.* at 11.

[44] *Id.* at 11-12.

[45] *Department of the Navy Naval Facilities Eng. Command W. Div. San Bruno, Cal.*, 45 F.L.R.A. 138 (1992).

[46] *Id.* at 156.

[47] *American Fed. of Govt. Employees Nat. Border Patrol Council*, 44 F.L.R.A. 1395 (1992).

FLRA found that at the time of the comments, the agent was functioning as a representative of the union. Thus, his comments were protected activity under § 7102 unless they constituted "flagrant misconduct."

[8,9] We conclude that a similar legal standard should apply to the determination of whether speech is protected under the Act. Under this new standard, public employees belonging to a labor organization have the protected right to engage in conduct and make remarks, including publishing statements through the media, concerning wages, hours, or terms and conditions of employment. However, employees lose the statutory protection of the Act if the conduct or speech constitutes "flagrant misconduct." Flagrant misconduct includes, but is not limited to, statements or actions that (1) are of an outrageous and insubordinate nature, (2) compromise the public employer's ability to accomplish its mission, or (3) disrupt discipline. It would also include conduct that is clearly outside the bounds of any protection, including, for example, assault and battery[48] or racial discrimination.[49] Importantly, the CIR must balance the employee's right to engage in protected activity, which permits some leeway for impulsive behavior, against the employer's right to maintain order and respect for its supervisory staff. Factors that the CIR may consider, but would not necessarily be determinative, include: (1) the place and subject matter of the conduct or speech, (2) whether the employee's conduct or speech was impulsive or designed, (3) whether the conduct or speech was provoked by the employer's conduct, and (4) the nature of the intemperate language or conduct.

(v) Conclusion

Because we have prescribed a new standard for determining when union speech is protected under the Act, we deem it appropriate that the CIR should apply the standard in the first instance to the facts pertaining to the Housh article. Accordingly,

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[48] See *Department of the Air Force v. F.L.R.A.*, 294 F.3d 192 (D.C. Cir. 2002).

[49] See *Veterans Admin., Washington D.C.*, 26 F.L.R.A. 114 (1987).

we reverse, and remand to the CIR with directions to make that determination.

2. Union's Cross-Appeal

(a) Andersen's Prohibited Practice Claim

The Union argues that the CIR erred in finding that the IA investigation of Andersen did not constitute a prohibited labor practice. In its order, the CIR found that the evidence did not show that the IA investigation of Andersen was "improperly conceived" or "improperly performed" or that the procedure of conducting IA investigations instead of some lesser means of investigation had been overused or otherwise used abusively. The CIR concluded that "[a] pattern or practice of using an internal affairs investigation based upon 'anonymous' phone calls could well establish interference, restraint or corrosion in the exercise of the right to participate in union activities, but the evidence here does not establish such a pattern or practice."

In an appeal from a CIR order regarding prohibited practices under § 48-824, the Nebraska Supreme Court will affirm a factual finding of the CIR if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.[50] Based on our reading of the record, we conclude that the CIR's finding is supported by a preponderance of the evidence. Thus, the Union's argument has no merit.

(b) Housh's Remedy

[10] Next, the Union argues that the CIR erred in failing to provide a remedy to Housh after finding the appellants had engaged in a prohibited labor practice. Because we have reversed the CIR's finding that a prohibited practice occurred with respect to Housh, we need not reach this issue. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[51] Expressing no

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[50] See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra* note 6.

[51] *Perry Lumber Co. v. Durable Servs.*, 271 Neb. 303, 710 N.W.2d 854 (2006); *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005).

opinion as to whether the CIR will determine on remand that a prohibited practice occurred, we briefly address the question of Housh's remedy.

When the CIR finds that a party has violated the Act, §§ 48-819.01 and 48-825(2) grant the CIR authority to issue such orders as it may find necessary to provide adequate remedies to the parties to effectuate the public policy enunciated in § 48-802.[52] The record fully supports the finding by the CIR that Housh is not a party to this action and has entered into a separate settlement agreement regarding his personal claims against the appellants. We conclude that the CIR did not err in determining that Housh was not entitled to personal relief in this proceeding based upon any prohibited practice claim asserted by the Union.

(c) Attorney Fees

Finally, the Union argues that the CIR erred in not awarding reasonable attorney fees. Although unnecessary to our disposition of this appeal, we exercise our discretion to reach this issue because of the possibility that it will recur on remand.[53]

Rules of the Nebraska Commission of Industrial Relations 42 (rev. 2005) states: "Attorney's fees may be awarded as an appropriate remedy when the Commission finds a pattern of repetitive, egregious, or willful prohibited conduct by the opposing party." In this case, the CIR found that "the evidence does not establish a willful pattern or practice of violation of the [Union's] freedom in conducting union activities, and it does not establish that the investigations were undertaken in bad faith. Therefore, payment of attorney fees will not be ordered."

Applying the aforementioned standard of review to the whole record,[54] we conclude that the CIR's finding is supported by a preponderance of the competent evidence. Therefore, this argument has no merit.

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[52] *Operating Engrs. Local 571 v. City of Plattsmouth*, 265 Neb. 817, 660 N.W.2d 480 (2003).

[53] See, *Perry Lumber Co. v. Durable Servs.*, *supra* note 51; *In re Estate of Rosso*, *supra* note 51.

[54] See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, *supra* note 6.

V. CONCLUSION

For the reasons discussed, we affirm the order of the CIR on all issues presented in this appeal, except its determination that the appellants committed a prohibited practice with respect to Housh. We reverse and vacate that determination because it was based on an incorrect legal standard and therefore contrary to law. We remand the cause to the CIR with directions to apply the legal standard set forth in this opinion to that claim on the existing record.

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

HEAVICAN, C.J., not participating.

IN RE ESTATE OF KLAUS DUECK, DECEASED. PAUL D. GARNETT, PERSONAL REPRESENTATIVE OF THE ESTATE OF KLAUS DUECK, DECEASED, APPELLEE, V. GENETIC IMPROVEMENT SERVICES OF NORTH CAROLINA, INC., APPELLANT.

736 N.W.2d 720

Filed August 3, 2007. No. S-06-538.

1. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
4. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the trial court when competent evidence supports those findings.
5. **Reformation: Fraud.** A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought.
6. **Contracts.** In order to reform a written agreement to correct a mutual mistake, some form of an agreement in writing must have existed.

Appeal from the County Court for Gage County: STEVEN BRUCE TIMM, Judge. Affirmed.

Andrew M. Loudon, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Adam J. Prochaska, of Harding, Shultz & Downs, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

The county court for Gage County denied the petition for allowance of claim filed by the appellant, Genetic Improvement Services of North Carolina, Inc. (GIS), against the estate of Klaus Dueck. At issue in this case is whether Dueck, when he was a member of Forward Trend, LLC, personally guaranteed amounts owed by Forward Trend to GIS.

Following trial, the county court found that Dueck neither signed a written guaranty nor orally agreed to guarantee Forward Trend's debt to GIS. In view of these findings, the county court rejected the arguments advanced by GIS that the purported written guaranty by Dueck be reformed or, in the alternative, that the purported oral guaranty by Dueck be deemed enforceable under the "leading object rule," which is an exception to the writing requirement found in the statute of frauds, Neb. Rev. Stat. § 36-202(2) (Reissue 2004). The county court denied GIS' claim. GIS appeals. We determine that the county court did not err in denying the claim. We affirm.

STATEMENT OF FACTS

In approximately June 2002, Forward Trend contracted with GIS to repopulate Forward Trend's swine operation in accordance with a purchase and security agreement. Although the record does not contain a signed copy of this agreement, the parties do not dispute that Forward Trend entered into this agreement with GIS. An additional agreement, entitled "Addendum to Purchase and Security Agreement," composed of two parts, "Payment" and "Unconditional Personal Guaranty," is at issue in this case.

Under the purchase and security agreement, GIS agreed to provide certain replacement gilts. The addendum set forth the terms of a financing plan between the parties. Under the financing plan, Forward Trend would pay 50 percent of the invoice upon delivery, with the balance of the invoice, plus interest, due 6 months from the date of delivery. On June 26, 2002, Dueck signed the "Payment" portion of the addendum on behalf of Forward Trend. The guaranty portion of the addendum was signed by a representative of GIS.

At trial and on appeal, GIS asserts that prior to June 26, 2002, Forward Trend had discussed with Dueck his providing a personal guaranty for Forward Trend's financed debt. GIS further asserts that approximately 2 weeks after June 26, it discovered that its representative had signed the guaranty. GIS claims that it sent a new guaranty agreement to Dueck and that Dueck signed the guaranty. A witness for GIS testified that the new, executed guaranty agreement was then misplaced and has never been found. The record on appeal does not contain a copy of this guaranty agreement allegedly signed by Dueck.

Dueck died on July 18, 2004. At the time of Dueck's death, Forward Trend owed GIS certain sums under the financing plan. On October 12, GIS filed a claim with Dueck's estate for the unpaid portion of the financed debt. On December 3, the personal representative denied the claim. GIS then filed a petition for allowance with the county court.

On March 2, 2006, a trial was held on GIS' claim. Several witnesses testified, and a total of 25 exhibits were received into evidence. During the trial and again before us on appeal, GIS argues that the guaranty portion of the addendum was inadvertently signed by the GIS representative on June 26, 2002, and should be reformed to reflect a guaranty by Dueck. In the alternative, GIS argues in effect that Dueck had orally agreed to guarantee Forward Trend's debt and that the claimed oral agreement should be deemed enforceable under the "leading object rule," which is an exception to the writing requirement found in the statute of frauds, § 36-202(2).

On April 12, 2006, the county court entered an order denying GIS' claim. GIS appeals.

ASSIGNMENTS OF ERROR

On appeal, GIS assigns two errors. GIS claims, restated, that the county court erred (1) when it refused to reform the June 26, 2002, personal guaranty portion of the written addendum to reflect a guaranty by Dueck and (2) when it concluded that the leading object rule, an exception to the statute of frauds concerning oral agreements, did not apply.

STANDARDS OF REVIEW

[1-4] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2006), are reviewed for error on the record. *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *In re Estate of Lamplaugh, supra.* An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the trial court when competent evidence supports those findings. See *in re Trust of Rosenberg, supra.*

ANALYSIS

Given our standard of review, the county court's factual findings are central to our analysis on appeal. As we read the county court's order, the court found, first, that Dueck did not execute the June 26, 2002, guaranty agreement, and second, that Dueck did not orally agree to guarantee Forward Trend's debt to GIS. Thus, the county court effectively found that there was no agreement between GIS and Dueck pursuant to which Dueck guaranteed Forward Trend's debt to GIS, and as a result, the county court denied GIS' claim against Dueck's estate. We have reviewed the record on appeal for clear error and find none. Accordingly, we find no merit to the arguments of GIS and determine that the county court did not err in denying GIS' claim.

Written Addendum: Reformation Is Not an Available Remedy.

[5] For its first assignment of error, GIS claims that the county court erred in refusing to exercise its equitable powers to reform the June 26, 2002, personal guaranty portion of the addendum to reflect Dueck's signature rather than the signature of the GIS representative. A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought. *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004). GIS argues in effect that the GIS representative mistakenly thought that Dueck's June 26 signature on the "Payment" portion of the addendum, which Dueck signed as a representative of Forward Trend, also served as Dueck's personal guaranty on the "Unconditional Personal Guaranty" portion of the addendum and that the representative was merely signing as a witness to Dueck's signature. GIS refers the court to testimony to the effect that Dueck later signed the personal guaranty portion of the addendum, although the latter document could not be produced for trial.

[6] It is axiomatic that in order to reform a written agreement to correct a mutual mistake, some form of an agreement in writing must have existed. See, *Mandell v. Hamman Oil and Refining Co.*, 822 S.W.2d 153, 161 (Tex. App. 1991) (stating that court was "hard pressed to determine how a nonexistent contract could be reformed"); *McClellan v. Boehmer*, 700 S.W.2d 687, 694 (Tex. App. 1985) (stating that "[e]quity may reform the instrument to reflect [the true] agreement [between the parties] but cannot create and bring into being an agreement not made by the parties"), *disapproved on other grounds, Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990); *Wolfe v. Kalmus*, 186 W. Va. 622, 625, 413 S.E.2d 679, 682 (1991) (stating that "it is an exercise in futility to attempt to discuss reformation . . . of a nonexistent contract").

In its order of April 12, 2006, the county court stated the evidence presented by GIS "consist[ed] of an improbable series of events" and found that there was no written guaranty agreement between the parties. In the absence of a written agreement

between GIS and Dueck, there was nothing to reform. See, *Mandell v. Hamman Oil and Refining Co., supra*; *McClellan v. Boehmer, supra*; *Wolfe v. Kalmus, supra.*

When reviewing a judgment for errors appearing on the record, the inquiry by an appellate court is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006). We have reviewed the record in the instant case, and the record supports the county court's decision. Given this record, we determine that the county court did not err in refusing to reform the June 26, 2002, written addendum to create a personal guaranty by Dueck.

Oral Agreement: Leading Object Rule Is Inapplicable.

For its second assignment of error, GIS generally claims that the county court erred when it concluded that the leading object rule, an exception to the statute of frauds, did not apply. GIS specifically claims that Dueck orally agreed to guarantee Forward Trend's debt and that because Dueck was a member of Forward Trend, he personally benefited from the financing arrangement between Forward Trend and GIS. GIS continues that Dueck's purported oral promise to guarantee Forward Trend's debt to GIS was enforceable under the leading object rule, which is an exception to the writing requirement of the statute of frauds. We determine there is no merit to GIS' second assignment of error.

Nebraska's statute of frauds provides in pertinent part as follows: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith . . . (2) every special promise to answer for the debt, default, or misdoings of another person." § 36-202(2). Under the leading object rule, when

> the principal object of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor or surety, and the promise is made on sufficient

> consideration, it will be valid although not in writing. . . . The consideration to support an oral promise to pay the debt of another must operate to the advantage of the promisor . . . and place him under a pecuniary obligation to the promisee . . independent of the original debt . . . which obligation is to be discharged by the payment of that debt.

Heese Produce Co. v. Lueders, 233 Neb. 12, 19-20, 443 N.W.2d 278, 283 (1989) (citations omitted). See, also, *VSC, Inc. v. Lilja*, 203 Neb. 844, 845, 280 N.W.2d 901, 903 (1979) (stating that when "'the leading object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid although not in writing. In such case the promissor assumes the payment of the debt'") (quoting *Fitzgerald v. Morrissey*, 14 Neb. 198, 15 N.W. 233 (1883)).

The leading object rule presumes that there has been an oral promise or some sort of an oral agreement. See *id.* See, also, 9 Samuel Williston, A Treatise on the Law of Contracts § 22:20 at 302 (Richard A. Lord ed., 4th ed. 1999) (stating that leading object exception applies to an oral promise when "[t]he purpose or object of the promisor is . . . to acquire the consideration for which the promise is exchanged; that is why he gives his promise . . . and if he wants the consideration enough, he will give the kind of promise for it that the promisee desires").

In the instant case, the county court found that Dueck did not orally agree to guarantee Forward Trend's debt to GIS, and it follows that the leading object rule was inapplicable. We have reviewed the evidence and conclude that the county court's decision is supported by the record. Thus, the county court did not err in concluding that the leading object rule, an exception to the statute of frauds, did not apply.

CONCLUSION

The record supports the county court's finding that there was no written or oral guaranty agreement between Dueck and GIS. Therefore the county court did not err in denying GIS' claim against Dueck's estate. The decision of the county court is affirmed.

AFFIRMED.

IN RE APPLICATIONS OF LOREN W. KOCH. LOREN W. KOCH AND DEPARTMENT OF NATURAL RESOURCES, APPELLEES, V. RONALD E. AUPPERLE AND MARY ANN AUPPERLE, APPELLANTS.

736 N.W.2d 716

Filed August 3, 2007. No. S-06-736.

1. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
2. **Courts: Judgments.** 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.
3. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.
4. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Appeal from the Department of Natural Resources. Appeal dismissed.

Donald G. Blankenau, Kevin Griess, and, on brief, Jaron J. Bromm, of Blackwell, Sanders, Peper & Martin, L.L.P., for appellants.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee Loren W. Koch.

Jon Bruning, Attorney General, and Justin D. Lavene for appellee Department of Natural Resources.

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

PER CURIAM.

Ronald E. Aupperle and Mary Ann Aupperle appeal from an order of the director of the Department of Natural Resources

(DNR) determining that they lacked standing to object to two applications filed by Loren W. Koch. One application sought approval of Koch's plans to construct a dam on an unnamed tributary that runs through properties owned by Koch and the Aupperles, and the other sought a permit to impound 50.5 acre-feet of water from the tributary via the dam. We conclude that the appeal is moot.

BACKGROUND

The Aupperles and Koch own adjoining real property in Cass County, Nebraska. An unnamed tributary of Weeping Water Creek runs through the Aupperles' land in a northerly direction and enters onto land owned by Koch. The Aupperles are thus upstream users of the tributary, and Koch is a downstream user.

In 1989, Koch constructed a dam on the tributary and impounded approximately 50.5 acre-feet of water. The dam was constructed without obtaining the required dam safety and storage permits from the DNR. In 2005, the Aupperles, in cooperation with the Lower Platte South Natural Resources District (LPSNRD), commenced construction of a small, low-hazard dam to also impound water from the tributary. Because of its size, the dam was exempt from the DNR permitting requirements.[1]

In June 2005, Koch filed an action in the district court for Cass County seeking to enjoin the Aupperles from constructing their dam, which at the time was approximately 80-percent complete. The district court subsequently enjoined the Aupperles from constructing the dam unless it contained a drawdown or similar device that would allow water to flow through to Koch's property. The Aupperles appealed, and we reversed the judgment of the district court in an opinion filed today.[2]

On September 7, 2005, Koch filed two applications with the DNR. Application No. A-18333 sought a permit to allow

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[1] See Neb. Rev. Stat. §§ 46-1601 to 46-1670 and 46-241(2) (Cum. Supp. 2006).

[2] See *Koch v. Aupperle, ante* p. 52, 737 N.W.2d 869 (2007).

the impoundment of 50.5 acre-feet of water for livestock purposes. Application No. P-16637 sought approval of the design and construction of his existing dam. The Aupperles and LPSNRD both filed written objections to the applications. Koch moved to strike the objections, and the director ruled in Koch's favor, finding that the Aupperles and LPSNRD lacked standing to object. In its order, the DNR noted that the processing of the applications would continue because "[s]talling the Application[s] simply defeats the intent of the Safety of Dams and Reservoirs Act." The DNR concluded: "As no objections remain on the record, the Applications will be processed with information from the Applications and the [DNR's] investigation, without hearing."

The Aupperles filed this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3] LPSNRD is not a party to the appeal. The DNR is a named party but did not file a brief after its motion for summary dismissal was overruled without prejudice.

On the day of oral argument in this court, Koch filed a motion to dismiss the appeal, accompanied by a copy of an order entered by the DNR on the previous day which approved both of Koch's applications. Oral argument proceeded as scheduled, but we granted both parties leave to submit additional briefs on the issue of mootness. In their mootness brief, the Aupperles concede that the DNR has granted Koch's applications. They argue, however, that the appeal is not moot and that even if it is, it should nevertheless be decided on the merits under the public interest exception to the mootness doctrine.

ANALYSIS

Is Appeal Moot?

[1] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

existing facts or rights, in which the issues presented are no longer alive.[4] The issue originally presented in this appeal was whether the Aupperles had standing to object to Koch's permit applications based upon their status as upstream landowners and the provisions of § 46-241(2), under which an on-channel reservoir with a water storage impounding capacity of less than 15-acre feet is exempted from DNR permit requirements. We conclude that this case is moot. Our resolution of the standing issue would have no impact on the DNR's consideration of Koch's applications, as that administrative proceeding has been concluded.

[2,3] The Aupperles argue that "[t]he question on appeal ultimately concerns the extent of DNR's regulatory authority over the owners of certain small ponds."[5] But the DNR has not sought in this action to exercise any regulatory authority over the Aupperles. Thus, any determination of the respective water rights of the Aupperles and Koch would constitute nothing more than an advisory opinion, as there is no case and controversy regarding such rights. 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.[6] A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.[7]

Does Public Interest Exception Apply?

[4] The Aupperles argue that if we determine the appeal is moot, we should nevertheless decide the issues presented under the public interest exception to the mootness doctrine.

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[4] *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004); *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002).

[5] Brief for appellant in opposition to motion for summary dismissal at 4.

[6] *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).

[7] *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003); *In re Estate of Reading*, 261 Neb. 897, 626 N.W.2d 595 (2001).

An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.[8] This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.[9]

At its core, this is a dispute between two private landowners regarding potential future rights to store water flowing in a watercourse which transverses their properties. The facts which would frame the resolution of this dispute have not yet occurred. Because we find the necessary considerations to be lacking, we decline to reach the merits of this moot appeal under the public interest exception.

CONCLUSION

For the reasons discussed, we conclude that the issue presented in this appeal is moot, and we decline to reach it under the public interest exception to the mootness doctrine. Accordingly, we dismiss the appeal.

APPEAL DISMISSED.

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[8] *Davis v. Settle*, 266 Neb. 232, 665 N.W.2d 6 (2003); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[9] *Id.*

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V.
JOHN P. HEITZ, RESPONDENT.
739 N.W.2d 161

Filed August 3, 2007. No. S-07-512.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, John P. Heitz. The court accepts respondent's surrender of his license and enters an order of disbarment.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 24, 1975. At all times relevant hereto, respondent was engaged in the private practice of law in Nebraska.

On May 10, 2007, an application for the temporary suspension of respondent from the practice of law was filed by the chairperson of the Committee on Inquiry of the Third Disciplinary District. The application stated, in effect, that respondent had been appointed to serve as the personal representative in a probate estate case and that in that capacity, respondent had converted in excess of $50,000 of estate funds for his personal use. The application further stated in effect that respondent "has engaged in and continues to engage in conduct that, if allowed to continue until final disposition of disciplinary proceedings, will cause serious damage to the public and to the members of the Nebraska State Bar Association." On May 17, this court issued an order to show cause why respondent should not be temporarily suspended. On May 25, respondent filed his consent to suspension, and on June 6, this court entered an order suspending respondent from the practice of law. Respondent was ordered to comply with the terms of Neb. Ct. R. of Discipline 16 (rev. 2004). The court file in this case reflects that respondent has returned his bar card.

On June 26, 2007, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent stated that, for the purpose of his voluntary surrender of license, he knowingly does not challenge or contest the truth of the allegations in the application for temporary suspension to the effect that while he was serving as the personal representative of a probate estate, he converted

estate funds for his personal use. In addition to surrendering his license, respondent voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

ANALYSIS

Neb. Ct. R. of Discipline 15 (rev. 2001) provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to rule 15, we find that respondent has voluntarily surrendered his license to practice law and that, for the purpose of this voluntary surrender of license, respondent knowingly does not contest the truth of the allegations made against him in the application for temporary suspension. Further, respondent has waived all proceedings against him in connection with his voluntary surrender. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that, for the purpose of this voluntary surrender of license, respondent voluntarily has stated that he knowingly does not challenge or contest the truth of the allegations in the application for temporary suspension to the effect that while he was serving as the personal representative of a probate estate, he converted estate funds for his personal use. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith fully comply with all terms of disciplinary rule 16, 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.

HEAVICAN, C.J., not participating.

HYANNIS EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. GRANT COUNTY SCHOOL DISTRICT NO. 38-0011, ALSO KNOWN AS HYANNIS HIGH SCHOOL, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

736 N.W.2d 726

Filed August 10, 2007. No. S-06-300.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Schools and School Districts: Contracts: Wages: Words and Phrases.** "Deviation" in a school wage case is defined as the ability to depart from the salary schedule included in the parties' contract.

Appeal from the Commission of Industrial Relations. Reversed and remanded with directions.

Rex R. Schultze, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Mark D. McGuire, of McGuire & Norby, for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

This industrial dispute between the Hyannis Education Association (Association) and Grant County School District No. 38-0011 (District) is before us for the second time. The issue presented by this appeal is whether the Commission of Industrial Relations (CIR) erred when it eliminated a deviation clause from the parties' agreement.

BACKGROUND

THIS COURT'S DECISION IN *HYANNIS I*

The Association and the District were unable to reach a negotiated agreement for the 2002-03 contract year. As a result, the Association filed a petition with the CIR. This court set forth all the relevant facts in its decision in *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011* (*Hyannis I*),[1] and such facts will be repeated here only as necessary.

In its order in *Hyannis I*, the CIR accepted the Association's array of comparable districts and determined that the salary schedule from the parties' 2001-02 contract should be utilized in setting the District's base salary and salary schedule for the 2002-03 contract year. The CIR also concluded that issues relating to fringe benefits were moot and, further, that it could not consider whether it was proper to include a deviation clause in the agreement unless it was presented with an array of deviation clauses identical in their terms. Both the Association and the District appealed.

While this court affirmed the order of the CIR in most respects,[2] we reversed the order with respect to the CIR's authority regarding the inclusion of a deviation clause. We concluded that

> [a] valid prevalence analysis does not require as a prerequisite a complete identity of provisions in the array. Rather, prevalence involves a general practice, occurrence, or acceptance, as determined by the CIR. We conclude

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[1] *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

[2] *Id.*

that the portion of the CIR's order stating that it could not consider the parties' dispute over the inclusion of the deviation clause is contrary to law. Accordingly, given the facts, we reverse that portion of the CIR's order declining to consider the deviation issue and remand the cause to the CIR for consideration of the deviation issue under a prevalence analysis.[3]

CIR Proceedings Following Remand

Upon remand, the issue presented to the CIR was whether the deviation clause in question was prevalent. The language of that clause reads as follows: "The Board reserves the right to deviate from the agreement if it becomes necessary to hire teachers for a particular position." This same language had been included as a negotiated term in the parties' 2001-02 agreement.

The District contended that because four of the seven schools in its array allowed deviation from the salary schedule, albeit under varying circumstances, deviation was prevalent. In essence, the District suggested that deviation be defined broadly. The Association, however, argued that deviation should be defined more narrowly to reflect the distinction between the open-ended deviation proposed by the District and defined deviation. Because open-ended deviation clauses were not prevalent in the array selected by the CIR, the Association asserted that the District's proposed clause should not be included in the parties' contract.

The CIR found for the Association. In so finding, the CIR defined deviation to include only those clauses that "permit[ed] a departure from the bargained for and agreed upon contract, upon defined criteria and/or specific standards, that have been bargained for and agreed upon by the parties." In conducting its prevalency analysis, the CIR was presented with the following deviation language as quoted from the other schools' contracts in the District's array.

Burwell:

> In the event that a new teacher cannot be hired on the basis of the adopted schedule and it is necessary to raise

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[3] *Id.* at 968-69, 698 N.W.2d at 56.

> the base, all the teachers in the system shall be placed on the new schedule and salaries adjusted accordingly. If a position has not been filled by August 1, however, the Board reserves the right to exceed the schedule for the new teacher only if it is necessary to do so to fill the position.

Garden County:

> The salary schedule shall not be construed as being contractual and no teacher employed by the district shall have claims, demands, or course of action of [sic] reason of the provisions. Furthermore, the Board reserves the right to make necessary adjustments in order to meet emergencies which may arise.

Gordon: No deviation language in contract.

Rock County:

> New Graduates may be placed on Step Two if the number of applicants is one.

Rushville: No deviation language in contract.

Thedford:

> Although the Board of Education will endeavor to abide by the Salary Schedule in every instance in employing and reemploying teachers, it does reserve the right to depart from the schedule when it deems the best interest of the school may be served by doing so.

West Holt:

> The district retains the authority to provide extra compensation for special assigned work and requested services.

The CIR found that only Rock County met its definition of deviation in the context of a school wage case. As only one of the seven schools in the District's array allowed deviation which met the CIR's definition, the CIR concluded that deviation was not prevalent.

The CIR also noted that the District's proposed deviation clause was not "sufficiently similar" to the deviation clauses included in the negotiated agreements of the other schools in the array. As such, the CIR ordered the deviation clause eliminated from the 2002-03 contract.

The District now appeals the CIR's determination.

ASSIGNMENT OF ERROR

The District assigned seven assignments of error, which can be restated as one: The CIR erred in finding that the deviation clause in question was not prevalent and eliminating it from the parties' 2002-03 agreement.

STANDARD OF REVIEW

[1] In our review of orders and decisions of the CIR involving an industrial dispute over wages and conditions of employment, our standard of review is as follows: Any order or decision of the CIR may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.[4]

ANALYSIS

In *Hyannis I*, we remanded this cause to the CIR "for consideration of the deviation issue under a prevalence analysis."[5] In doing so, we held that contract terms relating to deviation need not be identical in order to be prevalent, and noted that in the context of a prevalent wage rate, "when the members of the array to which comparison is made 'are sufficiently similar and have enough like characteristics or qualities[, then] comparison [is] appropriate.'"[6]

We conclude that under the circumstances presented, the CIR erred in concluding that deviation was not prevalent. The record presented to this court contains the deviation clauses in the negotiated agreements of the other schools in the District's array. Although these clauses vary in their construction, each has a common thread: Each district with such a clause has the ability to depart, or deviate from, the salary schedule included in the negotiated agreement.

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[4] *Hyannis I, supra* note 1.

[5] *Id.* at 969, 698 N.W.2d at 56.

[6] *Id.* at 967, 698 N.W.2d at 55.

[2] This commonality is consistent with the generally understood definition of "deviation." Webster's dictionary defines deviation as the "departure from an established body of principles, a system of beliefs, an ideology, or a party line,"[7] while Black's dictionary defines deviation as "a change from a customary or agreed-on course of action."[8] We conclude that "deviation" in a school wage case is the ability to depart from the salary schedule included in the parties' contract.

This definition is also consistent with our statement in *Hyannis I* that contract terms need not be identical to be considered in a prevalency analysis, but instead need only be "'sufficiently similar and have enough like characteristics or qualities.'"[9] In comparing the deviation language of the other schools to the language proposed by the District, the CIR found that none of the clauses presented were sufficiently similar. In doing so, the CIR rejected the basic similarity of all of the clauses, that each allowed a departure from the salary schedule.

Given our conclusion that the CIR did not apply the correct definition of deviation to the record in this case, it would ordinarily be necessary for the CIR to make further factual findings regarding the prevalency of deviation clauses in the array. However, such action is not necessary here. As outlined below, certain factual findings in the CIR's order allow this court to apply the correct definition of deviation to the record in order to make a determination regarding prevalency.

In table 1 of its order, the CIR noted a distinction between "'Deviation' clauses with defined terms" and those "without defined terms." Implicitly, then, the CIR acknowledged that both clauses dealt with deviation in its general sense. We conclude that the schools categorized by the CIR as having either type of deviation clause should be considered in a prevalency analysis. On the record before us, four of the schools in the District's array—Burwell, Garden County, Rock County, and Thedford—allow deviation from the salary schedule. And yet

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[7] Webster's Third New International Dictionary, Unabridged 618 (1993).

[8] Black's Law Dictionary 482 (8th ed. 2004).

[9] *Hyannis I, supra* note 1, 269 Neb. at 967, 698 N.W.2d at 55.

another district, West Holt, has language in its agreement that could arguably be considered deviation language.

In *Hyannis I*, we reaffirmed that "[t]he standard inherent in the word 'prevalent' is one of general practice, occurrence, or acceptance . . . ."[10] Where at least four of the seven schools in the District's array have negotiated agreements which contain deviation clauses, such a practice is prevalent. Because such practice is prevalent, the deviation clause should be included in the parties' contract for 2002-03. The CIR's order to eliminate the clause was contrary to law and was not supported by a preponderance of the competent evidence on the record considered as a whole. We therefore reverse the CIR's order eliminating the clause, and remand this cause to the CIR with instructions to include the clause in the parties' 2002-03 contract.

The District makes several additional arguments, all relating to the assertion that the CIR erred in concluding that deviation was not prevalent. Because we agree with the District that the CIR erred in eliminating the provision, we need not consider the District's remaining arguments.

MOOTNESS

We note that the Association contends this appeal is moot as a result of the enactment of 2005 Neb. Laws, L.B. 126. The Association argues that due to L.B. 126, both the District and the Association ceased to exist as legal entities. Although the Association acknowledges that legal entities bearing the same names exist, it contends that those entities are not the same legal entities which were the original parties to this industrial dispute.

We disagree with the Association. We have reviewed the record, including those public records of which the parties stipulated we could take judicial notice, and conclude that this appeal is not moot.

CONCLUSION

We conclude the CIR erred in finding that deviation was not prevalent among the schools in the District's array. As such, the

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[10] *Hyannis I, supra* note 1, 269 Neb. at 968, 698 N.W.2d at 55.

CIR erred in eliminating the proposed deviation clause from the parties' 2002-03 contract.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, APPELLEE, V. AMWEST SURETY INSURANCE COMPANY, APPELLEE, AND STRATEGIC CAPITAL RESOURCES, INC., CLAIMANT, APPELLANT.

738 N.W.2d 805

Filed August 17, 2007. No. S-05-1267.

1. **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.
2. **Insurance: Equity: Appeal and Error.** An insurer liquidation proceeding lies in equity, and an appellate court reviews a liquidation court's determination of claims disputes de novo on the record.
3. **Contracts: Guaranty.** Nebraska adheres to the rule of strict construction of guaranty contracts.
4. ____: ____. A guaranty is interpreted using the same general rules as are used for other contracts.
5. **Guaranty: Liability.** When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.
6. **Principal and Surety.** A surety cannot be held beyond the precise terms of its contract. Any intention on the part of the surety to assume a further and continued liability must be found in the words of the contract made.
7. **Contracts: Guaranty: Liability.** When a guaranty contract contains express conditions, those conditions must be strictly complied with before the guarantor is liable.
8. **Contracts: Guaranty.** Where a guarantor attaches a certain condition or conditions to the agreement, such condition or conditions must be construed in favor of the guarantor, and the failure of a creditor to strictly comply with any condition or conditions invalidates the guaranty.
9. **Contracts: Guaranty: Notice.** Where a contract of guaranty specifically requires notice of default, the failure to give such notice discharges the guarantor's obligations.

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

Steven N. Lippman, of Rothstein, Rosenfeldt & Adler, and Sean M. Reagan, of Reagan Law Offices, P.C., L.L.O., for appellant.

John H. Binning, Robert L. Nefsky, and Jane F. Langan, of Rembolt Ludtke, L.L.P., for appellee L. Tim Wagner.

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

GERRARD, J.

Saxton, Inc., entered into four lease agreements with Strategic Capital Resources, Inc. (Strategic), then contracted with Amwest Surety Insurance Company (Amwest) to issue four corresponding lease bonds under which Amwest agreed to provide payment to Strategic in the event that Saxton defaulted. Amwest became subject to an order of liquidation, pursuant to which Amwest's lease bonds were canceled and a statutory liquidator was appointed to manage claims made against Amwest.

Following the termination of the lease bonds, Strategic provided Amwest with written notice of Saxton's default. The liquidator denied all of Strategic's claims. Strategic appealed. Because Strategic failed to comply with the express provisions of the lease bonds before the lease bonds were canceled, we affirm the denial of Strategic's claims.

STATEMENT OF FACTS

In 1999, Saxton entered into four lease agreements with Strategic. As security for Saxton's performance under the lease agreements, Saxton contracted with Amwest to issue lease bonds. Pursuant to each lease bond, Amwest agreed to provide payment to Strategic, up to a predetermined amount, in the event that Saxton committed a default under the lease. Amwest issued four lease bonds, each bond corresponding to one of the four leases.

Three of the four lease bonds contained the following provision:

> This bond is executed by the Principal [Saxton] and Surety [Amwest] and accepted by the Obligee [Strategic] upon the following express conditions:

. . . .

> 2. In the event of any default of the Principal herein, the Surety shall be given written notice by the Obligee of such default within thirty (30) days after such default by certified mail to the Surety . . . .

The other lease bond provided:

> A default shall be deemed to have occurred on the part of the Principal [Saxton] if the Principal shall fail to perform fully its obligations under the lease agreement within the time set forth therein. Obligee [Strategic] has given Principal written notice of such default, and Principal has failed to cure such default within the time period required by the lease agreement.

On June 7, 2001, Amwest became the subject of an "Order of Liquidation, Declaration of Insolvency, and Injunction" entered by the district court for Lancaster County. Pursuant to the liquidation order, L. Tim Wagner, Director of Insurance for the State of Nebraska, was appointed as statutory liquidator (Liquidator). The Liquidator appointed Horizon Business Resources, Inc. (Horizon), as the authorized claims/litigation management, construction consulting, and subrogation agent. As the authorized claims agent, Horizon was responsible for investigating claims made on Amwest and evaluating their validity and value. The order of liquidation also provided that all of Amwest's bond obligations were to be canceled 30 days from the date of entry of the order. Thus, the cancellation date for the lease bonds at issue in this case was July 6, 2001.

On June 8, 2001, a document entitled "Notice of Legal Rights and Obligations" was sent to all bond obligees. This document, among other things, informed the bond obligees that an order to liquidate Amwest had been entered in the district court and listed the name and responsibilities of the Liquidator. This document also stated the relevant cancellation dates of Amwest's bond obligations.

On July 9, 2001, Strategic sent Amwest four letters, each letter referencing one of the four lease bonds. The letters stated that "Saxton, Inc. has failed to perform its obligations under the Lease Agreement and therefore is in default." The letters demanded full payment under each of the corresponding lease

bonds. The only evidence presented in the record that provides any detail with regard to Saxton's alleged default is in the affidavit of David Miller, Strategic's chairman. In his affidavit, Miller testified that Saxton failed to make lease payments on December 1, 2000, and thereafter.

Horizon apparently treated Strategic's notice of default letters as an attempt to serve a claim on Amwest because, on July 30, 2001, Horizon sent Strategic four letters acknowledging receipt of each of Strategic's "notice of claim[s]." Enclosed with the letters were proof of claim forms. Horizon's letters explained that Strategic was to file the proof of claim forms, and supporting documentation, no later than June 7, 2002.

On August 1, 2001, Amwest sent four letters to Strategic, each letter corresponding to one of the four lease bonds. The letter stated that the Liquidator would implement a claims process and that Strategic would be sent a new proof of claim form within 90 days, which form Strategic would also need to complete and file by June 7, 2002. The letter explained that Horizon "will continue to act as the authorized claims adjusting company on all Amwest claims" and that a "Horizon claims representative will continue to investigate your claim."

Miller testified in his affidavit that following receipt of these letters, Strategic contacted Horizon at the telephone number listed on each of Amwest's August 1, 2001, letters, and was told that it could not file a claim until it received the appropriate forms. Miller further testified that sometime between June 7 and June 19, 2002, Strategic received and completed the approved proof of claim forms. The proof of claim forms were filed on June 20, 2002, 13 days after the June 7 bar date. On September 5, Amwest sent Strategic four letters acknowledging the receipt of Strategic's proof of claim forms and informing Strategic that because the proof of claim forms were postmarked after the bar date, the claims would be treated as late-filed claims.

LIQUIDATOR'S DECISION

On October 31, 2003, the Liquidator denied all Strategic's claims. The Liquidator explained that

> [b]y operation of law, all bonds issued by Amwest . . . were cancelled 30 days after the Order of Liquidation.

> Therefore, all bonds were cancelled on July 6, 2001. Notice of default on [these] bond[s] was issued on July 9, 2001, after cancellation of the bond[s]. Therefore, there is no coverage for [these] claim[s].

Strategic filed an objection to the Liquidator's decision. The Liquidator reviewed Strategic's objection and chose not to alter his initial determination.

Referee's Decision

Pursuant to Neb. Rev. Stat. § 44-4839(2) (Reissue 2004), whenever objections are filed with a liquidator and the liquidator does not alter his or her denial of the claim, the disputed claim may be referred to a court-appointed referee who submits findings of fact and his or her recommendation. In the present case, the disputed claims were referred to the court-appointed referee. The district court approved and adopted "procedures" to be used to govern the referee's participation in the administration of the claims against Amwest in accordance with § 44-4839(2).

Because all four of Strategic's claims involved similar facts, the referee consolidated the claims and issued a single report in which he recommended that all of the claims be denied. In denying the claims, the referee stated that pursuant to Neb. Rev. Stat. § 44-4835(2) (Reissue 2004), "the inclusion of late filed claims in the claims adjudication process is wholly within the discretion of the Liquidator; the Liquidator has exercised his discretion to accept [Strategic's] claims as Class 6 (Late Filed Claims). The [District] Court should not review this action of the Liquidator." The referee continued, explaining:

> The . . . Liquidator's determination that no amount should be allowed for [Strategic's] claims is supported by the Hearing Record. The Notices of Default are without any specificity. If Saxton was in default of its performance obligations under the Lease Agreements, the Lease Agreements required notice to Saxton and an opportunity to cure the default. The nature of Saxton's claimed defaults is not identified. It is reasonable to conclude that upon learning of Amwest's liquidation, [Strategic] sought a complete forfeiture of the Lease Bonds. The obligations [sic] of Amwest was to assure Saxton's performance; there is

> nothing in the Hearing Record to support a conclusion that Saxton failed to perform any of its lease obligations while the Bonds were in-force.

Strategic disagreed with the referee's report and filed its objections to the referee's findings in the district court.

DISTRICT COURT'S DECISION

The district court found that all of the claims were properly denied. The court stated that "the Referee's determination [was] supported by competent, material and substantive evidence appearing in the record and was made in accordance with the Procedures."

The court further explained that "the in-force obligations of Amwest were cancelled no later than July 6 2001" but that Strategic sent its written notices on July 9, 2001. The court stated that "the claim file contains no evidence that the that [sic] Saxton failed to perform any of its lease obligations while the bonds were in force." Finally, the court noted that "the record makes clear that the Claimant's claim was received after the Claims bar date of June 7, 2002." And "even if any amount was allowed, the Claim was properly characterized as a Class 6 (late filed) claim." Strategic appeals.

ASSIGNMENTS OF ERROR

On appeal, Strategic assigns, restated and renumbered, that the district court erred in (1) denying its objection to the referee's report and (2) concluding that Strategic's claims were not timely filed.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.[1]

[2] An insurer liquidation proceeding lies in equity, and an appellate court reviews a liquidation court's determination of claims disputes de novo on the record.[2]

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[1] *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006).

[2] *State ex rel. Wagner v. Amwest Surety Ins. Co.*, *post* p. 121, 738 N.W.2d 813 (2007).

ANALYSIS

STRATEGIC'S FAILURE TO PROVIDE NOTICE

Strategic's arguments on appeal are primarily concerned with the conclusion that its claims were late filed. We do not reach those issues, however, because of a more fundamental problem with Strategic's claims. On our de novo review of the record, we agree with Amwest's argument that Strategic's claims were correctly denied because Strategic failed to comply with the express conditions set forth in each of the lease bonds before the lease bonds were canceled.

[3-6] Nebraska adheres to the rule of strict construction of guaranty contracts.[3] A guaranty is interpreted using the same general rules as are used for other contracts.[4] When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.[5] We have further explained that

> "[A] surety cannot be held beyond the precise terms of his contract. Any intention on the part of the surety to assume a further and continued liability must be found in the words of the contract made. It is not a matter of inference, but of express statement. The liability of a surety, therefore, is measured by, and will not be extended beyond, the strict terms of his contract."[6]

In short, Amwest's obligations as a surety are strictly governed by the express terms of the lease bonds. Accordingly, for Amwest to be liable under the terms of the lease bonds, Strategic must comply with all of the necessary preconditions for payment.

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[3] *Federal Deposit Ins. Corp. v. Heyne*, 227 Neb. 291, 417 N.W.2d 162 (1987).

[4] *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

[5] *Federal Deposit Ins. Corp., supra* note 3.

[6] *Farmers Union Co-op Assn. v. Mid-States Constr. Co.*, 212 Neb. 147, 153, 322 N.W.2d 373, 377 (1982).

We addressed a similar issue in *Dockendorf v. Orner*.[7] In *Dockendorf*, the United States Fidelity and Guaranty Company (U.S.F.&G.), as surety, and Donald Moran, as principal, entered into a surety agreement. For approximately 10 months, Moran and his agents purchased cattle from Dale Dockendorf. Approximately 6 months after the final purchase, Dockendorf sued Moran, his agents, and U.S.F.&G., alleging that Moran had defaulted on payments owed and that U.S.F.&G., as surety, was liable for the principal's default up to the maximum amount under the bond.

Moran's surety bond provided in relevant part that "'[a]ny claim for recovery on this bond must be filed in writing with either the Surety, or the Trustee . . . . All claims must be filed within 120 days of the date of the transaction on which claim is made.'"[8] The surety bond further provided that the surety "'shall not be liable to pay any claim for recovery on this bond if it is not filed in writing within 120 days from the date of the transaction on which the claim is based . . . .'"[9] The bond also required that a lawsuit based on the claim be filed no less than 180 days or more than 18 months after the transaction.[10] Dockendorf had not filed a claim within 120 days, and thus, Dockendorf's claim was denied.[11]

In denying the claim, we explained that the bond contained two conditions: The first condition required a timely filing of a claim in writing, and the second condition related to the time-frame within which litigation must be commenced.[12] We concluded that "[i]t is clear that in the present case [Dockendorf] failed to file a claim in writing within 120 days of the date of the transaction on which claim is made. Since [Dockendorf] failed to satisfy the first condition, recovery under the bond will

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[7] *Dockendorf v. Orner*, 206 Neb. 456, 293 N.W.2d 395 (1980).

[8] *Id.* at 459, 293 N.W.2d at 397.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Dockendorf, supra* note 7.

not be allowed."[13] In other words, because the conditions to payment had not been satisfied, the surety's obligation to pay did not arise.

[7] Courts in other jurisdictions have similarly concluded that when a guaranty contract contains express conditions, those conditions must be strictly complied with before the guarantor is liable.[14] Since the foundation of the creditor's rights is the guarantor's contract, it follows that his rights are restricted by the terms of the contract and any conditions, express or implied, affecting them.[15] The guarantor may limit his liability by whatever conditions he may see fit to impose, and failure to comply with them will preclude recourse to him.[16]

[8,9] Where a guarantor attaches a certain condition or conditions to the agreement, such condition or conditions must be construed in favor of the guarantor, and the failure of a creditor to strictly comply with any condition or conditions invalidates the guaranty.[17] A stipulation for notice of default is a condition of liability which may always be imposed.[18] Where a contract of guaranty specifically requires notice of default, the failure to give such notice discharges the guarantor's obligations.[19]

In the present case, each of the four lease bonds contained explicit conditions that must be complied with before Amwest's liability under the agreements would arise. As set forth more fully above, three of the four lease bonds required Strategic to provide Amwest written notice of Saxton's default as a condition precedent to Strategic's right to payment under the lease bonds. The undisputed facts, however, reveal that Amwest did

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[13] *Id.* at 461, 293 N.W.2d at 398.

[14] See, e.g., *Lee v. Vaughn*, 259 Ark. 424, 534 S.W.2d 221 (1976); *Yama v. Sigman*, 114 Colo. 323, 165 P.2d 191 (1945); *Electric Storage Battery Co. v. Black*, 27 Wis. 2d 366, 134 N.W.2d 481 (1965).

[15] *Barati v. M.S.I. Corp. et al.*, 212 Pa. Super. 536, 243 A.2d 170 (1968).

[16] *Lee, supra* note 14.

[17] *Id.*

[18] *Id.*; *Barati, supra* note 15.

[19] *Lee, supra* note 14.

not receive notice of Saxton's default until after the lease bonds were canceled.

The first time Amwest received notice of any alleged default by Saxton was on July 9, 2001. That was the earliest possible date Amwest's liability could have arisen. However, pursuant to the liquidation order, the lease bonds had been terminated 3 days earlier. Amwest's obligation to pay did not arise before the lease bonds had been terminated. Strategic's claims for payment under these three lease bonds were correctly denied.

Strategic also failed to comply with the express terms of the remaining lease bond. Amwest's obligation to pay, pursuant to that bond, did not arise until Strategic had given Saxton written notice of its default and an opportunity to cure the default. But our de novo review of the record reveals no evidence to show that Strategic complied with these conditions by sending written notice of the alleged default to Saxton or any evidence that Saxton was ever given an opportunity to cure the alleged default. Strategic has failed to prove that it was entitled to any payment from Amwest under the remaining lease bond.

Strategic claims that notwithstanding the fact that the lease bonds have now been terminated, the alleged defaults took place before the lease bonds were canceled and that therefore, Amwest remains obligated to pay. In support of this argument, Strategic relies on cases dealing with occurrence-based insurance policies. Strategic contends that under occurrence policies, if the event insured against—i.e., the occurrence—takes place within the policy period, regardless of when a claim is made, the policy provides coverage.

However, Strategic's reliance on cases relating to occurrence policies is misplaced. The contracts at issue in this case are guaranty contracts, not insurance liability policies. As a guaranty contract, the liability of the guarantor is limited to the precise terms used in the contract.[20] Before Amwest's liability under the lease bonds arose, certain conditions had to be satisfied. Strategic did not comply with those provisions while the lease bonds were in force.

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[20] See *Federal Deposit Ins. Corp.*, *supra* note 3.

Strategic also argues that while the lease bonds do require written notice of default to Amwest, this has never been asserted as a basis for denying Strategic's claims and, therefore, cannot be a basis now. Strategic's argument is without merit. In denying Strategic's claims, the Liquidator explained that

> [b]y operation of law, all bonds issued by Amwest . . . were cancelled 30 days after the Order of Liquidation. Therefore, all bonds were cancelled on July 6, 2001. Notice of default on [these] bond[s] was issued on July 9, 2001, after cancellation of the bond[s]. Therefore, there is no coverage for [these] claim[s].

Strategic's failure to satisfy the conditions of the lease bonds was clearly relied upon by the Liquidator, and Strategic has failed to demonstrate error on this basis for denying its claims.

In sum, on our de novo review, we conclude that Strategic has failed to comply with the express conditions found in each of the four lease bonds while the lease bonds were in effect. Accordingly, the Liquidator, the referee, and the district court correctly concluded that Strategic was not entitled to payment under any of the lease bonds. Having determined that Strategic's claims were properly denied for failure to comply with the express conditions of the lease bonds, we need not address Strategic's remaining assignments of error.

CONCLUSION

The referee and the district court correctly denied Strategic's claims because Strategic failed to satisfy the conditions set forth in the lease bonds before the lease bonds were canceled. The judgment of the district court is affirmed.

AFFIRMED.

McCORMACK, J., not participating.

STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, APPELLEE, V. AMWEST SURETY INSURANCE COMPANY, APPELLEE, AND SUNHOUSE INTERNATIONAL, INC., CLAIMANT, APPELLANT.

738 N.W.2d 813

Filed August 17, 2007. No. S-06-049.

1. **Equity: Appeal and Error.** Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review.
2. **Actions: Pleadings.** Whether a particular action is one at law or in equity is determined by the essential character of a cause of action and the remedy or relief it seeks.
3. **Claims: Judgments: Appeal and Error.** The liquidation court's determinations of claims disputes are reviewed de novo on the record.
4. **Claims: Notice.** In a pending liquidation proceeding, when notice is not properly given in accordance with Neb. Rev. Stat. § 44-4822 (Reissue 1998), a claimant should not be penalized for failing to timely file a claim in the liquidation proceeding of which the claimant was unaware.
5. ____: ____. If the liquidator, through the records of the company in liquidation, has the direct address of the persons described in Neb. Rev. Stat. § 44-4822 (Reissue 1998), then it is not an onerous requirement to send notice to that address.
6. **Evidence: Proof.** Even in cases where the party does not have the general burden of proof, the burden to produce evidence will rest upon that party when the party possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within the party's control.

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

Robert F. Craig, P.C., for appellant.

John H. Binning, Robert L. Nefsky, and Jane F. Langan, of Rembolt Ludtke, L.L.P., for appellee L. Tim Wagner.

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

MCCORMACK, J.

NATURE OF CASE

This is an appeal from an insurer liquidation proceeding under the Nebraska Insurers Supervision, Rehabilitation,

and Liquidation Act (the Act).[1] Sunhouse International, Inc. (Sunhouse), appeals the district court's approval of a downgrade of Sunhouse's claim against Amwest Surety Insurance Company (Amwest) to a class 6 late-filed claim.[2] Sunhouse did not receive actual notice of the liquidation proceedings until after the claim bar date. According to Sunhouse, despite the fact that the liquidator's file clearly contained Sunhouse's corporate address, the liquidator sent notice of the liquidation proceedings only to Sunhouse's former attorneys. Sunhouse asserts that such notice was insufficient under § 44-4822(1)(d) of the Act, which states that the liquidator shall give notice of the liquidation by first-class mail to all "persons known or reasonably expected to have claims against the insurer . . . at their last-known address as indicated by the records of the insurer."

BACKGROUND

Sunhouse's claim against Amwest stems from a 1996 subcontract performance bond and subcontract labor and material bond which Amwest provided for Consolidated Techniques, Inc. (Consolidated), insuring its work relating to the construction of an elementary school in Miami, Florida. Sunhouse was a general contractor for the job and had hired Consolidated to do certain electrical work. Consolidated left the project before completion in August 1997, on the ground that it had not been fully paid. Alleging breach of contract, Sunhouse filed suit against Consolidated in Florida in April 1998. Sunhouse originally lost the suit, but the Florida Court of Appeals reversed the judgment and remanded the cause with directions to enter judgment in favor of Sunhouse and to determine further damages and costs.[3] Judgment in favor of Sunhouse was eventually entered in the amount of $423,471.16.

The Nebraska district court's order to liquidate Amwest was issued on June 7, 2001, during the pendency of the appeal of Sunhouse's Florida suit. A claim bar date for the liquidation

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[1] Neb. Rev. Stat. §§ 44-4801 to 44-4862 (Reissue 1998).

[2] See § 44-4842(6).

[3] See *Sunhouse Const., Inc. v. Amwest Surety Ins.*, 841 So. 2d 496 (Fla. App. 2003).

proceedings was set for June 7, 2002, such that any claim filed after that date would be considered late filed. Affidavits by the vice president of Sunhouse and by Sunhouse's attorney reflect that Sunhouse did not receive actual notice of the liquidation.

As will be set forth in further detail in our analysis, Amwest's records contain Sunhouse's correct corporate address at 363 Granello Avenue, Coral Gables, Florida. Amwest's records also contain the address of attorneys who, according to Sunhouse, no longer represented Sunhouse at the time of the liquidation proceedings. The address for these attorneys was found in correspondence dating from the early years of the Florida litigation.

There is no dispute that Horizon Business Resources (Horizon), on behalf of the liquidator, sent notice to the attorneys shown in Amwest's records. The evidence is in dispute, however, as to whether the liquidator ever sent notice directly to Sunhouse at its Granello Avenue address.

Sometime in the spring of 2003, an attorney who represented Amwest and Consolidated in the Florida litigation advised Sunhouse's attorneys in Florida that Amwest was in liquidation in Nebraska. Soon thereafter, Sunhouse filed a proof of claim against Amwest in the Nebraska liquidation proceedings.

The liquidator informed Sunhouse that the claim would be considered a class 6 late-filed claim because notice had been sent to Sunhouse's attorneys of record. Sunhouse disputed this determination, and in accordance with § 44-4839, the liquidator asked the district court for a hearing on the disputed claim. The district court referred the matter to a court-appointed referee and set forth procedures specifying that the hearing would consist of the submission of the liquidator's claim file and other supportive written evidence, along with legal arguments. The referee concluded, "The Hearing Record supports the finding that timely notices were sent to Sunhouse . . . at its business address shown in the records of Amwest." It is unclear from the report to what "business address" the referee was referring. The referee recommended that the class 6 designation be upheld.

Sunhouse took exception to the referee's report, and a hearing was held before the district court, which received into evidence the claim file and several affidavits that had been considered by the referee. The court stated it would accept and approve the

referee's determination if supported by competent, material, and substantive evidence appearing in the record. The district court ultimately found that timely notices were sent to Sunhouse at the 363 Granello Avenue address. In its conclusion, the district court stated that even if Sunhouse were correct that notice was sent only to the attorneys listed in the Amwest file, such notice was sufficient. The district court approved and adopted the referee's report and upheld the liquidator's class 6 designation of Sunhouse's claim. Sunhouse appeals.

ASSIGNMENT OF ERROR

Sunhouse assigns that the district court erred in approving the liquidator's classification.

STANDARD OF REVIEW

[1] Before addressing the merits of the dispute, we must first determine our standard of review. In this case, whether the liquidation proceedings lie in law or equity is decisive. Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review.[4]

[2,3] Whether a particular action is one at law or in equity is determined by the essential character of a cause of action and the remedy or relief it seeks.[5] We have characterized insurance liquidation proceedings under the prior statutory scheme as judicial in nature and conducted in a court of equity.[6] The equitable character of such proceedings is reflected in the language of the current Act. Its stated purpose is the protection of the interests of the insureds, claimants, creditors, and the public through various means, including "[e]quitable apportionment

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[4] *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999).

[5] See *id.*

[6] See, *Clark v. Lincoln Liberty Life Ins. Co.*, 139 Neb. 65, 296 N.W. 449 (1941); *State, ex rel. Good, v. National Old Line Life Ins. Co.*, 129 Neb. 473, 261 N.W. 902 (1935); *State v. Farmers & Merchants Ins. Co.*, 90 Neb. 664, 134 N.W. 284 (1912).

of any unavoidable loss."[7] A liquidation plan submitted for court approval "may prefer the claims of certain insureds and claimants over creditors and interested parties as well as other insureds and claimants, as the director finds to be fair and equitable considering the relative circumstances of such insureds and claimants."[8] The Act further provides for "[e]quitable allocation of disbursements to each of the guaranty associations and foreign guaranty associations entitled thereto."[9] There is no provision in the current Act limiting the scope of appellate review of orders entered by the district court. We conclude that this proceeding under the Act is equitable in nature and, therefore, reviewable de novo on the record.[10]

ANALYSIS

Sunhouse's primary contention is that the liquidator failed to comply with the Act's notice provisions. Section 44-4822(1)(d) states that the liquidator shall give or cause to be given notice of the liquidation order as soon as possible "[b]y first-class mail to all persons known or reasonably expected to have claims against the insurer, including all policyholders *at their last-known address as indicated by the records of the insurer.*" (Emphasis supplied.) "If notice is given in accordance with [§ 44-4822(4)], the distribution of assets of the insurer . . . shall be conclusive with respect to all claimants whether or not they receive actual notice."[11]

[4] We agree with Sunhouse that in a pending liquidation proceeding, when notice is not properly given in accordance with § 44-4822, a claimant should not be penalized for failing to timely file a claim in the liquidation proceeding of which the claimant was unaware. Section 44-4822(2) states that "[n]otice to potential claimants under subsection (1) of this section shall require claimants to file with the liquidator their claims together

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[7] § 44-4801(4).

[8] § 44-4818(6)(a).

[9] § 44-4834(c).

[10] See *Dillon Tire, Inc. v. Fifer, supra* note 4.

[11] § 44-4822(4).

with proper proofs thereof under section 44-4836 on or before a date the liquidator shall specify in the notice." Although the Act does not specifically set forth the consequences of a failure to provide notice under § 44-4822, it follows that if statutory notice "shall require claimants to file," then lack of notice does not require such filing. This has been the approach taken by other jurisdictions that have considered the effect of a liquidator's failure to comply with the statutory notice requirements of insurance liquidations.[12]

[5] We also agree that if the liquidator's file reflects the potential claimant's direct address, then mailing a notice to attorneys listed in correspondence between the claimant and the insurance company from several years previous does not satisfy § 44-4822. The statute specifies that notice must be mailed to the last known address of "all persons known or reasonably expected to have claims" and does not provide that notice can be sent to those persons "or their representatives." If the liquidator, through the records of the company in liquidation, has the direct address of the persons described in § 44-4822, then it is not an onerous requirement to send notice to that address.

Thus, we now consider the record to determine whether the liquidator in this case had Sunhouse's corporate address in Amwest's records. The district court stated that "the last known address of Sunhouse as indicated by the records of Amwest was 'c/o Siegfried, Rivera, Lerner, De La Torre & Sobel.'" This is the law firm, located at 201 Alhambra Circle, Suite 110, Coral Gables, Florida, which Sunhouse states no longer represented it at the time of the notices. Our review of the record shows that Amwest's file contains correspondence from 1997 and 1998 showing the address of the Siegfried, Rivera, Lerner, De La Torre, and Sobel law firm. But, in addition, Amwest's records contain numerous letters of correspondence between Sunhouse and Amwest showing Sunhouse's correct corporate address at 363 Granello Avenue. In fact, the file contains several letters

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[12] See, *Matter of Transit Cas. Co.*, 79 N.Y.2d 13, 588 N.E.2d 38, 580 N.Y.S.2d 140 (1992); *Middleton v. Imperial Ins. Co.*, 34 Cal. 3d 134, 666 P.2d 1, 193 Cal. Rptr. 144 (1983); *State v. United Physicians Ins. Risk Ret.*, 958 S.W.2d 348 (Tenn. App. 1997).

sent by Amwest to Sunhouse at the Granello Avenue address. We conclude that Sunhouse's "last-known address as indicated by the records of the insurer" was Sunhouse's corporate address at 363 Granello Avenue.[13] The liquidator had an obligation to send notice to that address.

Whether notice was in fact sent by the liquidator to Sunhouse's corporate address is the main point of contention between the parties. We find it helpful to set forth the relevant evidence on this issue in its entirety and in chronological order.

The record shows that in an internal e-mail of Horizon, dated May 5, 2003, a Consolidated employee advised that Sunhouse was disputing proper notice, but that after reviewing the "master mailing list," it was clear that notice was sent to Sunhouse's previous attorney of record. The employee concluded that Sunhouse's claim should be classified as late, because Horizon "did everything we could under the circumstances." The "master mailing list" does not appear in the record.

On June 20, 2003, a letter was sent from Horizon to Sunhouse's current attorney, in response to Sunhouse's objection to its late-filed classification. Horizon again justified the class 6 designation by explaining that notice was sent to Sunhouse's attorneys of record, stating, "If that firm was no longer representing Sunhouse, and chose not to forward the [proof of claim] to its (prior) client or the new attorney of record, that fact was unknown and uncontrollable by Amwest's Liquidator." That same date, an internal note to Horizon's file states that after "reviewing the complete file, and checking in Amwest . . . records . . . notice of liquidation . . . was timely sent to the principal's counsel on record in our file." Correspondence dated May 17, 2004, again recommends that Sunhouse's claim be considered late filed because notice was sent to Sunhouse's counsel, as reflected by the records of Amwest.

It was not until July 2005 that evidence was presented indicating notice for Sunhouse was sent to anyone other than its previous attorneys of record. That evidence consists entirely of the affidavit of Marnell Land. We quote that affidavit in full:

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[13] See § 44-4822(1)(d).

1. I am an employee of the Special Deputy Liquidator of Amwest Surety Insurance Company ("Amwest"). I have personal knowledge of the matters addressed in this Affidavit. I am a custodian of the records prepared and maintained in the ordinary course of Amwest and Amwest's liquidation from which the information contained in this Affidavit was derived. These records were made at or near the time of the events they record.

2. Part of my duties [is] to investigate the handling of legally required notices and other communications to claimants and other interested parties. I have become familiar with the process that the liquidation has employed in assuring that all Notices of Bond and Policy Cancellation, Notices of Legal Rights (Notices) and Proofs of Claim (POCs) were mailed to the parties, including Amwest policyholders (the "Interested Parties"), who may have an interest in the liquidation of Amwest.

3. I have investigated the POCs and Notices mailed to Interested Parties regarding Bond # 030001648 whose principal is Consolidated Techniques, Inc. and whose obligee is Sunhouse International, Inc. (the "Sunhouse Parties").

4. Between June 21, 2001 and June 28, 2001, a Notice of Cancellation of Bond and Policy Cancellation and a Notice of Legal Rights [were] mailed to the following Sunhouse Parties: Consolidated Techniques, Inc. P.O. Box 823266, South Florida, FL 33082; Sunhouse International, Inc., 363 Granello Avenue, Coral Gables, FL 33146; Collinsworth, Alter, Nielson, Fowler & Dowling, Inc., 5979 NW 151st Street, Suite 105, Miami Lakes, FL 33014. All of said notices were mailed to the last known addresses of the addressees as indicated by the records of Amwest.

5. Between October 19, 2001 and October 23, 2001, POCs were mailed to the following Sunhouse Parties: Consolidated Techniques, Inc. P.O. Box 823266, South Florida, FL 33082; Sunhouse International, Inc., 363 Granello Avenue, Coral Gables, FL 33146; Collinsworth, Alter, Nielson, Fowler & Dowling, Inc. 5979 NW 151st Street, Suite 105, Miami Lakes, FL 33014; Sunhouse Construction, c/o Siegfried Rivera Lerner De La Torre &

Sobel, 201 Alhambra Circle, Suite 110, Coral Gables, FL 33134. All of said notices were mailed to the last known addresses of the addressees as indicated by the records of Amwest.

No exhibits were attached to the affidavit.

At this juncture, we must consider the burden of proof for a disputed claim in liquidation proceedings. The Act is silent on this question. Sunhouse offered affidavits of its vice president and of an attorney whose firm represented Sunhouse in the Florida litigation from January 2002 to January 2005. Both testified that based on their personal knowledge, notice of Amwest's liquidation was not received either by Sunhouse at its corporate address or through its attorneys during the relevant time period.

[6] Sunhouse could not do more to prove that the liquidator failed to send it notice. We have said that even in cases where the party does not have the general burden of proof, the burden to produce evidence will rest upon that party when the party "possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within [the party's] control."[14] We conclude that under the circumstances of this case, the burden fell to the liquidator to prove that the notice requirements of § 44-4822 had been met.

Land's 2005 affidavit was the only evidence presented by the liquidator to suggest that notice was mailed to Sunhouse's corporate address. In contrast, several documents from the liquidator's file from 2003 and 2004 reflect that after Sunhouse complained of not receiving notice, Horizon reviewed "the complete file" and determined that notice was sent to the offices of Siegfried, Rivera, Lerner, De La Torre and Sobel. If there was evidence in Amwest's file that notice had also been sent directly to Sunhouse at its corporate address, it is curious that this was not mentioned at that time.

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[14] *Fitzsimmons v. Gilmore*, 134 Neb. 200, 206, 278 N.W. 262, 265 (1938). See, also, *Central Nat. Bank v. First Nat. Bank*, 115 Neb. 472, 216 N.W. 302 (1927) (applying this principle to bank receiverships).

We are called upon, in our de novo review, to judge the credibility of Land's affidavit. In light of the other evidence presented, we find the affidavit insufficient proof that, in accordance with § 44-4822, notice was sent to Sunhouse's last known address as reflected in Amwest's records. Land asserts that the affidavit is based on personal knowledge, but she does not explain what that knowledge is. Land later states that she is the custodian of the Amwest liquidation records "from which the information contained in this affidavit was derived." If Land's knowledge is based only upon a review of the records, as opposed to having personally witnessed the preparation or mailing of the notices, then the records themselves would be the best evidence of the facts in issue. We have no explanation as to why the relevant portions of the records referred to in the affidavit are not in evidence.

The statement made in Land's affidavit is simply too lacking in specificity and foundation, and was made too late in these proceedings, to contradict Sunhouse's evidence that it did not receive the notice required by law.

CONCLUSION

Because the liquidator failed to sustain its burden to prove the required statutory notice was sent, we reverse the district court's decision to uphold the late-filed classification.

REVERSED.

RICHARD T. BELLINO, ALSO KNOWN AS RICH BELLINO, AND LA VISTA KENO, INC., APPELLANTS AND CROSS-APPELLEES, V. MCGRATH NORTH MULLIN & KRATZ, PC LLO, ET AL., APPELLEES AND CROSS-APPELLANTS.

738 N.W.2d 434

Filed August 17, 2007. No. S-06-130.

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. **Directed Verdict: Evidence: Appeal and Error.** Concerning the overruling of a motion for a directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only when reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
3. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
4. ____: ____. To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
5. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
6. **Limitations of Actions: Negligence.** A claim for professional negligence accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the claim.
7. ____: ____. In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.
8. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a civil action for legal malpractice, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client.
9. **Attorney and Client.** The general rule regarding an attorney's duty to his or her client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.
10. **Corporations.** A director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons.
11. ____. An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and should refrain from all acts inconsistent with his or her corporate duties.
12. **Corporations: Partnerships.** Shareholders in a close corporation owe one another the same fiduciary duty as that owed by one partner to another in a partnership.
13. **Partnerships.** Partners must exercise the utmost good faith in all their dealings with the members of the firm and must always act for the common benefit of all.
14. ____. A partner has a duty to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

15. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
16. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
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 assigning the error.
18. **Malpractice: Attorney and Client: Damages.** The general measure of damages in a legal malpractice action is the amount of loss actually sustained by the claimant as a proximate result of the attorney's conduct.
19. **Malpractice: Attorney and Client: Negligence: Proof.** In an action for legal malpractice, the plaintiff must establish that but for the alleged negligence of the attorney, the plaintiff would have obtained a more favorable judgment or settlement.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed in part, and in part reversed and remanded with direction.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law Group, P.C., L.L.O., for appellants.

John R. Douglas and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

WRIGHT, J.

I. NATURE OF CASE

Richard T. Bellino sought legal advice concerning the severance of his business relationship with Robert L. Anderson and La Vista Lottery, Inc. (Lottery). As a result of Bellino's actions in reliance on such advice, Anderson and Lottery sued and obtained a judgment against Bellino. Based on this judgment, the court awarded monetary damages and a constructive trust in favor of Anderson. Bellino brought the present action for professional negligence against the law firm McGrath North Mullin & Kratz, PC LLO, and two of its attorneys, James D. Wegner and William F. Hargens (collectively McGrath North). The jury returned a $1.6 million verdict in favor of Bellino. The district

court sustained McGrath North's motion for judgment notwithstanding the verdict in part and reduced the award to $229,036.40. Bellino appeals, and McGrath North cross-appeals.

II. SCOPE 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. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996).

[2] Concerning the overruling of a motion for a directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only when reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Fales v. Norine*, 263 Neb. 932, 644 N.W.2d 513 (2002).

[3,4] On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006). To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id.*

[5] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006).

III. FACTS

1. Underlying Case

This action for professional negligence arose out of the legal representation given to Bellino with regard to the severing of his business relationship with Anderson and Lottery. Bellino was the president, a director, and a 50-percent shareholder of

Lottery. Bellino's actions in severing this relationship resulted in litigation, the facts of which are reported in *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). Some of those facts are recounted here for the sake of providing helpful background.

In 1989, the city of La Vista sought bids for the operation of a keno-type lottery for the city. Bellino and Anderson submitted a bid for the La Vista keno contract. In April 1989, Bellino and Anderson formed Lottery, a Nebraska corporation, for the purpose of operating the keno parlor. Bellino and Anderson each owned 50 percent of the shares of stock of Lottery, and both were officers and directors of the corporation.

Lottery entered into a keno operation contract with La Vista on May 16, 1989. The fixed term of the contract was extended through July 31, 1998, with a provision that the term would continue indefinitely beyond that term until one party served 60 days' written notice of termination upon the other.

Initially, Bellino and Anderson received salaries from Lottery. In 1993, following the advice of an accountant, they stopped receiving salaries. There was no express agreement between Bellino and Anderson as to the amount of time that each would devote to the lottery business. From 1994 to 1998, Lottery employed general managers, keno managers, supervisors, and keno writers.

In December 1997, Bellino and Anderson discussed the fact that Lottery's keno contract with La Vista was set to expire on July 31, 1998. Bellino told Anderson that he would meet with Anderson after the holidays to discuss Lottery's course of action. Shortly thereafter, in early 1998, Bellino sought legal advice from his attorneys concerning his desire to end the business arrangement with Anderson yet continue the keno operation.

In a letter to Anderson dated February 26, 1998, Bellino stated that he felt he was doing more than his share of the work. Bellino indicated he no longer intended to be associated with Lottery after the corporation's keno contract expired on July 31, 1998. In a letter dated April 21, 1998, Anderson's attorney informed Bellino that the keno contract with the city of La Vista was a corporate opportunity. The letter expressed Lottery's desire to have Bellino cooperate with Lottery in bidding for the new contract.

During the first quarter of 1998, Bellino met with La Vista's city administrator, Cara L. Pavlicek. After her conversation with Bellino, Pavlicek reviewed the contract and recommended to the city council that the keno contract be put up for competitive bid. On April 21, 1998, the La Vista City Council voted to accept Pavlicek's recommendation and put the keno contract up for bids. On May 4, Bellino's attorney wrote to Anderson and Lottery, informing them that Bellino had no interest in trying to resolve matters with Lottery and would not bid for the contract as part of Lottery.

Based on the advice of his attorney, Bellino formed La Vista Keno, Inc. (Keno), of which he was the sole shareholder. Bellino prepared and submitted a bid on behalf of Keno for the keno contract. The city awarded the new keno contract to Keno on July 24.

On July 29, 1998, Anderson and Lottery sued Bellino and Keno, alleging that Bellino had breached a fiduciary duty he owed to Lottery as an officer, director, and shareholder of Lottery by forming Keno and bidding on the La Vista keno contract. Anderson and Lottery sought the imposition of a constructive trust on Keno's business operations for the benefit of Anderson and Lottery.

Following a trial on May 9, 2000, the district court concluded that Bellino and Keno had obtained the contract with La Vista in breach of Bellino's fiduciary duty to Lottery and that the appropriate remedy was the imposition of a constructive trust for the benefit of Anderson and Lottery. The court further ordered Bellino to pay Anderson and Lottery $644,992.63, representing various items, including rents, profits, and benefits resulting from Bellino and Keno's receiving the keno contract from La Vista.

Bellino appealed to this court. On March 28, 2003, we affirmed the district court's order imposing a constructive trust upon Keno for the benefit of Anderson and Lottery, as well as the monetary judgment entered against Bellino.

2. Present Action for Professional Negligence

Bellino was represented in the above-described proceedings by attorneys Wegner and Hargens of McGrath North. Bellino

relied on the attorneys' advice when he formed Keno and submitted a bid for the keno contract with La Vista. These attorneys continued to represent him throughout the resulting litigation with Anderson, including at trial, during initial settlement discussions, and on appeal. The attorneys withdrew from representing Bellino on May 27, 2003. Bellino retained new counsel and ultimately settled his dispute with Anderson for $2,427,729.76. The settlement payment was made to acquire Anderson's share in Keno that Anderson had acquired through the constructive trust.

Bellino and Keno (collectively Bellino) commenced this action for professional negligence against McGrath North, Wegner, and Hargens on December 3, 2003, in the district court for Douglas County. Bellino alleged that McGrath North committed legal malpractice because it failed to fully and fairly advise him that he could be liable for a breach of fiduciary duty by forming Keno and bidding for the La Vista keno contract while still associated with Anderson and Lottery. Bellino alleged that McGrath North failed to advise him that a court could impose a constructive trust in favor of Anderson and Lottery on Keno's profits from the La Vista keno contract. He requested judgment against McGrath North for all damages proximately caused by the attorneys' professional negligence.

After a trial, the jury awarded Bellino $1.6 million in damages. McGrath North moved for judgment notwithstanding the verdict or, in the alternative, for a new trial.

McGrath North asserted 12 grounds for judgment notwithstanding the verdict that the district court restated into four: (1) McGrath North's legal advice to Bellino did not constitute malpractice because the attorneys advised him on an unsettled point of Nebraska law, (2) McGrath North's legal advice was not the proximate cause of any damages, (3) Bellino's claim was barred by the statute of limitations, and (4) the jury verdict of $1.6 million in favor of Bellino was contrary to the law and evidence.

(a) Rejection of Argument Regarding Unsettled Point of Law

McGrath North claimed that Nebraska case law provided an "undefined exception" to the fiduciary duty rule prohibiting

corporate officers and directors from competing against the corporation of which they serve. McGrath North argued that it attempted to qualify Bellino for this exception by advising him to take an "above-board" approach when he incorporated Keno and submitted a bid for the La Vista keno contract in competition with Lottery. It advised Bellino to cooperate with Anderson in submitting a bid on behalf of Lottery even while preparing a bid on behalf of Keno, to continue to allow Lottery to rent space in a building owned by Bellino if Lottery successfully retained the keno contract, and to refrain from submitting a competing bid in the name of Bellino's wife.

McGrath North asserted that even though it was unsuccessful in qualifying Bellino for the "undefined exception" to the fiduciary duty rule, the attorneys had not committed malpractice. The district court found that the evidence, viewed in a light most favorable to Bellino, did not show that the attorneys informed Bellino about any "undefined exception" to the rule prohibiting an officer or director from competing against his current corporation.

(b) Finding of Proximate Cause

McGrath North next argued that its legal advice was not the proximate cause of any damages to Bellino because there was no evidence of any legally permissible alternative that could have been recommended and pursued other than a buyout. McGrath North argued that the trial evidence showed that the only way that Bellino could have terminated his business relationship with Anderson and retained the La Vista keno contract was to buy out Anderson. According to McGrath North, a buyout was not successful because Bellino did not want to pay the amount Anderson had demanded.

During the trial, Jane Friedman, a retired law professor and one of Bellino's experts, testified that McGrath North could have advised Bellino to file an action for judicial dissolution of Lottery as provided by Nebraska law. McGrath North argued that judicial dissolution was not a viable alternative. It claimed there was no evidence of a deadlock between Bellino and Anderson or in the management of the corporate affairs that caused or threatened an irreparable injury to Lottery. Construing

the evidence in favor of Bellino, the district court found that reasonable minds could conclude that there was a basis for judicial dissolution. The evidence showed that Bellino no longer wanted to be in business with Anderson and sought legal advice to terminate their relationship.

(c) Finding That Bellino's Claim Was Timely Filed

Next, McGrath North argued that Bellino's claim was barred as a matter of law by the 2-year limitations period applicable to claims for professional negligence. McGrath North had advised Bellino concerning Keno between February and July 1998. It argued that Bellino's claim was reasonably discoverable on May 9, 2000, when the district court ruled that Bellino had breached his fiduciary duties as a corporate officer of Lottery. McGrath North contended that Bellino should have reasonably discovered that its advice had been negligent when the judgment was entered by the district court and, therefore, that he should have brought his claim no later than May 9, 2001.

The district court rejected this argument and applied the continuous representation rule. Under this rule, the statute of limitations for a claim of professional negligence is tolled if there is a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. The evidence showed that Bellino relied on McGrath North's advice when he formed a new corporation and bid for the La Vista keno contract. The court found that Bellino continued to rely on McGrath North's legal advice throughout the ensuing litigation with Anderson. Bellino did not terminate the professional relationship with McGrath North until after this court issued its opinion in *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). Construing the evidence and the inferences therefrom in Bellino's favor, the court determined that reasonable minds could conclude that a continuous relationship existed between Bellino and McGrath North from 1998 until May 27, 2003, that prevented him from discovering the legal malpractice until after the relationship was terminated. The court thus concluded that McGrath North was not entitled to judgment notwithstanding the verdict based on the statute of limitations.

(d) Reduction of Damages Award

McGrath North also asserted that the evidence did not support the $1.6 million jury verdict. It claimed that the only damages Bellino sustained as a result of the attorneys' legal advice were the legal and accounting fees incurred while defending the lawsuit filed by Anderson and Lottery.

During the trial, the jury heard testimony from two expert witnesses regarding Bellino's damages. Leo J. Panzer, a certified public accountant, testified that Bellino's damages exceeded $3.1 million. McGrath North presented testimony from another certified public accountant, who said that Bellino did not suffer any damages because he bought out Anderson's interest in Keno, which interest Anderson acquired through the constructive trust. McGrath North argued that Bellino suffered no damages by settling the matter with Anderson because Bellino received a valuable asset in return for the settlement payment.

In sustaining part of McGrath North's motion for judgment notwithstanding the verdict, the court found that McGrath North's negligent advice resulted in the filing of a lawsuit against Bellino for breach of fiduciary duty. Because Bellino was forced to spend a total of $229,036.40 in legal and accounting fees to defend the lawsuit, the court held that McGrath North was liable to Bellino for that amount.

However, the court concluded that the evidence was insufficient to support the remainder of the $1.6 million awarded by the jury. Evidence showed that by settling with Anderson for $2,427,729.76, Bellino had acquired Anderson's constructive interest in the keno operation. To achieve Bellino's goals of terminating the business relationship with Anderson and retaining the La Vista keno contract, the court concluded that Bellino had no other option but to buy out Anderson's share in the keno operation. Stated another way, the court concluded that a buyout was inevitable, even if McGrath North had not advised Bellino in the manner it did. The court thus concluded that the settlement payment was not proximately caused by McGrath North's negligence and modified the judgment to $229,036.40, reflecting only the amount Bellino paid in the Anderson litigation for legal and accounting fees.

IV. ASSIGNMENTS OF ERROR

In his appeal, Bellino claims the trial court erred in partially sustaining McGrath North's motion for judgment notwithstanding the verdict and reducing the award of damages.

McGrath North asserts 11 assignments of error in its cross-appeal, which we summarize in the following manner: The trial court erred (1) in finding that Bellino's action for professional negligence was timely filed under the applicable statute of limitations; (2) in failing to hold as a matter of law that the conduct of McGrath North was not negligent and did not result in loss to Bellino; (3) in allowing Bellino's witnesses to discuss and the jury to decide whether a sufficient basis existed for judicial dissolution of Lottery, because that determination was a question of law for the district court; and (4) in overruling McGrath North's motion for new trial.

V. ANALYSIS

1. McGrath North's Cross-Appeal

(a) Timeliness of Bellino's Claim

McGrath North argues that Bellino's action was barred by the applicable statutes of limitations. The limitations period on a claim for professional negligence is 2 years from the date of the alleged act or omission; however, if the cause of action is not discovered and could not be reasonably discovered within such 2-year period, then the action may be commenced within 1 year from the date of discovery. See Neb. Rev. Stat. § 25-222 (Reissue 1995). The trial court applied the continuous representation rule and found that Bellino timely filed his claim against McGrath North.

McGrath North asserts that Bellino's claim for legal malpractice was reasonably discoverable on May 9, 2000, when the trial court entered judgment in *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003), that Bellino had violated his fiduciary duty as a corporate officer of Lottery. McGrath North thus asserts that Bellino should have filed this action no later than May 9, 2001. We disagree.

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. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996).

[6] A claim for professional negligence accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the claim. See *Zion Wheel Baptist Church v. Herzog*, *supra*. A statute of limitations may begin to run at some time before the full extent of damages has been sustained. *Id.* Bellino's claim accrued in 1998, when the attorneys advised him to form Keno and bid for the La Vista keno contract.

[7] If a claim for professional negligence is not to be considered time barred, the plaintiff must either file within 2 years of an alleged act or omission or show that its action falls within the exceptions of § 25-222. See *Zion Wheel Baptist Church v. Herzog*, *supra*. Because Bellino did not file a complaint against McGrath North until December 3, 2003, his claim would be barred unless the limitations period was tolled for some reason. In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. *Id.*

The evidence showed that during the time McGrath North represented Bellino, he continued to reasonably rely on the attorneys' legal advice. Bellino relied on the advice of his attorneys in forming Keno and bidding on the La Vista keno contract. He relied on the attorneys' advice when he was sued by Anderson and Lottery and lost at trial. And he continued to rely on the attorneys' advice throughout the appeal process, including the attorneys' suggestion that Bellino would do better on appeal than by accepting a $1.5 million settlement with Anderson. The professional relationship continued until shortly after this court issued its opinion on March 28, 2003, in *Anderson v. Bellino, supra*. Bellino terminated his professional relationship with McGrath North on May 27. He filed a complaint against McGrath North on December 3. We conclude that the continuous representation rule applies and that the trial court did not err in determining that this action was timely filed.

(b) Professional Negligence

On cross-appeal, several of McGrath North's arguments concern the district court's refusal to hold as a matter of law that the law firm's conduct did not constitute professional negligence. Specifically, McGrath North argues that the jury verdict was contrary to the evidence and the law, and it contests the court's overruling of its motions for directed verdict and new trial and overruling in part its motion for judgment notwithstanding the verdict. We address McGrath North's arguments in a general manner by considering whether any evidence supported a finding that McGrath North committed professional negligence while representing Bellino.

(i) Negligent Conduct

In summary, McGrath North argues that it advised Bellino in accordance with Nebraska case law that provides an "undefined exception" to the fiduciary duty rule prohibiting corporate officers and directors from competing against the corporation they serve. The law firm asserts that it did not commit legal malpractice even though it was unsuccessful in qualifying Bellino for this "exception" because it cannot be liable for making an error in judgment over an unsettled point of law.

The district court determined that the evidence in a light most favorable to Bellino established that he was never informed about any exception to the fiduciary duty rule and that when looking at all the evidence in a light most favorable to Bellino, reasonable minds could conclude that McGrath North committed legal malpractice in failing to inform Bellino about an exception to the rule. We conclude that McGrath North's argument concerning the "undefined exception" is without merit.

In *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003), we held that Bellino breached a fiduciary duty owed to Anderson and Lottery. The contract to operate keno in La Vista was a corporate opportunity that Bellino, as a director, diverted from Lottery by forming a new corporation to bid against Lottery. See *id.* The issue in the present case is whether McGrath North negligently advised Bellino, which advice resulted in a loss to Bellino.

[8,9] In a civil action for legal malpractice, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client. *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006). The general rule regarding an attorney's duty to his or her client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998).

A director or corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons. *Anderson v. Bellino, supra*; *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983). Our opinion in *Anderson v. Clemens Mobile Homes*, 214 Neb. at 288, 333 N.W.2d at 904, contains dicta stating:

> It has been held that although an officer or a director of a corporation is not necessarily precluded from entering into a separate business because it is in competition with the corporation, his fiduciary relationship to the corporation and its stockholders is such that if he does so he must prove by a preponderance of the evidence that he did so in good faith and did not act in such a manner as to cause or contribute to the injury or damage of the corporation, or deprive it of business; if he fails in this burden of proof, there has been a breach of that fiduciary trust or relationship.

This language does not provide a defense to McGrath North.

Although McGrath North asserts that it relied on this language and in good faith believed that a situation was possible in which an officer or director could compete with the corporation and not breach his or her fiduciary duty, the facts in this case clearly do not support such an argument. McGrath North claims it believed Bellino's best strategy was to be "up front and honest" with Anderson when bidding against Lottery for the La Vista keno

contract and to give Lottery an opportunity to also bid on the contract. See brief for appellees on cross-appeal at 37. None of these actions could relieve Bellino of his fiduciary duty not to act adversely to the corporation of which he was the president, a director, and a 50-percent shareholder. McGrath North asserts that Bellino's claim for legal malpractice was based on the attorneys' failure to pursue a particular strategy. And they argue that under Nebraska law, a dispute over a choice of strategies or an error of judgment by the attorney on unsettled law is not actionable. The problem is there was no strategy to pursue.

[10,11] *Anderson v. Clemens Mobile Homes* does not set forth an "undefined exception" to the factual situation presented in the case at bar. A director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003); *Anderson v. Clemens Mobile Homes, supra*. An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and should refrain from all acts inconsistent with his or her corporate duties. *Electronic Development Co. v. Robson*, 148 Neb. 526, 28 N.W.2d 130 (1947).

[12-14] In addition, this court has held that shareholders in a close corporation owe one another the same fiduciary duty as that owed by one partner to another in a partnership. *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984), *disapproved on other grounds, Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985). See, also, *I. P. Homeowners v. Radtke*, 5 Neb. App. 271, 558 N.W.2d 582 (1997) (holding that stockholders in close corporation owed fiduciary duty to corporation). Partners must exercise the utmost good faith in all their dealings with the members of the firm and must always act for the common benefit of all. *Bode v. Prettyman*, 149 Neb. 179, 30 N.W.2d 627 (1948). A partner has a duty to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership. Neb. Rev. Stat. § 67-424 (Reissue 2003). Accordingly, Bellino, as the president, a director, and a shareholder in a close corporation, had a duty to act in the best interests of Lottery. No justification

for his conduct existed in Nebraska law, and McGrath North negligently advised Bellino to act contrary to such duty.

We reject McGrath North's argument that its advice to Bellino was not negligent. The trial court was correct in refusing to find as a matter of law that McGrath North's conduct did not constitute professional negligence.

(ii) Proximate Cause

[15] McGrath North claims the trial court erred in failing to hold as a matter of law that the conduct of the attorneys was not the proximate cause of Bellino's damages. A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). McGrath North argues that its advice did not proximately cause Bellino's damages because there was no evidence of any legally permissible alternative that could have been recommended other than a buyout. However, the record shows that expert witnesses for Bellino testified that, given Bellino's goals and the severely strained relationship between him and Anderson, McGrath North should have considered, among other alternatives, judicial dissolution.

Friedman, a retired law professor, testified that McGrath North gave Bellino the wrong advice in telling him to submit the competing bid. Friedman stated that dissolving the corporation was an option that should have been considered. Lowell Moore, an attorney, also testified that an action to dissolve the company was an option available to Bellino. After being instructed on proximate cause and that the measure of damages was the amount of loss actually sustained as a proximate result of the attorneys' conduct, the jury found in favor of Bellino.

[16] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Rod Rehm, P.C. v. Tamarack Amer.*, 261 Neb. 520, 623 N.W.2d 690 (2001). On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom

the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006). To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id.* If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Rod Rehm, P.C. v. Tamarack Amer., supra.*

Giving Bellino the benefit of all proper inferences deducible from the relevant evidence, the district court found that reasonable minds could conclude that other legal options were available to Bellino, options which should have been suggested by his lawyers. We conclude that the trial court did not err in refusing to decide as a matter of law that McGrath North's negligence did not proximately cause Bellino's loss.

(c) Testimony Regarding Action to Dissolve Corporation

Bellino's expert witnesses testified that McGrath North should have considered and advised Bellino of other alternatives, including the possibility of a dissolution action. McGrath North asserts that the district court erroneously delegated its duty to the jury to decide whether the uncontested facts formed a basis for Bellino to bring a dissolution action under the dissolution statute, Neb. Rev. Stat. § 21-20,162 (Cum. Supp. 2006). The record does not support this assertion. The jury was not instructed to determine whether a basis existed for dissolution but whether Bellino had proved by the greater weight of the evidence (1) the existence of an attorney-client relationship, (2) negligence by McGrath North, (3) proximate cause, and (4) damages.

McGrath North also claims the district court erred in allowing Bellino's witnesses to discuss whether a sufficient basis existed for judicial dissolution of Lottery, since that determination was a question of law for the district court. It relies on *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995), in which this court held that expert testimony concerning a

question of law is generally not admissible in evidence. In *Sports Courts of Omaha*, a law professor opined that the actions taken by an attorney on behalf of his client with regard to certain stock constituted a disposition of collateral under the Uniform Commercial Code. We found that because there was no dispute as to the actions of the attorney, whether those actions constituted a disposition of collateral as contemplated in the code was a matter of statutory interpretation, which was a question of law.

In the present case, Bellino's experts did not interpret the judicial dissolution statute. Friedman explained generally what it means to dissolve a corporation. She opined that a lawyer of ordinary skill and prudence would have researched the law, including the statutes, and she concluded that dissolving the corporation would have been a viable option for Bellino. Neither did Moore attempt to interpret Nebraska law. He stated that when the owners of a small corporation cannot agree, a dissolution action is a procedure available to them whereby their interests could be divided. He opined that a dissolution action was an option for Bellino.

In *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999), we held that expert testimony in an action for legal malpractice is normally required to establish an attorney's standard of conduct in a particular circumstance and whether the attorney's conduct was in conformity therewith. The required standard of conduct is that the attorney exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances. *Id.* Although this general standard is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact. *Id.*

To determine how the attorney should have acted in a given case, the jury will often need expert testimony describing what law was applicable to the client's situation. A "'"jury cannot rationally apply a general statement of the standard of care unless it is aware"' of what the common attorney would have done in similar circumstances." *Id.* at 124, 589 N.W.2d at 124. Testimony about the relevant law is often essential to assist the jury in determining what knowledge is commonly possessed by

lawyers acting in similar circumstances and whether the attorney exercised common skill and diligence in ascertaining the legal options available to his or her client. Attorneys represent their clients in legal matters; thus, in an action for professional negligence, the law is ingrained in the canvas upon which the picture of the attorney-client relationship is painted for the jury.

A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006). We conclude that the district court did not abuse its discretion in permitting Bellino's expert witnesses to testify that a dissolution action was a viable option.

(d) Motion for New Trial

[17] To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). Although McGrath North assigns as error the overruling of its motion for new trial, no argument is made in support of this assignment. Thus, we do not address it.

2. Bellino's Appeal: Award of Damages

The jury found that the negligence of Bellino's attorneys caused him $1.6 million in damages. The district court in part sustained McGrath North's motion for judgment notwithstanding the verdict, concluded that the evidence did not support the $1.6 million verdict, and reduced the award of damages to $229,036.40, the amount Bellino paid for legal and accounting services in defending the Anderson lawsuit. The court reasoned that Bellino's goals were to terminate his business relationship with Anderson and retain the La Vista keno contract. In order to attain his goals, the court found, Bellino would have been required to buy out Anderson, even if the advice of the attorneys had not been negligent. It therefore concluded that the only loss to Bellino proximately caused by the negligence of McGrath North was the lawsuit brought against him by Anderson. Bellino appealed and has assigned the reduction of damages as error.

In reviewing the district court's grant of judgment notwithstanding the jury verdict, we are guided by well-established principles. To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006). The party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Id.*

[18] The jury was instructed that the general measure of damages in a legal malpractice action is the amount of loss actually sustained by the claimant as a proximate result of the attorney's conduct. See *Eno v. Watkins*, 229 Neb. 855, 429 N.W.2d 371 (1988). A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

In early 1998, Bellino sought to end his business relationship with Anderson. Each of them was a 50-percent shareholder in Lottery and an officer and a director. Lottery had a keno contract with La Vista that was set to expire July 31, 1998. Bellino wanted to continue in the keno business without Anderson. The evidence, considered in a light most favorable to Bellino, indicated that Bellino was not properly informed of his fiduciary duties as the president, a director, and a shareholder of Lottery, a close corporation. Further evidence indicated he was not properly informed that a constructive trust could result. Erroneous legal advice that causes the client to breach a fiduciary duty to such a corporation can be devastating to the client. Bellino was forced to remain in business with Anderson, via the constructive trust, under a 10-year keno contract with La Vista.

Bellino presented expert testimony at trial concerning the damages proximately caused by the negligent advice of McGrath North. Panzer, a certified public accountant, testified that Bellino settled with Anderson in July 2004 to end the constructive trust, separate from Anderson, and maintain the keno operation. Panzer testified that the monetary loss sustained by Bellino due to the legal advice given by his attorneys exceeded $3.1 million. This sum included: legal and accounting fees incurred in

the Anderson litigation—$176,373.48 and $52,662.92, respectively; settlement payments to Anderson totaling $2,427,729.76; interest in the amount of $190,182.60 on personal loans taken by Bellino for the settlement payments; and the lost economic benefit, calculated at $325,773.27, of money Bellino was forced to use to settle with Anderson.

[19] In an action for legal malpractice, the plaintiff must establish that but for the alleged negligence of the attorney, the plaintiff would have obtained a more favorable judgment or settlement. *Viner v. Sweet*, 30 Cal. 4th 1232, 70 P.3d 1046, 135 Cal. Rptr. 2d 629 (2003). See *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000). The jury found that Bellino had sustained damages in the amount of $1.6 million as a proximate result of McGrath North's negligent representation. Sufficient evidence was presented to the jury to support a finding that these damages included the cost to Bellino as a result of the Anderson settlement in July 2004.

In its motion for judgment notwithstanding the verdict, McGrath North argued that the jury's verdict was based on the difference between (1) the amount ($1.5 million) for which Anderson had offered to settle the case after the trial and before this court's ruling in *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003), and (2) the expenses Bellino actually spent to settle the case after the appeal, which amount McGrath North contended was approximately $3.1 million. McGrath North argued that the jury's verdict was improper because it was based on Bellino's own decision to reject Anderson's settlement offer.

The district court determined that at some point, regardless of McGrath North's negligent advice, Bellino would have been required to buy out Anderson in order to terminate their business relationship and retain the keno contract. Because a buyout was inevitable, the court found that the payment to Anderson could not be proximately caused by McGrath North's negligence. The court determined that the difference in the settlement price before and after the litigation was concluded was not proximately caused by McGrath North because Bellino made the ultimate decision to reject the first offer. We disagree.

Before the litigation in *Anderson v. Bellino, supra*, was concluded, Anderson offered to settle for $1.5 million. McGrath

North advised Bellino that he could "do much better" on appeal. The issue is whether the legal advice given to Bellino increased the cost of severing his business relationship with Anderson.

McGrath North represented Bellino throughout the litigation with Anderson. Before trial, Bellino's attorneys told Bellino he would win on the points of law. After Bellino lost at trial, he was assured by counsel that the judge's ruling was wrong.

There was evidence that in December 2002 (i.e., before this court affirmed the judgment in *Anderson v. Bellino, supra*), Anderson offered to settle the litigation and yield his interest in the keno operation to Bellino for $1.5 million. Bellino was told by his legal counsel that his chances for a successful appeal of the district court's decision were favorable and that the appeal would result in a better outcome than a $1.5 million settlement. Panzer, who participated in discussions concerning a possible settlement, said that counsel persistently told Bellino that after the appeal was decided, Bellino and Anderson would "split the baby," but there was no suggestion that Bellino would be required to keep paying Anderson from Keno's profits for the entirety of the La Vista contract. Bellino said that he continued to move forward with his appeal to this court due to his lawyers' advice.

That advice concerning the appeal was wrong. The law in Nebraska is clear that a person who is an officer, director, and shareholder of a closely held corporation has a fiduciary duty not to act adversely to that corporation. Given the facts in this case, it was inevitable that a court would determine Bellino had breached his fiduciary duty to Lottery.

Although the decision whether to settle the controversy is ultimately left to the client, see *Wood v. McGrath, North*, 256 Neb. 109, 589 N.W.2d 103 (1999), evidence showed that Bellino relied greatly on the ongoing legal advice of McGrath North that he would prevail on appeal when he chose to forgo settlement and wait for the appeals process to run its course. We have recognized that

> "'litigants rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we [have] insist[ed] that the lawyers of our state advise clients with respect to settlements with

> the same skill, knowledge, and diligence with which they pursue all other legal tasks.'"

McWhirt v. Heavey, 250 Neb. 536, 546, 550 N.W.2d 327, 334 (1996).

In *Streber v. Hunter*, 221 F.3d 701 (5th Cir. 2000), attorneys incorrectly advised their client on how to treat a large sum of money for tax purposes, and the Internal Revenue Service issued a notice of deficiency against the client. Evidence indicated that the Internal Revenue Service would have settled the case but that the attorneys insisted the client would win at trial. Based on that advice, the client did not settle. The client lost at the tax trial, and the judgment against her was substantially more than the settlement would have been.

The client brought an action for legal malpractice against the attorneys. Following a trial, the jury returned a verdict in favor of the client. The largest portion of damages represented the difference between the amount of money the client would have paid the Internal Revenue Service had the attorneys advised her correctly and the amount she eventually had to pay. The attorneys appealed.

The U.S. Court of Appeals for the Fifth Circuit considered whether the evidence supported the jury's determination that the lawyers' overall conduct, particularly their advice that the client would win at the tax trial and that therefore, she should not settle, fell below the standard of care. Expert testimony had been presented that the attorneys' tax advice had been wrong from the start and that the attorneys failed to adequately inform the client of the apparent outcome of the tax case. The client testified that she would have settled but did not because the attorneys told her she would be successful in the tax trial. The court found that based on the facts and in light of the applicable tax law, the attorneys performed negligently by failing to advise the client to settle. The evidence, reviewed in a light favorable to the client, was sufficient to sustain the jury's damage award.

In the present case, Bellino's attorneys advised him to set up Keno and bid against Lottery for the La Vista contract. Moore, one of Bellino's experts, testified that this advice caused Bellino "to become involved in litigation where there was virtually no chance of him being successful." Bellino continued to rely on

his attorneys' advice throughout the resulting litigation. Moore testified that McGrath North fell below the standard of care by not advising Bellino that he was likely to lose the case. The jury could reasonably have inferred that the failure of counsel to properly advise Bellino of the apparent outcome of his appeal was a proximate cause of his decision not to pay the $1.5 million which Anderson requested to settle the matter.

The district court found that Bellino would inevitably have to buy out Anderson but did not consider that the price of such buyout could have been increased as a result of McGrath North's negligent representation. The jury could reasonably have concluded, based on the evidence, that it cost Bellino more to purchase Anderson's interest after the litigation and judgment against Bellino than before such judgment. The jury could reasonably have determined that Anderson's settlement offer of $1.5 million established a baseline number for what it would have cost Bellino to buy out Anderson.

After Bellino did not accept Anderson's offer, Bellino's appeal continued until this court affirmed the judgment in favor of Anderson. Friedman, one of Bellino's experts, testified that Bellino "suffered terribly monetarily after the [Nebraska] Supreme Court rendered its opinion" in *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). The constructive trust was imposed, and Bellino was locked into the existing arrangement for several more years.

The evidence, viewed favorably to Bellino, indicated that following the conclusion of the appeal, it cost Bellino in excess of $3.1 million to attain his goal of separating from Anderson and continuing the keno operation. The settlement with Anderson satisfied all obligations and sums owed to Anderson as a result of the constructive trust, including all profits currently due Anderson or to which he would be entitled in the future under the La Vista keno contract. The jury could reasonably have concluded that but for the negligence of McGrath North, Bellino would have paid substantially less to attain his stated goals.

On its motion for judgment notwithstanding the verdict, McGrath North was deemed to have admitted as true all the relevant evidence favorable to Bellino and Bellino was entitled to the benefit of all proper inferences deducible from the relevant

evidence. See *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006). The amount of damages awarded by the jury was supported by the evidence, bore a reasonable relationship to the elements of the damages proved, and was not such that reasonable minds could draw but one conclusion on the issue of damages. See *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

We conclude that the district court erred in sustaining the motion for judgment notwithstanding the verdict and in reducing the damages to $229,036.40.

VI. CONCLUSION

The district court erred in partially sustaining McGrath North's motion for judgment notwithstanding the verdict and disturbing the jury verdict. We reverse the district court's order reducing the award of damages. In all other respects, the court's order and rulings are affirmed. We remand the cause to the district court with direction to reinstate the jury verdict and judgment in favor of Bellino.

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

McCORMACK, J., not participating.

ORCHARD HILL NEIGHBORHOOD ASSOCIATION ET AL., APPELLEES, V. ORCHARD HILL MERCANTILE, L.L.C., APPELLANT, AND NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

738 N.W.2d 820

Filed August 17, 2007. No. S-06-228.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court has discretion in deciding whether a witness is qualified to testify as an expert, and an appellate court will not disturb the trial court's decision unless it is clearly erroneous.
2. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing a district court's order under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to

84-920 (Reissue 1999 & Cum. Supp. 2006), for errors appearing on the record, an appellate court looks at whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

4. **Courts: Jurisdiction.** Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.
5. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
6. **Administrative Law: Liquor Licenses.** Nebraska statutes establish a renewal privilege, and liquor licensees are entitled to renewal, absent a change of circumstances indicated on the licensee's renewal application.
7. **Constitutional Law: Administrative Law: Liquor Licenses.** A liquor licensee has a constitutionally protected interest in obtaining renewal of an existing license.
8. **Rules of Evidence: Expert Witnesses.** Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness qualifies as an expert.
9. **Trial: Expert Witnesses.** Whether a witness qualifies as an expert is a preliminary question for the trial court.
10. **Expert Witnesses.** A court should not admit expert testimony if it appears the witness does not possess facts that will enable him or her to express an accurate conclusion, as distinguished from a mere guess or conjecture.
11. **Expert Witnesses: Records.** A court should reject an expert's opinion if the record does not support a finding that the expert had a sufficient foundation for his or her opinion.
12. **Appeal and Error.** When an issue is raised for the first time in an appellate court, the court will disregard it because the district court cannot commit error in resolving an issue never presented and submitted to it for disposition.
13. **Judgments: Appeal and Error.** An appellate court will not substitute its factual findings for those of the district court when competent evidence supports the district court's findings.

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

Michael J. Lehan for appellant.

Steven M. Virgil, and Matthew Andrew, Senior Certified Law Student, of Community Economic Development Clinic, Creighton University School of Law, for appellees Orchard Hill Neighborhood Association et al.

No appearance for appellee Nebraska Liquor Control Commission.

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

CONNOLLY, J.

The Orchard Hill Neighborhood Association and neighborhood residents (collectively the Objectors) appealed the order of the Nebraska Liquor Control Commission (Commission) granting a liquor license to Orchard Hill Mercantile, doing business as Hamilton Outlet Tobacco (Mercantile). On review, the district court found that under Neb. Rev. Stat. § 53-132(2) (Reissue 2004), the "public convenience and necessity" did not require the issuance of the liquor license. The court reversed the Commission's decision, and Mercantile appeals. Because competent evidence supports the district court's decision, we affirm.

I. BACKGROUND

Mercantile applied for a retail class D liquor license at 4026 Hamilton Street, Omaha, Nebraska. With the license, Mercantile could sell off-sale package liquor. Under Neb. Rev. Stat. § 53-133 (Reissue 2004), two neighbors and a pastor of a nearby church protested.

1. HEARING BEFORE THE COMMISSION

(a) Expert Testimony Against Issuing the License

Under Neb. Rev. Stat. § 84-914(1) (Reissue 1999), the Objectors requested the Commission comply with the rules of evidence. Two experts testified for the Objectors. The first expert was Dr. Rebecca K. Murray, who is an assistant professor of sociology and anthropology at Creighton University. She received her master's degree and doctorate from the University of Nebraska at Omaha. Her research focuses on environmental criminology—studying how urban structures affect crime within particular areas. Although she is not familiar with the Hamilton Street neighborhood (Neighborhood), she has studied how liquor establishments affect automobile thefts and assaults in Omaha; she testified that a correlation exists between crime and liquor establishments. She opined that assaults rise by 1.0959 per year per block when increasing the number of off-sale

liquor-serving establishments from zero to one; assaults rise by 2.0117 when increasing the number of liquor establishments from one to two. Presently, one liquor store—about one-half to one block from Mercantile's proposed location—serves the Neighborhood. Presently, two to three assaults occur per year in the Neighborhood. Murray stated her research methodology is generally accepted in her field.

Relying on her research, training, and education, Murray opined that issuing a liquor license to Mercantile at the proposed location would not serve the public's interests. She added that a liquor establishment would increase crime anywhere in Omaha, but that the Neighborhood, a residential area, already has a higher crime rate compared with the city as a whole. She further stated that her opinion was her "best-guess" based on her research.

The second expert was Dr. Russell L. Smith, who teaches urban studies and public administration at the University of Nebraska at Omaha. He has a doctorate in political science. He focuses on public policy, urban revitalization, and community development. Smith is familiar with the Neighborhood because he works with programs and projects concerning the Neighborhood. In addition, he has conducted surveys and focus groups on issues regarding the Neighborhood. He testified that the Neighborhood is in an "advanced state of decline," as evidenced by the number of vacant lots, declines in housing values, and a population decrease. He stated that the deteriorated commercial strip showed promise for revitalization efforts, but that putting a liquor store there would be a "disservice" to the Neighborhood. Smith conducted a survey that found 42 percent of the respondents have concerns about illegal alcohol use in the Neighborhood. He opined that Mercantile's liquor store would negatively affect the surrounding community.

(b) Other Evidence Regarding the Neighborhood

The record reflects that while graffiti, loitering, and traffic violations have increased, the Neighborhood is improving. The Omaha Community Foundation has invested about $250,000 in private donations for community development, including home improvement, a community gardening project, and after-school

programs. Also, the city of Omaha is preparing a redevelopment plan for the area.

(c) Mercantile's Evidence Supporting the License

The proposed site complies with zoning requirements, and sanitary and sewer systems are in place. The city recommended that the Commission grant the license. Also, Mercantile's owners have invested about $1.5 million, improving several buildings in the Neighborhood. Charles Kline, an owner, testified that more than 400 people would like Mercantile to provide liquor at the proposed location. He testified that the site would have adequate parking—15 parking spots and an estimated 200 customers per day. Contrary to the expert testimony, Kline testified that within the last year or two, property values have increased. Mercantile's owners believe their liquor store will serve the public interest.

(d) The Commission's Decision

At the hearing's conclusion, the Commission unanimously voted to approve the license, and on July 5, 2005, the Commission entered its order.

2. The District Court Decision

The Objectors appealed the Commission's decision to the district court. They contended that the Commission's order issuing the license was arbitrary and capricious and that the evidence did not support it.

The district court, reviewing the record of the Commission de novo,[1] found that under the Nebraska Liquor Control Act,[2] the present or future public convenience and necessity did not require the liquor license. The court relied on "the slim margin by which the City Council voted to approve [Mercantile's] application; the existence of a strong, proactive citizen protest; and the existence of another liquor-selling establishment in such close proximity to the proposed location." The court further found that issuing the license would frustrate the positive trend occurring in the

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[1] See Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999).

[2] Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2004).

Neighborhood. The court balanced these concerns against its findings that (1) Mercantile's owners are qualified, (2) the site complied with zoning and sanitation requirements, and (3) the site presented no parking concerns.

II. ASSIGNMENTS OF ERROR

Mercantile assigns that the district court erred in (1) reversing the Commission's decision as arbitrary, unreasonable, and not supported by competent evidence; (2) considering expert testimony based on "guess and conjecture" which was not relevant to the issues; (3) considering expert testimony when the record contains no findings that the trier of fact performed its role as a gatekeeper; (4) interpreting § 53-132(3); (5) considering only one element of the factors set forth in § 53-132(3); (6) relying on *City of Lincoln v. Nebraska Liquor Control Comm.*[3] in determining that a single factor may require reversal of an order of the Commission; and (7) failing to dismiss Orchard Hill Neighborhood Association for lack of standing.

III. STANDARD OF REVIEW

[1] A trial court has discretion in deciding whether a witness is qualified to testify as an expert, and we will not disturb the trial court's decision unless it is clearly erroneous.[4]

[2,3] Under the Administrative Procedure Act,[5] we may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.[6] When reviewing a district court's order under the Administrative Procedure Act for errors appearing on the record, we look at whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[7]

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[3] *City of Lincoln v. Nebraska Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001).

[4] See *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

[5] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006).

[6] See *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003). See, also, § 84-918(3).

[7] *Stejskal v. Department of Admin. Servs.*, *supra* note 6.

IV. ANALYSIS

1. The Controversy Is Not Moot

Before reaching the legal issues presented, we address a jurisdictional issue raised by the Objectors. The Objectors contend that Mercantile's appeal is moot. Under Nebraska statute, a liquor license cannot exceed 1 year.[8] The Objectors argue that more than 1 year has passed since July 5, 2005, when the Commission first issued a liquor license to Mercantile. The record shows that Mercantile attempted to renew its license but that the Commission denied its request because of the district court's decision. The Objectors argue that because Mercantile's liquor license has expired and the Commission has not renewed it, the Commission cannot reinstate it. They argue the case is moot and that we cannot grant relief on appeal. We disagree.

[4,5] Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.[9] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.[10]

The Maryland Court of Appeals considered a mootness argument under analogous facts. In *Bethesda Management Serv. v. Dep't*,[11] the appellants held licenses to operate employment agencies. The Maryland Department of Licensing and Regulation, Division of Labor and Industry, revoked the appellants' licenses, and they appealed. The department argued that the case was moot because the revoked licenses lasted for 1 year and would have expired by their own terms by the time the case reached the appellate court. The appellants had unsuccessfully applied for new licenses for the next year. The court, however, concluded

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[8] § 53-149.

[9] See *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

[10] *Id.*

[11] *Bethesda Management Serv. v. Dep't*, 276 Md. 619, 350 A.2d 390 (1976).

that the case still presented a live controversy. The court reasoned that if the revocation stood, the department would not issue a new license to the appellants. The court stated, "[I]f it should be ultimately determined that the revocations were unwarranted, and no other cognizable grounds for denial existed, appellants would be entitled to new licenses."[12] The court held that the appellants had a real interest in the outcome of the case.

[6,7] Here, although Mercantile's original liquor license has expired, the controversy is not moot. Nebraska statutes establish a renewal privilege, and liquor licensees are entitled to renewal, absent a change of circumstances indicated on the licensee's renewal application.[13] We have recognized that a liquor licensee has a constitutionally protected interest in obtaining renewal of an existing license.[14] That interest would be jeopardized if the license were wrongfully taken away. Because Mercantile has an interest in judicial resolution beyond the expiration of its original license, the controversy is not moot.

2. The Hearing Officer Properly Admitted the Expert Testimony

[8,9] Mercantile contends that the testimony of Murray, Smith, and another witness, Dr. Andrew Jameton, was inadmissible as expert testimony. Under Neb. Evid. R. 702,[15] a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness qualifies as an expert. Whether a witness qualifies as an expert is a preliminary question for the trial court.[16] A trial court is allowed discretion in deciding whether a witness qualifies to testify as an expert. And unless

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[12] *Id.* at 626, 350 A.2d at 394.

[13] *Grand Island Latin Club v. Nebraska Liq. Cont. Comm.*, 251 Neb. 61, 554 N.W.2d 778 (1996); *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989). See, also, §§ 53-135 and 53-135.02.

[14] *Grand Island Latin Club v. Nebraska Liq. Cont. Comm., supra* note 13.

[15] Neb. Rev. Stat. § 27-702 (Reissue 1995).

[16] *Carlson v. Okerstrom, supra* note 4.

the court's finding is clearly erroneous, we will not disturb that decision on appeal.[17]

(a) Murray Provided Sufficient Foundation for Her Opinion

[10,11] Mercantile contends that Murray based her testimony on a "'best guess scenario'" and that she lacked knowledge of the Neighborhood.[18] Mercantile's objection appears to be a foundational challenge, and that is how we will address it. A court should not admit expert testimony if it appears the witness does not possess facts that will enable him or her to express an accurate conclusion, as distinguished from a mere guess or conjecture.[19] That is, a court should reject an expert's opinion if the record does not support a finding that the expert had a sufficient foundation for his or her opinion.[20]

We discussed an evidentiary foundation issue in *Scurlocke v. Hansen*.[21] There, the witness testified regarding the cost to restore trees damaged by a bulldozer. He, however, had no experience estimating such damages, he estimated the cost to restore the property to its original condition without having seen it before the damage, he took no measurements, and his "methodology" consisted of "walking around the [plaintiff's] property and trying to 'visualize' where trees had been prior [to the damage]."[22] We decided the skeletal foundation could not support his opinion.

In contrast, Murray fleshed out the foundation for her opinion. She relied on her research of the city. She examined felonious assaults and automobile thefts occurring in the city and the number of liquor-serving establishments. She used census data to control for other variables, including income, racial composition,

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[17] *Id.*

[18] Brief for appellant at 11.

[19] See, *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005); *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004).

[20] See *City of Lincoln v. Realty Trust Group, supra* note 19.

[21] *Scurlocke v. Hansen, supra* note 19.

[22] *Id.* at 552, 684 N.W.2d at 569.

and land ownership at the block level. She testified that based on her research of a citywide trend, crime would increase in the Neighborhood with the establishment of an additional liquor store. Murray also testified the Neighborhood already averaged more crime per year than other areas, suggesting that an increase in crime there could be more detrimental.

Mercantile attempts to characterize Murray's testimony as "mere guess or conjecture"[23] under *Scurlocke* because she testified that her opinion regarding the effect of a liquor store in the Neighborhood was her "best-guess." The record reveals, however, that Murray clarified that any opinion about future events has some uncertainty, and repeated that she based her opinion on her research. We believe this case is distinguishable from *Scurlocke*. Murray's background and research provided sufficient foundation for her opinion. The hearing officer did not clearly err in admitting Murray's testimony.

(b) Mercantile Did Not Raise a *Daubert* Challenge at the Commission Hearing

Mercantile also challenges Smith's and Jameton's testimony. It argues that they failed to explain their methodology and whether it was applied in a reliable manner. Mercantile appears to invoke a challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[24] and *Schafersman v. Agland Coop.*[25] But the record shows that Mercantile, at the Commission hearing, did not object because of methodology. Instead, Mercantile objected to Smith's testimony on relevance, hearsay, and foundation. And it objected to Jameton's testimony as hearsay. Further, Mercantile did not challenge either witness' methodology before the district court.

[12] When an issue is raised for the first time in this court, we will disregard it because the district court cannot commit error in resolving an issue never presented and submitted to it

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[23] Brief for appellant at 11.

[24] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[25] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). See, also, *City of Lincoln v. Realty Trust Group, supra* note 19.

for disposition.[26] Because Mercantile did not object before the Commission or the district court, we do not address this issue.

3. The District Court Properly Considered the Criteria in § 53-132(3)

Mercantile argues that the district court failed to consider all of the statutory criteria in § 53-132(3) in determining whether the Commission correctly issued the liquor license. Section 53-132(2) of the Nebraska Liquor Control Act provides the requirements for issuing a retail liquor license. To issue a retail liquor license, the Commission must find that the license satisfies each condition specified in § 53-132(2)(a) through (d).[27] Subsection (d) provides that the issuance of a license must be "required by the present or future public convenience and necessity." In deciding whether an application meets these requirements, the Commission must consider each factor listed in § 53-132(3)(a) through (j).[28] When the Commission conducted the hearing, those factors were:

> (a) The recommendation of the local governing body;
>
> (b) The existence of a citizens' protest made in accordance with section 53-133;
>
> (c) The existing population of the city, village, or county and its projected growth;
>
> (d) The nature of the neighborhood or community of the location of the proposed licensed premises;
>
> (e) The existence or absence of other retail licenses or craft brewery licenses with similar privileges within the neighborhood or community of the location of the proposed licensed premises;
>
> (f) The existing motor vehicle and pedestrian traffic flow in the vicinity of the proposed licensed premises;
>
> (g) The adequacy of existing law enforcement;
>
> (h) Zoning restrictions;

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[26] See *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002).

[27] *City of Lincoln v. Nebraska Liquor Control Comm.*, *supra* note 3.

[28] *Id.*

(i) The sanitation or sanitary conditions on or about the proposed licensed premises; and

(j) Whether the type of business or activity proposed to be operated in conjunction with the proposed license is and will be consistent with the public interest.[29]

We discussed the above factors in *City of Lincoln v. Nebraska Liquor Control Comm.*[30] There, we considered whether the Commission properly issued a liquor license when the proposed location failed to meet zoning requirements. We stated that no one factor invariably controls the decision to grant or deny a liquor license. All of the factors in § 53-132(3) must be considered in determining whether an applicant meets the requirements of § 53-132(2). In *City of Lincoln*, we decided that because the location did not comply with zoning requirements, the Commission should have denied the license.

In its order, the district court, citing our decision in *City of Lincoln*, stated that "[n]o specific factor 'controls' the decision to grant or deny an application for a liquor license, but in some cases, a single factor may weigh so heavily that it tips the balance one way or the other." Mercantile apparently interprets this statement to mean that the district court relied solely on whether the liquor license was in the public interest, the factor listed in § 53-132(j). The court's order, however, shows it considered all of the statutory factors. In its order, the court listed the factors in § 53-132(3) that the Commission must consider in deciding whether to approve or deny a license application. The court specifically found that several factors weighed against issuing the license and that others weighed in favor of the license. After balancing the factors, the court decided that the "present or future public convenience and necessity" did not require the license under § 53-132(2)(d). In reaching its decision, the court properly considered all of the factors listed in § 53-132(3).

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[29] § 53-132(3).

[30] *City of Lincoln v. Nebraska Liquor Control Comm., supra* note 3.

4. Competent Evidence Supports the District Court's Decision

[13] Mercantile argues that the district court's decision was arbitrary and capricious and lacked competent evidence to support it. When reviewing a district court's order under the Administrative Procedure Act for errors appearing on the record, we look at whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[31] We will not substitute our factual findings for those of the district court when competent evidence supports those findings.[32]

The district court's order contains a detailed summary of the evidence presented to the Commission. The court examined evidence on all of the statutory factors. In deciding that the Commission should have denied the liquor license, the court wrote:

> [T]his Court finds that the slim margin by which the City Council voted to approve [Mercantile's] application; the existence of a strong, proactive citizen protest; and the existence of another liquor-selling establishment in such close proximity to the proposed location militate strongly against issuance of a license to [Mercantile]. This Court further finds that the nature of the Orchard Hill neighborhood and community, though in a state of decline, is benefiting from the substantial efforts and contributions of public and private entities and donors, and that this positive trend would likely be frustrated by the issuance of a liquor license to [Mercantile]. While this Court finds that there are no zoning or sanitation impediments to granting a license to [Mercantile], that traffic and parking concerns are minor, and that [Mercantile] is in all respects qualified to operate a stable and relatively secure liquor-selling establishment, these factors, on balance, are insufficient to show, as [Mercantile] must, that the issuance of the license

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[31] *Stejskal v. Department of Admin. Servs.*, *supra* note 6.

[32] See *id.*

> to [Mercantile] "is or will be required by the present or future public convenience and necessity."

Adhering to our standard of review for error on the record, we believe the record supports the district court's decision. Expert testimony establishes that a liquor license would negatively affect the Neighborhood and that crime would likely increase. The record contains a petition signed by more than 400 Neighborhood residents opposing the liquor license. Testimony established that another liquor establishment is presently located within one block from Mercantile's proposed location. Although some evidence does weigh in favor of issuing the liquor license, sufficient competent evidence supports the court's decision. We recognize that the Commission also considered the evidence in deciding to issue the liquor license. But under our standard of review, we cannot say that the district court's decision to overturn the Commission's decision was arbitrary, capricious, or unreasonable. The district court did not err in ordering the Commission to deny the license to Mercantile.

V. CONCLUSION

We conclude that Mercantile's appeal is not moot because Mercantile has an existing interest in obtaining relief from the district court's denial of its liquor license. Because competent evidence—including properly admitted expert testimony—supports the court's decision, we affirm. The remaining issues are unnecessary to resolve this case, and we need not address them on appeal.[33]

AFFIRMED.

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[33] See *Ferer v. Erickson, Sederstrom*, 272 Neb. 113, 718 N.W.2d 501 (2006).

W. BEN SNYDER, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, AN ADMINISTRATIVE AGENCY OF THE STATE OF NEBRASKA, APPELLANT.

736 N.W.2d 731

Filed August 17, 2007. No. S-06-352.

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. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Jurisdiction.** In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute in order to confer jurisdiction.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Jon Bruning, Attorney General, and Edward G. Vierk for appellant.

S. Gregory Nelson for appellee.

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

STEPHAN, J.

The sole issue in this case is whether a sworn report listing the reasons for an arrest as "Speeding (20 OVER)/D.U.I." is sufficient to confer jurisdiction on the Department of Motor Vehicles (DMV) in an administrative license revocation (ALR) proceeding. We agree with the district court for Douglas County that it is not and, therefore, affirm the judgment of that court which reversed the administrative revocation.

FACTS

On October 6, 2005, at 1:47 a.m., an Omaha police officer stopped a motor vehicle driven by W. Ben Snyder after observing the vehicle speeding. The officer ultimately arrested Snyder for suspicion of driving under the influence. After transporting

him to police headquarters, the officer read Snyder a postarrest chemical test advisement. Snyder then submitted to a chemical test of his breath via an Intoxilyzer 5000 machine. The chemical test showed a blood alcohol concentration over the legal limit.

On October 12, 2005, the director of the DMV received a sworn report completed by the arresting officer. The sworn report stated, among other things, that Snyder was arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2004) and listed the reasons for his arrest as "Speeding (20 OVER)/D.U.I." The director also received a petition for an administrative hearing from Snyder, and a hearing on whether Snyder's license should be revoked was held on November 1. Snyder's counsel objected to the director's jurisdiction, arguing that the sworn report did not properly reflect the reasons for the arrest. The hearing officer took the objection under advisement. The arresting officer testified at the hearing. The hearing officer subsequently found that the information in the sworn report was sufficient to confer jurisdiction on the DMV and recommended that Snyder's license be revoked for the statutory period of 90 days. The director adopted this recommendation on November 8.

Snyder timely appealed to the district court, which reversed the director's decision and dismissed the revocation of Snyder's license. The district court reasoned that speeding and "D.U.I." were not sufficient reasons for the arrest and that thus, the sworn report did not confer jurisdiction upon the DMV to revoke Snyder's license. The DMV filed this timely appeal. We moved the case to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENT OF ERROR

The DMV assigns, restated, that the district court erred in determining that the reasons for arrest listed in the sworn report were not sufficient to give the DMV jurisdiction to revoke Snyder's license.

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

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.[2]

ANALYSIS

Resolution of the issue presented in this appeal requires an examination of the relevant Nebraska statutes and our decision in *Hahn v. Neth*.[3] Nebraska law makes it unlawful

> for any person to operate or be in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor or of any drug;
>
> (b) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or
>
> (c) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.[4]

Any person who operates a motor vehicle in Nebraska is deemed to have given consent to submit to chemical tests for the purpose of determining the concentration of alcohol in the blood, breath, or urine.[5] A police officer may require any person arrested for committing an offense while driving under the influence of alcohol to submit to a chemical test "when the officer has reasonable grounds to believe that such person was driving or was in the actual physical control of a motor vehicle . . . while under the

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[2] *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007); *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006).

[3] *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005).

[4] Neb. Rev. Stat. § 60-6,196(1) (Reissue 2004).

[5] § 60-6,197(1).

influence of alcoholic liquor."[6] Any person arrested for suspicion of driving under the influence of alcohol may be directed by an officer to submit to a chemical test to determine the concentration of alcohol in that person's body.[7] If the chemical test shows a concentration above the legal limit, the driver is subject to the ALR procedures found in Neb. Rev. Stat. §§ 60-498.01 to 60-498.04 (Reissue 2004).[8]

Section 60-498.01(3) provides that when a person arrested under circumstances described in § 60-6,197(2) submits to a chemical test of blood or breath that discloses an illegal presence of alcohol and the test results are available to the arresting officer while the arrested person is still in custody, the arresting officer

> shall within ten days forward to the director a sworn report stating (a) that the person was arrested as described in subsection (2) of section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration specified in section 60-6,196 [over .08].[9]

If a motorist arrested under these circumstances requests a hearing, the issues under dispute are limited to the following:

> (A) Did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 . . . and
>
> (B) Was the person operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of section 60-6,196.[10]

Resolution of the first issue depends on the officer's reasons for arresting a motorist, while resolution of the second depends

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[6] § 60-6,197(2).

[7] § 60-6,197(3).

[8] *Id.*

[9] § 60-498.01(3).

[10] § 60-498.01(6)(c)(ii).

upon the results of the tests conducted after the arrest. Both issues require a showing of facts.

[2] The arresting officer's sworn report triggers the ALR process by establishing a prima facie basis for revocation.[11] When such a prima facie case showing is made, unless the arrested person petitions for a hearing and establishes by a preponderance of the evidence that grounds for revocation do not exist, the operator's license is automatically revoked upon the expiration of 30 days after the arrest.[12] Because of the substantial evidentiary role of the sworn report in an ALR proceeding, it "must, at a minimum," contain the information specified in § 60-498.01(3) in order to confer jurisdiction upon the director of the DMV to administratively revoke a license.[13] In this case, we focus on the reasons for the arrest, which reasons must be stated in the sworn report pursuant to § 60-498.01(3)(a).

The sworn report includes 2½ blank lines on which the officer is to state the reasons for the arrest. Here, the arresting officer's notation that Snyder was speeding explains the initial traffic stop but does not, standing alone, constitute a reason for the arrest. Although the record reflects that the officer made certain observations and conducted field sobriety tests and a preliminary breath test before the arrest, the observations and test results are not stated in the sworn report. Instead, the officer wrote only "D.U.I.," the common abbreviation for driving under the influence. While this tells us what the officer suspected when he made the arrest, it provides no factual reasons upon which his suspicion was based. As the district court correctly noted, it is a conclusion, not a reason.

Completion of the 1-page sworn report form is not an onerous task.[14] Recently in *Betterman v. Department of Motor Vehicles*,[15] we held that a notation on the sworn report that the

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[11] *Hahn v. Neth, supra* note 3.

[12] *Id.* See § 60-498.01(3).

[13] *Hahn v. Neth, supra* note 3, 270 Neb. at 171, 699 N.W.2d at 38.

[14] See *Hahn v. Neth, supra* note 3.

[15] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 182, 728 N.W.2d 570, 578 (2007).

motorist "'displayed signs of alcohol intoxication'" constituted a reason for the arrest sufficient to confer jurisdiction on the DMV. While that provided a very general factual statement of the reasons for the arrest, it was sufficient to meet the requirement of § 60-498.01(3). In contrast, the conclusory notation "D.U.I." provides no factual reason for the officer's decision to arrest Snyder on suspicion of driving under the influence of alcohol instead of merely citing him for speeding. Because of this jurisdictional deficiency, the DMV could not consider the officer's testimony at the hearing regarding his reasons for arresting Snyder.[16]

CONCLUSION

The sworn report failed to state a reason for the officer's suspicion that Snyder was operating a motor vehicle while under the influence of alcohol, which resulted in his arrest. Because the sworn report did not include the information required by § 60-498.01(3)(a), it did not confer jurisdiction on the DMV to revoke Snyder's license. We affirm the order of the district court reversing the revocation order and directing the DMV to reinstate Snyder's driving privileges.

AFFIRMED.

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[16] See *Hahn v. Neth, supra* note 3.

HEAVICAN, C.J., dissenting.

I respectfully dissent. In the majority's view, the failing of the sworn report in this case is that the officer completing the report simply stated a conclusion rather than stating his reasons for arresting W. Ben Snyder. The majority concludes that under *Hahn v. Neth*,[1] such a defect requires a finding that the sworn report did not confer jurisdiction on the Department of Motor Vehicles (DMV) to revoke Snyder's license.

While some defects in a sworn report might be jurisdictional, the technical defects of the sworn report in this case should not operate to divest the DMV of jurisdiction. The better rule and better reading of the statutory scheme is that the information

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[1] *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005).

missing from the sworn report, at least as to the "reasons for such arrest"[2] at issue in this case, may be established by other means, including the testimony of the arresting officer. Indeed, such was permissible prior to this court's decision in *Hahn*. In *Morrissey v. Department of Motor Vehicles*,[3] this court held that "[i]f the sworn report is not proper, the department may, nevertheless, establish its case by other means, such as by the testimony of a witness . . . ."

There is no dispute that the information in the sworn report in this case was accurate and provided the DMV with a factual basis with which to commence revocation proceedings. Indeed, the sworn report, in compliance with § 60-498.01(3), stated that Snyder was arrested for driving while under the influence, listed reasons for Snyder's arrest, and further indicated that upon request, Snyder submitted to a chemical test which ultimately showed a blood alcohol concentration over the legal limit.

To the extent that the "reasons" provided in the sworn report might have initially been insufficient, there is no dispute that by the conclusion of the hearing, evidence had been adduced to substantiate all necessary factual findings. In particular, the officer who arrested Snyder testified to certain observations he made during the course of the traffic stop. The officer also testified that prior to Snyder's arrest, he conducted, and Snyder failed, field sobriety tests and a preliminary breath test.

The statutory scheme which provides for the revocation of an operator's license when an individual has been driving a vehicle while under the influence of alcohol is contained in § 60-498.01. The intent behind the revocation process is clear:

> Because persons who drive while under the influence of alcohol present a hazard to the health and safety of all persons using the highways, a procedure is needed for the swift and certain revocation of the operator's license of any

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[2] Neb. Rev. Stat. § 60-498.01(3)(a) (Reissue 2004).

[3] See *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 459, 647 N.W.2d 644, 649 (2002), *disapproved, Hahn v. Neth, supra* note 1.

> person who has shown himself or herself to be a health and safety hazard . . . .[4]

Given that the Legislature has seen fit to find that "swift and certain revocation" of an operator's license is necessary when an individual drives while under the influence, I respectfully dissent from the majority's conclusion that the technical defects in this sworn report divest the DMV of jurisdiction to revoke Snyder's license. I would instead reverse the judgment of the Douglas County District Court and affirm the revocation order entered by the DMV.

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[4] § 60-498.01(1).

DAVID KAREL, SPECIAL ADMINISTRATOR OF THE ESTATE OF TINA KAREL, DECEASED, AND AUSTIN KAREL, A MINOR, BY AND THROUGH DAVID KAREL, HIS GUARDIAN AND NEXT BEST FRIEND, APPELLANTS, V. NEBRASKA HEALTH SYSTEMS, A NEBRASKA NONPROFIT CORPORATION, DOING BUSINESS AS CLARKSON WEST EMERGICARE, AND SCOTT MENOLASCINO, M.D., APPELLEES.

738 N.W.2d 831

Filed August 24, 2007. No. S-05-1311.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
3. **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.
4. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
5. **Evidence: Proof.** For evidence to be relevant, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.

6. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries.
7. **Jury Instructions: Appeal and Error.** A court does not err in failing to give an instruction if the substance of the proposed instruction is contained in those instructions actually given.
8. ____: ____. In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error.
9. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

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

Terrence J. Salerno for appellants.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

PER CURIAM.

This is an appeal from a judgment in favor of Nebraska Health Systems, doing business as Clarkson West EmergiCare (Clarkson West), and Scott Menolascino, M.D., defendants in a medical malpractice action brought by the special administrator of the estate of Tina Karel, deceased. The primary issue presented is whether the district court erred in excluding evidence of print and radio advertisements produced by Clarkson West. We conclude that it did not, and affirm the judgment.

FACTS

The operative facts in this case occurred on September 27 and 28, 2000. At that time, Clarkson West was an emergency medical facility in Omaha, Nebraska, operated as a division of Nebraska Health Systems, a Nebraska nonprofit

corporation. Menolascino worked at Clarkson West as an emergency physician. According to Menolascino, Clarkson West held itself out as a full-service emergency room, open 24 hours per day and capable of addressing life-threatening conditions.

Menolascino was on duty at Clarkson West when Karel arrived there at 7:24 p.m. on September 27, 2000. At the time of Karel's admission, a nurse recorded that Karel's chief complaints included difficulty breathing, pain and thickness in her throat, bilateral arm pain, pain in her teeth, and difficulty swallowing. Menolascino then saw Karel and obtained additional medical history. He reviewed her symptoms and determined that her throat pain was of sudden onset and that she was not experiencing back or chest pain. Menolascino performed a physical examination and listened to Karel's heart. After ordering and reviewing an electrocardiogram (EKG) and laboratory tests, Menolascino formed a diagnosis of a severe allergic reaction to medications Karel had taken, accompanied by a high degree of anxiety. He treated her with medication administered intravenously, which reduced her symptoms. Menolascino discharged her from the facility at 9:35 p.m., with instructions to stop taking the medications which he believed had triggered the allergic reaction and to see her primary physician in 2 to 3 days to have her blood pressure rechecked. Menolascino advised Karel to return to Clarkson West if she experienced further symptoms.

Karel returned to Clarkson West a few hours later at approximately 2:20 a.m. on September 28, 2000, complaining of neck pain. Menolascino again listened to Karel's heart and this time detected a murmur which had not been present at the time of his earlier examination. This caused him to suspect a potentially catastrophic condition involving her aorta. Karel was moved to a higher acuity room and, at 2:45 a.m., given a medication to reduce her blood pressure and slow down her heart rate. At 2:50 a.m., another EKG was conducted, and at 3 a.m., a chest x ray was obtained. Menolascino concluded that Karel needed to be transported to a hospital for additional tests and began making arrangements for her transfer. Menolascino testified that it was Clarkson West's policy to transfer a patient only after the patient's primary care physician was notified and the accepting

hospital confirmed that it had a bed available. Clarkson West's director at the time of Karel's admission testified that the transfer policy then in effect required the "prior approval" of the receiving facility, meaning that the receiving facility must "have the resources to take care of that patient," including a bed for the patient. An expert testified on behalf of Karel, however, that a patient in an unstable condition such as Karel should be immediately transferred to a care center of "greater level" and that such transfer would not violate "EMTALA," a federal law designed to protect patients by preventing transfers to hospitals without resources to treat the patient. He opined that the law did not require the receiving facility to have a bed if the patient being transferred was unstable and in need of greater care.

Menolascino testified that it was Clarkson West's policy not to call an ambulance squad to transfer a patient until it received notification from the accepting hospital that a bed was available. At 3:50 a.m., Clarkson West was notified by the University of Nebraska Medical Center that it had a bed, and an ambulance was called. Karel left in the ambulance at 4:25 a.m., with the records of all her tests and treatments done at Clarkson West and Menolascino's orders.

Those orders, written at 4 a.m., provided: "Admit ICU. Dx suspect Acute aortic regurgitation vs ascending aorta tear[.] Condition guarded[.] Contact cardiology for consult. Get emergent echocardiogram." Karel arrived at the University of Nebraska Medical Center's intensive care unit at 4:57 a.m. Although Menolascino had ordered an "emergent" echocardiogram, it was not until 7:10 a.m. that a cardiology consult and "transthoracic echo" were ordered by the medical center's doctors. Karel went into cardiac arrest and died at 8:59 a.m. An autopsy revealed that she died of an aortic dissection, a tearing of the inner lining of her aorta.

Karel's father, the special administrator of her estate, brought this action on behalf of the estate and Karel's minor son against Menolascino and Clarkson West. Menolascino and Clarkson West filed a pretrial motion in limine to prohibit the special administrator from presenting evidence related to print and radio advertisements produced by Clarkson West during the time period immediately prior to Karel's death. They alleged that the

advertisements were irrelevant and that even if relevant their probative value was outweighed by their prejudice. The district court sustained the motion in limine.

At trial, the special administrator presented the testimony of Martin Beerman, marketing director for Clarkson West's parent entity, as an offer of proof. Beerman testified that in 1999 and 2000, he promoted Clarkson West through an advertising campaign. The goals of the campaign were to inform the public of what services the facility offered, including that it was open 24 hours a day, 7 days a week, including holidays. The campaign used print and radio advertisements directed at women between the ages of 35 to 54 because it was understood that they made the most health care decisions for their families. The campaign emphasized the convenience of the location, the 24-hour availability, and the capability and comprehensiveness of the facility. The radio advertisements played on more than 100 occasions in both 1999 and 2000, and the print advertisements appeared in the Omaha World-Herald newspaper 12 to 16 times during each of the 2 years.

Beerman testified that the advertisements used words designed to convey the capability of the facility, the technology available at the facility, and the facility's quality of care. He testified that the advertisements represented that the doctors at the facility were capable and competent in using the technology and that if seconds mattered and when life-threatening conditions occurred, people could come to Clarkson West. During Beerman's testimony, the special administrator attempted to offer a compact disc containing the radio advertisement and printouts of the newspaper advertisement. The district court sustained the defendants' relevancy objections to the exhibits and the offer of proof.

The jury returned a verdict in favor of the defendants, and the special administrator filed this timely appeal, which we moved to our docket based on our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The special administrator assigns, restated and consolidated, that the district court erred in (1) ruling that he was not entitled to present the testimony and exhibits offered by Clarkson West's marketing director, (2) failing to instruct the jury that it could return a verdict against Clarkson West for its independent negligence, (3) instructing the jury that violations of the federal Emergency Medical Treatment and Labor Act could result in civil and criminal penalties, and (4) denying his motion for new trial.

STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.[2] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[3]

[3] Whether a jury instruction given by a trial court is correct is a question of law.[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[5]

ANALYSIS

At trial, there was conflicting expert testimony as to whether Menolascino met the applicable standard of care in his diagnosis and treatment of Karel. The jury resolved this factual dispute in favor of Menolascino. On appeal, the special administrator does not challenge the jury's finding in this regard, and we therefore do not examine this issue. This appeal instead focuses

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[2] *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007); *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[3] *Green Tree Fin. Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002); *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

[4] *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007); *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

[5] *Id.*

on whether the district court committed error with respect to the special administrator's allegations of Clarkson West's independent negligence.

Marketing Evidence

[4,5] The special administrator asserts that Beerman's evidence relating to the marketing campaign conducted by Clarkson West in the years prior to Karel's death was relevant to a determination of the applicable standard of care. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[6] For evidence to be relevant, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.[7]

[6] In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries.[8] Obviously, the marketing materials do not pertain to the specific medical care received by Karel at Clarkson West. However, we understand the special administrator to contend that the marketing evidence is relevant to the standard of care to which Clarkson West should be held. We find no indication in the record that Clarkson West claimed to be anything other than a full-service emergency room open 24 hours per day and capable of addressing life-threatening conditions; Menolascino's deposition testimony offered in evidence by the special administrator confirmed this fact. The jury was instructed that "[a] physician of an emergency room has the duty to possess and

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[6] Neb. Rev. Stat. § 27-401 (Reissue 1995). See, also, *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001); *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

[7] See, *V.C. v. Casady, supra* note 6; *Snyder v. Contemporary Obstetrics & Gyn., supra* note 6.

[8] *Snyder v. Contemporary Obstetrics & Gyn., supra* note 6; *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

use the care, skill, and knowledge ordinarily possessed and used under like circumstances by other emergency room physicians engaged in a similar practice in the same or similar community." The marketing materials would add or subtract nothing with respect to the nature of the facility for purposes of defining the applicable standard of care. And, as one court has recently noted in concluding that a hospital's marketing materials were not even discoverable, the standard of care "in a medical malpractice action is measured against local, statewide, or nationwide standards and the 'superior knowledge and skill' that a provider actually possesses, . . . not against the knowledge and skill that the provider claims to possess in its advertising."[9]

In its petition, the special administrator alleged that the marketing materials "misled . . . Karel . . . to believe that Clarkson West . . . was staffed by individuals who possessed the requisite knowledge and skill to identify serious and life-threatening conditions and to properly attend to those conditions in a timely and expedient manner." We, like the trial court, read this allegation as one for negligent misrepresentation. One of the elements of a cause of action for negligent misrepresentation is justifiable reliance on the part of the plaintiff.[10] Neither the offer of proof nor any other part of the record affords any basis for concluding that Karel relied upon or was even aware of the marketing activities undertaken by Clarkson West when she chose to seek medical care at the facility. We conclude that the district court did not abuse its discretion in sustaining the relevancy objections to the marketing materials.

Jury Instruction on Clarkson West's Negligence

The special administrator assigns error by the district court in failing to instruct the jury that it could return a verdict against Clarkson West for its negligence. The record includes a stipulation that following the instruction conference, the trial court submitted to counsel jury forms which it proposed to submit, at

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[9] *McCullough v. University of Rochester*, 17 A.D.3d 1063, 1064, 794 N.Y.S.2d 236, 237 (2005) (citation omitted).

[10] *Washington Mut. Bank v. Advanced Clearing, Inc.*, 267 Neb. 951, 679 N.W.2d 207 (2004).

which time counsel for the special administrator objected to the court's failure to include a jury form on which the jury could find solely against Clarkson West for its separate negligence. The proposed verdict form is not itself in the record. The verdict forms given to the jury permitted a verdict only for or against "the Defendants." On appeal, the special administrator argues that the failure to give the separate form to the jury was error.

The record does not reflect that the special administrator requested a specific jury instruction regarding negligence on the part of Clarkson West independent of that alleged on the part of Menolascino. In his proposed instruction, which included the statement of the case, the special administrator asserted his claim that the "defendants" were negligent in one or more of eight particulars. The statement of the case instruction given by the court utilized substantially similar introductory language, but included only five of the eight particulars. The special administrator did not make a specific objection to this instruction, but when asked if he had any proposed corrections or additions, counsel replied, "Only as were set out in the instructions that I've offered the Court." On appeal, he does not specifically argue that the jury instructions given were erroneous.

The special administrator also requested the following instruction, based upon NJI2d Civ. 6.30, the essential substance of which was given by the court:

> Professional corporation can act only through its employees or agents. A corporation is bound by the knowledge possessed by its employees and agents. It is also bound by the acts and omissions of its employees performed within the scope of their employment.
>
> At the time of treatment rendered to Tina Karel, Dr. Scott Menolascino was acting within the scope of his duties with Clarkson West Emergi[C]are. That means that if you find that Dr. Menolascino is liable to the estate of Tina Karel . . . then you must also find that Clarkson West EmergiCare and Nebraska Health Systems doing business as Clarkson West EmergiCare are also liable to the estate of Tina Karel . . . .

Thus, the jury was instructed as to the defendants' alleged negligence exactly in the manner proposed by the special

administrator, except for the deletion of three specifications of negligence in the statement of the case. The first of these involved the claim that Clarkson West "held itself out as an emergency room capable of handling sudden or life threatening injuries or illness and capable of providing CT scans on site." As we have noted above, this allegation does not relate specifically to the medical care provided to Karel, and to the extent it is asserted as a negligent misrepresentation claim, it is unsupported by the record.

[7,8] The second of the negligence specifications included in the proposed statement of the case instruction but deleted from the instruction given was a claim that defendants were negligent "[i]n failing to properly investigate, monitor and ascertain that its employees possessed the requisite knowledge, skill and training to work in an emergency room setting with patients like Tina Karel who would present with life threatening conditions." This claim presumes that Clarkson West employees did not possess such knowledge, skill, and training, and is therefore subsumed within the specific claims of negligence directed at Menolascino, the only Clarkson West employee who is specifically alleged to have been negligent in providing medical care to Karel. The third specification of negligence requested by the special administrator but not included in the court's statement of the case instruction was an alleged failure "to adequately staff the facility so that when a determination of hospitalization was made the transfer could be facilitated in an efficient and prompt manner." This is simply a restatement of the claim submitted to the jury that the defendants were negligent in "failing to provide timely transfer from Clarkson West EmergiCare" to the hospital. A court does not err in failing to give an instruction if the substance of the proposed instruction is contained in those instructions actually given.[11] In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there

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[11] *Worth v. Kolbeck, supra* note 4.

is no prejudicial error.[12] Applying this standard to the record before us, we conclude that there was no prejudicial error with respect to the jury instructions and verdict forms given by the district court.

EMTALA Instruction

Instruction No. 14 given to the jury advised that the Emergency Medical Treatment and Labor Act (EMTALA),[13] a federal law regarding the transferring of patients between health care facilities, contained certain provisions. One provision was that an "appropriate transfer" occurred when the "receiving facility" "has available space" and "has agreed to accept transfer of the individual." Instruction No. 14 further provided: "A violation of [EMTALA] can result in [a] significant monetary fine. (This is not the verbatim language from this subsection, but a synopsis.)"

[9] The special administrator argues on appeal that the court erred in giving the instruction because it addressed the "civil and criminal penalties associated with violation of EMTALA" and confused the jury.[14] 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.[15] We find nothing in the language of this instruction that could have prejudiced Karel or confused the jury.

Denial of Motion for New Trial

The special administrator asserts that the district court erred in denying his motion for new trial. All of the grounds he asserts as error in this appeal were asserted in support of his motion for new trial. For the reasons discussed herein, the district court did not err in denying the motion for new trial.

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[12] *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006).

[13] 42 U.S.C. § 1395dd (2000 & Supp. IV 2004).

[14] Brief for appellants at 16.

[15] *Orduna v. Total Constr. Servs.*, *supra* note 12; *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

CONCLUSION

The special administrator's assignments of error are unsupported by the record and the applicable law. The jury verdict is affirmed.

AFFIRMED.

KEVIN M. JONES AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY, A WISCONSIN CORPORATION, APPELLANTS, V. SHELTER MUTUAL INSURANCE COMPANIES, APPELLEE.

738 N.W.2d 840

Filed August 24, 2007. No. S-06-310.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Summary Judgment: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.
5. **Insurance: Contracts.** An insurance policy is a contract between an insurance company and an insured, and as such, the insurance company has the right to limit its liability by including limitations in the policy definitions. If the definitions in the policy are clearly stated and unambiguous, the insurance company is entitled to have such terms enforced.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Eugene L. Hillman and Patricia McCormack, of Hillman, Forman, Nelsen, Childers & McCormack, for appellants.

Susan Kubert Sapp and Laura R. Hegge, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

STEPHAN, J.

This appeal requires us to determine whether an insurer's definition of "use" of a motor vehicle as "operation and maintenance" violates Nebraska public policy applicable to uninsured motorist insurance. We conclude that it does not.

FACTS

This case was tried to the district court on stipulated facts. On December 30, 2003, Kevin M. Jones was a front seat passenger in an automobile driven by Amanda Stastny. The automobile was struck by an uninsured motorist in Omaha, Douglas County, Nebraska. The uninsured motorist was legally liable for the accident.

At the time of the accident, Shelter Mutual Insurance Companies (Shelter) had in effect a policy of automobile insurance issued to Stastny which insured her automobile. The policy included uninsured motorist coverage. On the same date, American Family Mutual Insurance Company (American Family) had in force an automobile liability insurance policy issued to Jones' parents, under which Jones was an additional insured for purposes of uninsured motorist coverage. Both Stastny and Jones made claims for uninsured motorist benefits under the Shelter policy, and Jones made a claim for uninsured motorist benefits under the American Family policy. Shelter paid $25,000 in benefits to Stastny, but denied benefits to Jones. American Family paid Jones $60,000 of its $100,000 policy limit, and he executed a release and assignment of any rights he had against Shelter in favor of American Family.

Jones and American Family brought this action to recover uninsured motorist benefits under the Shelter policy. The policy provided for uninsured motorist benefits in the amount of $50,000 per person or $100,000 per accident. It contained a provision limiting uninsured benefits for non-named insureds to the minimum limits required by law, which in Nebraska is $25,000 per person.[1] The Shelter policy provided in relevant part:

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[1] See Neb. Rev. Stat. § 44-6408(1)(a) (Reissue 2004).

PART I — AUTO LIABILITY

COVERAGE A — **BODILY INJURY** LIABILITY;
COVERAGE B — **PROPERTY DAMAGE** LIABILITY

ADDITIONAL DEFINITIONS USED IN PART I

As used in this Part, **insured** means:

(1) **You**, with respect to **your ownership** or **use** of the **described auto** and **your use** of a **non-owned auto**;

(2) any **relative**, with respect to his or her **use** of the **described auto** or a **non-owned auto**;

(3) any **individual** who is:

(a) related to **you** by blood, marriage, or adoption, who is primarily a resident of, and actually living in, **your** household, including **your** unmarried and unemancipated child away at school; or

(b) a foster child in **your** legal custody for more than ninety consecutive days immediately prior to the **accident**; but only with respect to that **individual's use** of the **described auto**;

(4) any **individual** listed in the Declarations as an "additional listed insured," but only with respect to that **individual's use** of the **described auto**; and

(5) any **individual** who has **permission** or **general consent** to **use** the **described auto**. However, the limits of **our** liability for **individuals** who become **insureds** solely because of this subparagraph, will be the minimum limits of liability insurance coverage specified by the **financial responsibility law** applicable to the **accident**, regardless of the limits stated in the Declarations.

. . . .

PART IV — UNINSURED MOTORISTS

COVERAGE E — UNINSURED MOTORISTS

ADDITIONAL DEFINITIONS USED IN PART IV

As used in this Part:

. . . .

(2) **Insured** means:

(a) **You**;

(b) any **relative**;

(c) any **individual** who is:

(i) related to **you** by blood, marriage, or adoption, who is primarily a resident of, and actually living in, **your** household, including **your** unmarried and unemancipated child away at school; or

(ii) a foster child in **your** legal custody for more than ninety consecutive days immediately prior to the **accident**; but only when that **individual** is **occupying** the **described auto**;

(d) any **individual** listed in the Declarations as an "additional listed insured," but only when that **individual** is **occupying** the **described auto**; and

(e) any **individual** who has **permission** or **general consent** to **use** the **described auto** but only when that **individual** is **using** the **described auto**. However, the limit of **our** liability for **individuals** who become **insureds** solely because of this subparagraph, will be the minimum limits of uninsured motorist insurance coverage specified by the **uninsured motorist law** or **financial responsibility law** applicable to the **accident**, regardless of the limit stated in the Declarations.

The "**DEFINITIONS**" section of the Shelter policy, applicable to all sections of the policy, defined "**Use**" to mean "**operation** and **maintenance**," "**Occupy**" to mean "being in physical contact with a vehicle while in it, getting into it, or getting out of it," and "**Operate**" to mean "physically controlling, having physically controlled, or attempting to physically control, the movements of a vehicle." It is undisputed that Jones was not a relative of Stastny and was not a named insured or an additional insured on the Shelter policy. Jones also was not the operator of the automobile at the time of the accident, nor was he performing maintenance on the vehicle.

American Family and Shelter filed motions for summary judgment. The district court granted Shelter's motion, finding that Jones was not an insured under the Shelter policy and therefore was not entitled to uninsured motorist benefits. The district court also determined that notwithstanding this fact, the American Family policy was Jones' primary source of uninsured motorist benefits and that he had not exhausted this

coverage prior to asserting his claim against Shelter. The court concluded that "the Shelter . . . policy denying uninsured motorist coverage to Jones under the circumstances is not contrary to Nebraska law."

Jones and American Family (hereinafter collectively appellants) filed this timely appeal. We granted their petition to bypass the Court of Appeals.[2]

ASSIGNMENTS OF ERROR

Appellants assign, restated and consolidated, that the district court erred in (1) failing to find that language in the Shelter policy violates Nebraska public policy and the Nebraska uninsured motorist statutes, (2) failing to find that the Shelter policy provides uninsured motorist coverage for Jones, and (3) finding that American Family was the primary uninsured motorist carrier.

STANDARD OF REVIEW

[1,2] 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.[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[4]

[3,4] 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.[5] When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those

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[2] See Neb. Rev. Stat. § 24-1106(2) (Reissue 1995).

[3] *Lovette v. Stonebridge Life Ins. Co.*, 272 Neb. 1, 716 N.W.2d 743 (2006); *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006).

[4] *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007).

[5] *Johnson v. Knox Cty. Partnership*, 273 Neb. 123, 728 N.W.2d 101 (2007).

motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.[6]

ANALYSIS

We begin from a point of consensus. The district court determined that Jones was not an "insured" as defined in the Shelter policy. Appellants and Shelter agree with that reading of the policy. The question presented is whether the Shelter policy provision defining "use" to include only "operation and maintenance" of the vehicle is contrary to the public policy embodied in the Uninsured and Underinsured Motorist Insurance Coverage Act,[7] the purpose of which is "to give the same protection to a person injured by an uninsured or underinsured motorist as the person would have if he or she had been injured in an accident caused by an automobile covered by a standard liability policy."[8] The provisions of the act are to be liberally construed to accomplish such purpose.[9]

The act requires in relevant part:

> No policy insuring against liability imposed by law for bodily injury . . . suffered by a natural person arising out of the *ownership, operation, maintenance, or use* of a motor vehicle within the United States . . . shall be delivered, issued for delivery, or renewed with respect to any motor vehicle principally garaged in this state unless coverage is provided for the protection of *persons insured* who are legally entitled to recover compensatory damages for bodily injury . . . from (a) the owner or operator of an uninsured motor vehicle . . . .[10]

Appellants contend that this statute "specifies the circumstances under which uninsured coverage must be provided" and that

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[6] *Id.*

[7] Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2004).

[8] See *Allied Mut. Ins. Co. v. Action Elec. Co.*, 256 Neb. 691, 697, 593 N.W.2d 275, 279 (1999).

[9] *Id.*

[10] § 44-6408(1) (emphasis supplied).

those circumstances include "when bodily injury results from the 'ownership, operation, maintenance, or use of a motor vehicle.'"[11] They argue that the statute clearly requires that "ownership," "operation," "maintenance," and "use" must have separate definitions and meaning and that Shelter's policy fails to carry out this statutory intent because it equates "use" with "operation and maintenance" in its definitions.[12]

Our case law recognizes that in the context of motor vehicle insurance, the term "use" may have a broader meaning than "operation," especially when applied to passengers.[13] However, the fact that we have held in past cases that a passenger is "using" a motor vehicle for purposes of a motor vehicle insurance policy is not determinative here, because there is no indication in those cases that the policies included the restrictive definition of "use" found in the Shelter policy.[14]

In *Allied Mut. Ins. Co.*,[15] we held that the phrase "persons insured" as used in § 44-6408 means "those persons insured under the liability provisions of a motor vehicle policy." Because the liability coverage of the policy at issue in that case insured persons "using" the vehicle, we held that the insurer could not limit underinsured motorist coverage "to the smaller class of persons 'occupying' the vehicle."[16]

[5] Unlike the policy at issue in *Allied Mut. Ins. Co.*, the Shelter policy before us defines "insured" in substantially the same way under its liability and uninsured motorist coverages. Although both provide coverage for persons using the vehicle

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[11] Brief for appellants at 15.

[12] See *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007) (holding court must attempt to give effect to all parts of statute, and no word, clause, or sentence will be rejected as superfluous or meaningless).

[13] See, *Allied Mut. Ins. Co. v. Action Elec. Co.*, *supra* note 8; *National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 139 N.W.2d 821 (1966); *Metcalf v. Hartford Acc. & Ind. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964).

[14] See *id.*

[15] *Allied Mut. Ins. Co. v. Action Elec. Co.*, *supra* note 8, 256 Neb. at 699, 593 N.W.2d at 280.

[16] *Id.*

with the permission of the named insured, "use" is narrowly defined to include only "operation and maintenance." Thus, a passenger is not an "insured," as defined by the policy, under either its liability or its uninsured motorist insurance provisions. An insurance policy is a contract between an insurance company and an insured, and as such, the insurance company has the right to limit its liability by including limitations in the policy definitions.[17] If the definitions in the policy are clearly stated and unambiguous, the insurance company is entitled to have such terms enforced.[18]

Appellants argue that Shelter's definition is contrary to the language of § 44-6408. Clearly, however, § 44-6408 relates specifically to uninsured and underinsured motorist coverage and does not dictate who must be insured under the *liability* coverage of a policy. The phrase "ownership, operation, maintenance, or use" in § 44-6408 simply describes the type of liability coverage a policy *may* offer. As we held in *Allied Mut. Ins. Co.*, the statute then requires that any person or class of persons insured under that liability coverage must also be insured under the uninsured motorist coverage. Here, Shelter has chosen to limit both its liability and uninsured coverage for a person "using" the vehicle with the consent of the insured to those circumstances in which the use involves the operation and maintenance of the vehicle. Such limitation does not violate the public policy expressed in § 44-6408.

As an alternative basis for its ruling in favor of Shelter, the district court determined that the American Family policy was Jones' "primary source of benefits under the circumstances" and that Jones' failure to exhaust such benefits barred any claim against Shelter.

Section 44-6411 provides:

> (1) In the event an insured *is entitled to uninsured or underinsured motorist coverage under more than one policy of motor vehicle liability insurance*, the maximum

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[17] *Hillabrand v. American Fam. Mut. Ins. Co.*, 271 Neb. 585, 713 N.W.2d 494 (2006).

[18] *Id.*

> amount an insured may recover shall not exceed the highest limit of any one such policy.
>
> (2) In the event of bodily injury, sickness, disease, or death of an insured while occupying a motor vehicle not owned by the insured, payment shall be made in the following order of priority, subject to the limitations in subsection (1) of this section: (a) The uninsured or underinsured motorist coverage on the occupied motor vehicle is primary; and (b) if such primary coverage is exhausted, other uninsured or underinsured motorist coverage available to the insured is excess.
>
> (3) *When multiple policies apply, payment shall be made in the following order of priority*, subject to the limit of liability for each applicable policy:
>
> (a) A policy covering a motor vehicle occupied by the injured person at the time of the accident;
>
> . . . .
>
> (c) A policy covering a motor vehicle not involved in the accident with respect to which the injured person is an insured.

(Emphasis supplied.) Jones was not an insured under the Shelter policy insuring the vehicle in which he was an occupant at the time of his injury. Accordingly, under § 44-6411, he was not "entitled" to benefits under more than one policy, nor do "multiple policies" apply to him. The district court correctly found that the priority-of-payment provisions in § 44-6411 were not applicable and that the American Family policy is the primary policy under the circumstances of this case.

CONCLUSION

For the reasons discussed, Shelter's definition of "use" to include only "operation and maintenance" does not violate the public policy embodied in § 44-6408. Because Jones was not an insured under the uninsured motorist coverage afforded by the Shelter policy, the priority-of-payment provisions in § 44-6411 are inapplicable to him. We affirm the judgment of the district court.

AFFIRMED.

WRIGHT and MCCORMACK, JJ., not participating.

GERRARD, J., concurring.

I agree with the majority opinion that Shelter's definition of "use" as "operation and maintenance" does not violate existing Nebraska public policy applicable to uninsured motorist insurance. While Shelter's definition of use does not expressly violate the current public policy (such as it is) embodied in Neb. Rev. Stat. § 44-6408 (Reissue 2004), Shelter's insurance policy has exposed a loophole in Nebraska law that, until closed by the Legislature, will leave many Nebraskans at the mercy of uninsured motorists.

The problem is created by Nebraska's omnibus statute for motor vehicle insurance, which does not provide the same protection that is provided to motorists in nearly every other state. Like most states, Nebraska requires motor vehicles to be covered by some form of financial security, usually liability insurance.[1] And like most states, Nebraska has a statute specifying the coverage necessary to meet that requirement.[2]

But in most states, the omnibus statute sets minimum standards for both the amount of coverage and the scope of that coverage.[3] In other words, the policy must provide coverage up to a monetary limit, must cover a certain range of injuries, and most pertinent to this case, must include particular people as "insured."[4] In nearly every state, an omnibus statute requires a policy to insure any motor vehicle owned by the insured *and* any other person using that vehicle with permission of the insured against loss from liability for damages "arising out of the ownership, maintenance, or use" of the vehicle.[5] In a few other states,

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[1] See Neb. Rev. Stat. § 60-387 (Cum. Supp. 2006).

[2] See Neb. Rev. Stat. § 60-310 (Cum. Supp. 2006).

[3] See, generally, 8 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 111:22 (2004); 1 Irvin E. Schermer and William J. Schermer, Automobile Liability Insurance § 3:9 (4th ed. 2004).

[4] See *id.*

[5] See *id.* See, e.g., Alaska Stat. § 28.22.101 (2004); Ariz. Rev. Stat. Ann. § 28-4009 (2004); Cal. Ins. Code § 11580.1 (West Cum. Supp. 2007); Colo. Rev. Stat. Ann. § 10-4-620 (West 2006); Conn. Gen. Stat. Ann. § 38a-335 (West 2000); Del. Code Ann. tit. 21, § 2118(a) (2005); Fla. Stat. Ann. § 627.736(1) (West Cum. Supp. 2007); Haw. Rev. Stat. § 431:10C-301(b)

statutes more specifically address whether liability coverage must extend to passengers and who must be provided with uninsured motorist protection.[6] Florida, for example, has specified in commendable detail the coverage that compulsory automobile liability insurance should provide, including coverage for passengers and permissive users and the particular benefits to which an insured is minimally entitled.[7]

By contrast, Nebraska's omnibus statute, § 60-310, only establishes monetary limits for a policy. It does not require a motorist's liability insurance to cover any particular range of persons or injuries. Nebraska's insurance requirement can be satisfied by evidence of an "automobile liability policy," which only requires insurance "protecting other persons from

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(2005); Idaho Code Ann. § 49-1212 (Cum. Supp. 2007); Ind. Code Ann. § 9-25-2-3 (LexisNexis 2004); Iowa Code Ann. § 321.1(24B) (West Cum. Supp. 2007); Kan. Stat. Ann. § 40-3107 (2001); Ky. Rev. Stat. Ann. § 304.39-020 (LexisNexis 2006); La. Rev. Stat. Ann. § 32:900(B)(2) (Cum. Supp. 2007); Me. Rev. Stat. Ann. tit. 29-A, § 1605 (1996 & Cum. Supp. 2004); Mass. Gen. Laws Ann. ch. 90, § 34A (West 2001); Mich. Comp. Laws Ann. § 500.3101 et seq. (West 2002 & Cum. Supp. 2007); Minn. Stat. Ann. § 65B.49 (West Cum. Supp. 2007); Miss. Code Ann. § 63-15-3(j) (Cum. Supp. 2006); Mo. Ann. Stat. § 303.190 (West 2003); Mont. Code Ann. § 61-6-103 (2005); Nev. Rev. Stat. § 485.3091 (2005); N.H. Rev. Stat. Ann. § 259:61 (Cum. Supp. 2006); N.J. Stat. Ann. § 39:6B-1 (West Cum. Supp. 2007); N.M. Stat. § 66-5-205.3 (2006); N.Y. Veh. & Traf. Law § 311 (McKinney 2005); N.C. Gen. Stat. § 20-279.21 (2005); N.D. Cent. Code § 39-16.1-11 (Supp. 2007); Ohio Rev. Code Ann. § 4509.01(K) (LexisNexis 2003); Okla. Stat. Ann. tit. 47, § 7-600 (West 2007); Or. Rev. Stat. § 806.080 (2005); 75 Pa. Cons. Stat. Ann. § 1702 (West 2006); R.I. Gen. Laws § 31-47-2 (2002); S.C. Code Ann. § 38-77-140 et seq. (Cum. Supp. 2006); S.D. Codified Laws § 32-35-70 (2004); Tenn. Code Ann. §§ 55-12-102 and 55-12-122 (2004); Tex. Transp. Code Ann. § 601.071 et seq. (Vernon 1999); Utah Code Ann. §§ 31A-22-303 and 31A-22-304 (2005); Va. Code Ann. § 46.2-472 (2005); W. Va. Code Ann. § 17D-4-2 (LexisNexis 2004); Wyo. Stat. Ann. § 31-9-405 (2007).

[6] See, e.g., Ga. Code Ann. § 33-7-11 (Supp. 2006) (uninsured motorist coverage for permissive users); Md. Code Ann. Ins. § 19-505 (LexisNexis Supp. 2006); Md. Code Ann. Transp. § 17-103 (LexisNexis 2006) (specifying coverage for permissive users); Wis. Stat. Ann. § 632.32 (West 2004) (uninsured motorist coverage for permissive users; no passenger exclusions).

[7] See Fla. Stat. Ann. § 627.736(1).

damages for liability on account of accidents" in the amount of $25,000 or $50,000, depending on the injury.[8] Because Nebraska's peculiar omnibus statute does not specify the scope of insurance coverage Nebraska motorists must carry, Shelter was left free to define "use" in a way that is inconsistent with the well-established meaning of the word and in a way that would not have met the minimum standards required nearly everywhere else.

Nebraska law does require that policies certified as "proof of financial responsibility" insure the named insured and permissive users "against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle."[9] But that statute only extends to policies intended to provide the "proof of financial responsibility" that must be filed by persons subject to the Motor Vehicle Safety Responsibility Act,[10] whose licenses have been suspended or revoked for reasons such as an unsecured accident, an unsatisfied judgment, or a criminal conviction. It does not apply to policies not certified for that purpose,[11] and Nebraska's compulsory financial responsibility law can be satisfied by *either* "proof of financial responsibility" *or* the lesser showing of "evidence of insurance" explained above.[12] When the Legislature passed 1995 Neb. Laws, L.B. 37, enacting the predecessor to § 60-310, it may have intended to require the same insurance coverage for all motorists. But the statutes as currently written do not accomplish that.

It is clear from the record in this case that Shelter's policy was intended to comply with Nebraska's compulsory insurance statutes. If Nebraska had an omnibus statute imposing the

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[8] See § 60-310.

[9] See Neb. Rev. Stat. § 60-534 (Reissue 2004). See, also, Neb. Rev. Stat. § 60-346 (Cum. Supp. 2006).

[10] Neb. Rev. Stat. ch. 60, art. 5 (Reissue 2004 & Cum. Supp. 2006).

[11] See, *State Farm Mut. Auto. Ins. Co. v. Hildebrand*, 243 Neb. 743, 502 N.W.2d 469 (1993); *State Farm Mut. Auto. Ins. Co. v. Pierce*, 182 Neb. 805, 157 N.W.2d 399 (1968).

[12] See § 60-387.

requirements found to be minimally acceptable in nearly every other state, Jones, as a passenger, would have been engaged in permissive "use" of the vehicle within the well-established meaning of the word and would have been an "insured" for purposes of uninsured motorist coverage.[13] The result in this case is a direct consequence of that defect in Nebraska's motor vehicle liability insurance statutes.

Fourteen years ago, several members of this court characterized Nebraska statutes on liability insurance coverage for motor vehicles as "a series of intermittent skin grafts on an amorphous body of law with the anatomical deficiency of no backbone," concluding that the deficiencies in the statutes "produc[ed] a public misperception and the mirage of mandatory insurance coverage."[14] While the situation now is not as unfortunate as it was then, unless there is further improvement, Nebraska's omnibus statute cannot achieve its remedial purpose of protecting the public.[15] And the Uninsured and Underinsured Motorist Insurance Coverage Act[16] will not serve its purpose of protecting the public from negligent, financially irresponsible motorists[17] so long as innocent passengers can be effectively excluded from its benefits.

It is a fact of life in the insurance industry that consumers have little if any leverage when purchasing insurance policies[18] and that consumers unaware of or unschooled in the vagaries of insurance contracts may be misled into believing they have purchased coverage when in reality they have not.[19] It is for

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[13] See *Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963).

[14] *Hildebrand, supra* note 11, 243 Neb. at 757, 502 N.W.2d at 477 (Shanahan, J., concurring; White, Fahrnbruch, and Lanphier, JJ., join).

[15] See *Cornelius, supra* note 13.

[16] Neb. Rev. Stat. § 44-6401 et seq. (Reissue 2004).

[17] *Continental Western Ins. Co. v. Conn*, 262 Neb. 147, 629 N.W.2d 494 (2001).

[18] See *Hildebrand, supra* note 11 (Shanahan, J., concurring).

[19] See *Allied Mut. Ins. Co. v. Action Elec. Co.*, 256 Neb. 691, 593 N.W.2d 275 (1999).

these reasons that the legislatures in nearly every state have enacted statutory schemes that serve the purpose of providing compensation for innocent victims of automobile accidents and protecting named insureds, permittees, and injured persons.[20] Nebraska's Legislature would be well advised to follow their example. For the moment, however, I am constrained to concur in the properly reasoned judgment of the court.

HEAVICAN, C.J., joins in this concurrence.

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[20] See 8 Russ & Segalla, *supra* note 3.

IN RE TRUST CREATED BY HENRY S. HANSEN, DECEASED. WELLS FARGO BANK, N.A., TRUSTEE OF THE HENRY S. HANSEN TRUST, ET AL., APPELLEES, V. ESTATE OF RUTH ELAINE MANSFIELD, APPELLANT.

739 N.W.2d 170

Filed August 31, 2007. No. S-06-002.

1. **Trusts: Equity: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.
2. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
5. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.
6. **Trusts: Courts: Jurisdiction.** The act of registering a trust gives the county court jurisdiction over the interests of all notified beneficiaries to decide issues related to any matter involving the trust's administration, including a request for instructions or an action to declare rights.
7. **Decedents' Estates: Courts: Jurisdiction: Equity.** In exercising probate jurisdiction, a court may use equity power and principles to dispose of a matter within the court's probate jurisdiction.
8. **Trusts.** Neb. Rev. Stat. § 30-3812 (Cum. Supp. 2006) does not limit to trustees the right to seek instructions from the court.

9. **Trusts: Intent.** The extent of the beneficiary's interest in a trust depends upon the discretionary power that the settlor intended to grant the trustee.
10. ____: ____. When the parties do not claim that the terms are unclear or contrary to the settlor's actual intent, the interpretation of a trust's terms is a question of law.
11. **Decedents' Estates: Trusts.** A trust beneficiary's estate can seek to enforce the beneficiary's interests in the trust to the extent that the beneficiary could have enforced his or her interests immediately before death.
12. **Trial: Evidence.** A county court's order is not supported by competent evidence when it fails to hold an evidentiary hearing on factual issues.
13. **Trial: Pleadings.** Neither the parties' arguments nor the court's discussions with parties can substitute for providing the parties an opportunity to support or refute disputed factual issues raised by the pleadings.
14. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the County Court for Douglas County: EDNA R. ATKINS, Judge. Reversed and vacated, and cause remanded with directions.

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

M.H. Weinberg, of Weinberg & Weinberg, P.C., for appellees Stephen S. Scholder and Paula Sue Baird Kaminski.

William R. Johnson, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellee Wells Fargo Bank, N.A.

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

HEAVICAN, C.J.

NATURE OF CASE

The county court determined, without an evidentiary hearing, that after the beneficiary of a discretionary support trust had died, the trustee could not pay claims for the beneficiary's health care expenses because the purpose of the trust had ceased to exist. We conclude that a decedent beneficiary's estate can seek to enforce the beneficiary's interests in a trust to the same extent that the beneficiary could have enforced his or her interests immediately before death. We further conclude that an evidentiary hearing was required before the county court could

determine whether the trustee abused its discretion or had a duty to make support payments. Accordingly, we reverse and vacate the county court's order and remand the cause with directions to hold an evidentiary hearing.

BACKGROUND

Trust Provisions

In June 1979, Henry S. Hansen executed this inter vivos trust. The trust provided for the care, support, and maintenance of Hansen during his lifetime. Upon Hansen's death, the residue of his estate was to be held in trust for the lifetime benefit of his daughters. Article I provided: "The Trust shall continue for the duration of the lives of Grantor's two daughters, MILDRED B. BONACCI and RUTH E. MANSFIELD, and until the death of the survivor of them." Article II provided in part:

> The Trustee shall make two divisions of the corpus of the Trust, one for MILDRED B. BONACCI and one for RUTH E. MANSFIELD. During the lifetime of each of said daughters, the Trustee shall pay the net income of the respective divisions of the Trust to said daughters in installments not less frequently than quarterly. In addition, should either of said daughters, by reason of accident or illness require funds in excess of the net income of the Trust, then the Trustee shall make such payments from such daughter's division of the principal as it may deem proper for the benefit of such daughter.

Upon the surviving daughter's death, article III instructed the trustee to pay Hansen's four grandchildren $5,000 each and to distribute the remaining funds to two of those grandchildren, Paula Sue Baird Kaminski and Stephen S. Scholder.

Remainder Beneficiaries' Filing After Ruth's Death

Hansen died in October 1979. In May 2005, the trustee, Wells Fargo Bank, N.A., registered Hansen's trust with the county court, with notice to interested parties. On June 6, 2005, the remainder beneficiaries, Kaminski and Scholder, filed an action to declare rights with the county court, alleging that Mildred B. Bonacci had died on June 30, 1986, and that Ruth Elaine Mansfield (Ruth) had died on January 8, 2005. They alleged that

on January 19, a person named "Jane Falion" had filed a claim with the trustee requesting payment for Ruth's medical expenses and that the trustee had denied the claim on March 10. The record does not reflect whether Falion is Ruth's personal representative. Two letters, one from Falion and another from the trustee, were attached as exhibits, along with invoices for Ruth's expenses. In the trustee's letter, a trust officer stated that the trustee did not believe it could make a distribution after Ruth's death and that "it is our understanding that [Ruth's] Estate has sufficient assets to pay those expenses."

Trustee Seeks Court Directive

On June 7, 2005, the trustee filed a petition for a trust administration proceeding. The same letters were attached as exhibits. The trustee alleged that it had denied the claim "until such time as [it] obtained credible information regarding the composition of [Ruth's] probate estate" and that the estate had failed to provide this information upon request. The trustee requested that the court interpret the trust and direct how it should distribute the assets.

Ruth's Estate Sues Trustee

In August, Ruth's estate filed an action for breach of the trust and to compel the trustee to comply with its duties. Ruth's estate alleged that beginning in 2001, Ruth's physical and mental health had deteriorated and that her relatives and representatives "inquired to the Trustee about the terms of the Trust and, in particular, the sections of the Trust [dealing with payments to the beneficiaries for illness and distribution of the estate]." It alleged that the trustee knew or should have known of Ruth's medical condition and needs, but did not exercise any diligence in inquiring about her support or distribute any funds for her support. The estate did not allege that anyone on Ruth's behalf asked the trustee for support payments before Ruth's death.

The court set an evidentiary hearing on the estate's action against the trustee for August 23, 2005. Before the hearing, Ruth's estate deposed the trust officer who had written the trustee's letter, and the remainder beneficiaries served additional discovery on the trustee. On August 11, the trustee moved to

consolidate the actions and continue the evidentiary hearing. The court also set a hearing on those motions for August 23, to be conducted before the evidentiary hearing.

Remainder Beneficiaries Seek Court Directive

In addition to their original action to declare rights, on August 15, 2005, the remainder beneficiaries also moved for a declaration of rights. In their motion, they asked the county court to decide three issues as a matter of law in order to guide the parties in resolving their dispute. The remainder beneficiaries asked, restated: (1) Does the court or trustee determine the propriety of distributions under the trust? (2) Can the trustee deny payments for billings related to Ruth's care, accrued before her death but not submitted until after her death? (3) If billings submitted after Ruth's death may be paid, what standards should the trustee use in determining whether to pay the expenses? The remainder beneficiaries further stated: "The factual development of the case can still proceed to an ultimate determination of rights based upon the Court's legal guidance . . . ."

County Court Hearings

On August 23, 2005, just before the hearing on the trustee's motions to continue and to consolidate the actions, the county court judge had a conversation with counsel for the remainder beneficiaries. Counsel stated that the trustee and the remainder beneficiaries would argue that the judge's powers "were done" after Ruth's death and that the evidentiary hearing may not be necessary. During the hearing, the court stated that it could not conduct the evidentiary hearing because another case was taking up the afternoon.

Counsel for the remainder beneficiaries stated that the remainder beneficiaries and the trustee were asking for a ruling on whether postdeath payments could be made if there were no bills submitted before Ruth's death and that if the court concluded the trust was unambiguous, it could decide that issue as a matter of law. They argued that if the court concluded the payments could be made, then Ruth's estate could submit evidence.

Ruth's estate agreed with the remainder beneficiaries that the threshold issue was whether the trustee could make the

payments, but argued that there was evidence the court must hear before making that determination. In addition, Ruth's estate argued that there would be evidence that the trustee was aware of Ruth's circumstances before her death and that there was a request for support payments prior to her death. The court stated it would not make a determination or receive evidence that day and continued the hearing.

Various discovery actions and motions to compel Ruth's estate to produce documents were filed during the fall of 2005. In November, the court sustained the remainder beneficiaries' motion to compel discovery and gave Ruth's estate 60 days to respond. On December 23, however, the court issued a written order, concluding that an evidentiary hearing was unnecessary and deciding the dispute.

County Court's Order

The county court specifically found:

> Ruth . . . was [a] successful business woman and had substantial income at her disposal, exclusive of the Trust income. As she advanced in age, Ruth . . . became ill and infirm. Medical bills and last illness expenses were incurred. On January 8, 2005, Ruth . . . died. Thereafter, on January 19, 2005, for the first time, representatives of Ruth['s] estate made a written request to the Trustee for payment of these expenses from the Trust funds.

The court determined that the Hansen trust was a discretionary support trust because the support payments did not become mandatory until "the Trustee in [its] discretion determines that the beneficiary requires funds in excess of the Trust income." The court ultimately concluded that the trustee had properly denied payment of the medical bills because the purpose of the trust had ended with Ruth's death and the payments would only benefit Ruth's creditors and heirs.

Ruth's estate timely appealed.

ASSIGNMENTS OF ERROR

Ruth's estate assigns that the county court erred in (1) rendering a factual and legal decision without the benefit of an evidentiary hearing, (2) determining that Ruth's interests in the

trust ended with her death, (3) misapplying the law applicable to determining the purposes of a trust, (4) finding that the trustee had satisfied its duties under the trust, and (5) entertaining communications with counsel for the remainder beneficiaries outside the presence of the other parties.

STANDARD OF REVIEW

[1-4] Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.[1] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3] In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.[4]

ANALYSIS

Ruth's estate contends the county court could not determine the terms of the trust or whether the trustee had complied with its duties under the trust without first conducting an evidentiary hearing. The remainder beneficiaries argue the court could decide this issue as a matter of law because a trustee has no discretion to make support payments after a beneficiary's death. They also characterize the court's order as a default judgment and their August 15, 2005, motion to declare rights as a motion for a judgment on the pleadings.

NATURE OF REMAINDER BENEFICIARIES' MOTION

[5] Neb. Ct. R. of Pldg. in Civ. Actions 12(c) (rev. 2003) provides in part: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment

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[1] *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

[2] *Id.*

[3] *Id.*

[4] *Id.*

on the pleadings." The remainder beneficiaries' August 15, 2005, filing is entitled "Motion of Remaindermen for a Declaration of Rights and Notice," not a request for a judgment on the pleadings. Moreover, a motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.[5]

The remainder beneficiaries admitted in their motion that there were issues of fact to be resolved but stated that "[t]he factual development of the case can still proceed to an ultimate determination of rights based upon the Court's legal guidance in an expeditious manner." Thus, their characterization of the motion as a request for a judgment on the pleadings is without merit.

Neither was the August 15, 2005, motion a request for a default judgment. The remainder beneficiaries did not allege that Ruth's estate had failed to file an answer, nor did they ask the court to determine that the trustee could not pay the billings for Ruth's care because of her estate's alleged default. Rather, they ask the county court to decide *whether* the trustee could pay the billings and, if so, what standards should be applied.

Moreover, we reject the remainder beneficiaries' argument that Ruth's estate "failed to answer [or] vacate the default judgment between August 23, 2005 and the date of the Order of December 22, 2005."[6] No judgment in this case was entered before December 23, 2005, and the county court had authority to combine the various requests for relief into one proceeding,[7] which consolidation the trustee specifically requested. Their motion is more properly characterized as seeking the court's direction in a matter of trust administration.

[6,7] The act of registering a trust gives the county court jurisdiction over the interests of all notified beneficiaries to decide issues related to any matter involving the trust's administration, including a request for instructions or an action to

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[5] *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

[6] Brief for appellees Kaminski and Scholder at 24.

[7] See Neb. Rev. Stat. § 30-3814(d) (Cum. Supp. 2006).

declare rights.[8] In exercising probate jurisdiction, a court may use equity power and principles to dispose of a matter within the court's probate jurisdiction.[9]

[8] Section 30-3812 does not limit to trustees the right to seek instructions from the court.[10] Further, Nebraska's declaratory judgment statutes allow trustees and persons interested in the administration of a trust to seek a declaration regarding any question arising in the administration of a trust.[11] Thus, without deciding the propriety of the remainder beneficiaries' motion under these circumstances, we construe their motion as a request for the court to instruct the trustee on its duties and powers.

This reading of § 30-3812 is consistent with a proposed rule for the Restatement (Third) of Trusts. As of the date of this opinion, the American Law Institute has tentatively approved the 2005 draft of the Restatement (Third) of Trusts § 71 at 9 (Tent. Draft No. 4, 2005), which provides: "A trustee or beneficiary may apply to an appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions."[12] Because a "beneficiary" includes persons with "a present or future beneficial interest in a trust, vested or contingent,"[13] the proposed Restatement rule also allows remainder beneficiaries to request the court to instruct a trustee on its powers and duties.

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[8] See Neb. Rev. Stat. §§ 30-3812 and 30-3819 (Cum. Supp. 2006).

[9] *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993). See, also, Neb. Rev. Stat. § 30-3806 (Cum. Supp. 2006).

[10] See *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005).

[11] Neb. Rev. Stat. § 25-21,152 (Reissue 1995).

[12] See, also, American Law Institute, 82d Annual Meeting: 2005 Proceedings 313 (2005) (tentatively approving draft); George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 559 (rev. 2d ed. 1980).

[13] Neb. Rev. Stat. § 30-3803(3)(A) (Cum. Supp. 2006). See, also, Restatement (Third) of Trusts § 48, comment *a.* (2003).

TYPE OF TRUST HANSEN CREATED

Ruth's estate argues that a trustee's liability for abusing its discretion during a beneficiary's lifetime is not extinguished by the beneficiary's death and that the county court could not make that determination without an evidentiary hearing. The remainder beneficiaries argue that "[u]nder a discretionary support trust, after a life beneficiary's death, the trustee cannot distribute assets to or for the beneficiary because the purpose of the trust related to the life beneficiary has ceased."[14]

[9,10] Under our de novo on the record review, we determine that the threshold issue presented by these arguments is what type of trust the settlor created. The extent of the beneficiary's interest in a trust depends upon the discretionary power that the settlor intended to grant the trustee.[15] When the parties do not claim that the terms are unclear or contrary to the settlor's actual intent, the interpretation of a trust's terms is a question of law.[16] The parties do not claim that the terms of the trust are unclear or fail to accurately reflect Hansen's intent. Thus, the type of trust he created is a question of law, and we conclude that the county court and both parties are laboring under an incorrect assumption that Hansen created a discretionary support trust, or hybrid trust.

We begin with the distinction between a support trust and discretionary trust, which we recently clarified in *Pohlmann v. Nebraska Dept. of Health & Human Servs.*[17]:

> "The settlor's intent determines whether a trust is classified as a support or a discretionary trust . . . . A support trust essentially provides the trustee 'shall pay or apply only so

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[14] Brief for appellees Kaminski and Scholder at 29.

[15] See, Restatement (Third) of Trusts, *supra* note 13, § 50(2); Restatement (Second) of Trusts § 128 (1959).

[16] See, § 30-3803(19); *In re Trust of Rosenberg*, *supra* note 1; *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994). See, also, Neb. Rev. Stat. § 30-3841 (Cum. Supp. 2006).

[17] *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 280, 710 N.W.2d 639, 645 (2006), quoting *Eckes v. Richland Cty. Soc. Ser.*, 621 N.W.2d 851 (N.D. 2001). See, also, Restatement (Second) of Trusts, *supra* note 15, comments *d.* and *e.*

> much of the income and principal or either as is necessary for the education or support of a beneficiary.' . . . A support trust allows a beneficiary to compel distributions of income, principal, or both, for expenses necessary for the beneficiary's support . . . .
>
> "Conversely, a discretionary trust grants the trustee 'uncontrolled discretion over payment to the beneficiary' and may reference the 'general welfare' of the beneficiary. . . . [T]he beneficiary of a discretionary trust does not have the ability to compel distributions from the trust . . . ."

We further stated in *Pohlmann* that trust provisions granting trustees the power to pay trust assets to a beneficiary "'*as it may, from time to time, deem appropriate for* [*the beneficiary's*] *health, education, support or maintenance*' . . . do not create a right of the beneficiary to compel payments from the trust."[18]

Hansen, however, did not grant the trustee the same breadth of discretion created by the trust in *Pohlmann*. That is, Hansen did not provide that the trustee "'*may*, from time to time,'" make determinations of his daughter's needs; rather, he provided that "'the Trustee "*shall*"'" make payments for his daughter's benefit if she should require funds in excess of the trust's income because of an accident or illness.

This provision is the functional equivalent of a term providing that "'the trustee "*shall* pay or apply only so much of the . . . principal . . . as is necessary for the [medical care] . . . of a beneficiary."'"[19] The trustee had discretion to determine whether and how much additional support Ruth properly required as the result of an accident or illness, but it did not have discretion to determine whether to support her.[20] In general, trustees of support trusts have discretion to determine what is needed for the beneficiary's support and to make payments only for

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[18] *Pohlmann, supra* note 17, 271 Neb. at 280, 710 N.W.2d at 645 (emphasis in original), citing *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000), and *Smith, supra* note 16.

[19] *Pohlmann, supra* note 17, 271 Neb. at 280, 710 N.W.2d at 645 (emphasis supplied).

[20] See, generally, *First Nat'l Bk. of Maryland v. Dep't of Health*, 284 Md. 720, 399 A.2d 891 (1979).

that purpose.[21] But this level of discretion does not preclude a beneficiary from seeking to show that a trustee has abused its discretion in failing to make support payments.[22]

The language of Hansen's trust indicates that his primary concern was the care of his daughters in the event of an accident or illness. We conclude that Hansen authorized the trustee to exercise the same degree of discretion created by an ordinary support trust but limited Ruth's interests in the trust's principal to the support she needed upon the happening of a designated event.[23] Having established which type of trust Hansen intended to create, we turn to the county court's determination regarding the trustee's postdeath obligations.

Right of Ruth's Estate to Recover Support Payments

Part of the county court's order shows it determined, as a matter of law, that a trustee cannot make payments for the beneficiary's last-illness expenses after the beneficiary's death, regardless of whether the medical bills were submitted to the trustee before or after the beneficiary's death. Relying on *Smith*,[24] the court concluded:

> [T]he purposes of the Hansen Trust (support of the beneficiary during her life) ended with the death of Ruth . . . . Payment of the medical bills and last illness expenses would benefit the creditors and heirs of the estate of Ruth . . . instead of Ruth . . . .
>
> It is clear that the Trustee acted properly, and in good faith, in denying payment of said expenses from the Trust funds.

If the county court had correctly determined that a beneficiary's estate could never recover expenses for the beneficiary's last illness after the beneficiary has died, then its further determination that the trustee had not abused its discretion in denying

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[21] See Bogert & Bogert, *supra* note 12, § 811.

[22] See *First Nat'l Bk. of Maryland, supra* note 20.

[23] See Restatement (Third) of Trusts, *supra* note 13, § 49, comment *f.*, and § 50, comment *d(4)*. Compare *Pyne v. Payne*, 152 Neb. 242, 40 N.W.2d 682 (1950).

[24] *Smith, supra* note 16.

such claims would necessarily follow, even without an evidentiary hearing. We conclude, however, that the county court interpreted our decision in *Smith* too broadly.

In *Smith*, this court stated that "support trusts may be reached by creditors for support-related debts, but that discretionary trusts may not be reached by creditors for any reason."[25] We held that the beneficiary's former wife could not reach two discretionary support trusts when the purpose of the trusts had ceased to exist. The trusts were intended to benefit the settlors' son and his children, in the event their parents were unable to do so. The son owed more than $90,000 in child support arrears, and his ex-wife filed two separate actions to garnish the trust assets for the debt, which actions were consolidated on appeal. In the first action, this court held that the trust assets could not be reached for child support arrears after the children were emancipated:

> [T]he payment of the child support arrearage would not further the purposes of the trusts, since the children are emancipated. Without a showing that the payment of the arrearage would contribute to the support of the beneficiaries of the trusts, [the trustee] could not be compelled to distribute trust assets.[26]

Smith is distinguishable, however, because the person attempting to reach the trust was the beneficiary's creditor. In the first action, she did not show that her claim against the son was support-related or would support his children if the parents were unable, because the children were emancipated. Nor were we dealing with a beneficiary's request for support payments in that action. In contrast to creditors, a personal representative has the same right to enforce a decedent's rights and claims that the decedent had immediately prior to death, where the cause of action survives death.[27]

The county court's reasoning that the payment of medical expenses would benefit Ruth's heirs instead of Ruth would also

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[25] *Id.* at 197, 517 N.W.2d at 398.

[26] *Id.* at 199, 517 N.W.2d at 399.

[27] See Neb. Rev. Stat. § 30-2464 (Cum. Supp. 2006).

apply if the trustee had failed to make quarterly payments to Ruth from her half of the trust's accrued income. But the general common-law rule is that a beneficiary's estate may recover income of the trust, which is accrued and payable at the time of the beneficiary's death but has not been paid over,[28] unless the trustee had uncontrolled discretion whether to make distributions of income.[29] We agree and note that this rule is consistent with our holding that the estate of a life tenant is entitled to profits accumulated through the life tenant's use of personalty in the life estate, in the absence of the testator's expressed contrary intent.[30]

[11] Accordingly, we conclude that *Smith* does not control here and that Ruth's estate can seek to enforce Ruth's interests in the trust to the extent that Ruth could have enforced her interests immediately before her death. We adopt the standard for an estate's recovery of the beneficiary's last-illness expenses from the Restatement (Third) of Trusts § 50 (2003), which concerns the enforcement of a beneficiary's interests and specifically deals with postdeath obligations.

When a beneficiary dies before payment for necessary services are rendered, the Restatement provides:

> A question may arise, following the death of the beneficiary of a discretionary interest, whether a support or other standard authorizes or requires the trustee to pay the beneficiary's funeral and last-illness expenses and debts incurred by the beneficiary for support. Ultimately, the question is one of interpretation when the terms of the trust are unclear, with the presumption being that the trustee has discretion to pay these debts and expenses.

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[28] See, e.g., *In re Trusteeship of Downer*, 232 Iowa 152, 5 N.W.2d 147 (1942); *Leverett v. Barnwell*, 214 Mass. 105, 101 N.E. 75 (1913); *Matter of Will of Hopkin*, 119 Misc. 2d 218, 462 N.Y.S.2d 587 (1983); Restatement (Second) of Trusts, *supra* note 15, § 235A; Annot., 141 A.L.R. 1466 (1942).

[29] *Green v. Gilmore*, 331 Mass. 283, 118 N.E.2d 755 (1954); *Minot v. Tappan*, 127 Mass. 333 (1879).

[30] See *In re Estate of Wecker*, 123 Neb. 504, 243 N.W. 642 (1932). See, also, Uniform Principal and Income Act, specifically Neb. Rev. Stat. § 30-3126(b) (Cum. Supp. 2006).

> A duty to do so is presumed only to the extent that (i) probate estate, revocable trust, and other assets available for these purposes are insufficient or (ii) the trustee, during the beneficiary's lifetime, either agreed to make payment or unreasonably delayed in responding to a claim by the beneficiary for which the terms of the trust would have required payment while the beneficiary was alive. (A deceased beneficiary's estate may also recover distributions the trustee had a duty to make but did not make during the beneficiary's lifetime.)[31]

Obviously, recovery under these factors presents factual issues as to whether the trustee abused its discretion or had a duty to make support payments, and the parties have not yet been given an opportunity to try these issues in an evidentiary hearing. In its order, the county court found that no claims for medical expenses were submitted to the trustee prior to Ruth's death. This finding, however, was contrary to statements made by counsel for Ruth's estate that it would show a request for support payments was made before Ruth's death. The court also found that Ruth was a businesswoman with "substantial income at her disposal," although no evidence in the record supports that finding.

[12,13] This court has very recently either reversed or vacated three separate county court orders for lack of competent evidence when the court failed to hold an evidentiary hearing on factual issues.[32] Neither the parties' arguments nor the court's discussions with the parties can substitute for providing the parties an opportunity to support or refute disputed factual issues raised by the pleadings.[33] Our adoption of the Restatement's postdeath obligation standard requires us to once again vacate

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[31] Restatement (Third) of Trusts, *supra* note 13, § 50, comment *d(5).* at 269. See, also, II Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts § 128.4 (4th ed. 1987).

[32] *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007); *In re Trust of Rosenberg, supra* note 10; *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004).

[33] See, *In re Trust of Rosenberg, supra* note 10; *In re Guardianship & Conservatorship of Trobough, supra* note 32.

the county court's order to hold an evidentiary hearing on the relevant factual issues.

[14] An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[34] In light of our conclusion that the county court must conduct an evidentiary hearing to determine whether the trustee abused its discretion or had a duty to make support payments, it is unnecessary for us to reach the remaining assignments of error.

CONCLUSION

We conclude that the county court erred in determining, as a matter of law, that the trustee of a support trust cannot make payments for the beneficiary's last-illness expenses after the beneficiary's death without conducting an evidentiary hearing on factual issues relevant to that determination. We therefore reverse and vacate the court's order and remand the cause to the county court with directions to hold an evidentiary hearing on the issues outlined in this opinion.

REVERSED AND VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., not participating.

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[34] *State v. Morrow*, 273 Neb. 592, 731 N.W.2d 558 (2007).

PAPILLION RURAL FIRE PROTECTION DISTRICT, APPELLEE, V. CITY OF BELLEVUE, A MUNICIPAL CORPORATION, APPELLANT.

739 N.W.2d 162

Filed August 31, 2007. No. S-06-308.

1. **Summary Judgment.** 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.
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. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
4. ____. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

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

Frank F. Pospishil and Timothy M. Kenny, of Abrahams, Kaslow & Cassman, L.L.P., for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

The Papillion Rural Fire Protection District (the District) brought an action for declaratory judgment to determine the rights, duties, and obligations of the District and the City of Bellevue (the City). This suit arose as a result of the City's partial annexation of property formerly located within the District. The district court granted the District's motion for summary judgment and entered judgment against the City in an amount which was to be calculated using a formula set forth in the court's order.

The City appealed the district court's decision to the Nebraska Court of Appeals, which dismissed the appeal because the judgment for money was not specified with definiteness and certainty.[1] Following its dismissal of the City's appeal, the Court of Appeals issued a mandate ordering the district court to enter judgment in conformity with the Court of Appeals' opinion. The district court then entered a new order which specified the

[1] *Papillion Rur. Fire Prot. Dist. v. City of Bellevue*, 13 Neb. App. lvi (No. A-05-116, May 9, 2005).

amount of damages to be awarded to the District and included a new award for prejudgment interest. The City now appeals.

BACKGROUND

The District is a rural fire protection district under the provisions of Neb. Rev. Stat. § 35-501 et seq. (Reissue 2004), which is located in Sarpy County, Nebraska. In 1998, the District had issued bonds in the principal sum of $1.5 million. The stated purposes were to "acquir[e] fire fighting equipment and emergency equipment and other fire and rescue equipment and apparatus" and "to pay costs of issuance and underwriting associated with issuance" of those bonds. These bonds are a general obligation of the District payable from the District's tax levy. According to the prospectus for the bonds, the bond issue was the only debt of the District.

Following the issuance of the bonds, the District entered into an agreement with the Papillion Volunteer Fire Department, Inc. (the Volunteers). Under this agreement, the District agreed to purchase fire and rescue apparatus and equipment from the Volunteers for approximately $956,000 and to lease that equipment to the Volunteers for $1 for a period of 5 years with the option to renew the lease term for an additional 5-year period. In 2001, the District and the city of Papillion entered into an interlocal cooperation agreement which created an intergovernmental mutual financing organization to be funded by the District and the city of Papillion. The interlocal agreement provided that the city of Papillion would create a fire department to provide all fire and rescue services for both the city of Papillion and the District, using the District's equipment and apparatus. The District and the city of Papillion agreed to share the expenses of the city of Papillion's fire department. And the District agreed to excuse the partial annexation agreement payments due to the District from the city of Papillion. Following the execution of the interlocal agreement, the District and the Volunteers mutually terminated their agreement.

In December 1999, the City passed, approved, and adopted a series of annexation ordinances which annexed portions of the territory located within the District's service and taxing area. At the time of the annexation, the District, including the annexed

territory, remained subject to a levy for the 1998 bonded indebtedness. Following the 1999 annexation, representatives of the City and the District discussed the appropriate division of assets, liabilities, maintenance, or other obligations of each arising out of the annexation. The parties, however, were unable to reach an agreement.

Thereafter, the District instituted the present action in the district court. In its operative petition, the District sought a declaratory judgment for an adjustment of all matters growing out of or in any way connected with the annexations by the City, and a decree fixing the rights, duties, and obligations of the parties. The District also sought an award of attorney fees, court costs, and other relief as may be appropriate. Discovery in the matter ensued. On August 27, 2004, the City filed a motion to compel the District to fully respond to the City's first set of interrogatories and the City's first request for production of documents. The City alleged in its motion to compel that the District failed to fully respond to its interrogatories. The district court denied the City's motion to compel, and the City filed a motion for reconsideration of the court's decision, which the district court also denied.

On August 13, 2004, the District filed a motion for summary judgment. In its response and supplemental response to the District's motion for summary judgment, the City argued in relevant part that material questions of fact existed as to (1) the exact nature of the District's assets; (2) whether the District's assets should be divided and distributed to the City, or whether the City should be allowed a setoff of the amount of such assets if the court determines the City has any liability to the District; (3) the division of liabilities, maintenance, and other obligations under Neb. Rev. Stat. § 31-766 (Reissue 2004); (4) whether § 31-766 is contradicted by prorating only debt for each partial annexation; and (5) the effect the interlocal cooperation agreement entered into between the District and the city of Papillion, which created a mutual finance organization, has on the allocation under § 31-766.

On January 3, 2005, the court issued an order granting the District's motion for summary judgment. The court stated in part that the City's claim that the allocation formula should include a

valuation of the assets of the District less the bonded debt would result in an absurd result. This is because the City could annex all but a small portion of the District and pay none of the debt associated with the annexation. The court further stated that subsequent to *Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha*,[2] § 35-508 was amended to allow for a sinking fund to be funded by tax revenues for the District's use for those items set out in the statute. The court found that in dividing the equities, the value of the sinking fund must be considered and that this value should be deducted from the bonded debt in determining the City's liability. Notwithstanding the fact that the court could not determine from the evidence whether a sinking fund exists or its value if it does exist, the court found that it did not give rise to a material issue of fact. The district court then entered judgment against the City based on the calculation of the following formula which was set out in the court's order: "*Bonded debt - (12.4528 % of sinking fund) = (Debt subject to allocation) x 12.4528% = Amount of debt owed by Defendant.*"

The City appealed the court's January 3, 2005, order to the Court of Appeals. Citing *Lenz v. Lenz*[3] for the proposition that a judgment must be sufficiently certain in its terms to be able to be enforced in a manner provided by law and a judgment for money must specify with definiteness and certainty the amount for which it is rendered, the Court of Appeals dismissed the City's appeal. The Court of Appeals issued its mandate to the district court ordering it to "without delay, proceed to enter judgment in conformity with the judgment and opinion of this court."

The district court then entered the following journal entry: "Mandate from the Court of Appeals having been received, Judgment entered in conformance with Mandate." The particulars of this judgment, however, are not in the record before us.

The District then filed a motion requesting the district court to enter an order clarifying, interpreting, and correcting the court's January 3, 2005, summary judgment order by specifying

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[2] *Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha*, 226 Neb. 50, 409 N.W.2d 574 (1987).

[3] *Lenz v. Lenz*, 222 Neb. 85, 382 N.W.2d 323 (1986).

the amount of money judgment in favor of the District, by determining prejudgment interest, and for such other and further equitable relief as the court deemed just and proper. At the hearing on the District's motion, the District requested that the court take judicial notice of an affidavit of Kevin Edwards, the administrator for the District, which affidavit was dated September 22, 2005. Attached to Edwards' affidavit was a calculation which showed that the City's liability to the District was $84,491.88. The affidavit included notations regarding the District's sinking fund, which were not contained in the affidavit before the court when the original order of summary judgment was entered. The City objected to the court's taking judicial notice of the affidavit. The district court stated that it was going to reserve ruling on the affidavit, however, the record does not reflect a specific ruling on the affidavit. The court did, however, refer to the affidavit in its February 21, 2006, order.

On February 21, 2006, the district court entered an order in which it awarded the District judgment against the City in the amount of $84,491.88, with prejudgment interest at 4.038 percent from October 21, 2004. In its order, the court stated that it viewed the District's September 30, 2005, motion as "one to amend [the court's] judgment and the mandate to make the same certain." The court also noted that Edwards' September 22 affidavit was attached to the District's motion, along with a worksheet showing Edwards' calculation. This calculation indicated that the City owed the District $84,491.88, and attested that any prior sinking fund moneys were accounted for in his calculations and were included in that figure. In response to an argument by the City that the court did not have jurisdiction over the matter, the court stated that pursuant to Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2004), it "has the inherent power to vacate or modify its judgments or orders . . . after the term at which they were made." The court stated that the District filed its motion during the term and concluded that it clearly has the power to revisit its own judgment. The court further stated that once the appeal was dismissed by the Court of Appeals, jurisdiction was revested in the district court, and that the Court of Appeals' mandate and accompanying notation required it to retake jurisdiction and conform its judgment to the Court of

Appeals' order. Thereafter, the City timely perfected the present appeal.

ASSIGNMENTS OF ERROR

The City's assignments of error, which have been partially consolidated, are that the district court erred in (1) amending and modifying its January 3 and June 16, 2005, orders to comply with the mandate of the Court of Appeals by entering an amended final order on February 21, 2006, and awarding the District a judgment against the City in the amount of $84,491.88 with prejudgment interest at 4.038 percent from October 21, 2004, which amount was not from a clarification of the court's January 3, 2005, order, but from consideration of an affidavit made subsequent to the mandate; (2) granting the District's motion for summary judgment; (3) not applying the provisions of § 31-766 to the partial annexation involved in this matter; (4) not granting the City's motion to compel discovery and motion for partial reconsideration of the City's motion to compel discovery from the District; (5) not following the Court of Appeals' May 9, 2005, disposition and June 13 mandate which fully concluded this litigation; (6) allowing the District prejudgment interest; and (7) taking judicial notice of the untimely Edwards affidavit and erroneously using this affidavit to calculate the judgment entered in favor of the District and against the City.

STANDARD OF REVIEW

[1,2] 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.[4] 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.[5]

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[4] *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007).

[5] *Id.*

ANALYSIS

District's Motion for Summary Judgment

We first address the City's claim that the district court erred in granting the District's motion for summary judgment.

Section 31-766 addresses the division of assets, liabilities, maintenance, or other obligations of a fire protection district when the district is partially annexed by a city or village. Section 31-766 provides in part:

> The division of assets, liabilities, maintenance, or other obligations of the district shall be equitable, shall be proportionate to the valuation of the portion of the district annexed and to the valuation of the portion of the district remaining following annexation, and shall, to the greatest extent feasible, reflect the actual impact of the annexation on the ability of the district to perform its duties and responsibilities within its new boundaries following annexation.

Section 31-766 provides further that if the district and city or village do not agree on the proper adjustment of all matters growing out of the partial annexation, the district or the annexing city or village may apply to the district court for an adjustment of matters growing out of the annexation. And under § 31-766, the district court is authorized to enter an order or decree fixing the rights, duties, and obligations of the parties.

We last addressed the allocation of assets, liabilities, maintenance, and other obligations under § 31-766 in *Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha*.[6] In that case, the Millard Fire Protection District (the Millard District) brought a declaratory action to determine the rights, duties, and responsibilities of the Millard District and the City of Omaha with regard to areas of the Millard District annexed by the City of Omaha. We affirmed on appeal the district court's determination that an equitable method of determining the City of Omaha's assumption of the Millard District's indebtedness was to multiply the Millard District's net debt by the percentage of the valuation of

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[6] *Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha*, *supra* note 2.

the territory annexed. We did not, however, find that this was the only equitable method.

On appeal, the Millard District asserted that the district court incorrectly calculated the division of assets, liabilities, maintenance, and other obligations of the Millard District. The Millard District argued that in addition to assuming a percentage of its bond debt, the City of Omaha should have had to assume a percentage of the Millard District's ongoing operation and maintenance expenses relating to the entire Millard District. We noted that the Millard District ignored the fact that the City of Omaha assumed full responsibility of the operation and maintenance of the annexed areas. We further noted that although the annexation removed property from the Millard District's tax base, the record showed that the actual value of the property in Douglas County remaining within the Millard District had risen from $132 million in 1968 to approximately $751 million in 1984. We then concluded that based on the circumstances of that case, an equitable division resulted from the following method: a pro rata assumption of net bonded indebtedness, "along with assumption of responsibility for providing fire and rescue services to the annexed areas."[7]

In its January 3, 2005, order, the district court entered summary judgment in favor of the District based on the formula set forth in *Millard Rur. Fire Prot. Dist. No. 1*, with one modification. In determining the debt subject to allocation, the court subtracted from the bonded indebtedness the percentage of the annexed property's proportion of the sinking fund. The City argues that the allocation formula in *Millard Rur. Fire Prot. Dist. No. 1* is not controlling in this case and that the district court should take into consideration the assets of the District in order to achieve an equitable adjustment under § 31-766.

In *Millard Rur. Fire Prot. Dist. No. 1*, we were presented with the question of whether an equitable adjustment under § 31-766 required the assumption by the City of Omaha of a percentage of the Millard District's maintenance expenses, in addition to an assumption of a portion of the Millard District's bond debt. As we explained, the City of Omaha did assume a

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[7] *Id.* at 58, 409 N.W.2d at 579.

percentage of the Millard District's maintenance expenses by taking control of the annexed land. Thus, under the facts in that case, we determined that the equitable division was a pro rata assumption by the City of Omaha of the Millard District's bond debt. In *Millard Rur. Fire Prot. Dist. No. 1*, unlike in the present case, the allocation of the Millard District's assets was not at issue. We conclude that *Millard Rur. Fire Prot. Dist. No. 1* is, therefore, distinguishable.

Section 31-766 specifically includes assets of a fire district in those items to be equitably divided when a fire district is partially annexed. Thus, where there is evidence that the partially annexed fire district has assets, those assets should be considered in determining a proper adjustment of those matters growing out of the annexation.

The evidence in the record now before us indicates that the District has significant assets which were not considered by the district court. We conclude that under the facts presented here, an equitable division under § 31-766 should take into account any assets of the District.

Because the district court did not consider the District's assets and because questions remain as to the extent of the District's assets, we conclude that the district court erred by entering summary judgment in favor of the District. We therefore reverse the order and remand the cause to the district court for further proceedings.

Limitations on Discovery

[3] Although we have concluded that the order of summary judgment in favor of the District must be reversed and the cause remanded for further proceedings, we will address the City's assignment of error relating to the City's motion to compel discovery and motion for partial reconsideration of the City's motion to compel discovery from the District. This issue is likely to recur on remand. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[8]

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[8] *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

In denying the City's motion to compel discovery, the district court explained that those issues or items to be discovered must be relevant to the issues being litigated. The district court further explained that in light of *Millard Rur. Fire Prot. Dist. No. 1*, the information the City sought to discover was not relevant. We conclude that to the extent that the information sought to be discovered by the City relates to assets, liabilities, maintenance, or other obligations of the District, the City should be permitted full discovery. We reverse the district court's denials of the City's motion to compel and motion for reconsideration to the extent that the denials conflict with our holding.

Remaining Assignments of Error

[4] Because we have determined that the district court erred by entering summary judgment in favor of the District, we do not address the City's remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.[9]

CONCLUSION

For the reasons discussed, we conclude that questions of material fact exist and that the district court erred in entering summary judgment in favor of the District. We therefore reverse the order and remand the cause for further proceedings. We further conclude that the City should be permitted full discovery of the District's assets, liabilities, maintenance, and other obligations. We reverse the district court's denials of the City's motion to compel and motion to reconsider to the extent that the court's denials conflict with our decision on this issue.

Reversed and remanded for
further proceedings.

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

IN RE PETITION OF NEBRASKA COMMUNITY CORRECTIONS COUNCIL TO ADOPT VOLUNTARY SENTENCING GUIDELINES FOR FELONY DRUG OFFENSES.

738 N.W.2d 850

Filed August 31, 2007. No. S-36-070001.

Original action. Petition denied.

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

CONNOLLY, J.

The Legislature has mandated by statute that we promulgate by court rule sentencing guidelines for certain offenses.[1] Under the guidelines, courts must consider community correctional programs and facilities in sentencing offenders. In February 2007, the legislatively created Community Corrections Council petitioned this court to adopt its proposed guidelines. We invited the public to comment on the proposed guidelines. Several members of the judiciary raised concerns related to separation of powers. We conducted a hearing in April.

We agree that the Legislature's mandate violates the Nebraska Constitution's separation of powers clause.[2] We deny the Community Corrections Council's petition, because we conclude that the Legislature cannot delegate to the judicial branch its constitutional power to enact the laws of this state.

OVERVIEW OF THE CREATION UNDER L.B. 46 OF COMMUNITY CORRECTIONS COUNCIL AND SENTENCING GUIDELINES

In 2001, the Governor convened the Community Corrections Working Group. The group worked within the Nebraska Commission on Law Enforcement and Criminal Justice. The group's goal was to address Nebraska's rising prison costs by (1) developing less expensive community-based correctional options for nonviolent offenders and (2) reducing the State's

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[1] Neb. Rev. Stat. § 47-630 (Reissue 2004 & Cum. Supp. 2006).

[2] Neb. Const. art. II, § 1.

reliance on incarceration for these offenders.[3] In passing 2003 Neb. Laws, L.B. 46, the Legislature adopted many of the group's proposals.[4]

At the committee hearing, the introducer of L.B. 46 stated that the goal was "to limit the use of incarceration" and "to prevent Nebraska's correctional system from bankrupting the state of Nebraska."[5] He explained that the budget for the Department of Correctional Services had increased 100 percent from fiscal year 1996-97 to fiscal year 2002-03. He projected that even with completion of a new correctional facility in 2001, the prison population would reach 153 percent of design capacity by 2005.[6]

In passing L.B. 46, the Legislature enhanced treatment programs for substance abuse offenders and required participants in both probation and non-probation-based programs to pay fees toward the costs of services.[7] Also, as part of L.B. 46, the Legislature enacted the Community Corrections Act.[8] The act establishes community-based correctional alternatives for some offenders. The Legislature specifically intended to

> [p]rovide for the development and establishment of community-based facilities and programs in Nebraska for adult offenders and encourage the use of such facilities and programs by sentencing courts and the Board of Parole as alternatives to incarceration or reincarceration, in order to reduce prison overcrowding and enhance offender supervision in the community.[9]

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[3] Legislative Research Division, A Review: Ninety-Eighth Legislature, First Session (2003).

[4] See Statement of Intent, Judiciary Committee, 98th Leg., 1st Sess. (Feb. 13, 2003).

[5] Judiciary Committee Hearing, 98th Leg., 1st Sess. 24, 26 (Feb. 13, 2003).

[6] *Id.*

[7] See Neb. Rev. Stat. §§ 29-2252(14), 29-2262.06, and 29-2266 (Cum. Supp. 2006). See, also, Neb. Rev. Stat. § 29-2246 (Cum. Supp. 2006).

[8] See Neb. Rev. Stat. §§ 47-619 to 47-634 (Reissue 2004).

[9] § 47-620(1).

To carry out the program, the act created the Community Corrections Council (hereinafter the Council).[10] The Council's duties include (1) developing a statewide plan for community correctional facilities and programs,[11] (2) developing eligibility standards for probationers and parolees in community facilities and programs,[12] and (3) recommending sentencing guidelines for adoption by this court.[13]

In addition to mandating that the Council develop sentencing guidelines, the Legislature also mandated that we adopt sentencing guidelines: "In order to facilitate the purposes of the Community Corrections Act, the Supreme Court shall by court rule adopt guidelines for sentencing of persons convicted of certain crimes."[14]

Also, § 47-630(4) provides that "[t]he Council shall develop and periodically review the guidelines and, when appropriate, recommend amendments to the guidelines." Obviously, this means the Council would periodically recommend that we adopt amendments to the guidelines.

In February 2007, the Council filed a petition with this court requesting that we adopt and implement by court rule its "voluntary sentencing guidelines for felony drug offenses." The Council also asked that we develop, in coordination with the Council, protocols and curriculum for training judges, probation officers, county attorneys, and defense counsel.

COMPOSITION OF SENTENCING GUIDELINES

As its title shows, the Council's proposed sentencing guidelines apply only to the sentencing of felony drug offenders. Woven into the guidelines' fabric is a matrix of sentencing ranges, in months, which ranges fall within the statutory minimum and maximum sentences for an offense. A sentencing judge would select a sentencing range by finding the intersection

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[10] § 47-622.

[11] See § 47-624(14).

[12] § 47-624(6).

[13] § 47-624(4).

[14] § 47-630(1).

of coordinate points on horizontal and vertical axes. Points on the horizontal axis of the matrix represent criminal history categories, and points on the vertical axis represent crime severity levels. In addition, the matrix is color coded into three recommended types of sentences.

From this mosaic, the Council recommends that a judge sentence a defendant to a prison term if the defendant's plotted sentence falls within the matrix's yellow, or upper, section. It recommends that a judge sentence a defendant to probation if the plotted sentence range falls within the matrix's light blue, or lower, section. Finally, defendants whose plotted sentence ranges fall within the dark blue, or intermediate, section are eligible for community-based correction alternatives. A judge may divert these defendants from prison.

HEARING ON THE COUNCIL'S PETITION TO ADOPT ITS SENTENCING GUIDELINES

In April 2007, we heard argument on the Council's petition. The chairman, Kermit Brashear, spoke for the Council. He stated that in June 2006, the prison population had reached the emergency level—140 percent of capacity[15]—and was currently around 139 percent of capacity. He further stated that if action were not taken, another prison would have to be built. Brashear also reported that in a 6-year period, the budget for the Department of Correctional Services had doubled from $60 million to $120 million, and that it would double again at a time when the State was facing declining revenues.

He stated that the Council had targeted nonviolent felony drug offenders in its initial guidelines because these offenders make up 27 percent of the maximum-security prison population. The Council believed many offenders could be diverted into alternative correction programs.

Finally, Brashear stated that treatment within prisons is the least effective but most costly way of dealing with drug offenders and reducing their recidivism. He reported that incarceration costs $30,000 per year for each offender, while substance abuse

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[15] See Correctional System Overcrowding Emergency Act, Neb. Rev. Stat. §§ 83-960 to 83-963 (Cum. Supp. 2006).

supervision programs cost about $3,000 per year and are more effective in reducing recidivism.

OVERVIEW OF THE SEPARATION OF POWERS CLAUSE

Nebraska's separation of powers clause[16] prohibits the three governmental branches from exercising the duties and prerogatives of another branch.[17] It also prohibits a branch from improperly delegating its own duties and prerogatives—except as the constitution directs or permits.[18] Our constitution, unlike the federal Constitution and those of several other states, contains an express separation of powers clause. So we have been less willing to find overlapping responsibilities among the three branches of government.[19]

Deciding whether the Nebraska Constitution has committed a matter to another governmental branch, or whether the branch has exceeded its authority, is a delicate exercise in constitutional interpretation.[20] And it is our responsibility, as the ultimate interpreter of our constitution, to make that decision.[21]

As we know, the line between what is a legislative function and what is a judicial one has not been drawn with precision; we make that decision on a case-by-case basis.[22] In defining that line, we look at the function's purpose—not merely its statutory origin—to decide whether a governmental function is legislative or judicial.[23]

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[16] Neb. Const. art. II, § 1.

[17] See, *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007); *Polikov v. Neth*, 270 Neb. 29, 699 N.W.2d 802 (2005).

[18] *Polikov v. Neth, supra* note 17.

[19] *Id.*

[20] *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 17, citing *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

[21] See, *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007); *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 17.

[22] *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985); *Lux v. Mental Health Board of Polk County*, 202 Neb. 106, 274 N.W.2d 141 (1979).

[23] See *Lux v. Mental Health Board of Polk County, supra* note 22.

POWERS OF THE LEGISLATIVE BRANCH

As imprecise as the line between the branches may sometimes be, logic and case law dictate that it is the Legislature's function through the enactment of statutes to declare the law and public policy and to define crimes and punishments.[24] In defining crimes and punishments, it sets the broad policy goals of this state's criminal justice system, including whether, for a particular type of crime, the corrective goal should be retribution, deterrence, or rehabilitation.[25]

In setting out the Legislature's powers to define crimes and punishments, we have stated:

> [T]he Legislature has the authority to fix the penalty range which can be imposed for the crimes it has defined. The Legislature determines the nature of the penalty imposed, and so long as that determination is consistent with the Constitution, it will not be disturbed by the courts on review. In this regard, in *State v. Tucker*,[26] we observed: "'The legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; and its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.'"[27]
>
> We have [also] stated: "The range of the penalty for any offense is a matter for legislative determination. The court exercises its discretion as to the penalty to be applied under any particular state of facts within the range provided by the law."[28] Thus, once the Legislature has defined the crime and the corresponding punishment for a violation of the crime, the responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature.[29]

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[24] *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007).

[25] *Id.*

[26] *State v. Tucker*, 183 Neb. 577, 579, 162 N.W.2d 774, 776 (1968), quoting *State ex rel. Nelson v. Smith*, 114 Neb. 653, 209 N.W. 328 (1926).

[27] See *State v. Tatreau*, 176 Neb. 381, 126 N.W.2d 157 (1964).

[28] *Id.* at 392, 126 N.W.2d at 163.

[29] *State v. Divis*, 256 Neb. 328, 333-34, 589 N.W.2d 537, 541 (1999).

In short, the Legislature defines crimes and establishes the range of penalties.

Powers of the Judicial Branch

This court's primary duty is the proper and efficient administration of justice.[30] Although this court's decisions establish substantive rules of law, those rules have developed in resolving parties' disputes in real cases and controversies. We have often held that an actual case or controversy must exist before a court can exercise judicial power.[31] We do not have power to *enact* substantive laws of general applicability, because that power is exclusively reserved to the Legislature. In criminal law, substantive laws are those that declare what acts are crimes or prescribe the corresponding punishment.[32]

This court also has inherent judicial power to do whatever is reasonably necessary for the proper administration of justice,[33] and this includes supervisory power over the courts.[34] But the Council's petition does not call on us to exercise our supervisory powers. For example, it has not asked us to collect statistical data on sentencing to decide whether sentencing disparity exists.

Finally, under the Nebraska Constitution, we have independent procedural rulemaking power.[35] We believe, however, that by adopting the guidelines, we would be establishing the presumptive sentencing ranges that courts must consider. The proposed guidelines, therefore, are not procedural rules.

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[30] *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994).

[31] See, e.g., *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

[32] See, *Barnes v. Scott*, 201 F.3d 1292 (10th Cir. 2000); *Smith v. State*, 537 So. 2d 982 (Fla. 1989). See, also, *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987); *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

[33] *In re Estate of Reed*, 267 Neb. 121, 672 N.W.2d 416 (2003); *State v. Joubert, supra* note 30.

[34] See, *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); *Wassung v. Wassung*, 136 Neb. 440, 286 N.W. 340 (1939).

[35] See Neb. Const. art. V, § 25.

SENTENCING GUIDELINES ARE SUBSTANTIVE LAW

The Council's comments to the guidelines state that sentences within the matrix are "'voluntary.'" It is true that the guidelines' enforcement mechanisms support an argument that the guidelines are voluntary: a sentence could not be reversed on appeal solely because of a judge's departure from a recommended range. Nevertheless, the guidelines set forth the preferred sentencing policy and, in fact, discourage departure. Section 47-630(2) provides: "The guidelines shall specify appropriate sentences for the designated offenders in consideration of factors set forth by rule. The Supreme Court may provide that a sentence in accordance with the guidelines constitutes a rebuttable presumption."

We interpret § 47-630(2) to mean that the Legislature intended this court's adoption of the guidelines to represent the presumptively appropriate sentences. Further, while the guidelines are not binding, § 47-630(1) compels a judge to consider them: "The guidelines *shall provide that courts are to consider* community correctional programs and facilities in sentencing designated offenders, with the goal of reducing dependence on incarceration as a sentencing option for nonviolent offenders." (Emphasis supplied.) Finally, the guidelines would require judges to explain in a written report their reasons for departing from the recommended sentencing guidelines range. In rejecting a similar legislative mandate to adopt sentencing guidelines, the Wisconsin Supreme Court observed:

> The very requirement of explaining "departure" from the guidelines creates a presumption that a sentence within the range set forth in the matrix for the particular offense/offender categories is appropriate, for it places the burden of showing the appropriateness of a sentence outside the matrix range on the sentencing judge. This, we believe, amounts to our prescribing "appropriate" types and lengths of sentences and constitutes unwarranted intrusion in the sentencing discretion and authority of the trial judge.[36]

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[36] *In re Felony Sentencing Guidelines*, 113 Wis. 2d 689, 697-98, 335 N.W.2d 868, 872-73 (1983).

We agree. Despite its "voluntary" label, requiring judges to explain their "departures" gives the guidelines a presumptive status. We do not believe we should promulgate rules that would effectively curb and conflict with the sentencing discretion a court currently has under Neb. Rev. Stat. § 29-2204 (Cum. Supp. 2006).

The Council, of course, views the matter differently. It points to the state court rules regarding sentencing guidelines in Delaware and Kansas. We note, however, that while the Kansas courts may have participated in developing Kansas' sentencing guidelines, the Kansas Legislature has statutorily enacted the guidelines and their presumptive status.[37]

It is true that the Delaware Supreme Court, through an administrative directive, has adopted presumptive sentencing guidelines as recommended by the state's sentencing commission.[38] The Delaware sentencing guidelines are found neither in the court's rules nor in the state's statutes or administrative code. Instead, they are produced by the state's sentencing commission in a publication called the "Benchbook."[39] Our research, however, has failed to find any decision by the Delaware Supreme Court upholding its adoption of presumptive sentencing ranges against a separation of powers challenge. Because of our constitution's structure, we decline to follow Delaware's model.

More on point, we note that in 1983, the Florida Supreme Court also promulgated sentencing guidelines by court rule in response to a legislative mandate. But, in 1989, the court determined that its rules violated the state constitution's separation of powers clause.[40]

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[37] See Kan. Stat. Ann. §§ 21-4701 to 21-4728 (1995 & Cum. Supp. 2006).

[38] See *Siple v. State*, 701 A.2d 79 (Del. 1997).

[39] Delaware Sentencing Accountability Comm., Benchbook (2006), http://cjc.delaware.gov/PDF/FinalBB2006.pdf. See, e.g., *Teti v. State*, No. 500,2005, 2006 WL 1788351 (Del. June 28, 2006) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 905 A.2d 747 (Del. 2006)).

[40] *Smith v. State*, *supra* note 32.

Similarly, the Michigan Supreme Court had promulgated presumptive sentencing guidelines by administrative order beginning in 1984. But,

> [t]he Michigan Supreme Court's guidelines and legislative system of disciplinary credits [were] criticized for several reasons, such as excessive leniency, inadequate punishment, and undue harshness. As a result, a systematic statutory sentencing structure was developed and enacted into law to replace the judicially-imposed sentencing guidelines [in] 1999 . . . .[41]

This criticism of judicially imposed sentencing guidelines emphasizes the difficult position in which a court places itself when it specifically prescribes sentencing policy outside a pending case. We would compromise our neutrality, in perception if not in fact, if we promulgated the very law that could be challenged. The attraction of delegating potentially controversial legislation to the judiciary is perhaps understandable. But by complying with the Legislature's mandate, we would undermine the separation of powers doctrine:

> The purpose of the doctrine . . . is to preserve the independence of each of the three branches of government in their own respective and proper spheres, thus tending to prevent the despotism of an oligarchy of the Legislature or judges, or the dictatorship of the executive, or any cooperative combination of the foregoing. In the words of Justice Brandeis, "[The purpose was] not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[42]

In addressing a separation of powers issue regarding pretrial diversion, we specifically held that the power to design formal

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[41] Miriam A. Cavanaugh, Note, *If You Do the Crime, You WILL Do the Time: A Look at the New "Truth in Sentencing" Law in Michigan*, 77 U. Det. Mercy L. Rev. 375, 386 (2000) (citing legislative analysis).

[42] *Prendergast v. Nelson*, 199 Neb. 97, 124-25, 256 N.W.2d 657, 673 (1977) (Clinton, J., concurring in part, and in part dissenting), quoting *Myers v. United States*, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

pretrial diversion programs is a legislative power.[43] We reasoned that the adoption of formal pretrial diversion programs represents a shift in focus from deterrence and retribution to rehabilitation.[44] That same reasoning applies to sentencing schemes that result in many offenders avoiding incarceration.

Even more to the point, the Legislature may not implement sentencing policy through delegation that is contrary to its current policy under § 29-2204. Section 29-2204 broadly sets forth a policy of indeterminative sentencing with no presumptive sentencing ranges.

We commend the Legislature's efforts to enact safe and effective means of treating substance abuse in the community and to address the rising costs of state correctional facilities. To the extent that substance abuse offenders have increased the prison population, we have cooperated with the Legislature's statutory mandate that we promulgate procedural rules for drug courts after the Legislature created these courts.[45] But the Legislature has not asked this court to promulgate procedural rules to govern court administration of a program enacted by the Legislature. Instead, it has asked us to promulgate substantive rules regarding sentencing that would carry out a sea change in sentencing policy.

Unquestionably, imposing sentencing guidelines presents challenging issues of public policy. We have repeatedly held that the Legislature cannot statutorily confer upon the courts the duties of other branches.[46] These public policy decisions should be debated in the proper forum—the Legislature. We reject the

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[43] *Polikov v. Neth, supra* note 17.

[44] *Id.*

[45] See, Neb. Rev. Stat. §§ 24-1301 to 24-1302 (Cum. Supp. 2006); Nebraska Supreme Court Rule Governing Establishment and Operation of Drug Courts (adopted June 17, 2007).

[46] See, e.g., *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996); *State v. Jones*, 248 Neb. 117, 532 N.W.2d 293 (1995); *Williams v. County of Buffalo*, 181 Neb. 233, 147 N.W.2d 776 (1967); *Searle v. Yensen*, 118 Neb. 835, 226 N.W. 464 (1929); *State v. Neble*, 82 Neb. 267, 117 N.W. 723 (1908).

Council's petition because the Legislature may not delegate its lawmaking function to the executive or judicial branches.[47]

PETITION DENIED.

[47] See *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994).

SHARI ERICKSON AND GEORGE ERICKSON, APPELLANTS, V. U-HAUL INTERNATIONAL, INC., DOING BUSINESS AS U-HAUL COMPANY, ET AL., APPELLEES.

738 N.W.2d 453

Filed September 7, 2007. No. S-05-1163.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
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. **Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.
4. **Negligence.** The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.
5. ____. Actionable negligence cannot exist if there is no legal duty to protect the plaintiff from injury.
6. ____. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
7. **Negligence: Words and Phrases.** A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
8. **Negligence.** When determining whether a legal duty exists for actionable negligence, a court considers (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.
9. ____. The duty of reasonable care generally does not extend to third parties absent other facts establishing a duty.
10. **Negligence: Liability.** The common law has traditionally imposed liability only if the defendant bears some special relationship to the potential victim.
11. **Negligence.** Regardless of whether a duty of reasonable care exists, a duty to warn cannot be imposed absent a special relationship.

12. **Negligence: Liability.** One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (1) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, (2) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (3) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.
13. ____: ____. The words "those whom the supplier should expect to use the chattel" and the words "a person for whose use it is supplied" include not only the person to whom the chattel is turned over by the supplier, but also all those who are members of a class whom the supplier should expect to use it or occupy it or share in its use with the consent of such person, irrespective of whether the supplier has any particular person in mind.
14. **Negligence: Contracts: Tort-feasors.** A contractual relationship between two parties, one of which is a tort-feasor, does not justify the imposition of an affirmative duty upon the other party to the contract to protect a third-party victim with whom no such relationship exists.
15. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the state's long-arm statute is satisfied. Second, it must determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
16. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
17. **Due Process: Jurisdiction: States.** If the long-arm statute has been satisfied, a court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
18. ____: ____: ____. To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
19. ____: ____: ____. The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
20. **Jurisdiction: States.** Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's actions created substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.
21. **Due Process: Jurisdiction: States: Appeal and Error.** In analyzing personal jurisdiction, an appellate court considers the quality and type of the defendant's activities to decide whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.

22. **Jurisdiction: States.** Two types of personal jurisdiction may be exercised depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction.
23. ____: ____. To satisfy general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in continuous and systematic general business contacts with the forum state.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Reversed and remanded for further proceedings.

P. Shawn McCann and Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellants.

Ronald F. Krause and Daniel J. Epstein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees U-Haul International, Inc., and U-Haul Center of N.W. Omaha.

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

CONNOLLY, J.

The appellants, Shari Erickson and her husband, George Erickson, sued U-Haul International, Inc., and U-Haul Center of N.W. Omaha (U-Haul Center). The district court granted U-Haul Center's motion for summary judgment, finding that it owed no duty to the Ericksons. The court also sustained U-Haul International's special appearance because the company did not satisfy the minimum contact requirements for the court to have jurisdiction.

This appeal raises two issues. First, whether, absent any special relationship between a lessor of a vehicle and a third party, the lessor has an affirmative duty to protect the third party from injury. Second, whether U-Haul International had sufficient minimum contacts with Nebraska to make it fair and reasonable to exercise general personal jurisdiction over the company. We conclude that (1) a lessor of a chattel has a duty to warn third-party users of the dangerous condition of the chattel and (2) U-Haul International had sufficient contacts to warrant a Nebraska court's exercise of general personal jurisdiction

over it. We reverse, and remand for further proceedings on the Ericksons' claims.

I. BACKGROUND

1. The Carstens' Rental of the U-Haul Truck

Shari's parents, Dale and Judith Carstens, rented a truck from U-Haul Center to move from Walnut, Iowa, to Herman, Nebraska. The truck, known as a 17-foot easy-loading mover, was licensed in Kentucky.

While operating the truck, Dale attempted to back it up to a porch, but the loading ramp was a few inches short of the top step. Shari held the ramp up while Dale attempted to reverse the truck a few more inches. When the truck was engaged, however, it first jumped forward, throwing Shari off balance, and as Dale backed up the truck, it pinned Shari's foot between the concrete step and the truck's ramp.

In deposition testimony, Shari testified that she did not see any warning labels on the truck instructing that the ramp should not be extended while the truck was in motion. In Judith's deposition, she testified that when she and Dale rented the truck, they did not receive a user's guide with any warnings about using the ramp. After Shari's injury, Judith inspected the truck for warning labels and the only label she found was a partial warning label that was "ragged" and hard to read.

The affidavit of the general manager of U-Haul Center contains a picture that shows a warning sticker below the latch to the truck's rear door stating, "DANGER DO NOT extend or hold ramp while vehicle is in motion. Failure to follow this warning could result in a serious or fatal injury." The affidavit also includes a copy of the "U-Haul Household Moving Van User Instructions," which U-Haul Center alleged that it gives to everyone to whom it rents a truck. On the first page of the instructions is a warning to "**NEVER** put the Household Moving Van in motion while the loading ramp is extended [or] being held."

2. U-Haul International's Contacts With Nebraska

The assistant corporate secretary of U-Haul International in an affidavit, averred that U-Haul International, a Nevada

corporation, has its principal place of business in Phoenix, Arizona; that it did not own the vehicle the Carstens rented; that it was never qualified to do business in Nebraska and did not employ anyone in the state; and that it does not possess any real estate in Nebraska or have a registered agent, maintain any office or bank accounts, conduct any meetings, or perform any kind of services in Nebraska.

U-Haul International, however, is the parent company and owns all of the stock of U-Haul Company of Nebraska (U-Haul Nebraska) and U-Haul Company of Kentucky, which owned the truck involved in the accident. U-Haul Center is a rental center of U-Haul Nebraska. U-Haul International owns the trademark used in Nebraska and displayed on all U-Haul trucks in the state. Also, U-Haul International operates a toll-free telephone number and Web site accessible from Nebraska.

Under the contract it had with U-Haul Nebraska, U-Haul International provided all rental contracts and other forms and stationery for the operation in Nebraska. It was also under contract with U-Haul Nebraska to provide accounting, record-keeping, technical, and advisory services. Finally, it coordinated the exchange of rental equipment between U-Haul Nebraska and other rental centers and prepared all federal and state tax reports.

II. ASSIGNMENTS OF ERROR

The Ericksons assign that the district court erred in (1) finding there was no duty owed by U-Haul Center to the Ericksons and failing to find a foreseeable risk of injury to rental truck users, (2) holding that no genuine issue of material fact exists and granting summary judgment, (3) denying the Ericksons' motion to amend or alter, (4) granting the special appearance of U-Haul International, and (5) failing to recognize the existence of sufficient minimum contacts between the State of Nebraska and U-Haul International.

III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may

be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] When a jurisdictional question does not involve a factual dispute, the issue presents a matter of law. We review questions of law independently of the lower court's conclusion.[3]

IV. ANALYSIS

1. Overview of Duty

The district court granted U-Haul Center's motion for summary judgment, finding that U-Haul Center did not owe a duty to Shari. Shari views the matter differently. She contends U-Haul Center owed her a duty because her mother, Judith, rented the truck and her father, Dale, drove it. She argues it was reasonably foreseeable that friends and family would assist Judith and Dale in moving, so a special relationship existed. Shari argues U-Haul Center had a duty to warn of the dangers of using the truck, which extended not just to Judith, who signed the contract, but to all those who used the rental truck.

U-Haul Center counters that for a duty to exist, a relationship must exist between the parties that imposes a legal obligation on one party to protect another party. It argues that because no contractual or special relationship existed between Shari and U-Haul Center, U-Haul Center owed her no duty.

[4-6] The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.[4] Actionable negligence cannot exist if there is no legal duty to protect the plaintiff from

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[1] *Glad Tidings v. Nebraska Dist. Council*, 273 Neb. 960, 734 N.W.2d 731 (2007).

[2] *Id.*

[3] See *Rozsnyai v. Svacek*, 272 Neb. 567, 723 N.W.2d 329 (2006).

[4] *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001).

injury.[5] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.[6]

[7,8] A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.[7] When determining whether a legal duty exists for actionable negligence, a court considers (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.[8]

[9-11] The duty of reasonable care generally does not extend to third parties absent other facts establishing a duty.[9] The common law has traditionally imposed liability only if the defendant bears some special relationship to the potential victim.[10] Regardless of whether a duty of reasonable care exists, a duty to warn cannot be imposed absent a special relationship.[11]

(a) Duty to Warn

[12] The Restatement (Second) of Torts addresses the duty of a supplier of chattels:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in

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[5] *Danler v. Rosen Auto Leasing*, 259 Neb. 130, 609 N.W.2d 27 (2000).

[6] *National Am. Ins. Co. v. Constructors Bonding Co.*, 272 Neb. 169, 719 N.W.2d 297 (2006).

[7] *Danler v. Rosen Auto Leasing, supra* note 5.

[8] *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006).

[9] See, *id.*; *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994).

[10] *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998).

[11] *Id.*

> the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.[12]

Therefore, under § 388 of the Restatement, a supplier has a common-law duty to warn expected users that a chattel may be dangerous. The comments to § 388 show that the term "supplier" includes lessors. And § 407 of the Restatement specifically extends the duties imposed by § 388 to lessors.[13]

This court has adopted and applied § 388 in finding liability against a manufacturer.[14] In *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*,[15] a corporation purchased a forklift, which overheated and caused a fire. The corporation was unaware that the forklift's resistor coil could heat to 1,200 degrees Fahrenheit. The corporation sued the forklift's manufacturer for the damage caused by the fire. We held that the manufacturer acted negligently because it failed to warn the corporation or the distributor about the forklift's heating propensity. We cited § 388 to support our decision.

We have not applied § 388 to a lessor. Other jurisdictions, however, have found that a lessor of chattels owed a duty to

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[12] Restatement (Second) of Torts § 388 at 300-01 (1965).

[13] *Id.*, § 407, comment *a*.

[14] See *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 205 N.W.2d 523 (1973). See, also, *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954).

[15] *Libbey-Owens Ford Glass Co. v. L & M Paper Co., supra* note 14.

warn of a chattel's dangerous condition.[16] For example, in *Barsness v. General Diesel & Equipment Co.*,[17] a church rented a crane from a construction equipment leasing company. A church member with limited construction experience acted as the general contractor for the project. He attached a manbasket to the crane to lift men for above-ground work. The basket fell while the plaintiff was working in it, and he sustained serious injuries. He sued the leasing company, alleging that the company negligently failed to warn. The trial court granted the leasing company's summary judgment motion.

The North Dakota Supreme Court reversed. It stated that it had recognized a cause of action for failure to warn in cases involving manufacturers. In concluding that a duty may also exist for other suppliers, the court stated: "[W]e see no reason to limit application of the doctrine to manufacturers only. We believe that other suppliers of chattels should be held liable for their negligent failure to warn of dangerous propensities of a chattel supplied to another, as outlined in Section 388."[18] The North Dakota Supreme Court remanded for the trial court to resolve factual issues whether a duty existed.

U-Haul Center contends that Neb. Rev. Stat. § 25-21,239 (Cum. Supp. 2004) has preempted a lessor's liability for leasing a chattel. That statute makes owners of leased trucks, truck-tractors, and trailers liable to persons injured because of the operation of the leased item. Because U-Haul Center does not own the truck that the Carstens leased, § 25-21,239 does not

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[16] See, e.g., *Barsness v. General Diesel & Equipment Co.*, 383 N.W.2d 840 (N.D. 1986); *Rinkleff v. Knox*, 375 N.W.2d 262 (Iowa 1985); *Clark v. Rental Equipment Co. Inc.*, 300 Minn. 420, 220 N.W.2d 507 (1974); *Parra v. Building Erection Services*, 982 S.W.2d 278 (Mo. App. 1998); *Gall v. McDonald Indus.*, 84 Wash. App. 194, 926 P.2d 934 (1996); *Big Three Welding Equipment Company v. Roberts*, 399 S.W.2d 912 (Tex. Civ. App. 1966). See, also, *Jordan v. Carlisle Constr. Co., Inc.*, No. 8:99CV162, 2001 U.S. Dist. LEXIS 24287 (D. Neb. May 3, 2001) (citing § 388 but finding no duty because the lessees were knowledgeable users).

[17] *Barsness v. General Diesel & Equipment Co., supra* note 16.

[18] *Id.* at 845.

apply. The lack of a statutory duty, however, does not prevent us from recognizing a common-law duty of a supplier to protect foreseeable users of its chattels from dangers known to the supplier.

(b) Duty to Third Persons

[13] Section 388 of the Restatement also makes clear that the duty extends to third persons, not just to those in privity of contract with the supplier of the chattel. Comment *a.* provides in part:

> The words "those whom the supplier should expect to use the chattel" and the words "a person for whose use it is supplied" include not only the person to whom the chattel is turned over by the supplier, but also all those who are members of a class whom the supplier should expect to use it or occupy it or share in its use with the consent of such person, irrespective of whether the supplier has any particular person in mind. Thus, one who lends an automobile to a friend and who fails to disclose a defect of which he himself knows and which he should recognize as making it unreasonably dangerous for use, is subject to liability not only to his friend, but also to anyone whom his friend permits to drive the car or chooses to receive in it as passenger or guest, if it is understood between them that the car may be so used.[19]

In *Gall v. McDonald Indus.*,[20] the Washington Court of Appeals applied § 388 to a third person. There, a construction company leased a dump truck. One of the company's employees was driving the truck when its brakes failed and the truck crashed, injuring the employee. The employee sued the leasing company, and the trial court entered summary judgment against him. In reversing the trial court's decision and remanding the cause, the Washington court cited the comments to § 388. The court held that a rational trier of fact could find that the employee was a foreseeable user of the truck, protected under § 388.

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[19] Restatement, *supra* note 12, comment *a.* at 301.

[20] *Gall v. McDonald Indus.*, *supra* note 16.

[14] U-Haul Center cites *Danler v. Rosen Auto Leasing*[21] in support of its argument that it owes no common-law duty to Shari. In *Danler*, we addressed a vehicle-leasing company's duty to a third-party victim. The lessee, while driving the leased vehicle, damaged a third party's parked car; the third party then sued the leasing company.[22] We determined that "[a] contractual relationship between two parties, one of which is a tort-feasor, does not justify the imposition of an affirmative duty upon the other party to the contract to protect a third-party victim with whom no such relationship exists."[23] That is, without a relationship between the leasing company and the third-party motorist, the leasing company had no affirmative duty to protect the third party.

We, however, believe that the rule in *Danler* does not apply here because a fact finder could determine that Shari was a foreseeable user of the leased goods, unlike the third-party victim in *Danler*. The duty owed by U-Haul Center is not to protect Shari from its lessee's negligence, but to protect her from danger stemming from her own use of the leased truck. She, therefore, could fall within the class of protected individuals under § 388.

(c) Genuine Issues of Material Fact Exist Regarding Whether U-Haul Center Had a Duty to Warn Shari

Whether a duty exists under § 388 is a question of law, which depends on several factual determinations. In a case involving a lessor of a crane, the North Dakota Supreme Court stated that a fact finder should resolve the following factual issues in deciding whether a duty to warn arose: (1) For what use was the chattel supplied? (2) Was the chattel dangerous or likely to be dangerous for that use? (3) Did the supplier know or have reason to know of the danger? and (4) Did the supplier have no reason to believe that those who would use the chattel would realize its dangerous condition?[24] The duty also depends on whether Shari

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[21] *Danler v. Rosen Auto Leasing, supra* note 5.

[22] *Id.*

[23] *Id.* at 136, 609 N.W.2d at 32.

[24] See *Barsness v. General Diesel & Equipment Co., supra* note 16.

was a person whom U-Haul Center should expect to use the truck or expect to be endangered by using the truck.

Here, there exist general issues of material fact. The record shows that Shari and the Carstens were using the truck for moving—its intended use. U-Haul Center has a regular practice of providing warnings like handbooks and warning labels on the trucks. This implies that the truck was dangerous for its intended use and that U-Haul Center knew of the danger. Nothing in the record suggests that Shari would realize the dangerous condition absent a warning. Further, U-Haul Center could expect that persons other than the lessee would help in the move, and therefore, use the truck.

Viewing the record in the light most favorable to the Ericksons, we conclude that genuine issues of material fact still exist before the trial court can determine whether, as a matter of law, U-Haul Center had a duty to warn Shari. The district court erred in sustaining U-Haul Center's motion for summary judgment.

2. Nebraska Has Personal Jurisdiction Over U-Haul International

The Ericksons contend the district court erred in not finding that the State of Nebraska has personal jurisdiction over U-Haul International. They argue that U-Haul International had sufficient minimum contacts with Nebraska to establish personal jurisdiction.

(a) Long-Arm Statute

[15,16] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the state's long-arm statute is satisfied. Second, it must determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.[25] Nebraska's long-arm statute provides: "A court may exercise personal jurisdiction over a person . . . (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise

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[25] See *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, 269 Neb. 222, 691 N.W.2d 147 (2005). See, also, *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003).

of personal jurisdiction consistent with the Constitution of the United States."[26] Nebraska's long-arm statute, therefore, extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.[27] Therefore, the issue is whether U-Haul International had sufficient contacts with Nebraska so that the exercise of personal jurisdiction would not offend federal principles of due process.[28]

(b) Minimum Contacts

[17-20] If the long-arm statute has been satisfied, a court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.[29] Therefore, we consider the kind and quality of U-Haul International's activities to decide whether it has the necessary minimum contacts with Nebraska to satisfy due process.[30] To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.[31] The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.[32] Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether

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[26] Neb. Rev. Stat. § 25-536 (Reissue 1995).

[27] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, *supra* note 25. See, also, *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004).

[28] See *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, *supra* note 25.

[29] *Id.* See, also, *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

[30] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, *supra* note 25.

[31] *Id.*

[32] *Id.*

the defendant's actions created substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.[33]

[21-23] In analyzing personal jurisdiction, we consider the quality and type of the defendant's activities in deciding whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.[34] A court exercises two types of personal jurisdiction depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction. Here, we focus on general personal jurisdiction. To satisfy general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in "'continuous and systematic general business contacts'" with the forum state.[35]

In finding sufficient contact in a similar case involving U-Haul International, the Alabama Supreme Court held that Alabama had personal jurisdiction over U-Haul International. In *Boyd v. U-Haul Intern., Inc.*,[36] the plaintiff rented a U-Haul truck and lost control of the truck while backing it up to the doorway of his home.[37] The truck crushed a child's foot against concrete steps, and his foot had to be amputated.[38] The court held that U-Haul International had sufficient minimum contacts with Alabama:

> [W]hile U-Haul International does not own the rented vehicles, it serves as a clearinghouse for U-Haul companies throughout the country. It continually collects monies and distributes percentages of those monies to U-Haul

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[33] *Id.*

[34] *Id.*

[35] *Id.* See, also, *Quality Pork Internat. v. Rupari Food Servs.*, *supra* note 29, 267 Neb. at 483, 675 N.W.2d at 650, quoting *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

[36] *Boyd v. U-Haul Intern., Inc.*, 527 So. 2d 713 (Ala. 1988).

[37] *Id.*

[38] *Id.*

> Company of Alabama. It provides accounting and auditing services to U-Haul Company of Alabama; it provides company forms and stationery; and it maintains standards for repairing and servicing U-Haul vehicles. Moreover, U-Haul International sends its representatives into this State for the express purpose of providing U-Haul Company of Alabama with auditing and accounting services. In light of the foregoing relationship, we conclude that U-Haul International's contacts with Alabama were deliberate rather than fortuitous and, therefore, that it should have been reasonably foreseen that at some time in the future it would need the protections, and would invoke the jurisdiction, of the Alabama courts.[39]

U-Haul International's relationship with U-Haul Company of Alabama looks similar to its relationship with U-Haul Nebraska. U-Haul International contracted with U-Haul Nebraska. The contract not only granted U-Haul Nebraska the exclusive right to have U-Haul rental stores in parts of Nebraska, but also required U-Haul International to provide accounting, record-keeping, technical, and advisory services. The contract required U-Haul International to coordinate the exchange of rental equipment between U-Haul Nebraska and other rental centers. U-Haul International also provided "all rental contracts and other forms and stationery desirable and necessary" for the operations in Nebraska, and prepared all federal and state tax reports. In addition, U-Haul International owns the trademark displayed on all U-Haul trucks used in Nebraska. Finally, U-Haul International operates a toll-free telephone number and Web site accessible from Nebraska. These contacts provide sufficient grounds for a Nebraska court to exercise personal jurisdiction over U-Haul International.

U-Haul International argues that *Boyd* is not binding precedent on this court and that we should instead rely on *Peterson v. U-Haul Co.*[40] In *Peterson*, the Eighth Circuit Court of Appeals found that Nebraska did not have jurisdiction over U-Haul

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[39] *Id.* at 714.

[40] *Peterson v. U-Haul Co.*, 409 F.2d 1174 (8th Cir. 1969).

Company of North Carolina.[41] Unlike U-Haul Company of North Carolina, however, U-Haul International is not one subsidiary within the U-Haul rental system, but is instead the parent corporation. And U-Haul Company of North Carolina's contacts with Nebraska—which arose primarily when one of its trucks was rented to a destination in Nebraska—were less systematic. In contrast, U-Haul International, as the parent corporation, purposely reached into the state to establish an interdependent contractual relationship with U-Haul Nebraska. This relationship resulted in many contacts between U-Haul International and Nebraska. In *Peterson*, no such contractual arrangement existed between U-Haul Nebraska and U-Haul Company of North Carolina for continuous, systematic contact with Nebraska.

Here, U-Haul International, a Nevada corporation, reached out beyond its borders and negotiated with a Nebraska corporation. This contract established a substantial and continuing relationship between U-Haul International and U-Haul Nebraska and committed U-Haul International to having continuing contacts in Nebraska. We are satisfied that the exercise of jurisdiction over U-Haul International would not offend due process. U-Haul International reached into the State of Nebraska, established sufficient minimum contacts, and invoked the benefits and protections of its laws. The district court, therefore, erred in granting U-Haul International's special appearance.

V. CONCLUSION

We conclude that genuine issues of material fact exist regarding whether U-Haul Center had a duty to warn Shari. Also, U-Haul International had sufficient contacts with Nebraska to warrant a Nebraska court's exercise of personal jurisdiction over it. We, therefore, reverse the district court's decision regarding both U-Haul Center's motion for summary judgment and U-Haul International's special appearance, and we remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[41] *Id.*

TROY NEIMAN AND CAROL LEWIS, SHAREHOLDERS IN TRI R ANGUS, INC., APPELLEES, V. TRI R ANGUS, INC., ET AL., APPELLANTS.

739 N.W.2d 182

Filed September 7, 2007. No. S-06-118.

1. **Summary Judgment.** 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.
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. **Statutes: Appeal and Error.** The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Corporations: Actions: Fraud: Proof.** To succeed in an action brought under Neb. Rev. Stat. § 21-2086(1) (Reissue 1997), the prohibited conduct must be proved, and it must be shown that removal of a director is in the best interests of the corporation. More specifically, the district court may remove a director in an action brought by shareholders holding at least 10 percent of the outstanding shares if the court, after reviewing the evidence, finds that the director engaged in fraudulent or dishonest conduct or engaged in a gross abuse of authority or discretion with respect to the corporation and also finds that the removal of the director is in the corporation's best interests.
5. **Corporations: Statutes.** The language of Neb. Rev. Stat. § 21-2086 (Reissue 1997) leads to the conclusion that judicial removal of a director is an extraordinary remedy.
6. **Fraud: Summary Judgment.** A claim of fraud is generally inappropriate for disposition at the summary judgment stage.
7. **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.
8. ____: ____. If the party moving for summary judgment fails to make a prima facie case, the movant is not entitled to judgment as a matter of law.

Appeal from the District Court for Thomas County: DONALD E. ROWLANDS II, Judge. Reversed and vacated, and cause remanded for further proceedings.

David A. Domina, of Domina Law Group, P.C., L.L.O., and George M. Zeilinger for appellants.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellees, Troy Neiman and Carol Lewis, shareholders in appellant Tri R Angus, Inc. (Tri R), instituted this action in the district court for Thomas County against Tri R and director appellants Jon L. Neiman and Frances E. Neiman (the director appellants), seeking to have the director appellants judicially removed as directors of Tri R. Appellees brought this action pursuant to Neb. Rev. Stat. § 21-2086 (Reissue 1997), which permits the removal of directors by judicial proceeding under certain circumstances. Appellees moved for summary judgment. Following an evidentiary hearing, the district court sustained appellees' motion, ordered the director appellants removed as directors of Tri R, and enjoined them from serving as directors for a period of 2 years. In a subsequent order, the district court denied appellants' "Motion for New Trial" and sustained appellees' motion for further order. In its further order, the court directed Tri R to hold a special shareholders' meeting for the purpose of electing new directors to replace the director appellants and further ruled that the director appellants were not eligible to be elected as directors.

Appellants filed an appeal. We conclude that appellees failed to establish that they were entitled to judgment as a matter of law, and we therefore reverse the district court's entry of summary judgment, vacate the district court's further order entered after the grant of summary judgment, and remand the cause for further proceedings.

STATEMENT OF FACTS

The record reflects that Tri R is a closely held, private corporation in which the director appellants hold approximately 80 percent of the corporation's stock, and appellees hold approximately 12 percent of the stock. The director appellants serve as directors of Tri R. Appellees filed this action with the district court

seeking the judicial removal of the director appellants as Tri R directors pursuant to § 21-2086, which provides as follows:

> (1) The district court of the county where a corporation's principal office, or, if none in this state, its registered office, is located, may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least ten percent of the outstanding shares of any class if the court finds that (a) the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation and (b) removal is in the best interests of the corporation.
>
> (2) The court that removes a director may bar the director from reelection for a period prescribed by the court.
>
> (3) If shareholders commence a proceeding under subsection (1) of this section, they shall make the corporation a party defendant.

In their complaint filed on May 18, 2005, appellees alleged, inter alia, that the director appellants, as directors of Tri R, authorized the distribution of assets in violation of state law, inappropriately mortgaged or pledged corporate assets, inappropriately sold or disposed of corporate assets, inappropriately diverted and utilized corporate earnings, and wasted corporate assets. Appellants filed an answer generally denying the allegations in the complaint.

On September 8, 2005, appellees filed a motion for summary judgment. An evidentiary hearing was held, and evidence was adduced by appellees. The director appellants did not introduce evidence in opposition to appellees' motion for summary judgment.

In an order filed December 5, 2005, the district court sustained appellees' motion and ordered the removal of the director appellants. In its order, the district court stated that its

> ruling [was] based in part upon the decision entered by . . . the Lincoln County District Court [in the] case of *Tri R. Angus, Inc. v. Neiman and Neiman Corp. et al.* [and upon] the orders [of the] United States Bankruptcy Court for the District of Nebraska involving the Chapter 11

> Bankruptcy proceedings of [Tri R] as well as [of the director appellants].

We note that the ruling from the Lincoln County District Court upon which the summary judgment in the instant case was based resolved litigation that had been initiated in 2001, involving events that had occurred primarily between 1998 and 2001, and that the bankruptcy court orders also relied on had been entered in 2003 and largely consisted of rulings dismissing the bankruptcy proceedings for failure to comply with bankruptcy court orders that directed the filing of amended bankruptcy schedules and operating reports and for failure to make an adequate protection payment in a timely manner. In its order filed December 5, 2005, the district court ordered that the director appellants be removed as directors of Tri R and further enjoined the director appellants from serving as Tri R directors for a period of 2 years.

Following the district court's order sustaining appellees' motion for summary judgment, appellants filed a "Motion for New Trial" and appellees filed a motion for further order. In an order filed January 19, 2006, the district court denied appellants' motion and sustained appellees' motion, setting a date for a shareholders' meeting to hold elections to fill the vacancies and prohibiting the director appellants from seeking election as directors. Appellants filed this appeal.

ASSIGNMENTS OF ERROR

On appeal, appellants assign various errors. In summary, appellants claim that the district court for Thomas County (1) lacked jurisdiction to decide this case because Tri R's principal office is located in Cherry County and not in Thomas County, (2) erred in entering summary judgment in favor of appellees, and (3) erred in sustaining appellees' motion for further order.

STANDARDS OF REVIEW

[1,2] 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. *Alston v. Hormel Foods Corp.*,

273 Neb. 422, 730 N.W.2d 376 (2007). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Reid v. Evans*, 273 Neb. 714, 733 N.W.2d 186 (2007).

ANALYSIS

Appellees Filed Their Action in the Appropriate District Court.

For their first assignment of error, appellants claim that the district court lacked authority to hear the instant case. In support of this argument, appellants rely upon § 21-2086(1), which, in pertinent part, provides that "[t]he district court of the county where a corporation's principal office, or, if none in this state, its registered office, is located, may remove a director of the corporation from office . . . ." Appellants claim that this statutory provision is jurisdictional and argue that Tri R's principal office is located in Cherry County, not Thomas County, and that therefore, the district court for Thomas County lacked jurisdiction to hear the instant case.

We determine that, without regard to whether § 21-2086(1) is jurisdictional in nature, the evidence in the record demonstrates that Tri R's principal office is located in Thomas County, where the action was filed, and that thus, the district court for Thomas County was authorized under the statute to hear the present action.

The record on appeal contains copies of Tri R's corporate bylaws. The bylaws provide that Tri R's principal office is located in Thomas County, a fact that counsel for appellants acknowledged at oral argument. Nothing in the record indicates that the bylaws have been amended relative to the principal office. Principal office is defined as "the office, in or out of this state, so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located." Neb. Rev. Stat. § 21-2014(15) (Reissue 1997). In

challenging the filing of this action in Thomas County, appellants have not directed this court to any annual reports located in the record that designated Tri R's principal office.

The record does not contain meaningful evidence that the principal office is located in a county other than Thomas County. Given the record, we conclude that there is no merit to appellants' first assignment of error.

The District Court Erred in Granting Appellees' Motion for Summary Judgment Because Appellees Failed to Establish That They Were Entitled to Judgment as a Matter of Law.

For their second assignment of error, appellants claim, for a variety of reasons, that the district court erred in entering summary judgment in favor of appellees. Taking into consideration the provisions of § 21-2086(1) and the record in this case, we conclude that appellees failed to establish that they were entitled to judgment as a matter of law and that therefore, the district court erred in sustaining appellees' motion for summary judgment. We reverse the district court's entry of summary judgment, and, as discussed in the last section of this opinion, vacate its further order of January 19, 2006, and remand the cause for further proceedings.

[4] This case seeking the judicial removal of directors was brought under § 21-2086(1), which provides as follows:

> The district court of the county where a corporation's principal office, or, if none in this state, its registered office, is located, may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least ten percent of the outstanding shares of any class if the court finds that (a) the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation and (b) removal is in the best interests of the corporation.

To succeed in an action brought under § 21-2086(1), the prohibited conduct must be proved, and it must be shown that removal of a director is in the best interests of the corporation. More specifically, the district court may remove a director in an action brought by shareholders holding at least 10 percent of

the outstanding shares if the court, after reviewing the evidence, finds that the director engaged in fraudulent or dishonest conduct or engaged in a gross abuse of authority or discretion with respect to the corporation and also finds that the removal of the director is in the corporation's best interests.

This court has not had occasion to consider the requirements for judicial removal of corporate directors under the provisions of § 21-2086, which was enacted in 1995. The Statement of Intent relative to the bill that introduced § 21-2086 indicates that the provisions of the bill are based on the Model Business Corporation Act (MBCA) and that the "intent [of the bill] is to fine-tune our corporate law to insure [sic] that it is meeting the needs of Nebraska businesses and creating an attractive environment in which corporations may be formed." L.B. 109, Banking, Commerce and Insurance Committee, 94th Leg., 1st Sess. (Jan. 23, 1995).

Appellants assert, and appellees do not dispute, that § 21-2086 is based upon MBCA § 8.09. See 2 Model Business Corporation Act Ann. § 8.09 (3d ed. 2002). Other states have enacted statutes based on MBCA § 8.09 that are comparable to § 21-2086. See, e.g., Ariz. Rev. Stat. Ann. § 10-809 (2004); Colo. Rev. Stat. Ann. § 7-108-109 (West 2006); Iowa Code Ann. § 490.809 (West Cum. Supp. 2007); N.Y. Bus. Corp. Law § 706 (McKinney 2003). However, we are not aware of, and the parties have not directed us to, decisions of courts in other jurisdictions that have provisions similar to § 21-2086 that are useful in determining how to apply the provisions of the Nebraska statute in the instant case.

We are aware that § 8.09 of the MBCA has been amended, and although the amendments have not been incorporated into the Nebraska statutory provision, comments made by the Committee on Corporate Laws of the Section of Business Law, which from time to time proposes changes to the MBCA, are instructive as to the drafters' intent behind the original provisions that form the basis of § 21-2086. The committee has observed that

> [t]he grounds for removal in the present statute ("the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation,") are vague, insufficient to distinguish more from

> less serious misbehavior, provide inadequate guidance for the exercise of the court's discretion, and may therefore be susceptible to abuse.

See Committee on Corporate Laws of the Section of Business Law, *Changes in the Model Business Corporation Act—Proposed Amendments Relating to Directors*, 56 Bus. Law. 85-86 (2000). More particularly, the official comment to the amended section states that

> [s]ection 8.09 is designed to operate in the limited circumstance where other remedies are inadequate to address serious misconduct by a director . . . . Misconduct serious enough to justify the extraordinary remedy of judicial removal does not involve any matter falling within an individual director's lawful exercise of business judgment, no matter how unpopular the director's views may be . . . .

See Committee on Corporate Law of the Section of Business Law, *supra* at 90.

In addition to this comment, commentators in states that have enacted statutory versions of § 8.09 have similarly discussed the extreme and limited nature of the remedy with respect to the conduct and the resultant harm to the corporation that would justify removal. One commentator has noted that the bar for removal

> is a high standard, requiring gross, intentional, or dishonest conduct [and e]ven if that standard is met, the director still cannot be removed unless the removal is in the best interests of the corporation. Clearly, the drafters of this statute wished to make it possible, but difficult, for a court to remove a director.

See 1 Cathy Stricklin Krendl et al., Methods of Practice § 1.62 (Colo. Prac. Series, 6th ed. 2005) (discussing Colo. Rev. Stat. Ann. § 7-108-109, Colorado's statutory version of MBCA § 8.09). In addition to noting the "high standard" established by the statute, legal commentators have discussed the elements the shareholder must prove in order to obtain judicial removal of a director, stating that

> [i]n an action to remove a director under statutory provisions, the plaintiff has the burden of proving . . . all of the elements of the cause of action. . . . The most difficult

> element in the plaintiff's case will usually be to establish the acts of the defendant director being relied upon as a ground for removal. The plaintiff may call the defendant and other corporate officers to testify as to the acts or transactions complained of, but in most cases, the plaintiff will have to conduct considerable discovery proceedings and obtain from the corporate records as much evidentiary matter as possible.

14A N.Y. Jur. 2d *Business Relationships* § 567 (1996) (discussing N.Y. Bus. Corp. Law § 706, New York's statutory version of MBCA § 8.09).

[5] The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Reid v. Evans*, 273 Neb. 714, 733 N.W.2d 186 (2007). The language of Nebraska's version of MBCA § 8.09, § 21-2086, leads us to conclude, as have others considering MBCA § 8.09, that judicial removal of a director is an extraordinary remedy. It is not a remedy to be judicially awarded when there is merely a difference of opinion between the shareholders and the directors regarding the operations of the corporation encompassed by the exercise of business judgment. Instead, it is an unusual remedy that is to be granted only upon the shareholder's production of sufficient evidence demonstrating that the director has engaged in "fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation." § 21-2086.

[6] By including "fraudulent" conduct in the list of conduct that justifies judicial removal of directors, we believe that § 21-2086 as a whole evinces a high bar for removal. *City of Gordon v. Ruse*, 268 Neb. 686, 690, 687 N.W.2d 182, 185 (2004) (stating that "[t]o determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language"). The elements for establishing fraud can commonly include a requirement that the actor whose conduct is challenged had the requisite knowledge that his or her conduct was unacceptable or his or her representations were false. *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986) (citing W. Page Keeton et al., Prosser & Keeton on the Law of

Torts § 105 (5th ed. 1984)). In connection with a complaint for securities fraud, we note that in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007), the U.S. Supreme Court recently discussed the heightened pleading requirement of facts evidencing scienter required by the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2) (2000) (§ 21D(b)(2)). Specifically, under § 21D(b)(2), plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Consistent with the foregoing, in discussing fraud, we have previously noted that scienter, as an aspect of the knowledge requirement of fraud, involves inferences going to the defendant's state of mind, and we have further observed that the defendant's state of mind is difficult to prove. *Nielsen v. Adams, supra.* As a result, not surprisingly, it has been observed that a claim of fraud is generally inappropriate for disposition at the summary judgment stage. See, *Mitchell v. Calhoun*, 229 Ga. 757, 194 S.E.2d 421 (1972); *Great So. Nat. v. McCullough Env. Serv.*, 595 So. 2d 1282 (Miss. 1992); *Lacy v. Morrison*, 906 So. 2d 126 (Miss. App. 2004); *Hooks v. Eckman*, 159 N.C. App. 681, 587 S.E.2d 352 (2003).

In *Tellabs, Inc.*, the U.S. Supreme Court noted that the various tests applicable to pleadings, summary judgments, and posttrial judgments are different and that "the test at each stage is measured against a different backdrop." 551 U.S. at 325 n.5. We, of course, agree that the tests differ at different stages of the litigation. In the instant appeal, we are asked to rule on the propriety of a summary judgment entered in favor of appellees based on a collection of documents that in and of themselves do not unequivocally demonstrate that the director appellants had the required state of mind and that the director appellants engaged in fraudulent conduct. For the present purpose of reviewing a summary judgment, we must view the evidence in a light most favorable to the party against whom the judgment is entered and give such party the benefit of all reasonable inferences deducible from the evidence. See *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007).

Giving the inferences in favor of the director appellants, as we must, we cannot say at the summary judgment stage that

appellees established that the director appellants engaged in fraudulent or dishonest conduct. See § 21-2086(1). By extension, and without regard to the knowledge requirement of fraud, we also believe that, taking the inferences in favor of the director appellants, the record on summary judgment fails to establish as a matter of law that the director appellants have necessarily engaged in gross abuse of authority or discretion with respect to the corporation. See *id.* Finally, we also believe that because judicial removal of directors is a remedy designed, in part, to prevent future abuse, the acts complained of should be relatively recent. See Olga N. Sirodoeva-Paxson, *Judicial Removal of Directors: Denial of Directors' License to Steal or Shareholders' Freedom to Vote?* 50 Hastings L.J. 97 (1998). As noted below, we also determine that the tendered evidence does not satisfy this requirement.

The record in the instant case consists of thousands of pages of documents. Aside from procedural affidavits from counsel, which identify the documents tendered into evidence, appellees have provided little guidance to this court with regard to the significance of these documents or the relationship between these documents and the requirements of § 21-2086(1). Our review of the evidence shows that the exhibits consist primarily of copies of pleadings and materials filed in other litigation involving Tri R, as well as copies of materials filed in Tri R's and the director appellants' chapter 11 bankruptcy proceedings. The acts reflected in the other cases are invariably several years old, dating from 2003 or earlier. There is no objective evidence of current conduct by the director appellants that meets the high bar to establish the conduct required under the statute. Further, there is no objective evidence that the older conduct requires removal or that removal is in the best interests of the corporation. See *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002) (commenting on inutility of stale evidence). For completeness, we note that the record does contain the November 2005 affidavit of appellee Troy Neiman relating to his observations relative to the condition of certain Tri R property, made after an aerial inspection. This affidavit is insufficient to establish that appellees were entitled to judgment as a matter of law.

[7,8] We have considered the evidence offered by appellees at the summary judgment hearing in light of the requirements of § 21-2086(1) discussed above to determine the propriety of the district court's ruling granting summary judgment. A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Pogge v. American Fam. Mut. Ins. Co.*, 272 Neb. 554, 723 Neb. 334 (2006). If the moving party fails to make a prima facie case, the movant is not entitled to judgment as a matter of law. See *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (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. *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 Neb. 376 (2007).

Applying the foregoing principles, appellees were not entitled to judgment as a matter of law, and the district court erred in granting appellees' motion for summary judgment. We reverse the district court's order granting summary judgment in favor of appellees and remand the cause for further proceedings.

The District Court's Order Entered on Appellees' Motion for Further Order Must Be Vacated.

Appellants' final assignment of error challenges the propriety of the district court's order of January 19, 2006, granting appellees' motion for further order, in which the district court set a date for a shareholders' meeting to hold elections to fill the director vacancies and prohibited the director appellants from seeking election as directors. In view of our reversal of the summary judgment entered in favor of appellees, it necessarily follows that this subsequent relief afforded by the district court granting appellees' motion for further relief was error and must be vacated.

CONCLUSION

In this action seeking judicial removal of directors under § 21-2086, appellees failed to establish that they were entitled

to judgment as a matter of law, and therefore, the district court erred when it granted appellees' motion for summary judgment and ordered the removal of the director appellants as directors. The district court's judgment entered in favor of appellees on their motion for summary judgment is reversed. The district court's further order directing a shareholders' meeting is vacated. The cause is remanded for further proceedings.

REVERSED AND VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JAY ROBERT GARROUTTE, RESPONDENT.

739 N.W.2d 191

Filed September 21, 2007. No. S-07-639.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Jay Robert Garroutte. The court accepts respondent's surrender of his license and enters an order of disbarment.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 25, 1991. On June 12, 2007, an application for the temporary suspension of respondent from the practice of law was filed by the chairperson of the Committee on Inquiry of the First Disciplinary District. The application stated that on March 27, 2007, in the district court for Polk County, Iowa, respondent pled guilty to felony criminal charges of manufacturing a controlled substance, in violation of Iowa Code Ann. § 124.401(1)(d) (West 2007), and failure to possess a tax stamp,

in violation of Iowa Code Ann. § 453B.12 (West 2006). The application further stated that on May 15, the district court found respondent guilty of the charges, sentenced him to prison for 5 years, and imposed a fine. The application further stated that

> respondent has engaged in . . . criminal [behavior] that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects and that if he [is] allowed to continue to practice law until final disposition of the . . . disciplinary proceedings, it would cause serious damage to the reputation of the legal profession and could cause damage to the public.

On June 20, 2007, this court entered an order directing respondent to show cause why his license should not be temporarily suspended. A copy of the show cause order was served on respondent. On August 29, this court determined that respondent had failed to show cause why his license should not be temporarily suspended and ordered respondent's license to practice law in the State of Nebraska temporarily suspended until further order of the court.

Respondent has filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent effectively does not challenge or contest the truth of the allegations in the application for temporary suspension to the effect that he pled guilty to felony criminal charges of manufacturing a controlled substance and failure to possess a tax stamp and, further, that the district court found respondent guilty of the charges, sentenced him to prison for 5 years, and imposed a fine. In addition to surrendering his license, respondent effectively consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

ANALYSIS

Neb. Ct. R. of Discipline 15 (rev. 2001) provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.

> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to rule 15, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him in the application for temporary suspension. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent voluntarily has stated that he knowingly does not challenge or contest the truth of the allegations in the application for temporary suspension to the effect that he pled guilty to felony criminal charges of manufacturing a controlled substance and failure to possess a tax stamp and that the district court found respondent guilty of the charges, sentencing him to prison and imposing a fine. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of 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.

GAIL FICKLE, BOTH INDIVIDUALLY AND AS PARENT AND GUARDIAN OF JACOB WAGNER, APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

759 N.W.2d 113

Filed September 28, 2007. No. S-04-1250.

SUPPLEMENTAL OPINION

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Jon Bruning, Attorney General, Michele M. Lewon, and Matthew F. Gaffey for appellant.

Douglas J. Peterson and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

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

PER CURIAM.

Case No. S-04-1250 is before us on the motion for rehearing filed by the State of Nebraska, appellant, regarding our opinion reported at *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007). We overrule the motion, but for purposes of clarification, modify the opinion as follows:

That portion of the opinion designated "(a) Future Economic Damages," *id.* at 1008-11, 735 N.W.2d at 771-73, is withdrawn, and the following language is substituted in its place:

> (a) Future Economic Damages
>
> Fickle asserts that the amount of future economic damages awarded was inadequate. At the time of trial, Wagner was 20 years old. George Wolcott, a neurologist, testified that Wagner could expect to live "into his 60's." The evidence established that Wagner's life expectancy from the time of trial was approximately 40 years. Fickle claims that Wagner's future medical care and loss of wages require a much greater award than was given by the district court.

(i) Future Medical Care

The evidence established that Wagner's future medical expenses (including the cost of residential care at Village Northwest Unlimited) would be between $193,610 and $198,355 per year. This range did not reflect inflation or future increases in cost. These amounts were shown in a "Life Care Plan" compiled by Robin Welch-Shaver. Welch-Shaver has a bachelor of science degree in nursing and is a certified life care planner. The plan was formulated using information from Fickle, Wagner, the providers at Village Northwest Unlimited, and Drs. Wolcott, Lester Sach, Sarah Zoelle, and Lyal Leibrock.

The life care plan considered that Wagner would remain a resident of Village Northwest Unlimited, which provided appropriate treatment, including 24-hour nursing care, physical and occupational therapy, cognitive-skills training, and other services. The plan also was based upon the fact that Wagner would always need a residential setting in which he would receive services similar to those he was receiving from Village Northwest Unlimited. The cost associated with Wagner's need for this residential setting was $462 per day, which equated to an annual cost of $168,630.

Evidence at trial suggested that Wagner had been receiving Medicaid payments and that Village Northwest Unlimited was charging him at the Medicaid rate, which was lower than the rate paid by private parties. The State argues that the lower Medicaid rate should have been considered in calculating damages instead of the private-party rate. This argument has no merit.

[24,25] The private-party rate, not the Medicaid rate, is the proper rate to use in calculating Wagner's future medical expenses. Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages. *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997). Social legislation benefits, including payments by Medicare and Medicaid, are excluded by the

collateral source rule. See, *Bynum v. Magno*, 106 Haw. 81, 101 P.3d 1149 (2004) (holding that collateral source rule prohibited reducing patient's damages award to reflect discounted Medicare and Medicaid payments); Restatement (Second) of Torts § 920A, comment *c.* (1979). Moreover, once Fickle receives the judgment awarded in this case, Wagner may no longer be eligible for Medicaid (or Village Northwest Unlimited's Medicaid rate), because eligibility standards take into account the resources available to a Medicaid applicant or recipient. See *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006).

The State also claims that certain medical expenses should not be included because they were controverted at trial. For instance, the State points out that Wagner was not required to take the following medications and supplements as a result of the accident: "Aterol," multivitamins, and calcium supplements. It further argues that the cost of future neurologic and urologic treatment should not have been included in the Life Care Plan because there was insufficient medical evidence that such care would be necessary. The State also asserts that the cost of a motorized wheelchair should not be included as a future medical expense because one of his physicians testified that he should continue to use a manual wheelchair. The State further claims that the projected cost of a customized minivan to accommodate Wagner's special needs should not have included the base cost of the vehicle before customization. Excluding all of the items of future medical expense which the State contests, there remains essentially uncontroverted evidence that Wagner's future medical expenses without adjustment for inflation will be between $7,398,320 and $7,493,120.

(ii) Lost Earning Capacity

Evidence showed that Wagner was unable to earn a living in the labor market due to his injuries. At trial, the State contested whether Wagner would have been a skilled laborer. At the time of the accident, Wagner was

a high school student who had difficulties in school and whose academic performance was not stellar. He planned to obtain a diploma through GED and pursue training through Job Corps to acquire a skill. Fickle argues that the evidence presented indicated that even if Wagner did not complete vocational training or obtain a diploma through GED, he could have expected to make at least $8 per hour as an unskilled laborer. A laborer working at this rate would earn a minimum of $16,000 per year. Over a period of 40 years, Wagner's earnings would amount to at least $640,000.

The State argues that Wagner's potential earnings should have been based upon the minimum wage. But the State fails to direct us to evidence in the record indicating that minimum wage was all that Wagner could have expected to earn. The record does not support a reasonable inference that Wagner's future earning capacity over his 40-year life expectancy was less than $640,000.

(iii) Total Future Economic Damages

There is competent and essentially uncontroverted evidence that future medical expenses for Wagner would be between $7,398,320 and $7,493,120 over a 40-year life expectancy and that he sustained a loss of future earning capacity of at least $640,000. Thus, without consideration for inflation, the evidence presented at trial established Wagner's future economic damages would be between $8,038,320 and $8,133,120.

(iv) Reduction to Present Value

[26,27] The general rule in Nebraska is that an award for future damages must be reduced to its present value. *Cassio v. Creighton University*, 233 Neb. 160, 446 N.W.2d 704 (1989). Present value is the current worth of a certain sum of money due on a specified future date after taking interest into consideration. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995).

Present value must be determined because the money awarded can be invested and earn interest. A present

award should also consider the fact that inflation will increase the expenses incurred by the plaintiff. Although the plaintiff can earn interest, the value of the dollar will decline because of inflation. See, generally, G. Michael Fenner, *About Present Cash Value*, 18 Creighton L. Rev. 305 (1985) (discussing various approaches for determining present value). These factors are left to the judgment of the trial court but should, nevertheless, be considered in the amount of the award.

(v) Conclusion Regarding Future Economic Damages

Giving the State the benefit of reasonably disputed items, we conclude that future economic damages proved at trial are far in excess of the amount awarded by the district court. Therefore, the award for economic damages did not bear a reasonable relationship to the damages proved at trial.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL LEE JONES, APPELLANT.
739 N.W.2d 193

Filed September 28, 2007. No. S-06-798.

1. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
2. **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.
3. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

4. **Courts: Juvenile Courts: Jurisdiction.** In determining whether a case should be transferred to juvenile court, a court should consider those factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 1998). In order to retain the proceedings, the court does not need to resolve every factor against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Mark A. Weber and Kylie A. Wolf, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

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

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

HEAVICAN, C.J.

INTRODUCTION

Daniel Lee Jones pled no contest to first degree murder in the stabbing death of Scott Catenacci and was sentenced to life imprisonment. After obtaining a new direct appeal through a postconviction action, Jones appeals his conviction. The primary issue presented by this appeal is whether the district court abused its discretion by not transferring Jones' case to juvenile court. We are additionally presented with the question of whether Jones' trial counsel was ineffective for recommending that Jones plead no contest to first degree murder.

FACTUAL BACKGROUND

Jones was charged by information with first degree murder and use of a weapon to commit a felony in the death of Catenacci. The information alleged that Catenacci was murdered on or about September 29, 1998. Jones, whose date of birth is November 7, 1981, was nearly 17 years of age at the time of Catenacci's death. Jones filed several pretrial motions, including one requesting a transfer to juvenile court. His transfer motion was denied by the district court.

On March 29, 1999, as part of a plea agreement, Jones pled no contest to first degree murder in return for the dismissal of the use of a weapon charge. On June 28, Jones was sentenced to life imprisonment. Jones' first appeal was dismissed for failure to pay the statutory docket fee.[1] Jones obtained a new direct appeal through a postconviction action and now appeals his conviction and sentence.

At Jones' plea hearing, the State provided the following factual basis for the plea:

> On or about the 29th day of September, 1998, at or near 2300 River Road, in Sarpy County, Nebraska — which is kind of a shrub and timber area adjacent to Haworth Park in Bellevue — the defendant . . . Jones, in concert with other defendants[,] attacked and stabbed to death Scott Catenacci. And the State would at the time of trial prove that this was a premeditated and deliberate and malicious attack, and that it had been discussed several days beforehand, and that . . . Jones stabbed . . . Catenacci several times, and that he died as a result of those stab wounds.

At this hearing, Jones acknowledged he "had knowledge enough of the plan that there was to be an attack on Scott Catenacci with knives." Jones did, however, dispute the contention that he was involved in the planning of the attack.

ASSIGNMENTS OF ERROR

On appeal, Jones assigns that (1) he received ineffective assistance of counsel when counsel advised him to plead no contest to first degree murder and (2) the district court erred in not transferring the case to juvenile court.

STANDARD OF REVIEW

[1] A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.[2]

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[1] *State v. Jones*, 258 Neb. xxii (No. S-99-957, Nov. 10, 1999).

[2] *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).

ANALYSIS

Ineffective Assistance of Counsel.

In his first assignment of error, Jones argues that his counsel was ineffective for recommending that Jones plead no contest to first degree murder when there was evidence that his actions did not rise to the level of first degree murder. In response, the State asserts that the record is not adequate to review Jones' ineffective assistance claim.

[2,3] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[3] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[4] 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.[5]

We concur with the State that this record is not sufficient to address Jones' claim of ineffective assistance of counsel. We therefore do not further address Jones' first assignment of error.

Motion to Transfer to Juvenile Court.

[4] In his second assignment of error, Jones argues that the district court erred in not transferring his case to juvenile court. A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.[6] In determining whether a case should be transferred, a court should consider those factors set forth in Neb. Rev. Stat.

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[3] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[4] *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

[5] *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007).

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

§ 43-276 (Reissue 1998).[7] In order to retain the proceedings, the court does not need to resolve every factor against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.[8]

Section 43-276 requires consideration of the following factors:

> (1) The type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; (9) whether the victim agrees to participate in mediation; and (10) such other matters as the county attorney deems relevant to his or her decision.

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[7] See *State v. Doyle*, 237 Neb. 944, 468 N.W.2d 594 (1991).

[8] See *State v. McCracken*, *supra* note 2.

This section has been revised several times since 1998; the above language was in effect at the time of the district court hearing and decision in this case.

In denying Jones' motion, the district court reasoned that while Jones was not as culpable as his accomplices, he was involved in the planning and commission of the crime charged, and that there was no indication he was coerced or forced into participating. The district court noted Jones' age at the time of the commission of the crime and highlighted the fact that Jones would be subject to juvenile court jurisdiction for approximately 18 months, despite the fact that he stood accused of first degree murder. The court also noted that the victim in this case died after being stabbed 69 times and that it was questionable, given the severity of the crime, whether there were appropriate juvenile services available to Jones. It is clear from the district court's order that all of the factors set forth in § 43-276 were considered by the court.

On appeal, Jones first contends that the district court failed to "adequately consider [his] lack of . . . participation in the planning of the death of the victim."[9] Contrary to this assertion, however, the district court made several references to Jones' involvement in the planning of the crime. For example, the district court noted that "[a]lthough the defendant's part in the homicide may be less culpable than others, reports received into evidence indicate participation in both the planning and carrying out of the offenses charged." The court further noted that "there is no evidence that shows any force or undue influence on the defendant by other participants such that the defendant's actions might be characterized as involuntary. In fact, as previously mentioned, the defendant actually took part in the planning of the offense." Finally, the court found that "[a]lthough other participants had a more active role in the offenses than did the defendant, nevertheless, the defendant took part in both the planning and premeditation as well as the actual commission of the offenses." These various references indicate that the district court considered but rejected Jones' assertion that his

[9] Brief for appellant at 10.

more limited involvement in planning the victim's attack supported a transfer to juvenile court.

Jones also argues that his lack of sophistication and maturity, as well as the fact that he read at just a fourth grade level, suggests that transfer to juvenile court was appropriate. But, as with Jones' planning of the crime, it is clear from a review of the district court's order that these points were considered and rejected by the district court. Moreover, Jones fails to address how his lack of maturity and sophistication would outweigh the other findings of the district court which seem to clearly support the denial of the motion to transfer.

Section 43-276 requires the district court to balance its various findings in determining whether transfer to juvenile court is appropriate. Jones was charged with first degree murder for a crime in which the victim was stabbed 69 times. Jones was 17 years of age at the time of sentencing; the juvenile court would have jurisdiction over him until he was 19 years of age, or for approximately 2 years. At that point, the juvenile court would cease to have jurisdiction and Jones would be released. And while Jones may have been less involved with the planning of this crime in comparison to the other perpetrators, the record indicates that he had at least some involvement in planning the crime. Moreover, evidence was presented at the hearing on Jones' motion suggesting that the juvenile system was not equipped to provide services to juveniles accused of first degree murder.

Given a balancing of these factors, we cannot conclude that the district court abused its discretion when it denied Jones' motion to transfer the case to juvenile court. Jones' second assignment of error is without merit.

CONCLUSION

The record presented to this court is insufficient to allow us to address whether Jones' counsel was ineffective by recommending that Jones plead no contest to first degree murder. As such, we do not further address that argument. In addition, we conclude that the district court did not abuse its discretion in denying Jones' motion to transfer his case to juvenile court. The judgment of the district court is affirmed.

AFFIRMED.

CITIZENS OF DECATUR FOR EQUAL EDUCATION ET AL., APPELLANTS, V. LYONS-DECATUR SCHOOL DISTRICT ET AL., APPELLEES.

739 N.W.2d 742

Filed October 5, 2007. No. S-06-159.

1. **Summary Judgment.** 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.
2. **Judgments: Statutes: Appeal and Error.** Concerning questions of law and statutory interpretation, an appellate court resolves the issues independently of the lower court's conclusion.
3. **Schools and School Districts: Statutes.** School boards are creatures of statute, and their powers are limited.
4. **Schools and School Districts: Legislature.** Any action taken by a school board must be through either an express or an implied power conferred by legislative grant.
5. ____: ____. School boards can bind a school district only within the limits fixed by the Legislature.
6. ____: ____. A school board's actions exceeding an express or implied legislative grant of power are void.
7. ____: ____. Whether a school board acted within the power conferred upon it by the Legislature presents a question of law.
8. ____: ____. When the Legislature has delegated authority to school boards to exercise their discretion, a school board's promise to do so in a reorganization petition can bind the school district.
9. **Statutes.** Statutes covering substantive matters in effect at the time of a transaction govern.
10. ____. Statutory interpretation presents a question of law.
11. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
12. ____: ____. An appellate court will not read a meaning into a statute that the language does not warrant; neither will it read anything plain, direct, or unambiguous out of a statute.
13. ____: ____. When confronted with a statutory interpretation issue, an appellate court resolves the issue independently and irrespective of the trial court's conclusion.
14. ____: ____. An appellate court's role, to the extent possible, is to give effect to the statute's entire language, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible.
15. ____: ____. When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.
16. **Constitutional Law: Statutes.** Under strict scrutiny review, the law must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

17. **Constitutional Law: Due Process.** Besides guaranteeing fair process, the Nebraska due process clause provides heightened protection against government interference with certain fundamental rights and liberty interests.
18. ____: ____. The Due Process Clauses of both the federal and the state Constitutions forbid the government from infringing upon a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.
19. **Equal Protection: Due Process: Statutes.** In both equal protection and due process challenges—when a fundamental right or suspect classification is not involved—a government act is a valid exercise of police power if it is rationally related to a legitimate governmental purpose.
20. **Constitutional Law: Schools and School Districts.** The federal Constitution does not provide a fundamental right to education.
21. ____: ____. Under the free instruction clause of the Nebraska Constitution, education in public schools must be free and available to all children.
22. **Constitutional Law: Words and Phrases.** Fundamental rights are those that are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.
23. **Constitutional Law: Claims.** There is a significant difference between a claim that government action has infringed upon the exercise of a personal right or liberty and a claim that authorized government action fails to go far enough.
24. **Constitutional Law: Legislature.** A state constitutional provision is not elevated to a fundamental right solely because it mandates legislative action.
25. **Constitutional Law: Schools and School Districts.** Adequate funding of public schools is not a judicially enforceable right under the free instruction clause of the Nebraska Constitution.
26. ____: ____. The free instruction clause of the Nebraska Constitution does not confer a fundamental right to equal and adequate funding of schools.
27. **Schools and School Districts: Legislature: Administrative Law.** The Legislature has statutorily delegated to school boards the duty to determine which schools to operate and, with the consent and advice of the State Department of Education, which grades to offer at schools.
28. **Constitutional Law: Schools and School Districts.** In constitutional challenges to school funding decisions, the appropriate level of scrutiny is whether the challenged school funding decisions are rationally related to a legitimate government purpose.
29. **Constitutional Law: Equal Protection.** The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.
30. **Schools and School Districts: Equal Protection.** The action of a school board may implicate the Equal Protection Clause.
31. **Equal Protection.** The Equal Protection Clause requires the government to treat similarly situated people alike.
32. ____. The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.

33. **Constitutional Law: Statutes.** If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the classification with strict scrutiny.
34. **Equal Protection: Words and Phrases.** A suspect class is one that has been saddled with such disabilities or subjected to such a history of purposeful unequal treatment as to command extraordinary protection from the majoritarian political process.
35. **Equal Protection: Statutes.** When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
36. **Equal Protection: Proof.** Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.
37. **Equal Protection.** The Equal Protection Clause does not require absolute equality or precisely equal advantages.
38. **Equal Protection: Legislature: Intent.** Social and economic measures violate the Equal Protection Clause only when the varying treatment of different groups or persons is so unrelated to the achievement of any legitimate purposes that a court can only conclude that the Legislature's actions were irrational.

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

David V. Drew and Gregory P. Drew, of Drew Law Firm, for appellants.

Karen A. Haase and John Selzer, of Harding, Shultz & Downs, for appellees.

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

CONNOLLY, J.

In 1984, the former Decatur and Lyons, Nebraska, school boards petitioned to dissolve the Decatur School District and add its territory to the Lyons School District.[1] In 2005, the appellants, a coalition of parents and taxpayers in Decatur (Coalition), sued the reorganized Lyons-Decatur School District and the school board members (collectively the school district).

[1] See Neb. Rev. Stat. § 79-402.03 (Reissue 1981). See, also, *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*, 270 Neb. 140, 699 N.W.2d 25 (2005) (explaining petition procedures by voters and school boards).

The Coalition sought to enjoin the school district from moving grades four through six from Decatur to Lyons. The Coalition alleged that the reduction in classes at the Decatur school breached the previously adopted merger petition because the school district failed to follow the required voting protocol set out in the merger petition. It also alleged that the school district violated the Coalition members' substantive due process and equal protection rights because the school district was operating the Decatur school without equal grades, teachers, facilities, and educational opportunities. The district court granted the school district's summary judgment motion on all the Coalition's claims and dismissed the Coalition's complaint with prejudice.

We will set out our reasoning with specificity in the following pages, but, briefly stated, we hold that (1) the voting requirements in the merger petition that the Coalition relies on are unenforceable and (2) the free instruction clause of the Nebraska Constitution does not confer a fundamental right to equal and adequate funding of schools. Applying the rational basis analysis, we conclude the school district's action advanced a legitimate educational goal. Accordingly, we affirm.

I. BACKGROUND

1. Reorganization Petition

In 1984, the school boards of the Lyons School District, a Class III district, and the Decatur School District, a Class II district,[2] filed a reorganization petition.[3] The petition sought to enlarge the boundaries of the Lyons School District to include the territory of the Decatur School District. Paragraph IV(A) of the reorganization petition provided:

> An attendance center for elementary students (kindergarten through sixth grade) shall be maintained in the existing Decatur School District facility until such time as the legal voters and electors of the former Decatur School District . . . and the Board of education vote by majority vote to discontinue the attendance center or until such time as all of the members of the board of education of the enlarged

[2] See Neb. Rev. Stat. § 79-102 (Reissue 1981).

[3] See Neb. Rev. Stat. § 79-402 (Reissue 1981).

Lyons School District vote unanimously to discontinue the attendance center.

2. School Board Moves Grades Four Through Six to Lyons, and Coalition Responds

In April 2004, the school district's superintendent, F.J. Forsberg, mailed an informational letter to patrons explaining the district's financial problems. Forsberg stated that the school district had lost significant state aid over the previous 4 years. He projected more losses for the upcoming school year because of changes in the school aid formula, declining enrollment, and an economic downturn. He further projected that the school district would continue to lose state aid through 2007 because of declining enrollment. He explained that the district had attempted to meet the deficits by several cost-saving measures: (1) reducing building maintenance, (2) not hiring for certain teaching positions, (3) combining grades at the Decatur school where student enrollment had dropped, (4) cutting building and instructional supplies, and (5) reducing the budget reserve. The district proposed similar cuts for the 2004-05 school year. He included a list of cost-saving measures the school board was considering, including moving part, or all, of the Decatur school to Lyons.

In January 2005, the school board rejected a motion to close the Decatur school. It voted 6 to 3, however, to operate it only for kindergarten through grade three and to move grades four through six to Lyons. In April, the Coalition filed this action.

The Coalition sought a temporary and permanent injunction to stop the school district from moving grades four through six to Lyons without obtaining the required votes. It also sought a declaration that the school district's action (1) was void because it violated the merger petition, (2) denied its members procedural due process, and (3) violated its members' substantive due process and equal protection rights by operating the Decatur school without "individual teachers for each grade, equal facilities, and equal educational opportunities."

3. Temporary Injunction Hearing

At the temporary injunction hearing, Forsberg testified that the school district had lost about $580,000 in state aid since

1999. He also stated that the Decatur school had experienced a larger drop in enrollment than the Lyons school. He stated that 3 or 4 years before, the board began eliminating some positions and hours at Lyons. It also began combining some grades at Decatur. Having few cost-saving options left, the board decided to move Decatur's grades four through six to Lyons. He stated that the Coalition's members were present at school board meetings when the board discussed cutting costs and that the Coalition's attorney addressed the board on these topics.

At the hearing, Forsberg presented a summary from school census reports which showed the Decatur school had considerably fewer students than Lyons. In Decatur, 36 students were then enrolled in grades kindergarten through six, and he projected Decatur would have 17 students in grades kindergarten through three the next year. In contrast, Lyons had 111 students enrolled in grades kindergarten through six, and he projected Lyons would have 52 students in grades kindergarten through three the next year. Forsberg testified that moving grades four through six from Decatur to Lyons would save the school district more than $200,000.

Forsberg stated that beginning with the 2004-05 school year, the school district bussed all students under grade seven in special education from Decatur to Lyons. Lyons and Decatur are 15 miles apart, and the commute time for students by bus is 25 to 30 minutes. After the hearing, the district court determined that the Coalition had failed to establish a clear right to relief and denied its request for a temporary injunction.

4. Summary Judgment Hearing on Coalition's Violation of Merger Petition and Procedural Due Process Claims

The Coalition moved for summary judgment on its first and second causes of action: breach of the merger petition and violation of its members' procedural due process rights. In July 2005, the court heard the summary judgment motion. The school district argued that the merger petition conflicted with what is now Neb. Rev. Stat. § 79-419(2) (Reissue 2003 & Cum. Supp. 2006). It argued that paragraph IV(A) exceeded the former Lyons and Decatur school boards' authority in two ways.

First, the school district argued that the merger statute allowed the merging school boards to require a vote by electors in the reorganized district who are served by a school. But it did not authorize a vote by electors in a former school district, as required by paragraph IV(A). Second, it argued that the merger statute allowed the former school boards to require a majority vote by electors before closing a school, but it did not authorize a majority vote before discontinuing any grades at a school.

The school district also argued it had provided due process. It argued that due process required only notice and an opportunity to be heard at the meeting when the school district discussed cost-saving measures.

The court denied the Coalition's partial summary judgment motion regarding its first and second causes of action. In addition, relying on *In re Freeholders Petition*,[4] the court granted summary judgment to the school district on those causes of action. The Coalition appealed, but the Nebraska Court of Appeals dismissed the appeal for lack of jurisdiction.[5]

5. Summary Judgment Hearing on Coalition's Equal Protection and Substantive Due Process Claims

On remand, the Coalition moved for a final judgment order under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), and the school district moved for summary judgment on the Coalition's third and fourth causes of action: violation of its members' equal protection and substantive due process rights. At the hearing, the Coalition submitted affidavits stating that (1) the school district had made financial cuts to the Decatur school, while providing improvements and benefits for the Lyons school, and (2) this funding deprivation had caused a decline in enrollment at Decatur as the facilities became inferior to those in Lyons. A former teacher stated in an affidavit that parents of children in the Decatur school had been opting to send their children to Lyons. She stated that the parents did not believe the children were receiving an equal education.

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[4] *In re Freeholders Petition*, 210 Neb. 583, 316 N.W.2d 294 (1982).

[5] *Citizens of Decatur v. Lyons-Decatur Sch. Dist.*, 14 Neb. App. xlv (No. A-05-1127, Oct. 13, 2005).

The Coalition argued that the school district's unequal funding of the Lyons and Decatur schools violated its members' equal protection and substantive due process rights. To support those constitutional claims, the Coalition argued that Nebraska's free instruction clause[6] provided a fundamental right to an education equally or proportionally funded compared with other schools in the same district. It further argued that the school district's underfunding of the Decatur school had deprived those students of their substantive due process rights.

The school district countered that the free instruction clause did not provide a fundamental right to have schools in the same district equally or proportionately funded. It further argued the Coalition did not have a fundamental right to identical facilities or offerings as other schools or to choose where a child attends school. Finally, it pointed out that the Coalition did not allege the school district had failed to educate Decatur children or that it had charged them tuition. Absent a fundamental right, the school district argued that the school district had offered a rational basis for moving the grades to Lyons.

In February 2006, the court granted the school district's motion for summary judgment on the Coalition's equal protection and substantive due process claims. It denied the Coalition's motion for final judgment as moot and dismissed the Coalition's complaint with prejudice.

II. ASSIGNMENTS OF ERROR

The Coalition generally assigns that the district court erred in granting summary judgment for the school district on all four of its causes of action. More specifically, it assigns, restated and renumbered, that the court erred in failing to (1) determine that the merger petition was legally enforceable and required the school board to maintain the Decatur school with grades kindergarten through six unless a majority of the voters in the former Decatur School District or every member of the school board voted for discontinuance of the school; (2) find that the school board breached the merger petition and that the Coalition's members would suffer irreparable harm if the school district

[6] Neb. Const. art. VII, § 1.

were not enjoined from moving Decatur's grades four through six to Lyons; (3) determine that under the merger petition, the Coalition members had a property and liberty interest in maintaining grades kindergarten through six at Decatur; (4) determine that due process required a vote in accordance with the merger petition before Decatur's grades four through six could be moved to Lyons; (5) determine that Decatur students have an equal protection right to obtain the free instruction "guaranteed by the Nebraska Constitution, statutes and regulations"; (6) find genuine issues of material fact whether the school district had underfunded the Decatur school to its detriment and in comparison to other schools in the district, and whether this underfunding had resulted in "inadequate quality of education" for Decatur students; and (7) find genuine issues of material fact whether the school district had violated the Decatur students' substantive due process rights by interfering with their right to obtain free instruction.

III. STANDARD OF REVIEW

[1,2] 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.[7] Concerning questions of law and statutory interpretation, we resolve the issues independently of the lower court's conclusion.[8]

IV. ANALYSIS

1. Enforceability of Merger Agreement

The parties do not dispute the terms of the merger agreement. They agree paragraph IV(A) provides that the school district maintain a school in Decatur for grades kindergarten through six unless one of two voting requirements were satisfied. Either the school board could vote unanimously to discontinue the school or a majority of the school board and voters from the

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[7] *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

[8] *Japp v. Papio-Missouri River NRD*, 273 Neb. 779, 733 N.W.2d 551 (2007).

former Decatur School District could vote to discontinue it. The parties also do not dispute that the school board's action was taken without obtaining a unanimous vote of the school board or a majority vote of the electors from the former Decatur School District. The Coalition argues that the court incorrectly determined that paragraph IV(A) was unenforceable. It claims merger petitions have the effect of law and school districts are bound by their terms. But the school district argues that the merger petition conflicts with Neb. Rev. Stat. § 79-402.07 (Reissue 1981), which authorized school districts to require only a vote by a majority of *all* legal voters served by a school in the reorganized district and only when a school board seeks to discontinue a school.

The court did not state its reasons for granting summary judgment to the school district on the Coalition's claim that the school district had breached the merger petition. We conclude, however, that the court could have properly granted summary judgment for the school district only if paragraph IV(A) is unenforceable.

[3-7] "We have long acknowledged that school boards are creatures of statute, and their powers are limited."[9] Any action taken by a school board must be through either an express or an implied power conferred by legislative grant.[10] School boards can bind a school district only within the limits fixed by the Legislature.[11] A school board's actions exceeding an express or implied legislative grant of power are void.[12] And whether a school board acted within the power conferred upon it by the Legislature presents a question of law.[13]

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[9] *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 488, 623 N.W.2d 672, 676 (2001).

[10] *Id.*

[11] *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997).

[12] See, *State ex rel. Fick v. Miller*, 255 Neb. 387, 584 N.W.2d 809 (1998), citing *Spencer v. Omaha Pub. Sch. Dist., supra* note 11; *School Dist. of Waterloo v. Hutchinson*, 244 Neb. 665, 508 N.W.2d 832 (1993).

[13] See *Spencer v. Omaha Pub. Sch. Dist., supra* note 11.

[8] The Coalition argues that *State ex rel. Fick v. Miller*,[14] supports its claim that paragraph IV(A) was enforceable. In *State ex rel. Fick*, we held that reorganization petitions have the effect of law and create duties owed to the public. We compared the petition to statutes, city charters, city ordinances, regulations, code of ethics rules, and public franchise contracts.[15] Because they have the force of law, ministerial acts required under the petition can be enforced through a writ of mandamus if the provision is valid. Specifically, we held that an affiliated high school had an enforceable ministerial duty to provide transportation to rural students because two conditions were satisfied. This provision was included in the affiliation petition, and the school board was statutorily authorized to bind the district to such terms. In *State ex rel. Fick*, we explicitly stated:

> Section 79-611(4) grants affiliated school districts the authority to provide free transportation [to students residing in an affiliated Class I district], but neither creates any ministerial legal duty nor provides for the enforcement of any duty. This provision is necessary to provide school boards with the authority to bind their districts to terms like the . . . affiliation petition's [transportation provision].[16]

So when the Legislature has delegated authority to school boards to exercise their discretion, a school board's promise to do so in a reorganization petition can bind the school district. Thus, we look to whether the school board had statutory authority to impose the voting restriction in paragraph IV(A).

We first note that school boards are under no statutory duty to maintain a school in their district.

> The school board of any district maintaining more than one school may close any school or schools within such district and may make provision for the education of children either in another school of the district, in the school of any other district, or by correspondence instruction for such children as may be physically incapacitated for

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[14] *State ex rel. Fick v. Miller, supra* note 12.

[15] *Id.*

[16] *Id.* at 397, 584 N.W.2d at 817.

> traveling to or attending other schools, with the permission of the parent.[17]

Further, the Legislature has given school boards the discretion to establish and classify grades, with the consent and advice of the State Department of Education.[18]

[9] When the school boards petitioned for reorganization in 1984, § 79-402.07, in relevant part, provided:

> The [reorganization] petition may contain provisions for the holding of school within existing buildings in the newly reorganized district and that a school constituted under the provisions of this section shall be maintained from the date of reorganization unless the legal voters *served by the school* vote by a majority vote for discontinuance of the school.[19]

(Emphasis supplied.) Statutes covering substantive matters in effect at the time of a transaction govern.[20] This language, however, is nearly identical to that used in the current codification at § 79-419(2).

[10-12] In interpreting § 79-402.07, we are guided by familiar canons of statutory construction. Statutory interpretation presents a question of law.[21] Absent anything to the contrary, we will give statutory language its plain and ordinary meaning.[22] We will not read a meaning into a statute that the language does not warrant; neither will we read anything plain, direct, or unambiguous out of a statute.[23]

Section 79-402.07 unambiguously allowed school districts to require a majority vote by all the legal voters *served by a*

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[17] Neb. Rev. Stat. § 79-1094 (Reissue 2003).

[18] Neb. Rev. Stat. § 79-526 (Reissue 2003). Compare *State ex rel. Shineman v. Board of Education*, 152 Neb. 644, 42 N.W.2d 168 (1950).

[19] See, also, Neb. Rev. Stat. § 79-402.06 (Reissue 1981) (providing that petitions by voters and school boards are subject to same requirements for contents).

[20] See *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000).

[21] *Rohde v. City of Ogallala*, 273 Neb. 689, 731 N.W.2d 898 (2007).

[22] See *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[23] See *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006).

school because that is the only restriction on "legal voters." It did not, however, explicitly state whether the "legal voters" must be part of the reorganized district or could be part of the former district.

[13-15] When confronted with a statutory interpretation issue, we resolve the issue independently and irrespective of the trial court's conclusion.[24] Our role, to the extent possible, is to give effect to the statute's entire language, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible.[25] When possible, we will try to avoid a statutory construction that would lead to an absurd result.[26] Here, several factors weigh against interpreting § 79-402.07 to support the voting restrictions placed in the reorganization petition.

First, interpreting § 79-402.07 as allowing merging school boards to require a majority vote in a former school district would lead to an absurd result. We would have to conclude that the Legislature intended the surviving school board's decision to discontinue a school to be conditioned upon approval from a school district that has ceased to exist.[27]

Second, the statutory provision at issue consists of a single sentence. The Legislature unambiguously referred to "the holding of school within existing buildings in the *newly reorganized district*."[28] It would be inconsistent to interpret a reference to "legal voters served by the school" in the same sentence to mean voters from the former school district.

Third, we do not read § 79-402.07 as authorizing merging school boards to impose *any* voting restrictions on the surviving school district's discretion. We acknowledge that the disputed sentence provides that "[t]he petition may contain provisions for the holding of school within existing buildings in the newly

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[24] See *Sjuts v. Granville Cemetery Assn.*, 272 Neb. 103, 719 N.W.2d 236 (2006).

[25] *In re Interest of Tamantha S.*, 267 Neb. 78, 672 N.W.2d 24 (2003).

[26] See, *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007); *City of Elkhorn v. City of Omaha, supra* note 22.

[27] See *School Dist. of Bellevue v. Strawn*, 185 Neb. 392, 176 N.W.2d 42 (1970).

[28] § 79-402.07 (emphasis supplied).

reorganized district . . . ." But if the Legislature had intended to permit merging school boards to impose any voting restrictions on the surviving school board's discretion, it would not have specified the type of voting restriction that could be imposed. That is, the disputed sentence specifically authorizes a majority vote by the legal voters served by a school for the discontinuance of the school. Reading § 79-402.07 to authorize *any* voting restrictions renders the Legislature's stated restriction meaningless.

Unlike the school transportation statute at issue in *State ex rel. Fick*,[29] § 79-402.07 neither expressly nor impliedly authorized the Decatur and Lyons school boards to require a majority vote by legal voters in the former Decatur School District. Nor did it authorize a unanimous vote by the surviving school board as a condition for discontinuing the Decatur school. Further, § 79-402.07 affirmatively described the circumstance in which a school board could exercise its power to require a vote: the "discontinuance of the school."

The plain and ordinary meaning of "discontinuance" is cessation or closure.[30] As the school district points out, other courts have specifically held that moving particular grades from one school to another is not the discontinuance or closing of a school.[31]

In sum, § 79-402.07 authorized the former school boards to require a vote only if the surviving school board for the reorganized district intended to close a school. It did not authorize the voting restrictions placed in paragraph IV(A). Because the school boards did not have authority to impose the voting requirements in paragraph IV(A), they were void and unenforceable. The Coalition does not allege, nor does the record reflect, that the school board acted in bad faith to circumvent the voting requirement. Instead, it reflects that the school board, faced

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[29] *State ex rel. Fick v. Miller, supra* note 12.

[30] See Webster's Third New International Dictionary Unabridged 646 (1993).

[31] See, *Lang v. Board of Trustees of Joint School Dist. No. 251*, 93 Idaho 79, 455 P.2d 856 (1969); *Western Area Business, etc. v. Duluth, etc.*, 324 N.W.2d 361 (Minn. 1982); *Choal, et al. v. Lyman Sch. Dist. Bd. of Ed.*, 87 S.D. 682, 214 N.W.2d 3 (1974).

with budget deficits, acted to maintain the Decatur school to the extent the district had resources to do so. The district court did not err in determining that paragraph IV(A) of the reorganization petition was unenforceable.

2. Procedural Due Process

The Coalition argues the school district denied it due process. It claims that due process required the school board to comply with paragraph IV(A) of the merger petition before moving grades four through six from Decatur to Lyons. Having concluded that those voting restrictions were void, we need not address this argument.

3. Substantive Due Process

The Coalition argues that the district court erred in finding that its members did not have a substantive due process right to obtain the free instruction guaranteed by Nebraska's Constitution, statutes, and regulations. The Coalition's substantive due process argument hinges on Nebraska's free instruction clause. The free instruction clause, in relevant part, provides: "The Legislature shall provide for the free instruction in the common schools of the state of all persons between the ages of five and twenty-one years."[32]

The Coalition does not claim that the school district denied students an education or charged tuition. Instead, it argues—for both its substantive due process and equal protection claims—that the school district has not provided equal facilities or funding to both schools. Thus, consistent with its complaint and arguments to the trial court, we construe the Coalition's argument to be that the free instruction clause guarantees a fundamental right to equal and adequate funding of schools within the same school district.

[16] The Coalition contends that the free instruction clause provides a fundamental right to an equal opportunity to obtain a free education "in the context of school funding."[33] Thus, it argues any government action affecting free instruction is subject

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[32] Neb. Const. art. VII, § 1.

[33] Brief for appellants at 39.

to strict scrutiny. Under strict scrutiny review, the law must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[34] The Coalition claims the school district's actions were not narrowly tailored to meeting budget deficits because it did not take similar cost-saving measures at both schools.

The school district, however, argues that this court has never found free instruction to be a fundamental right under the state Constitution. It argues that applying strict scrutiny to school board decisions is contrary to the broad discretion granted to school boards by both this court and the Legislature. We begin by explaining the limits of substantive due process protections.

[17] The due process clause provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law . . . ."[35] This language is similar to the Due Process Clause of the federal Constitution,[36] which provides both procedural and substantive protections.[37] In privacy and parental right claims, we have recognized that besides guaranteeing fair process, the Nebraska due process clause "'"provides heightened protection against government interference with certain fundamental rights and liberty interests."'"[38]

[18,19] We have recognized that the Due Process Clauses of both the federal and the state Constitutions forbid the government from infringing upon a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.[39] In both equal protection and due process challenges—when a fundamental

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[34] *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006).

[35] Neb. Const. art. I, § 3.

[36] See U.S. Const. amend. XIV, § 1.

[37] See, e.g., *Harrah Independent School Dist. v. Martin*, 440 U.S. 194, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979).

[38] *Hamit v. Hamit, supra* note 34, 271 Neb. at 665, 715 N.W.2d at 520, quoting *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Accord *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005).

[39] See *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001), citing *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

right or suspect classification is not involved—a government act is a valid exercise of police power if it is rationally related to a legitimate governmental purpose.[40]

[20] The federal Constitution does not provide a fundamental right to education.[41] Nevertheless, the Coalition argues that the free instruction clause of the Nebraska Constitution provides a fundamental right to equal educational funding. Its argument is twofold. First, it contends that our decision in *Kolesnick v. Omaha Pub. Sch. Dist.*,[42] "stands for the proposition that education is a fundamental right in Nebraska with regard to school financing."[43]

(a) We Did Not Recognize a Fundamental Right to Education Funding in *Kolesnick*

In *Kolesnick*, we held that in student discipline cases, "no fundamental right to education exists in Nebraska," "which would trigger strict scrutiny analysis whenever a student's misconduct results in expulsion for the interest of safety."[44] We concluded that the free instruction clause did not provide such a right and distinguished other cases involving the free instruction clause. But the Coalition plucks the following language from *Kolesnick*[45]:

> We have not construed [the free instruction clause] language in the context of student discipline to mean that a fundamental right to education exists in this state . . . . Rather, we have construed the term "free instruction" in right to education cases as pertinent to the issue of

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[40] See, *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006); *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997). Compare *Washington v. Glucksberg*, *supra* note 39, with *Vacco v. Quill*, 521 U.S. 793, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997).

[41] *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

[42] *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997).

[43] Brief for appellants at 38.

[44] *Kolesnick v. Omaha Pub. Sch. Dist.*, *supra* note 42, 251 Neb. at 581-82, 558 N.W.2d at 813.

[45] *Id.* at 581, 558 N.W.2d at 813.

> the constitutionality of school financing, including collection of fees, tuition, and taxes. See, *Banks v. Board of Education of Chase County*[46]; *Tagge v. Gulzow*[47]; *State, ex rel. Baldwin, v. Dorsey*[48]; *Martins v. School District*[49]. See, also, *Doe v. Superintendent of Sch*[*ools*] *of Worcester*[50].

The Coalition's reliance on our statement that the free instruction clause is "pertinent to the issue of the constitutionality of school financing" is misplaced. We clearly did not state that students have a fundamental right to equal educational funding in *Kolesnick*, and none of the cases cited in *Kolesnick* support that position.

[21] Recently, we cited three of the cases relied on in *Kolesnick*: *Tagge v. Gulzow*,[51] *State, ex rel. Baldwin, v. Dorsey*,[52] and *Martins v. School District*.[53] Those cases illustrate that the only qualitative, constitutional standards for public schools we could enforce under the free instruction clause are that "education in public schools must be free and available to all children."[54] In *Banks v. Board of Education of Chase County*,[55] we held that a school district's statutory power to levy taxes was not an unlawful delegation of legislative authority. We reasoned that the purpose of school districts is "'to fulfill the Legislature's duty "to encourage schools and the means of

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[46] *Banks v. Board of Education of Chase County*, 202 Neb. 717, 277 N.W.2d 76 (1979).

[47] *Tagge v. Gulzow*, 132 Neb. 276, 271 N.W. 803 (1937).

[48] *State, ex rel. Baldwin, v. Dorsey*, 108 Neb. 134, 187 N.W. 879 (1922).

[49] *Martins v. School District*, 101 Neb. 258, 162 N.W. 631 (1917).

[50] *Doe v. Superintendent of Schools of Worcester*, 421 Mass. 117, 653 N.E.2d 1088 (1995).

[51] *Tagge v. Gulzow, supra* note 47.

[52] *State, ex rel. Baldwin, v. Dorsey, supra* note 48.

[53] *Martins v. School District, supra* note 49.

[54] *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7, 273 Neb. at 550, 731 N.W.2d at 179.

[55] *Banks v. Board of Education of Chase County, supra* note 46.

instruction" . . . .'"[56] Like this court in *Kolesnick*, in *Doe v. Superintendent of Schools of Worcester*,[57] the Massachusetts Supreme Court was dealing with a student disciplinary case. There, the court explicitly stated that it had never held students have a fundamental right to education. We conclude that *Kolesnick* is not controlling.

(b) *Rodriguez* Test Is Inapplicable to Nebraska's Constitution

The crux of the Coalition's alternative argument is that the free instruction clause explicitly states the Legislature shall provide a free public education to persons between the ages of 5 and 21. Thus, it argues the Nebraska Constitution provides a fundamental right to educational funding.

[22] Fundamental rights have been defined as those that are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[58] The U.S. Supreme Court has stated that

> in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, . . . to have children, . . . to direct the education and upbringing of one's children, . . . to marital privacy, . . . to use contraception, . . . to bodily integrity, . . . and to abortion . . . .[59]

The Coalition relies on the U.S. Supreme Court's statement in *San Antonio School District v. Rodriguez*.[60] There, the Court stated that the key to discovering whether education is fundamental "lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[61] Yet many state courts have rejected the *Rodriguez* test for

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[56] *Id.* at 721, 277 N.W.2d at 79, quoting *Campbell v. Area Vocational Technical School No. 2*, 183 Neb. 318, 159 N.W.2d 817 (1968).

[57] See *Doe v. Superintendent of Schools of Worcester, supra* note 50.

[58] *Washington v. Glucksberg, supra* note 39, 521 U.S. at 721, quoting *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937).

[59] *Id.*, 521 U.S. at 720 (citations omitted).

[60] See *San Antonio School District v. Rodriguez, supra* note 41.

[61] *Id.*, 411 U.S. at 33.

determining whether education is a fundamental right under their state constitution.[62] These courts have reasoned that "state constitutions, unlike the federal constitution, are not of limited or delegated powers and are not restricted to provisions of fundamental import; consequently, whether a right is fundamental should not be predicated on its explicit or implicit inclusion in a state constitution."[63]

Unlike the federal Constitution, state constitutions are not an enumerated list of the government's limited powers. States have all powers not delegated to the federal government nor prohibited to them by the U.S. Constitution.[64] State constitutions include provisions related to providing government services at the local level. Many state provisions for government services "could as well have been left to statutory articulation" under the Legislature's plenary power and are not considered implicit to our concept of ordered liberty.[65]

[23] Accordingly, an express legislative power or duty to provide services in a state constitution pales in comparison to constitutional provisions prohibiting the government's interference with personal rights. As the *Rodriguez* Court recognized, there is a significant difference between a claim that government action has infringed upon the exercise of a personal right or liberty and a claim that authorized government action fails to go far enough. In the latter case, there would be no logical limitation on the

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[62] See, e.g., *Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 458 A.2d 758 (1983) (citing cases).

[63] *Id.* at 647, 458 A.2d at 785. Accord, *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981); *Idaho Schools for Equal Educ. v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993); *Levittown USFD v Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982); *Bd. of Edn. v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979); *Olsen v. State ex rel Johnson*, 276 Or. 9, 554 P.2d 139 (1976). See, also, *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 710 N.E.2d 798, 238 Ill. Dec. 1 (1999); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).

[64] See U.S. Const. amend. X.

[65] See *Levittown USFD v Nyquist, supra* note 63, 57 N.Y.2d at 44 n.5, 439 N.E.2d at 366 n.5, 453 N.Y.S.2d at 650 n.5. See, also, *Bd. of Edn. v. Walter, supra* note 63.

State's duties to provide services if a court were to conclude that such duties conferred personal liberty interests and apply strict scrutiny analysis.[66]

[24] Moreover, a state constitutional provision is not elevated to a fundamental right solely because it mandates legislative action.[67] For example, the Nebraska Constitution also requires the Legislature to provide for the organization of townships[68] and corporations.[69] Yet these provisions do not create fundamental rights.[70]

Other courts have pointed out the vulnerability of the *Rodriguez* test in considering property rights.[71] Although the right to acquire and hold property is an interest protected by the federal and state Constitutions, "'"that right is not a likely candidate for such preferred treatment."'"[72]

We also agree that no distinction exists upon which to elevate the funding of education to a fundamental interest over the funding of other vital state services: services that are also provided through the state's political subdivisions created under constitutional provisions. Considering the potential reach of *Rodriguez*, courts have concluded that other state services "could, within the *Rodriguez* formulation of fundamental rights, be deemed implicitly guaranteed in most state constitutions."[73] Even more illuminating, the *Rodriguez* court recognized the potential fallout of applying strict scrutiny to school funding decisions. "In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the

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[66] Compare *San Antonio School District v. Rodriguez,* supra note 41.

[67] See *Lujan v. Colorado State Bd. of Educ., supra* note 63.

[68] See Neb. Const. art. IX, § 5.

[69] See Neb. Const. art. XII, § 1.

[70] See *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972).

[71] See, e.g., *Lujan v. Colorado State Bd. of Educ., supra* note 63.

[72] *Id.* at 1017 n.12. See, also, *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939).

[73] See, e.g., *Hornbeck v. Somerset Co. Bd. of Educ., supra* note 62, 295 Md. at 649, 458 A.2d at 785.

Equal Protection Clause."[74] Because the Nebraska Constitution is not an enumeration of limited powers,[75] we conclude that it would be inappropriate to apply the U.S. Supreme Court's test in *Rodriguez* to our constitution.

(c) Nebraska's Constitution Does Not Confer a Fundamental Right to Equal and Adequate Funding of Schools

[25] No court questions the vital importance of public education in a democratic society. But "[a] heartfelt recognition and endorsement of the importance of an education does not elevate a public education to a fundamental interest warranting strict scrutiny."[76] No doubt Nebraska's children are entitled to a free education. Nevertheless, we recently concluded that prudential and practical considerations require that we not intervene in fiscal policy decisions regarding education.[77] In *Nebraska Coalition for Ed. Equity v. Heineman* (*Nebraska Coalition*),[78] we specifically stated that the framers of the Nebraska Constitution rejected language that required uniformity between schools. We concluded that the Nebraska Constitution committed the determination of adequate school funding solely to the Legislature. We further reasoned that the relationship between school funding and educational quality involved policy determinations that were inappropriate for judicial resolution.[79] We therefore held in *Nebraska Coalition* that adequate funding of public schools is not a judicially enforceable right under the free instruction clause.

The Coalition cites decisions in which state courts have held their state constitutions provide a fundamental right to equal educational funding. We conclude, however, that these decisions are unpersuasive. Two of these states have education

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[74] *San Antonio School District v. Rodriguez, supra* note 41, 411 U.S. at 41.

[75] See, e.g., *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

[76] *Lujan v. Colorado State Bd. of Educ., supra* note 63, 649 P.2d at 1018.

[77] *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7.

[78] *Id.*

[79] Accord *San Antonio School District v. Rodriguez, supra* note 41.

articles that are more comprehensive[80] than the "paucity of standards" contained in Nebraska's free instruction clause.[81] Another state constitution contained provisions that the court construed to require equal distribution of school funds,[82] which are similar to provisions the people of Nebraska omitted or deleted from our constitution.[83] The Coalition also cites a decision by the Alabama Supreme Court.[84] But we have noted that the Alabama Supreme Court changed course in 2002, holding that a constitutional challenge to school funding presented a nonjusticiable issue and dismissing the action.[85]

It is true that the California and North Dakota Supreme Courts have determined their state constitutions provide a fundamental right to equal educational funding despite education articles that required only a free public school system.[86] These decisions, however, are contrary to the greater weight of authority[87] and, more important, they are contrary to our decision in *Nebraska Coalition*.

[26] In *Nebraska Coalition*, we implicitly concluded that the free instruction clause does not confer a fundamental right to adequate funding of schools, or we would have decided the

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[80] See, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979); *Washakie Co. Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980).

[81] See *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7, 273 Neb. at 552, 731 N.W.2d at 180.

[82] *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977).

[83] See *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7.

[84] *Opinion of the Justices*, 624 So. 2d 107 (Ala. 1993).

[85] *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7, citing *Ex Parte James*, 836 So. 2d 813 (Ala. 2002).

[86] *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). See, also, *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); *Bismarck Public School Dist. 1 v. State*, 511 N.W.2d 247 (N.D. 1994).

[87] See, *Lujan v. Colorado State Bd. of Educ., supra* note 63; *McDaniel v. Thomas, supra* note 63; *Idaho Schools for Equal Educ. v. Evans, supra* note 63; *Lewis E. v. Spagnolo, supra* note 63; *Hornbeck v. Somerset Co. Bd. of Educ., supra* note 62; *Levittown USFD v Nyquist, supra* note 63; *Bd. of Edn. v. Walter, supra* note 63; *Olsen v. State ex rel Johnson, supra* note 63; *City of Pawtucket v. Sundlun, supra* note 63.

issue. We also noted that the U.S. Supreme Court had held open the possibility that some 14th Amendment claims would be nonjusticiable because they are too enmeshed with one of the political question tests. That is the case here. The free instruction clause does not mandate equal funding of schools. As noted, there is no uniformity clause in the Nebraska Constitution, and there is no other provision specifying the manner or amount of school funding that must be provided for schools. Instead, the Nebraska Constitution commits funding decisions to the Legislature.[88] The Legislature, in turn, has entrusted local budget decisions to the school boards.[89] Holding that the Nebraska Constitution provides a fundamental right to equal school funding of schools would affect discretionary legislative decisions at both local and state levels. So, the same prudential considerations that weighed against interfering with the Legislature's determinations of adequate school funding are implicated by the Coalition's equal funding claim. We conclude that the free instruction clause does not provide a fundamental right to equal and adequate funding of schools.

[27,28] As noted, the Legislature has statutorily delegated to school boards the duty to determine which schools to operate.[90] School boards also have authority to determine, with the consent and advice of the State Department of Education, which grades to offer at schools.[91] In constitutional challenges to school funding decisions, we conclude that the appropriate level of scrutiny is whether the challenged school funding decisions are rationally related to a legitimate government purpose.

(d) The School Board's Actions Were Rationally Related to a Legitimate Government Purpose

The Coalition does not contest whether the school board's actions were rationally related to a legitimate government interest. The thrust of its argument is that the Nebraska Constitution

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[88] See *Nebraska Coalition for Ed. Equity v. Heineman, supra* note 7.

[89] See *Werth v. Buffalo County Board of Equalization*, 187 Neb. 119, 188 N.W.2d 442 (1971).

[90] § 79-1094.

[91] § 79-526.

provides a fundamental right to equal and adequate educational funding, an argument which we reject. The school district contends that its actions to reduce costs, including adjusting its classes so that small classes could be combined, were rationally related to its goal of providing an education for its students. We agree.

At the temporary injunction hearing, Forsberg, the superintendent, was asked during cross-examination why the board had not chosen to save money by transporting the students from Lyons to Decatur. He responded that the board had considered that possibility. But because the secondary school was at Lyons, the Lyons facility had to be heated and operated anyway. He stated that because there were more students at Lyons than at Decatur, two busses, instead of one, would be required to transport students from Lyons to Decatur. He also said that the remaining students at Decatur in grades kindergarten through three would be taught in one "K-3 center," allowing the district to reduce staff costs and reduce heating and maintenance costs, for a total savings of about $200,000. Because the school board was confronted with increasing budget deficits, we conclude that its actions were rationally related to its legitimate goal of providing an education to all children in the district. Because the Coalition has failed to show that a heightened level of scrutiny applies to the school district's decisions or that those decisions were not rationally related to a legitimate government purpose, its substantive due process claim must fail.

4. Equal Protection

[29-32] The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.[92] And we have specifically held that the action of a school board may implicate the Equal Protection Clause.[93] The Equal Protection Clause requires the government to treat similarly

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[92] *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006).

[93] *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992), citing *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S. Ct. 2941, 61 L. Ed. 2d 666 (1979).

situated people alike.[94] It does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.[95]

[33,34] If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the classification with strict scrutiny.[96] A suspect class is one that has been "'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection from the majoritarian political process.'"[97] The Coalition does not allege that the school district discriminated against a "suspect class." And we have already determined that the Nebraska Constitution does not provide a fundamental right to equal and adequate funding of schools.

[35,36] When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.[98] Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.[99]

[37,38] "[T]he Equal Protection Clause does not require absolute equality or precisely equal advantages."[100] Social and economic measures violate the Equal Protection Clause only when the varying treatment of different groups or persons is

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[94] *Id.*, citing *Nordlinger v. Hahn*, 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

[95] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

[96] *Id.* See *State v. Senters, supra* note 38.

[97] *State v. Michalski*, 221 Neb. 380, 386, 377 N.W.2d 510, 515 (1985), quoting *San Antonio School District v. Rodriguez, supra* note 41.

[98] See, *Maack v. School Dist. of Lincoln, supra* note 93, citing *Nordlinger v. Hahn, supra* note 94.

[99] *Smith v. City of Chicago*, 457 F.3d 643 (7th Cir. 2006). Compare *State v. Senters, supra* note 38.

[100] *San Antonio School District v. Rodriguez, supra* note 41, 411 U.S. at 24.

so unrelated to the achievement of any legitimate purposes that a court can only conclude that the Legislature's actions were irrational.[101]

As we did in our substantive due process analysis, we conclude that the school board has shown a rational basis for its actions. Therefore, the Coalition's equal protection claim must similarly fail.

V. CONCLUSION

We conclude that the district court did not err in determining that the voting restrictions placed in the reorganization petition were unenforceable under Neb. Rev. Stat. § 79-402 (Reissue 1981). The school board of the reorganized district, therefore, did not breach the reorganization petition by failing to obtain the specified votes before moving grades four through six from the Decatur school to the Lyons school.

We further conclude that the school board's actions did not violate the Coalition members' substantive due process or equal protection rights. The free instruction clause of the Nebraska Constitution does not confer a fundamental right to equal and adequate funding for schools. The Coalition has not claimed that the school board's actions discriminated against a suspect class. Thus, under the rational basis test, the school district, confronted with increasing budget deficits, has shown that its actions were rationally related to its legitimate goal of providing an education to all children in the district.

AFFIRMED.

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[101] *Gourley v. Nebraska Methodist Health Sys.*, *supra* note 95; *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996).

STATE OF NEBRASKA, APPELLEE, V. ROBERT J. NELSON, APPELLANT.
739 N.W.2d 199

Filed October 5, 2007. No. S-06-449.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.

2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
4. ____: ____: ____. For the constitutionality of a statute to be genuinely involved in an appeal, within the meaning of Neb. Rev. Stat. § 24-1106(1) (Reissue 1995), the constitutional issue must be real and substantial; not merely colorable.
5. **Constitutional Law: Claims.** For a constitutional claim to be "real and substantial," the contention must disclose a contested matter of right, which presents a legitimate question involving some fair doubt and reasonable room for disagreement.
6. **Constitutional Law: Statutes: Rules of the Supreme Court: Notice: Appeal and Error.** A litigant presenting a real and substantial challenge to the constitutionality of a statute is still required by Neb. Ct. R. of Prac. 9E (rev. 2006) to provide notice of that constitutional issue so that a preliminary inquiry into the claim may be conducted, and so the Nebraska Supreme Court can exercise its authority to regulate the dockets of the appellate courts of this state.
7. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must first show that counsel's performance was deficient and second, that this deficient performance actually prejudiced his or her defense.
8. ____: ____. To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
9. **Effectiveness of Counsel: Proof: Words and Phrases.** To prove prejudice for a claim of ineffective assistance of counsel, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Petition for further review from the Court of Appeals, CARLSON, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Douglas County, PETER C. BATAILLON, Judge. Judgment of Court of Appeals affirmed.

Daniel W. Ryberg for appellant.

Jon Bruning, Attorney General, James D. Smith, and, on brief, Susan J. Gustafson for appellee.

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

GERRARD, J.

NATURE OF CASE

Robert J. Nelson was convicted of making terroristic threats in violation of Neb. Rev. Stat. § 28-311.01 (Reissue 1995). On appeal, Nelson argued that his trial counsel was ineffective for failing to challenge the constitutionality of § 28-311.01. The Nebraska Court of Appeals determined that it did not have jurisdiction to decide whether Nelson's trial counsel was ineffective because in order to do so, it would be required to determine the constitutional validity of the statute, and the Nebraska Supreme Court has exclusive jurisdiction to decide cases involving the constitutionality of a statute.[1] The issue presented in this appeal is whether the Court of Appeals had jurisdiction to decide Nelson's ineffective assistance of counsel claim.

STATEMENT OF FACTS

Nelson had been in a relationship with his girlfriend for approximately 4 years. Nelson's girlfriend testified that in June 2005, she and Nelson were living together, but had agreed, at her urging, to end their relationship. On the morning of June 11, Nelson woke his girlfriend up and began talking about how he did not want the relationship to end. His girlfriend testified that she got up to get dressed so she could leave the apartment, but Nelson began grabbing at her clothes in an attempt to stop her from getting dressed and leaving. Nelson's girlfriend explained that she tried to use the desk telephone to call the 911 emergency dispatch service, but Nelson disabled the desk telephone and later smashed her cellular telephone against the wall.

Nelson's girlfriend testified that she was able to get dressed, but as she did so, Nelson returned to the room with a steak knife in his hand. She testified that Nelson "jamm[ed] the knife into the TV" and told her that this was "the date that [she] was

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[1] See, Neb. Const. art. V, § 2; Neb. Rev. Stat. § 24-1106(1) (Reissue 1995).

going to die, and the only way [she] was going to leave this apartment was in a body bag." Nelson's girlfriend testified that she thought Nelson was going to kill her. Eventually, she was able to leave and contact the police.

Nelson was eventually charged with, and convicted of, making terroristic threats in violation of § 28-311.01 and use of a deadly weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1995). Nelson, represented by different counsel, appealed his convictions to the Court of Appeals. Nelson argued that his trial counsel provided ineffective assistance of counsel for failing to object to the constitutionality of § 28-311.01(1). Specifically, Nelson contended that § 28-311.01(1) is unconstitutional in that it fails to define the term "terror." Nelson also argued that his trial counsel was ineffective for failing to object to certain definitions given in the jury instructions.

Upon filing his direct appeal brief, Nelson also filed a rule 9E[2] notice claiming that this case involved the constitutionality of § 28-311.01. This court did not remove the case to its docket, and the appeal was submitted to the Court of Appeals. In a memorandum opinion filed on February 7, 2007, the Court of Appeals affirmed Nelson's convictions and sentences, but did not address Nelson's argument that his trial counsel was ineffective for failing to object to the constitutionality of § 28-311.01. The Court of Appeals explained that it could not "determine whether Nelson's trial counsel was ineffective in failing to raise the constitutionality of § 28-311.01(1) because doing so would require [the Court of Appeals] to determine the constitutionality of a statute, which [it] cannot do."

Nelson petitioned for further review, which we granted. We limited our review to the issue of whether the Court of Appeals erred in concluding that it did not have jurisdiction to address Nelson's claim that his trial counsel was ineffective for failing to challenge the constitutionality of § 28-311.01(1).

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[2] Neb. Ct. R. of Prac. 9E (rev. 2006).

ASSIGNMENT OF ERROR

Nelson assigns, restated, that the Court of Appeals erred in declining to address his allegation that his trial counsel was ineffective for failing to object to the constitutionality of § 28-311.01(1).

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[3]

[2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[4] an appellate court reviews such legal determinations independently of the lower court's decision.[5]

[3] The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.[6]

ANALYSIS

JURISDICTION OF COURT OF APPEALS

Pursuant to § 24-1106(1), cases "involving the constitutionality of a statute" bypass the Court of Appeals and are taken directly to the Nebraska Supreme Court.[7] The issue presented in this appeal is whether the Court of Appeals has jurisdiction to decide an ineffective assistance of counsel claim where the allegation is based on trial counsel's failure to challenge the constitutionality of a statute. Stated another way, the question

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[3] *State v. Merrill*, 273 Neb. 583, 731 N.W.2d 570 (2007).

[4] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[5] *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

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

[7] See, also, Neb. Const. art. V, § 2.

presented is whether, under limited circumstances, an appellate challenge to the constitutionality of a statute may be within the jurisdiction of the Court of Appeals.

Under the Nebraska Constitution, an act of the Legislature cannot be declared unconstitutional, except by the concurrence of five judges of the Nebraska Supreme Court.[8] The obvious intent of § 24-1106(1) was to bring such constitutional issues to the Supreme Court. But we do not read § 24-1106(1) to require that all constitutional arguments, no matter how insubstantial, bypass review by the Court of Appeals.

[4,5] Instead, we conclude that the mere assertion that a statute may be unconstitutional does not automatically deprive the Court of Appeals of jurisdiction over the case. To conclude otherwise would amount to ceding the regulation of our docket, and that of the Court of Appeals, to the unsupported allegations of litigants. We find that for the constitutionality of a statute to be genuinely "involved" in an appeal, "'[t]he constitutional issue must be real and substantial; not merely colorable.'"[9] For a constitutional claim to be "real and substantial," the contention must disclose a contested matter of right, which presents a legitimate question involving some fair doubt and reasonable room for disagreement.[10]

[6] If a preliminary inquiry reveals that the contention is so obviously unsubstantial or insufficient, either in fact or in law, as to be plainly without merit, the claim is merely colorable. For example, where a law has been held to be constitutional by this court, as against the same attack being made, the case merely requires an application of unquestioned and unambiguous constitutional provisions, and jurisdiction of the appeal lies in the Court of Appeals.[11] To the extent that *Metro Renovation v.*

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[8] *Id.*

[9] *Wright v. Missouri Dept. of Social Services*, 25 S.W.3d 525, 528 (Mo. App. 2000). See, also, *Schumann v. Mo. Highway & Transp. Com'n*, 912 S.W.2d 548 (Mo. App. 1995).

[10] See *Wright v. Missouri Dept. of Social Services, supra* note 9.

[11] See *Zepp v. Mayor &c. City of Athens*, 255 Ga. 449, 339 S.E.2d 576 (1986). See, also, *Brooks v. Meriwether Memorial Hosp. Auth.*, 246 Ga. App. 14, 539 S.E.2d 518 (2000).

State[12] suggests otherwise, it is disapproved. A litigant presenting a real and substantial challenge to the constitutionality of a statute is still required, by rule 9E, to provide notice of that constitutional issue so that a preliminary inquiry into the claim may be conducted, and so this court can exercise its authority to regulate the dockets of the appellate courts of this state.

We conclude that the Court of Appeals had the authority, in this case, to consider Nelson's constitutional claim. As explained below, Nelson's claim is foreclosed by this court's precedent and is plainly without merit. The Court of Appeals erred in declining to address his argument. But because this is the first instance in which we have held that the Court of Appeals has jurisdiction to determine, in limited circumstances, whether the constitutionality of a statute is implicated and because Nelson's argument is meritless, the court's error was harmless.

Merits of Nelson's Ineffective Assistance of Counsel Claim

[7,8] While the Court of Appeals could have decided the merits of Nelson's ineffective assistance of counsel claim, it did not, and for the sake of judicial economy, we choose to do so here.[13] Nelson argues that his trial counsel was ineffective for failing to challenge the constitutionality of § 28-311.01. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[14] the defendant must first show that counsel's performance was deficient and second, that this deficient performance actually prejudiced his or her defense.[15] To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.[16]

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[12] *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996).

[13] See, *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003).

[14] *Strickland v. Washington, supra* note 4.

[15] See *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

[16] See *id.*

[9] To prove prejudice, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[17]

Nelson contends that § 28-311.01 is unconstitutional because it fails to define the term "terror." As we read Nelson's argument, it appears he is challenging both subsections (1)(a) and (c) of the statute, as those are the only subsections that include a form of the word "terror." Section 28-311.01 provides in relevant part:

> (1) A person commits terroristic threats if he or she threatens to commit any crime of violence:
>
> (a) With the intent to terrorize another; [or]
>
> . . . .
>
> (c) In reckless disregard of the risk of causing such terror[.]

Both subsections (1)(a) and (c) have been subject to constitutional attacks in the past and have been upheld by this court as constitutional. In *State v. Schmailzl*,[18] § 28-311.01 was challenged as unconstitutionally vague and overbroad in that it failed to define what conduct constituted a threat. We rejected this argument and held that "the terroristic threats statute, § 28-311.01(1)(a) . . . is constitutional."[19]

Similarly, in *State v. Bourke*,[20] we held that § 28-311.01(1)(c) was constitutional. We concluded that "[s]ubsection (1)(c) of § 28-311.01 defines the crime with enough certainty [and] '"with sufficient definiteness and . . . ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. . . ."'"[21] And again, in *State v. Mayo*,[22] we held that "as used in § 28-311.01(1)(c),

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[17] *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[18] *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993).

[19] *Id.* at 742, 502 N.W.2d at 468.

[20] *State v. Bourke*, 237 Neb. 121, 464 N.W.2d 805 (1991).

[21] *Id.* at 125, 464 N.W.2d at 808.

[22] *State v. Mayo*, 237 Neb. 128, 129, 464 N.W.2d 798, 799 (1991).

the phrase 'reckless disregard of the risk of causing such terror or evacuation' is not unconstitutionally vague."

Also relevant to our analysis, although involving a different statute, is *State v. Holtan*.[23] In *Holtan*, we addressed a claim that the phrase "'serious assaultive or terrorizing criminal activity'" is unconstitutionally vague and indefinite.[24] We concluded, among other things, that the word "terrorizing" was a word in common usage with a meaning well fixed and generally clearly understood.[25]

We conclude, as dictated by our precedent, that "terror" and "terrorize" are words of common usage and meaning capable of being readily understood by an individual of common intelligence. Accordingly, we reaffirm our holding that § 28-311.01 is not unconstitutionally vague. The statute was sufficiently clear to make Nelson aware that his conduct, as described above, was unlawful. Nelson's counsel was not ineffective for failing to raise an argument that has no merit, nor was Nelson prejudiced by his counsel's failure to raise a meritless argument.

CONCLUSION

Although the Court of Appeals erred in not reaching the merits of Nelson's ineffective assistance of counsel claim, Nelson's claim is without merit and the Court of Appeals correctly affirmed Nelson's convictions and sentences. Although our reasoning differs from that of the Court of Appeals, the court's ultimate decision was correct, and accordingly, we affirm.[26]

AFFIRMED.

Connolly, J., participating on briefs.

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[23] *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

[24] *Id.* at 546, 250 N.W.2d at 879.

[25] *Id.* See, also, *Masson v. Slaton*, 320 F. Supp. 669 (N.D. Ga. 1970); *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972); *Com. v. Green*, 287 Pa. Super. 220, 429 A.2d 1180 (1981).

[26] See *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

DIANE C. SWEEM, APPELLANT, V. AMERICAN FIDELITY LIFE ASSURANCE COMPANY, A CORPORATION, APPELLEE.

739 N.W.2d 442

Filed October 5, 2007. No. S-06-870.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts.** An insurance policy is a contract, and its terms provide the scope of the policy's coverage.
4. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
5. **Trial: Juries: Evidence.** Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.
6. **Summary Judgment.** Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard J. Schicker for appellant.

William M. Lamson, Jr., and Craig F. Martin, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

STEPHAN, J.

American Fidelity Life Assurance Company (American Fidelity) discontinued benefits it had been paying to Diane C. Sweem under a group disability income policy, based upon its determination that Sweem was employable in some capacity

and therefore no longer totally disabled under the terms of the policy. Sweem, contending that she is still totally disabled and unable to work, brought this action for benefits under the policy and other relief based on multiple claims designated as separate "causes of action." The district court for Douglas County entered summary judgment in favor of American Fidelity, and Sweem perfected this appeal. We conclude that there are genuine issues of material fact which preclude summary judgment on Sweem's breach of contract claim, and therefore reverse, and remand for further proceedings. We affirm the judgment of the district court with respect to Sweem's remaining claims.

BACKGROUND

While employed as a teacher for the Fort Calhoun Public School District, Sweem enrolled in a group long-term disability income insurance policy offered through the school district and underwritten by American Fidelity. The policy included the following provisions:

> 1.09 "Total Disability" (or Totally Disabled) for the first twelve (12) months of disability means that the Insured is disabled and completely unable to do each and every duty of his employment. After that, "Total Disability" means the Insured is disabled and completely unable to engage in any occupation for wage or profit for which he is reasonably qualified by training, education, or experience.
>
> . . . .
>
> 3.01 Monthly Disability Benefits will be paid if an Insured is Totally Disabled as defined in Paragraph 1.09. . . . Benefits will be paid for each month Total Disability continues beyond the Elimination Period. No such benefits will be paid beyond the Maximum Disability Period stated in the Schedule [of Benefits].

The "twelve (12) months of disability" referred to in paragraph 1.09 was subsequently amended to "sixty (60) months." The maximum disability period is defined in the policy as "To age 65 or 5 years, whichever is greater, but not beyond age 70." Sweem was born on May 23, 1957.

In 1990, Sweem was injured in an accident unrelated to her work. She sought treatment from several health care providers,

including Dr. Michael McDermott, an oral and maxillofacial surgeon. McDermott examined Sweem and determined that she suffered from muscle spasms and a displaced disk in the temporomandibular joint of her jaw. McDermott initially recommended a course of conservative treatment and outpatient arthroscopic surgery. When this failed to provide satisfactory relief, McDermott performed open joint surgery. Sweem subsequently underwent additional surgical procedures.

In May 1992, Sweem filed a claim for disability benefits under the American Fidelity policy. On the initial claim form, Sweem identified only McDermott as her treating physician. McDermott completed the attending physician's portion of the claim form. Responding to the question of whether Sweem was "continuously totally disabled," McDermott indicated that she was unable to work from April 3, 1992, until "further notice." In July, American Fidelity approved Sweem's claim and began paying disability income benefits as of April 8.

Also in July 1992, Sweem completed a continuing disability benefits claim form provided by American Fidelity. In the attending physician's portion of that form, McDermott indicated that Sweem was not "totally disabled." However, he underlined the word "totally" on the form and below it wrote "partial yes." In August, McDermott completed another attending physician's statement form at the request of American Fidelity. In responding to the question of whether Sweem was "totally disabled," McDermott marked "Yes" but wrote "partially."

As a condition of receiving benefits, Sweem continued to complete continuing disability benefits forms as submitted to her by American Fidelity. McDermott periodically submitted an attending physician's statement on a form supplied by American Fidelity. On a form dated December 21, 1992, McDermott gave an affirmative response to the question whether Sweem was totally disabled for her regular occupation, but indicated that she was not totally disabled "for any occupation." McDermott responded similarly to these questions on subsequent continuing disability claim forms.

In 2001, American Fidelity began to question Sweem's eligibility for disability benefits. In October 2001, American Fidelity asked McDermott to complete a physical capacities

evaluation of Sweem on a form which it provided. On that form, McDermott indicated that in "an 8 hour workday," Sweem could sit for 7 hours, stand for 6 hours, and walk for 5 hours. McDermott also noted that Sweem could lift and carry some amount of weight and was, generally, not significantly restricted from other physical activities. In July 2002, an American Fidelity case manager wrote a letter to McDermott, asking, "[D]o you agree that . . . Sweem can return to work in another occupation?" McDermott gave an affirmative response, subject to the limitation that she was not to lift more than 25 pounds overhead.

In August 2002, American Fidelity commissioned a vocational evaluation and skills assessment of Sweem. The vocational consultant concluded that based on Sweem's education and experience and McDermott's evaluation, she had the "physical ability to resume employment in a position less physically demanding than her previous job." In September, the same consultant compiled a labor market survey in which she determined that there were nonteaching employment opportunities for Sweem within the Omaha, Nebraska, area. American Fidelity terminated Sweem's disability benefits on November 13, 2002.

Sweem commenced this action. In her operative amended complaint, she sought recovery based upon theories of breach of contract, bad faith, and intentional and negligent infliction of emotional distress. American Fidelity answered, denying Sweem's allegations with respect to liability and asserting several affirmative defenses.

American Fidelity then moved for summary judgment. The district court conducted a hearing at which it received evidence, including McDermott's deposition and affidavits of an American Fidelity employee and attached portions of American Fidelity's claim file pertaining to Sweem. In opposition to the motion, Sweem offered her own affidavit and deposition, another deposition given by McDermott, and the deposition of the American Fidelity employee. This evidence was received without objection. Sweem also offered the affidavit of Jane Yaffe-Rowell, to which was attached Yaffe-Rowell's employability assessment report pertaining to Sweem dated March 21, 2006, signed by her and Karen Stricklett, president of Stricklett & Associates,

Inc. American Fidelity asserted foundational and hearsay objections to this evidence. The court overruled the objections and received the evidence, but indicated that it would not consider any hearsay contained therein. In her report, Yaffe-Rowell, a rehabilitation consultant associated with Stricklett & Associates, stated that based upon the employability assessment which she performed in March, it was her opinion "with a reasonable degree of vocational certainty" that from November 13, 2002, to the present, Sweem was physically unable to perform the requirements of her previous work "or any other work that exists in the local or national economy."

In an order granting American Fidelity's motion for summary judgment and dismissing Sweem's complaint, the district court concluded:

> At the time the benefits were terminated by [American Fidelity], the only reasonable evidence available to [it] was the evidence previously considered on the initial Motion for Summary Judgment, but this did not include the March 21, 2006 Employability Assessment done by [Sweem's rehabilitation consultants]. However, that assessment is irrelevant to the issues raised by [Sweem] in the Second Amended Complaint as it only became available to [American Fidelity] three [and] one-half years after the original benefits were terminated. Therefore, [that evidence] cannot constitute a basis for a determination that [American Fidelity] on November 13, 2002, breached the contract with [Sweem] or that the termination was done in bad faith or in such a way as it negligently or intentionally inflicted emotional distress upon . . . Sweem. The evidence upon which the termination of benefits was based left no reasonable issue as to whether or not [American Fidelity] should have terminated them.

Sweem perfected this appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts.[1]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Sweem assigns, restated and reordered, that the district court erred (1) in failing to consider the report prepared by Sweem's rehabilitation consultants, (2) in finding that the insurance policy limited the time in which Sweem could submit evidence of her continued disability to American Fidelity after it denied benefits, and (3) in finding that no genuine issue of material fact existed on whether Sweem was totally disabled.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3]

ANALYSIS

Breach of Contract Claim

[3] An insurance policy is a contract, and its terms provide the scope of the policy's coverage.[4] Sweem's claim that American Fidelity breached its contract by discontinuing payment of disability benefits due under the policy rests upon a single question of fact: whether she was "totally disabled" as defined by the policy when American Fidelity stopped paying her disability benefits in November 2002. Because more than 60 months had elapsed from the commencement of disability, Sweem would be considered totally disabled under the policy if she were "completely unable to engage in any occupation for wage or profit for which [s]he is reasonably qualified by training, education, or experience."

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[2] *Stevenson v. Wright*, 273 Neb. 789, 733 N.W.2d 559 (2007).

[3] *Id.*

[4] *Sayah v. Metropolitan Prop. & Cas. Ins. Co.*, 273 Neb. 744, 733 N.W.2d 192 (2007).

[4-6] We have often noted that summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.[5] Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.[6] But where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.[7]

As the party moving for summary judgment, American Fidelity was required to produce enough evidence to demonstrate that it was entitled to judgment if the evidence were uncontroverted at trial.[8] This required a showing that Sweem was able "to engage in any occupation for wage or profit for which [s]he is reasonably qualified by training, education, or experience," and therefore not "totally disabled" as defined by the policy. American Fidelity met this prima facie burden by offering McDermott's statements, indicating that Sweem was not totally disabled "for any occupation," and the vocational evaluation and labor market survey, indicating that Sweem was physically able to work in various available positions which were less physically demanding than her former position.

The burden then shifted to Sweem to produce evidence showing the existence of a genuine issue of material fact that would prevent judgment as a matter of law.[9] She offered her own affidavit in which she stated that she suffered from degenerative bone and joint disease, that she was unable to have a conversation for more than one-half hour without her jaw's locking and severe

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[5] *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005).

[6] *Bates v. Design of the Times, Inc.*, 261 Neb. 332, 622 N.W.2d 684 (2001); *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000).

[7] *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006); *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000).

[8] *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006); *NEBCO, Inc. v. Adams*, 270 Neb. 484, 704 N.W.2d 777 (2005).

[9] *Id.*

pain in her jaw, and that she was unable to leave her home for more than 1 hour at a time. She stated that she was "not able to work at any employment." In her deposition, Sweem testified that she continues to have muscle spasms and "lock ups" in her jaw and is unable to blink one eye. She testified that she was always in some pain and can write or type for only short periods of time. She further testified that she sleeps only 3 to 4 hours at night and usually takes naps during the day to make up for lost sleep. She testified that she had never considered applying for a sedentary job because no physician had specifically told her that she could perform such work.

Sweem also offered a deposition of McDermott in which he described the injury to Sweem's temporomandibular joint as "one of the more severe types of injuries that I've seen in almost 30 years." He testified that while he had completed the attending physician's statements submitted to American Fidelity to the best of his ability, he had not determined whether Sweem could perform any particular job and did not feel qualified to make such determinations.

Sweem also offered the affidavit of rehabilitation consultant Yaffe-Rowell and the attached employability assessment dated March 21, 2006, signed by Yaffe-Rowell and Stricklett. As noted, Yaffe-Rowell concluded "with a reasonable degree of vocational certainty" that Sweem "continues to be incapable of performing any of her previous work or any other work that exists in the local or national economy." Although it received this exhibit over foundational and hearsay objections, the district court subsequently disregarded it as "irrelevant" because it was not available to American Fidelity at the time it discontinued Sweem's disability benefits. We agree with Sweem that this was error. While the fact that American Fidelity did not have this document when it discontinued Sweem's benefits may weigh against Sweem's claims that it acted negligently or in bad faith in doing so, it is clearly relevant to the dispositive factual issue in Sweem's breach of contract claim, i.e., whether she remained totally disabled, as defined in the policy, at the time of discontinuation of her benefits.

In urging that the district court properly disregarded this evidence, American Fidelity argues that Sweem "closed the

administrative record when she chose to file suit."[10] It argues that although this is not a case arising under the Employee Retirement Income Security Act of 1974 (ERISA),[11] ERISA principles limiting or prohibiting consideration of evidence which was not considered by a plan administrator are "logically applicable."[12] American Fidelity further argues that Sweem's counsel was invited to submit additional evidence after disability benefits were discontinued, but chose not to do so and filed suit instead.

We find no merit in these arguments. We discern no good reason to apply ERISA principles to this common-law action to recover benefits claimed due under an insurance policy, and American Fidelity directs us to no other state court decision which has done so. There is no claim that Sweem failed to comply with the notice of claim or proof of loss provisions of the policy. Indeed, based upon the information Sweem and her physicians provided, American Fidelity paid disability benefits for more than 10 years. It then discontinued such benefits, based in part upon the opinion of a vocational rehabilitation expert whom it retained. Sweem did not accept this determination, filed this action, and retained an expert whose opinion differed from that of American Fidelity's expert. We find nothing in the insurance policy or the applicable law which precluded her from doing so. The Yaffe-Rowell affidavit and report should have been considered by the trial court with respect to Sweem's breach of contract claim. That report, together with Sweem's affidavit and deposition testimony, established the existence of a genuine issue of material fact as to whether Sweem was totally disabled as defined by the policy when American Fidelity discontinued its payment of benefits. In circumstances such as these, where there is conflicting evidence on the question of whether an insured is "disabled" within the meaning of an insurance policy, we have held that neither party is entitled to summary judgment.[13] The

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[10] Brief for appellee at 9.

[11] See 29 U.S.C. §§ 1001 to 1461 (2000 & Supp. IV 2004).

[12] Brief for appellee at 9.

[13] *Knudsen v. Mutual of Omaha Ins. Co.*, 257 Neb. 912, 601 N.W.2d 725 (1999).

district court erred in entering summary judgment for American Fidelity on this claim.

OTHER CLAIMS

The entry of summary judgment also resulted in dismissal of Sweem's claims based upon alleged bad faith, as well as negligent and intentional infliction of emotional distress. Sweem did not assign or argue error with respect to the dismissal of these claims. Accordingly, we find no error in the dismissal of these claims.

CONCLUSION

Because Sweem does not raise any issue on appeal with respect to the dismissal of her claims based upon bad faith, negligent infliction of emotional distress, and intentional infliction of emotional distress, we affirm the entry of summary judgment as to those claims. However, for the reasons discussed, we conclude that the district court erred in entering summary judgment in favor of American Fidelity with respect to Sweem's breach of contract claim. We therefore remand that cause to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BETTY L. THORSON, APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, NANCY MONTANEZ, DIRECTOR, APPELLEE.

740 N.W.2d 27

Filed October 19, 2007. No. S-06-223.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

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

Steven E. Gunderson, of Gunderson Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, John L. Jelkin, and Douglas D. Dexter for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Betty L. Thorson applied with the Nebraska Department of Health and Human Services (DHHS) for medical assistance benefits known as Aid to the Aged, Blind, and Disabled (AABD) and Medicaid. DHHS determined that based on the value of Thorson's irrevocable trust for which Thorson is the beneficiary, Thorson was ineligible for AABD and Medicaid benefits.

BACKGROUND

On December 2, 1989, Thorson executed the "Irrevocable Betty Lou Thorson Trust" (the Trust). Thorson is the grantor and beneficiary of the corpus of the Trust, and her son is the trustee. The Trust was established as an irrevocable instrument. It authorizes the trustee, in his sole and absolute discretion, to pay to or apply for the benefit of Thorson such amounts from the principal or income of the Trust as he deems necessary or advisable for the satisfaction of Thorson's special needs. Special needs are referred to in the Trust as "the requisites for maintaining [Thorson's] good health, safety and welfare when, in the sole and absolute discretion of the Trustee, such requisites are not being adequately provided by any public agency, office or department of any State, or of the United States." The Trust further provides that the express purpose of the Trust is that "the

income and principal hereof be used only to supplement other benefits received by or available to [Thorson]."

On December 19, 2003, Thorson applied for AABD and Medicaid benefits with DHHS. Thorson had previously been denied assistance benefits on four prior occasions, the last occasion because her resources exceeded the program standard. Attached to Thorson's application for assistance was an accounting of the Trust's assets, which totaled $69,740.68.

After an administrative hearing on the matter, the director of DHHS affirmed DHHS' denial of Thorson's application for benefits. The director of DHHS specifically found that the finding that Thorson was ineligible for AABD and Medicaid benefits due to resources in the Trust was correct.

Thorson filed a petition for review of the DHHS decision pursuant to the Administrative Procedure Act (APA). Thorson alleged that the determination that her resources exceed the program's standard is unsupported by the evidence and is contrary to law. The district court affirmed the ruling of the director, concluding that it was proper for DHHS to consider the Trust as an available asset for purposes of determining Thorson's assistance eligibility. Thorson filed this timely appeal.

ASSIGNMENT OF ERROR

Thorson asserts that the district court erred in determining that assets held in the Trust were available resources in determining Thorson's eligibility to receive AABD and Medicaid benefits.

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[1] When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent

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[1] *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006).

evidence, and is not arbitrary, capricious, or unreasonable.[2] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.[3]

ANALYSIS

We are presented in this appeal with the question of whether the corpus of an irrevocable, discretionary trust established in 1989 is a resource available to the beneficiary for purposes of determining the beneficiary's eligibility for AABD and Medicaid benefits.

In 1965, Congress enacted the Medicaid program as a cooperative federal-state program to provide health care to needy individuals.[4] Although participation in the Medicaid program is optional, once a state has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.[5] By enacting Neb. Rev. Stat. § 68-1018 et seq. (Reissue 2003, Cum. Supp. 2004 & Supp. 2005), Nebraska has elected to participate in the Medicaid program and has assigned to DHHS the responsibility of administering the program.[6]

Under federal law, a state participating in the Medicaid program must establish resource standards for the determination of eligibility.[7] These standards must take into account "'only such income and resources as are, as determined in accordance with standards prescribed by the Secretary [of the U.S. Department of Health and Human Services], available to the applicant or recipient.'"[8]

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[2] *Id.*

[3] *Id.*

[4] *Matter of Kindt*, 542 N.W.2d 391 (Minn. App. 1996). See, also, *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, *supra* note 1.

[5] *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, *supra* note 1.

[6] *Id.*

[7] *Id.*; 42 U.S.C. § 1396a(a)(17)(B) (2000).

[8] *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, *supra* note 1, 271 Neb. at 276, 710 N.W.2d at 643 (quoting § 1396a(a)(17)(B)).

Prior to 1986, an irrevocable trust was not considered an asset in determining whether an applicant was sufficiently needy to qualify for Medicaid benefits.[9] This created a situation whereby many individuals created trusts in order to shield their assets. And, as a result, many individuals were receiving Medicaid benefits when they had irrevocable trusts containing assets which would otherwise have made them ineligible for public assistance.[10]

"In 1986, Congress attempted to close the 'loophole' in the Medicaid act so that assets in certain trusts would be counted in determining whether a Medicaid applicant satisfied the maximum asset requirement."[11] The trusts set forth in the 1986 amendment were called Medicaid qualifying trusts.[12] The amendment established circumstances under which the assets of Medicaid qualifying trusts would be counted in determining the beneficiary's Medicaid eligibility.[13] The amendment was codified at § 1396a(k) and provided:

> (1) In the case of a medicaid qualifying trust . . . the amounts from the trust deemed available to a grantor . . . is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of the previous sentence, the term "grantor" means the individual referred to in paragraph (2).
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> (2) For purposes of this subsection, a "medicaid qualifying trust" is a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the

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[9] *Boruch v. Nebraska Dept. of Health & Human Servs.*, 11 Neb. App. 713, 659 N.W.2d 848 (2003).

[10] *Id.*

[11] *Id.* at 717, 659 N.W.2d at 852.

[12] See § 1396a(k) (1988).

[13] *Boruch v. Nebraska Dept. of Health & Human Servs., supra* note 9.

> distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion . . . .
>
> (3) This subsection shall apply without regard to—
>
> (A) whether or not the medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medical assistance under this subchapter; or
>
> (B) whether or not the discretion described in paragraph (2) is actually exercised.
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> (4) The State may waive the application of this subsection . . . where the State determines that such application would work an undue hardship.

In 1993, Congress repealed § 1396a(k) and adopted tighter restrictions under § 1396p(d). This amendment expanded the types of trusts which are counted in determining an applicant's Medicaid eligibility.[14] Under the plain language of § 1396p(d), if a person establishes an irrevocable trust with his or her assets and the individual is able, under any circumstances, to benefit from the corpus of the trust or income derived from the trust, the individual is considered to have formed a trust which is counted in the determination of Medicaid eligibility. The corpus of the trust is considered a resource available to the individual.[15] Although § 1396p(d) supersedes the Medicaid qualifying trust provisions set forth in § 1396a(k), § 1396p(d) does not apply to trusts created on or before August 10, 1993.[16] Thus, because the Trust in the present case was created in 1989, the 1993 amendment does not apply and we are governed by § 1396a(k). As explained by the Connecticut Supreme Court:

> Because the medicaid act specifically provides that states may base eligibility determinations *only* on income and resources that are "available" to the applicant within the meaning of the act; see 42 U.S.C. § 1396a (a)(17)(B); and

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[14] *Id.*

[15] *Id.*

[16] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611(e)(2)(C), 109 Stat. 627 (1993). See, also, *Ahern v. Thomas*, 248 Conn. 708, 733 A.2d 756 (1999).

> because § 1396p (d) does not apply to the trust at issue in the present case, the regulations and guidelines that implement § 1396p (d) also are not applicable to the trust at issue in the present case. Thus, we are not required to determine whether there are "any circumstances" under which the trust instrument provides the trustees with discretion to make payments of trust principal "for the benefit of" or "on behalf of" the plaintiff. Instead, all that we must determine is whether the trust instrument provides the trustees with discretion to distribute trust principal "*to the grantor*" within the meaning of § 1396a (k)(1).[17]

Under § 1396a(k)(2), an irrevocable trust established by an individual or his or her spouse is considered a Medicaid qualifying trust if the trustee could exercise any discretion in order to make payments from trust principal or income to the beneficiary.[18] In the present case, Thorson and DHHS agree that the Trust is a Medicaid qualifying trust.

Under § 1396a(k)(1), the amount of a Medicaid qualifying trust considered available to an applicant for purposes of determining eligibility for Medicaid benefits "'is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor.'"[19] The Nebraska Administrative Code similarly provides that for irrevocable trusts established before August 11, 1993, the maximum amount that could have been distributed from either the income or the principal is considered an available resource.[20]

Thus, in order to determine whether the Trust's assets are an available resource, we must determine the maximum amount of

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[17] *Ahern v. Thomas, supra* note 16, 248 Conn. at 721-22, 733 A.2d at 766 (emphasis in original).

[18] See, *Ramey v. Rizzuto*, 72 F. Supp. 2d 1202 (D. Colo. 1999); *Cohen v. Commissioner of the Division of Medical Assistance*, 423 Mass. 399, 668 N.E.2d 769 (1996).

[19] *Ahern v. Thomas, supra* note 16, 248 Conn. at 717, 733 A.2d at 763 (emphasis omitted).

[20] 469 Neb. Admin. Code, ch. 2, § 009.07A5f(1) (2005).

the Trust's assets the trustee could distribute under the terms of the Trust. DHHS argues that under the terms of the Trust, the trustee has the discretion to apply the trust income and corpus for the health, comfort, and support of Thorson where her needs are not being met by public assistance, which is the case here. Thorson, on the other hand, argues that the trustee does not have authority to do so. Thorson claims that the language of the Trust indicates the clear intent that the trust income and corpus be used only to supplement, not replace, other benefits received by or available to Thorson.

When the parties do not claim that the terms of a trust are unclear or contrary to the settlor's actual intent, the interpretation of a trust's terms is a question of law.[21] Regarding questions of law, an appellate court has an obligation to reach conclusions independent of those reached by the lower court.[22] Where the language of the trust is not clear, the rules of construction for interpreting a trust are applied; however, if the language clearly expresses the settlor's intent, the rules do not apply.[23] The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator.[24]

The terms of the Trust are clear. It provides in relevant part:

> (A) Except as otherwise limited herein, during the lifetime of the Grantor, the Trustee shall pay to or apply for the benefit of the Grantor such amounts from the principal or income of the Trust, up to the whole thereof, as the Trustee, in his sole and absolute discretion, may from time to time deem necessary or advisable for the satisfaction of the Grantor's special needs. . . .
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> As used in this Trust Agreement, "special needs" refers to the requisites for maintaining the Grantor's good health, safety and welfare when, in the sole and absolute discretion of the Trustee, such requisites are not being adequately provided by any public agency, office or department of

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[21] *In re Trust Created by Hansen, ante* p. 199, 739 N.W.2d 170 (2007).

[22] See *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[23] *In re Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W.2d 117 (2004).

[24] *Id.*

> any State, or of the United States. "Special needs" shall include, but not be limited to, the costs of shelter, medical and dental expenses (and/or insurance therefore), clothing costs, travel and entertainment charges, expenses incurred in connection with programs of training, education and treatment and charges for essential dietary needs.
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> (B) This Trust is created expressly to provide for the Grantor's extra and supplemental care, maintenance and support, in addition to and over and above that provided through benefits she otherwise receives or may receive from any local, State or federal government, or from any private agency. It is the express purpose of this Trust that the income and principal hereof be used only to supplement other benefits received by or available to the grantor.

At the time the Trust was created, both federal and state statutory schemes allowed Medicaid claimants to become eligible for public assistance by entering into trust agreements making their assets legally unavailable to them. We conclude, however, that the Trust in question does not satisfy those federal and state statutes. Under the terms of the Trust, the trustee is authorized to pay to or apply for the benefit of Thorson the entirety of the Trust's assets in order to supplement any benefits Thorson may receive from any local, state, or federal government. As explained by other courts, the statutory definition of a Medicaid qualifying trust in § 1396a(k) "'does not require that a trustee have unbridled discretion, but indicates that *any* discretion to distribute assets is sufficient.'"[25] We cannot say that a distribution of the Trust's assets to Thorson if she were to receive any governmental assistance would be an abuse of the trustee's discretion. Accordingly, we cannot say that DHHS was wrong in determining that the assets of the Trust were an available resource.

[4] Thorson also argues that DHHS may not deny her benefits until it has exhausted its judicial remedies to determine whether

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[25] See *Allen v. Wessman*, 542 N.W.2d 748, 752 (N.D. 1996) (emphasis in original) (quoting *Gulick v. Dept. of Health & Rehab. Serv.*, 615 So. 2d 192 (Fla. App. 1993)).

the trustee has abused his discretion by refusing to distribute assets from the Trust to Thorson. The district court did not address this argument. Because an appellate court will not consider an issue on appeal that was not passed upon by the trial court, we do not address Thorson's argument.[26]

CONCLUSION

For the reasons discussed above, we affirm the decisions of the district court and DHHS.

AFFIRMED.

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[26] *In re Estate of Nemetz*, 273 Neb. 918, 735 N.W.2d 363 (2007).

IN RE INTEREST OF XAVIER H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. KATIANNE S., APPELLANT AND CROSS-APPELLEE.

740 N.W.2d 13

Filed October 19, 2007. No. S-06-841.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Parental Rights: Proof.** Under Neb. Rev. Stat. § 43-292 (Reissue 2004), in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that the termination is in the child's best interests.
3. ____: ____. Until the State proves parental unfitness, the child and his or her parents share a vital interest in preventing erroneous termination of their natural relationship.
4. ____: ____. The fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness.
5. **Parental Rights.** The placement of a child outside the home for 15 or more of the most recent 22 months under Neb. Rev. Stat. § 43-292(7) (Reissue 2004) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum level of fitness.
6. **Constitutional Law: Parental Rights.** Whether termination of parental rights is in a child's best interests is not simply a determination that one environment or set of circumstances is superior to another, but it is instead subject to the overriding recognition that the relationship between parent and child is constitutionally protected.

7. **Parental Rights: Presumptions: Proof.** The presumption that the best interests of a child are served by reuniting the child with his or her parent is overcome only when the parent has been proved unfit.

Petition for further review from the Court of Appeals, CARLSON, MOORE, and CASSEL, Judges, on appeal thereto from the County Court for Dodge County, ROBERT O'NEAL, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Richard Register and Christina C. Boydston, of Register Law Office, for appellant.

Jeri L. Grachek, Deputy Dodge County Attorney, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Katianne S. is the mother of Alita, born March 14, 2001; Kalila, born April 6, 2003; and Xavier, born May 12, 2004. Katianne's fitness as a mother to Alita and Kalila is not in question, and they remain with her in the family home in Fremont, Nebraska. Katianne's petition for further review asks that we evaluate the Nebraska Court of Appeals' decision to affirm the juvenile court's termination, under Neb. Rev. Stat. § 43-292(7) (Reissue 2004), of Katianne's parental rights to Xavier. The broader issue presented in this appeal is the extent to which the State must respect a parent's fundamental constitutional rights when terminating parental rights under § 43-292(7).

FACTS

BACKGROUND OF XAVIER'S ADJUDICATION

After Xavier's birth, Katianne immediately suspected that Xavier might have a milk allergy because he kept spitting up breast milk. Katianne's daughter, Kalila, had been born with reflux and allergies to soy and milk proteins and had shown similar symptoms. Katianne and Xavier were discharged from the hospital within 2 days, but Katianne continued to seek medical

care for Xavier's feeding problem, taking Xavier to his pediatrician several times a week.

Xavier was eventually diagnosed with a milk and soy protein intolerance and gastroesophageal reflux. From May 12 to July 23, 2004, Xavier was put on several different hypoallergenic formulas, but he continued to spit up frequently. He was gaining weight poorly and was very irritable. Katianne explained that Xavier's allergies and reflux problem were much more severe than her daughter Kalila's had been.

On July 23, 2004, Xavier was placed on a nasogastric feeding tube which would drip formula into his stomach at a slow rate to allow him to absorb the formula without spitting it up. The feeding tube was to be in place at all times. Xavier had to wear special mittens to keep from pulling it out. He would have to go to the hospital to have the tube reinserted if he pulled it out. The pump would "alarm every once in a while," and there was a list of procedures to determine the reason for the alarm. The bags of formula needed to be refilled as soon as they were empty, and periodic tubing changes were also required.

When Xavier was 2 weeks old, Katianne had gone back to work part time at a gas station. She explained that she soon began to suffer from postpartum depression, which was getting progressively worse. She did not seek professional help. Katianne had a history of depression as a teenager and of drug and alcohol abuse as a young adult. However, Katianne was an active member of Alcoholics Anonymous and had not had a drinking or drug abuse problem since at least 2000.

Xavier was cared for by his father or a sitter while Katianne was at work. Katianne became concerned over whether they could properly care for Xavier's special needs. According to Katianne, the pediatrician suggested temporary out-of-home care as a solution. Katianne testified that she contacted social services for assistance. Crystal Hestekind, a protection and safety worker for the Department of Health and Human Services (the Department), helped Katianne get some assistance through some community service agencies, but the Department initially refused out-of-home voluntary temporary placement.

On July 28, 2004, someone filed a report with the Department expressing concerns about Xavier's health and well-being. After

an investigation, the report was deemed to be unfounded. In discussions with Katianne about the report, Katianne again expressed to the Department her concern over Xavier's care while she was at work. Hestekind had Home Health Care increase its visitation to Katianne's home to three to four times per week to assist with weight checks and the pump. Hestekind explained that they were also encouraging Katianne to seek assistance for her postpartum depression, but, at that time, Katianne was reticent to take medication.

Hestekind explained that Katianne was not very successful in keeping in communication with Hestekind, and Xavier still was not gaining any weight. Hestekind testified that she had offered to set up commercial daycare with staff properly trained for Xavier's medical needs, but that Katianne had refused because of concerns about Xavier's becoming sick by being around other children. Hestekind later admitted that the daycare she had arranged for Katianne was closed during the evening hours that Katianne worked.

Because the situation was deteriorating, on August 9, 2004, Katianne and the Department agreed to a voluntary 1-month placement of Xavier outside the home. Xavier's condition improved in the foster home. On August 23, Katianne suffered what she described as a relapse. She drank half a bottle of whiskey, took "a bunch of pills," and was hospitalized for several days as a result.

Because Xavier still needed special care to be weaned from the feeding tube to the bottle, the Department asked Katianne and Xavier's father to sign a voluntary extension of the out-of-home placement. When Xavier's father refused to agree to the extension, Xavier was adjudicated, in accordance with Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), to be under the jurisdiction of the juvenile court due to the parents' failure to provide proper care. The petition for adjudication alleged that Xavier's parents did not feel they were capable of caring for Xavier while he had the feeding tube.

Compliance With Case Plan

Xavier was weaned from the feeding tube to the bottle, and his special needs largely resolved. However, his adjudication began

a process in which a case plan for reunification was developed by the Department for Katianne. According to the Department, Katianne was not to be reunited with Xavier until the goals of that plan were met. The goals of the case plan included maintaining steady employment, attending therapy, submitting to random urinalysis testing, attending parenting classes, presenting a budget and receipts for the timely payment of her bills, enhancing her time management skills, maintaining a healthy lifestyle, maintaining her home in a condition suitable for visits, engaging in positive family activities, maintaining communication with service providers, and cooperating with a family support worker to set up visitation with Xavier.

The initial visitation plan under the voluntary placement had been four 2-hour visits per week. As of September 9, 2004, when the Department asked Katianne and Xavier's father to sign a voluntary extension of that agreement, Katianne had not seen Xavier for 3 weeks. She had canceled her visits with Xavier for various reasons, including illnesses of her other children, and also, presumably, for reasons relating to her August 23 hospitalization. By November, after the adjudication, visitation was reduced to twice a week. Because of further missed visits, the frequency and number of which are not reflected in the record, Katianne's visits were reduced to once a week in January 2005.

The only visitation records submitted into evidence by the Department show that between June 1 and December 2, 2005, 48 out of 59 scheduled visits between Katianne and Xavier took place. Each visit lasted approximately 2 hours. Approximately 10 visits were missed, although several canceled visits were due to family members' being ill.

In accordance with the case plan, Katianne immediately began working with Lutheran Family Services to address substance abuse and mental health issues. After an initial evaluation, Lutheran Family Services recommended a 12-week individual and group outpatient therapy program for substance abuse. Katianne had successfully completed the program by the end of December 2004. Katianne also saw a psychiatrist at Lutheran Family Services, who prescribed antidepressants. Ongoing therapy to address general mental health issues was recommended in conjunction with her medication.

Debra Hallstrom was Katianne's therapist through Lutheran Family Services. Hallstrom testified that Katianne was fairly regular in her appointments with her. Still, by the end of December 2004, Katianne had three "late cancels" with the supervising psychiatrist who prescribed her antidepressants. In accordance with Lutheran Family Services' official policy, the three late cancels mandated that Katianne be discharged for all services provided by the program, including her therapy visits with Hallstrom. During her discharge, Katianne sought therapy outside of Lutheran Family Services.

In April 2005, Katianne was allowed back into the program at Lutheran Family Services. Katianne continued her therapy at Lutheran Family Services until October or November 2005, when she was again discharged for three late cancels with her supervising physician. Hallstrom testified that at the time of her discharge, Katianne had partially completed her therapy goals, such as "boundary issues" and "setting goals." Katianne was still working on issues relating to job stability, daycare, and her dependence on Social Security income. Katianne did not have the money to pay for daycare, and she could not rely on Xavier's father to take care of the children. Hallstrom explained that Katianne was not able to get to work when a child was sick, and because of unreliable childcare, this was causing problems with her employment. Although Katianne missed visits to her supervising physician, she did continue taking her antidepressant medication.

Katianne also worked with Raegen Yount, a family support worker, to try to reach the goals of her case plan. Yount instructed Katianne in a parenting course called "nurturing parenting." Katianne successfully completed the course in approximately 11 months. Yount described that 11 months was "on the high end" for completion of the course, but that Katianne was generally engaged and was good about completing her homework for the course.

Yount testified that she had less success in teaching Katianne to properly budget her finances. According to Yount, budgeting was just something Katianne was "not able to grasp." Yount opined that Katianne and Xavier's father were spending money on unnecessary items they could not afford. She pointed out that

they rented-to-own a dishwasher, washer and dryer, bunk beds for the girls, and a "fancy stereo," which stereo was apparently later returned at Yount's urging. Yount testified that Katianne paid her bills late and that family members had often been called upon to help Katianne with her rent or utility bills. Yount also noted the fact that a used van Katianne bought had been repossessed. While Katianne had not owned another vehicle, Yount considered this purchase unnecessary.

Yount supervised Katianne's visits with Xavier. She stated her general observation that Katianne's house was not organized. The master bedroom door would often be closed because of the disarray inside. There was clothing that had been thrown down the steps of the unfinished basement where the laundry room was located. The girls had colored on the walls of their bedroom.

Yount testified that some of Katianne's visits with Xavier went very well, and some went very badly. Yount testified that the recent second-year birthday party for Xavier at Katianne's home was "very, very nice." There was cake and pizza; they sang "Happy Birthday"; and there "wasn't a whole lot of chaos, a whole lot of screaming going on or anything."

Yount explained that, in contrast, in the last few months, there had been other times where the environment had been more noisy because of the girls' behavior and Katianne's trying to discipline them. Yount recounted an incident during a May 4, 2006, visit, when Katianne tried to discipline Kalila for refusing to put her clothes back on after Kalila had stripped and decided she wanted to take a bath. Yount stated that Katianne had redirected Kalila many times to the timeout chair, but, when describing Katianne's discipline skills, Yount stated:

> And that has always been a thing with Kati[anne] and [Xavier's father] is that they will say go to time out, but whether the time out is utilized at all, or even utilized correctly, is a challenge for them. They'll get parts of a time out right, but other parts they won't. . . . It was time after time. And I directed [Katianne] to just take [Kalila] to the room. And Kalila was just left there. No direction as to why she was going to her room and no direction as to why she should get out of her room.

Yount also testified as to an incident when Katianne was changing Xavier's diaper and Alita and Kalila were "in his face" and Kalila said something about Xavier's genital area. This, according to Yount, upset Xavier. Yount testified that the girls' crowding Xavier during diaper changes was a recurring problem. She did note, however, that during the last visit, Katianne did "prompt the girls to back up . . . without any guidance or anything." But she noted that, unfortunately, the girls did not back up and that Katianne simply finished changing Xavier without disciplining the girls.

Yount stated that on most visits, Katianne was attentive to Xavier and the girls. At times, Katianne would have had a bad day and would want to talk. On such occasions, Yount stated that Katianne would be sitting on the floor and would observe the children while she talked about herself. Yount testified that other than going to the park, Katianne did not plan structured activities such as doing a craft project or going to the library. Yount indicated that Katianne had kept in good contact with Xavier's physician to discuss his health, when that was an issue.

Yount noted that Katianne had missed visits with Xavier for various reasons. Sometimes the other children were sick. Sometimes Katianne had to work early. Yount explained that she and Katianne's case manager had refused Katianne's request on one occasion to have an extended visit with Xavier at an Omaha zoo when the Head Start program was offering free admission for the children. Yount explained that Katianne had given her only 1 day's notice of the request. Moreover, gas to drive to the zoo would cost money, Katianne still had to pay admission for herself, and Katianne had mentioned renting a stroller. Yount stated, "I had the concern about money because prior to that I know relatives had helped her pay bills. And so, I had a question as to why are we making these type [sic] of judgments." The girls eventually went to the zoo with someone else, and Katianne stayed home in order to be able to visit with Xavier.

Ann Paulson, a court-appointed special advocate, likewise observed many of Xavier's visits in Katianne's home. Paulson testified that Xavier would generally interact with his two sisters while at Katianne's home, play with toys, and have a snack.

Paulson described Kalila's temper tantrum during the May 4, 2006, visit that Yount had mentioned. Paulson explained that 3-year-old Kalila threw a tantrum when Katianne tried to keep Kalila from taking off all her clothes and her "pull-up." Paulson stated that Katianne repeatedly placed Kalila in a time-out chair when Kalila left the chair without Katianne's permission. Katianne did get Kalila's dress back on, but not the pull-up. Still, Paulson explained, "it went on for quite a lengthy time, and [Katianne] got very frustrated with the situation and kinda [sic] just gave up on not knowing what to do and how to handle her." Yount eventually called Kalila over to her, put on her "pull-up," and advised Katianne to put Kalila in her room, which she did.

Paulson noted that there was a flea infestation of Katianne's home in the fall of 2005. She also noted that on one visit in January 2006, she had not received a late message that Katianne was canceling visitation. Upon arrival to Katianne's home, Paulson could clearly see inside the house that it was in "complete turmoil, and there were clothes, boxes, and toys, and all kinds of possessions of all sorts laying all over the home." On three visits, she found that the girls' beds did not have any bedding on them, although she could not say whether that was because the bedding was being washed. With these exceptions, Paulson described Katianne's home as generally clean and ready for them to visit.

Michelle Barnett, the caseworker for the Department who prepared Katianne's case plan, testified that it was her opinion that Katianne had generally not followed through with the plan the Department had set for her. Barnett testified that Katianne had been "very good" in the area of remaining drug free. Nor had she had any problem taking her psychotropic medication "in quite some time." Barnett believed that Katianne had, with the exception of the flea incident, maintained the conditions of her home up to the Department's standards, and she did not find any reports that the home was "supposedly in disarray" to be of any concern. Katianne had remained in the same residence with her two other children during the entire time Barnett was on the case. Barnett recognized that Katianne had completed the psychological and parenting assessment and had "partially" completed the recommendations of her assessments.

Barnett described the case plan goal of positive family activities as "kinda [sic] like a half complete," explaining, "she attempts to go to the park and . . . she would put a swimming pool outside and try to get them out there in that way. However, some of the visitations are very chaotic . . . ." While Katianne had requested increased visitation, "with the chaos in the home," Barnett did not allow it. Visitation had been cut back to once a week because of "a consistent amount of visitations being cancelled, and to provide Xavier with the structure that he needs in the foster home and at the daycare setting." Barnett had told Katianne once that if she could provide consistent visitation that month, Barnett would increase it, "[a]nd [Katianne] was close, but not quite."

Barnett did not think that Katianne had successfully followed the budget developed with Yount's assistance. Moreover, she noted that although Katianne had been continuously employed, she had been employed at approximately 14 different jobs. Like Yount, Barnett disapproved of the "luxury" items Katianne had rented or purchased. Barnett also stated that Katianne's bank account was constantly overdrawn; that she could not "do a savings account"; that Katianne's family "is picking up the slack, paying bills"; that the telephone had been shut off and there was no cellular telephone; and that the van had been repossessed.

As to the case plan's goal of communication with the Department, Barnett stated that Katianne was inconsistent. In the beginning, Barnett explained, contact was "very good." Katianne had even told Barnett when would be good times to do random urinalysis testing on the father because Katianne was trying to help him stay sober. Contact had recently diminished, however.

Finally, Barnett testified that Katianne had not achieved the goal of time management. Nor did she believe that Katianne had completed the task of keeping people out of her home who would be a risk to her children. Barnett explained that Katianne still had some contact with Xavier's father. Barnett admitted that the only evidence of the father's danger to the children was Katianne's report that he had on previous occasions punched and kicked walls and that he had once threatened to kick Alita.

EVIDENCE OF XAVIER'S BEST INTERESTS

Barnett admitted that she had told Katianne that it would be difficult to terminate her parental rights because Katianne had completed parts of her plan. As Barnett explained: "She is sober and she is parenting two other kids in her home." Still, Barnett stated her opinion that termination of Katianne's parental rights was in Xavier's best interests because:

> We've already heard that Xavier can be fussy. [The foster mother] has called me numerous times where he has been screaming for hours at a time just because he is very smart, he is very strong willed, and he wants to get what he wants. And, I mean, I don't know that anybody can handle that, so there's things in that regard. He's difficult. [Katianne's] life is stressful. Things are not consistent in her home. The other two children are not well managed at this point. They need consistency and Kati[anne's] time and I don't feel that she can handle three children with their needs.

Barnett explained that Xavier's foster parents were unable to adopt Xavier because of their ages. There were four prospective adoptive placements for Xavier, one being an aunt and uncle on the father's side who lived in California with their three young children. Xavier had met the aunt and uncle during one weekend visit, and Barnett claimed that Xavier had bonded to them because "he talks to them twice a month on the phone, points to [the aunt] and calls her mommy, and can point to her in a booklet as his mother, and get excited and talk to her on the phone." Xavier had not bonded with any of the other prospective adoptive families. Barnett explained that after adoption, whether Xavier had any contact with his biological siblings would be "up to Katianne and whoever adopts him."

Xavier's foster mother testified Xavier was now a happy, healthy 2-year-old with age-appropriate development. The foster mother seemed to agree that he was "somewhat high maintenance," explaining:

> You know, I guess if I had more small children, you know, Xavier can be clingy, and when he is it's really hard to get him settled down, and if I had more little kids that I was having to — you know, get everybody to bed and baths on time and stuff, I think I would have a hard time getting

> everybody's needs met and keeping him calm. He wants to be picked up. He wants attention.

The foster mother testified that Xavier usually behaved "just fine" after his visits with Katianne, although on three occasions in August and September 2005, Xavier acted out by hitting or throwing toys after his visits. These episodes seem to correspond to a period where Xavier was generally experiencing more temper tantrums. The foster mother explained that the frequency of Xavier's temper tantrums had generally diminished since that time.

Katianne testified that she had ended her relationship with Xavier's father and that he no longer lived in her home. She still had some contact with him because of his relationship with his children. Katianne stated that she wished to move back to New Jersey, where her family and friends were, because she would have a network of support there. She testified that she was currently employed full time as a security guard and was trying to complete some online college courses. Katianne stated that although she had had several different jobs in the recent past, she had lost many of them when they conflicted with her children's needs. In the last couple of months, she had worked out an arrangement with another mother in her neighborhood to take turns babysitting while the other was at work. Katianne said that this arrangement was working out well and that she trusted the other mother with her children.

Katianne described the routine she had established for her girls, indicating that establishing a routine was something she had learned as a result of the parenting course and counseling. Katianne thought that the routine helped with the children's behavior. The routine included set mealtimes, snacks, naptime, playtime while Katianne did household chores, and a bath and bedtime routine which included television or stories.

Katianne explained that she believed it was in Xavier's best interests that her parental rights not be terminated:

> I believe my son should be with his mother. . . . He still recognizes me as mom. He still calls me mom. We walk up and down the street in front of the house and he points and says it's mom's house. Not just for the best interests of him, but for the other children also. For anyone whose

> [sic] ever had more than one child, and had to go to their own child or take their children to another child's funeral, that's how it will feel to my children. Not just me, but to my other two daughters, because it's not like they don't know them. It's not like they don't play together.

Katianne stated she is a single mother with no support system in Fremont and that although she was not wealthy, she had always met her children's needs. They had a home to live in, beds and bedding, food, and clothing. Katianne testified that she had made mistakes in the past but that she was working to fix those mistakes. Katianne noted that the uncle and aunt in California never acknowledged their niece, Xavier's sister, Kalila, on any occasion, including birthdays or Christmas. She doubted they would work to maintain a relationship between Xavier and the girls. Katianne stated that there was a possibility that in transitioning back to her home, she would take Xavier to a therapist, explaining, "I think therapy is a positive thing."

Clinical Parenting Evaluation

Pursuant to the case plan, Dr. Stephen Skulsky, a clinical psychologist, conducted a psychological evaluation of Katianne to determine her capacity to parent and conducted a parent bonding assessment with Kalila and Xavier. Skulsky's assessment showed that Katianne enjoyed family interactions. She was extroverted, had a strong interest in interpersonal relationships, and had a good knowledge of socially expected and conventional behaviors. She had good underlying empathic capacities. Katianne was also assessed as having a broad range of intellectual interests, "good reality testing," and "a good capacity to break situations apart and put them back together into a global or overall picture of what is occurring."

Skulsky concluded that Katianne was likely to be strongly bonded to her children. Also, she was able to talk about appropriate discipline for the different ages of her children and appropriate ways to show them affection, and was able to list some favorite foods, favorite activities, and developmental levels for all three of her children.

Skulsky's diagnostic impression of Katianne was "of an adjustment disorder with a mixture of upset feelings," which

was connected to Xavier's being taken from the home. Skulsky described Katianne's biggest fear as not getting Xavier back. Katianne had told Skulsky that her happiest times in her life was when all three children were together. Skulsky concluded that "[u]nder most circumstances, when not too strongly emotionally upset, [Katianne] is likely to be able to put her children's needs first. . . . When strongly emotionally stressed, she may be briefly unable to make appropriate judgments in handling her children. This constitutes a mild difficulty in [her] capacity to adequately parent."

In the bonding assessment, Skulsky stated that he observed that Katianne talked and played with the children in an age-appropriate manner, that she set appropriate verbal and behavioral limits for the children, and that she demonstrated a good capacity to be warm and engaging with the children. The children warmed up to Katianne as well.

Skulsky summarized in his report that Katianne could take care of and relate to her children in an appropriate manner. Because of limitations in her ability to set firm and consistent limits and make good judgments when too strongly stressed, Skulsky recommended ongoing courses of psychotherapy to further limit any concerns about difficulties in appropriate parenting.

Skulsky's testimony at the termination hearing clarified that Katianne's deficiencies could be adequately addressed by 6 to 18 months of therapy. He stated that they were "not the kind of more severe pervasive problems that some parents would have, where it would be years and years of therapy." Because by the time of the hearing Skulsky had not seen Katianne for approximately a year, Skulsky could not opine on whether she had adequately worked on her personality issues and underlying emotional struggles since his assessment.

Skulsky could opine that Katianne was bonded to Xavier. He could not opine on whether Xavier was deeply bonded to Katianne because such an evaluation could be made only through frequent observational visits, which he had not made. Skulsky stated that if Xavier had not bonded to Katianne, but had bonded to his foster family, then it would be difficult, after 18 months, to return to Katianne. It would, however, be equally

difficult for Xavier to leave his foster parents for an adoptive family to whom he was not yet bonded.

KATIANNE'S ONGOING COUNSELING

After being discharged from Lutheran Family Services, Katianne sought the help of Cynthia Jane Cusick, a mental health counselor and therapist. Cusick testified that she had been counseling Katianne once a week for the past 6 months. Cusick described Katianne's primary issue as major chronic depression with "financial family stressors and economic stressors." Cusick explained that Katianne had made all but two of her scheduled appointments with her. One appointment was missed due to work, and the other one had been scheduled the night before the hearing, and had only been tentatively scheduled in case it was needed.

Cusick described that Katianne was doing well with her sobriety and that it was not a major issue. As to issues relating to her depression, Cusick testified that Katianne was making steady improvement in "baby steps." It would require lifetime intervention and treatment. Cusick believed that Katianne had been doing well raising Xavier's siblings. Cusick testified that having an intimate relationship with Xavier's father and letting him live in her house were "greater stressor[s] than all of the children put together." However, Katianne had ended her relationship with Xavier's father.

TERMINATION OF PARENTAL RIGHTS

After Xavier had been in foster care for 15 months, the Department abandoned its reunification plan and sought termination of Katianne's parental rights under § 43-292(6) and (7). Subsection (6) allows for termination if such termination is in the best interests of the child and reasonable efforts to preserve and reunify the family have failed to correct the conditions leading to the determination that the juvenile was as described by § 43-247(3)(a). Subsection (7) provides for termination if it is in the best interests of the child and the child has been in out-of-home placement for 15 or more of the most recent 22 months. Xavier's father voluntarily relinquished his parental rights at the beginning of the proceedings.

The State and the guardian ad litem argued for termination of Katianne's parental rights because Xavier deserved permanency and Katianne had failed to sufficiently follow her case plan. Both pointed out that Katianne could not budget her finances and had trouble keeping the same job. Both pointed out that Katianne's visits with Xavier were only once a week and that they had been reduced to once a week because she had missed visits.

The juvenile court specifically found that the Department had failed to prove that, after reasonable efforts to preserve and reunify the family, Katianne had failed to correct the conditions leading to the § 43-247(3)(a) adjudication. Thus, it refused to terminate under § 43-292(6). Instead, the court terminated Katianne's parental rights under § 43-292(7). The court's order did not specify the basis for its determination that termination was in Xavier's best interests.

Appeal to Court of Appeals

In a memorandum opinion filed on February 5, 2007, the Court of Appeals affirmed the termination of Katianne's parental rights. The court stated that it was undisputed that Xavier had been in out-of-home placement for 15 or more of the most recent 22 months and that children should not have to wait indefinitely for indefinite parental maturity. The Court of Appeals concluded that termination under § 43-292(7) was in Xavier's best interests, pointing out Katianne's deficiencies in meeting her case plan's goal of budgeting and stability in employment. Apparently in reference to Katianne's being discharged for late cancels from Lutheran Family Services, the Court of Appeals also noted that Katianne had not been consistent in attending therapy for her mental health needs. The Court of Appeals stated that Katianne had been inconsistent with visitation and had difficulty managing her household with the two other children. Finally, the Court of Appeals stated that Xavier's father was still present in Katianne's life and that he was a negative influence.

We granted Katianne's petition for further review.

ASSIGNMENTS OF ERROR

Katianne asserts that the juvenile court erred in (1) determining that her parental rights should be terminated pursuant to § 43-292(7), (2) determining that it would be in Xavier's best

interests to terminate Katianne's parental rights, (3) refusing to declare § 43-292(7) unconstitutional as violative of Katianne's fundamental substantive due process rights under the 14th Amendment, (4) not requiring the Department to prove noncompliance with a reasonably related rehabilitation plan prior to termination, and (5) not determining that the Department failed to prove by clear and convincing evidence the grounds for termination. The State cross-appeals, asserting that the juvenile court erred in failing to find that the State had proved that Katianne's parental rights should be terminated under § 43-292(6).

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.[1]

ANALYSIS

[2] Under § 43-292, in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that the termination is in the child's best interests.[2] Katianne's parental rights were terminated under § 43-292(7). This court upheld the constitutionality of § 43-292(7) in *In re Interest of Ty M. & Devon M.*,[3] and we do not revisit that holding here. However, we do find that the juvenile court erred in finding termination to be in Xavier's best interests. Accordingly, we reverse.

The proper starting point for legal analysis when the State involves itself in family relations is always the fundamental constitutional rights of a parent.[4] The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme

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[1] *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

[2] See *id.*

[3] *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

[4] See *In re Adoption of Victor A.*, 157 Md. App. 412, 852 A.2d 976 (2004).

Court.[5] "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. 'If the State prevails, it will have worked a unique kind of deprivation.'"[6]

[3] That being so, the U.S. Supreme Court has been clear that the Due Process Clause of the U.S. Constitution would be offended "'[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness . . . .'"[7] "[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."[8]

We have likewise said repeatedly that "[a] court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right."[9] "'[N]ature demands that the right [to custody of the child] shall be in the parent, unless the parent be affirmatively unfit.'"[10]

[4,5] The fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness. Instead, as we explained in *In re Interest of Ty M. & Devon M.*,[11] the placement of a child outside the home for 15 or more of the most recent 22 months under § 43-292(7) "merely provides a guideline" for what would be a

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[5] *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

[6] *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

[7] *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).

[8] *Santosky v. Kramer, supra* note 6, 455 U.S. at 760.

[9] *Gomez v. Savage*, 254 Neb. 836, 848, 580 N.W.2d 523, 533 (1998). See, also, e.g., *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004); *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

[10] *In re Guardianship of D.J., supra* note 9, 268 Neb. at 247, 682 N.W.2d at 245.

[11] *In re Interest of Ty M. & Devon M., supra* note 3.

reasonable time for parents to rehabilitate themselves to a minimum level of fitness.[12] As stated by the Supreme Judicial Court of Massachusetts,[13] regardless of whether the child has been in foster care for 15 out of the last 22 months, the State "always bears the burden of proving, by clear and convincing evidence, that a child is still in need of care and protection."[14] This burden, the court explained, "necessarily involves showing that the parent is still unfit and the child's best interests are served by remaining removed from parental custody."[15]

[6,7] Section 43-292 nowhere expressly uses the term "unfitness," but that concept is encompassed by the fault and neglect described in subsections (1) through (6), where applicable, and, for all subsections, by a determination of the child's best interests. Although the name of the "'best interest of the child'" standard may invite a different "'intuitive'" understanding, "[t]he standard does not require simply that a determination be made that one environment or set of circumstances is superior to another."[16] Rather, as we have explained, "the '"best interests" standard is subject to the overriding recognition that the "relationship between parent and child is constitutionally protected."'"[17] There is a "rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent."[18] Based on the idea that "fit parents act in the best interests of their children,"[19] this presumption is overcome only when the parent has been proved unfit.

In this case, it is clear that the State has failed to consider Katianne's commanding interests and has failed to rebut the

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[12] *Id.* at 174-75, 655 N.W.2d at 692.

[13] *In re Erin*, 443 Mass. 567, 823 N.E.2d 356 (2005).

[14] *Id.* at 568, 823 N.E.2d at 359.

[15] *Id.* at 572, 823 N.E.2d at 361.

[16] *In re Yve S.*, 373 Md. 551, 565, 819 A.2d 1030, 1038 (2003).

[17] *In re Guardianship of D.J., supra* note 9, 268 Neb. at 246-47, 682 N.W.2d at 245.

[18] *Id.* at 244, 682 N.W.2d at 243.

[19] *Troxel v. Granville, supra* note 5, 530 U.S. at 68. See, also, *Parham v. J. R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

presumption that it is in Xavier's best interests to reunite with Katianne. The State admits Katianne is an adequate parent to her other two children. It has failed to show any reason why Katianne would not be an adequate parent to Xavier as well.

Xavier's special medical needs, which were the sole basis of his adjudication, are no longer present. The record shows that Katianne completed a parenting course and has improved in her parenting skills. She is employed. She has continued her medication and has stayed sober. She has diminished her contact with Xavier's father, who apparently had a negative influence on her life. She has attempted to maintain a bond with Xavier, attending most of her scheduled visitations.

Skulsky's parenting evaluation determined that Katianne was a capable parent so long as ongoing therapy addressed some of her mental health issues. Katianne is attending ongoing therapy and making progress in her therapy goals. There is no evidence that Katianne could not or would not provide for Xavier's basic needs. There is no evidence that Xavier would be subjected to abuse or neglect.

The fact that Katianne is deficient in her time management, budgeting, organization, and implementation of the "timeout" technique does not make her an unfit parent. "'[T]he law does not require perfection of a parent.'"[20] Rather,

> so long as a parent adequately cares for his or her children (*i. e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[21]

We are most troubled by the Department's argument that Katianne can handle two, but not three children, inviting the arbitrary removal of one. Nor does the fact that the State considers certain prospective adoptive parents "better" overcome the constitutionally required presumption that reuniting with Katianne is best. "'The court has never deprived a parent of the

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[20] *In re Interest of Aaron D.*, 269 Neb. 249, 265, 691 N.W.2d 164, 176 (2005).

[21] *Troxel v. Granville, supra* note 5, 530 U.S. at 68-69.

custody of a child merely because on financial or other grounds a stranger might better provide.'"[22]

Much concern has been expressed over Xavier's need for permanency and his extended stay in foster care. The record suggests that Xavier can find permanency with his natural mother, to whom he should have been returned as soon as it was safe to do so. There is little question that the alleged deficiencies in Katianne's parenting would not have justified Xavier's removal from the family home had they been the basis upon which the Department had sought adjudication in the first place. They should not have served to keep him out of the home once the reasons for his removal had been resolved; neither should a child be held hostage to compel a parent's compliance with a case plan when reunification with the parent will no longer endanger the child.

Because termination of Katianne's parental rights was not proved to be in Xavier's best interests, her parental rights could not be terminated under either § 43-292(6) or (7). Therefore, we need not consider the State's cross-appeal.

CONCLUSION

Termination of parental rights is permissible only in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code.[23] The State has failed to prove that termination is in Xavier's best interests because it has failed to prove that Katianne is unfit. We, therefore, reverse the judgment of the Court of Appeals, and remand the cause to that court with directions to reverse the judgment of the juvenile court.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., participating on briefs.

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[22] *In re Guardianship of D.J., supra* note 9, 268 Neb. at 247, 682 N.W.2d at 245.

[23] See, *id.*; *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999); *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004).

RICHARD A. WADKINS, APPELLANT, V. FERNANDO LECUONA III, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE.

740 N.W.2d 34

Filed October 19, 2007. No. S-06-1008.

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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Employment Security.** Based upon the plain and ordinary meaning of the first definition contained in Neb. Rev. Stat. § 48-602(27) (Reissue 2004), two elements must be satisfied to demonstrate unemployment: First, the individual must not perform any services for the relevant time period; and second, no wages may be payable with respect to that time period.
4. **Employment Security: Wages: Time.** In determining whether wages are "payable with respect" to the week in which they are paid, within the meaning of Neb. Rev. Stat. § 48-602(27) (Reissue 2004), the test is not in what week the remuneration is received but in what week it is earned or to which it may reasonably be considered to apply.
5. **Wages: Time.** Generally speaking, wages are tied to the week of work and not to the week in which they are paid.
6. **Employment Security: Wages.** Vacation pay is generally regarded, not as a gratuity or gift, but as additional wages for services performed.
7. **Employment Security: Words and Phrases.** A vacation is a respite from active duty, during which activity or work is suspended, purposed for rest, relaxation, and personal pursuits.
8. **Employment Security.** The Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-671 (Reissue 2004), is to be liberally construed to accomplish its beneficent purpose of paying benefits to involuntarily unemployed workers.
9. **Employment Security: Wages.** "Vacation pay" does not include circumstances in which an individual is being paid for time he actually worked.
10. **Wages: Time.** Deferred compensation is generally understood to be payable with respect to the time it is earned, not the time it is paid.
11. **Termination of Employment: Words and Phrases.** The term "layoff" can denote either a permanent or a temporary termination of employment, although it often implies a temporary cessation of employment with the possibility of recall.
12. ____: ____. A layoff involves termination of employment at the employer's will.
13. **Employment Security: Words and Phrases.** A layoff, despite the possibility of recall, is involuntary "unemployment" within the meaning of unemployment insurance benefit laws.

Appeal from the District Court for Otoe County: DANIEL BRYAN, JR., Judge. Reversed and remanded with directions.

Richard H. Hoch, of Hoch, Funke & Partsch, for appellant.

John H. Albin, Thomas A. Ukinski, and W. Russell Barger, of Nebraska Workforce Development, Department of Labor, Office of Legal Counsel and Administrative Affairs, for appellee.

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

GERRARD, J.

Richard A. Wadkins appeals from an order of the district court, affirming a determination of the Nebraska Appeal Tribunal that Wadkins had received unemployment insurance benefits to which he was not entitled. Wadkins had been laid off and was not performing services for his employer while he was receiving unemployment insurance benefits. But Wadkins was receiving money from his employer for compensatory time (comp time) Wadkins had accrued and for commissions on sales Wadkins had made before he had been laid off. The question presented in this appeal is whether the payments Wadkins received from his employer disqualified him from receiving unemployment insurance benefits under Nebraska's Employment Security Law.[1] We conclude they did not, and reverse the decision of the district court affirming the appeal tribunal's decision ordering Wadkins to repay the benefits he had received.

BACKGROUND

Wadkins was employed by Americana Shopping Carts, Inc. (Americana), a company that, by its own description, "maintains a nationwide fleet of mobile maintenance units that provide cleaning and repair of shopping carts" and other retail sales equipment. Wadkins was a maintenance supervisor, whose duties involved traveling to Americana's customers to repair their shopping carts. While Wadkins was visiting those customers, he also sold them carts and cart-related products such as

[1] Neb. Rev. Stat. §§ 48-601 to 48-671 (Reissue 2004).

spare parts and seatbelts. Wadkins earned a 5-percent commission on such sales.

The "Job Description and Requirements" for Wadkins' position explained that his salary was based on a 260-day work year and that comp time was awarded on a one-to-one basis for each day an employee worked over 260 days. Wadkins' regular pay, not including commissions, was $480.77 per week.

Wadkins was laid off because of a "temporary work slow down," effective December 11, 2004. Wadkins filed a claim for unemployment insurance benefits. During the time period at issue, between January 22 and March 5, 2005, Wadkins was paid unemployment insurance benefits of $288 per week. Wadkins was also being paid by Americana during that period. Americana paid Wadkins $480.77 per week except for the weeks of January 22, during which Wadkins was paid $508.55; January 29, during which Wadkins was paid $537.21; and February 12, during which Wadkins was paid $288.48. Wadkins was apparently recalled to work for Americana on March 8.

Wadkins testified that the money he was paid by Americana after he was laid off was money earned before he was laid off, by working Saturdays and Sundays during the prior year. Wadkins described that time as comp time, and explained that when he was off work, the company paid him for his comp time on a weekly basis. Wadkins asserted that he had not worked or earned wages while he was receiving unemployment insurance benefits. Wadkins also explained that commissions on sales orders were not paid immediately, but were paid when the sales orders were shipped. Wadkins said that Americana's payments for the weeks ending January 22 and January 29, 2005, included some of his sales commissions.

Following a wage audit, the Department of Labor (the Department) concluded that Wadkins' payments from Americana were unreported earnings and that Wadkins had been overpaid $2,016 in unemployment insurance benefits. Wadkins appealed, and the Nebraska Appeal Tribunal affirmed the judgment. The appeal tribunal accepted Wadkins' explanation of the payments, but determined that "[t]he amounts were at the time [Wadkins] received them 'determinable' and[/]or vacation pay,"

and therefore disqualifying compensation that exceeded his weekly benefit amount.[2]

Wadkins appealed the appeal tribunal's determination, pursuant to the Administrative Procedure Act.[3] The district court concluded that comp time payments were considered "earnings" when they became "payable" and found that Wadkins' comp time only became "payable" on a day-to-day basis during his layoff. The district court affirmed the decision of the appeal tribunal.

ASSIGNMENT OF ERROR

Wadkins assigns that the district court erred in finding that the compensation he received from Americana disqualified him from receiving unemployment insurance benefits.

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.[4]

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[5]

ANALYSIS

The issue in this case is whether Wadkins was, despite receiving compensation from Americana after being laid off,

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[2] See § 48-602(27).

[3] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006). See § 48-640.

[4] *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007).

[5] *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007).

"unemployed" within the meaning of the Employment Security Law. The Employment Security Law defines "unemployed" as

> an individual during any week in which the individual performs no service and with respect to which no wages are payable to the individual or any week of less than full-time work if the wages payable with respect to such week are less than the individual's weekly benefit amount, but shall not include any individual on a leave of absence or on paid vacation leave.[6]

"Paid vacation leave" is a period of time while employed or following separation from employment in which the individual renders no services to the employer but is entitled to receive vacation pay equal to or exceeding his or her base weekly wage.[7] And where a collective bargaining agreement does not allocate vacation pay to a specified period of time during a "period of temporary layoff or plant shutdown," the payment by the employer "will be deemed to be wages . . . in the week or weeks the vacation is actually taken."[8]

[3] We have explained that based upon the plain and ordinary meaning of the first definition contained in § 48-602(27), two elements must be satisfied to demonstrate unemployment: First, the individual must not perform any services for the relevant time period; and second, no wages may be payable with respect to that time period.[9] There is no dispute in this case that Wadkins performed no services for Americana after he was laid off. Our inquiry here focuses on whether Wadkins received wages payable with respect to the time after the layoff and whether Wadkins was on "paid vacation leave" within the meaning of the Employment Security Law.

[4,5] On appeal, the parties do not dispute the underlying facts. Given those facts, as a matter of law, Wadkins' comp time payments were not "payable with respect" to the weeks in which

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[6] § 48-602(27).

[7] § 48-602(18).

[8] See § 48-602(27).

[9] *Lecuona v. McCord*, 270 Neb. 213, 699 N.W.2d 403 (2005); *Vlasic Foods International v. Lecuona*, 260 Neb. 397, 618 N.W.2d 403 (2000); *Board of Regents v. Pinzon*, 254 Neb. 145, 575 N.W.2d 365 (1998).

the payments were made. In *Board of Regents v. Pinzon*,[10] we explained that in making such determinations, the test is not in what week the remuneration is received but in what week it is earned or to which it may reasonably be considered to apply. Thus, in *Pinzon*, we concluded that a university professor whose contract had not been renewed was entitled to unemployment compensation at the conclusion of the 9-month academic term, even though his salary for the year was paid on a 12-month basis.[11] Generally speaking, wages are tied to the week of work and not to the week in which they are paid.[12] In *Pinzon*, the claimant's remaining 3 months of salary were, essentially, deferred wages "payable" when they were earned during the academic year, not when they were received.[13]

The same principles apply here. It is not disputed that Wadkins actually worked the days for which, after the layoff, he was paid. The payments he received are properly allocated to the weeks in which they were earned, before the layoff, not when the payments were received.

The Department contends that *Pinzon* is distinguishable in a number of ways. Most pertinently, the Department argues that Wadkins' comp time payments are the equivalent of "paid vacation leave" within the meaning of the specific statutory exclusion of paid vacation leave from "unemployment."[14]

What little authority there is on the subject of comp time is divided. In *Transportation Dept. v. LIRC*,[15] the Court of Appeals of Wisconsin found that compensatory time off was "similar to a paid vacation" and was included within the definition of the term "wages." That disqualified the claimants from receiving unemployment insurance benefits, according to the court,

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[10] *Pinzon, supra* note 9.

[11] See *id.*

[12] *Id.*

[13] See *id.*

[14] § 48-602(27).

[15] *Transportation Dept. v. LIRC*, 122 Wis. 2d 358, 360, 361 N.W.2d 722, 723-24 (Wis. App. 1984).

because if the claimants received "wages" while they were not working, they were not unemployed under Wisconsin law.[16]

The Supreme Court of New York, Appellate Division, reached a contrary conclusion in *Matter of Giandomenico*,[17] in which unemployment insurance benefits had been extended to a driver of an ice cream truck who was laid off based on "traded time." Under the employment agreement, a driver would not be paid overtime when it was earned. Instead, the employer would credit the overtime hours to the driver. When business was slack, the least senior drivers would be laid off, but compensated from the fund created by the banked overtime.[18]

The New York appellate court concluded that the driver was unemployed under New York law and entitled to benefits. The court explained:

> The record conclusively demonstrates that the claimant was laid off . . . . His employer concededly had no work for him for a period of seven weeks. Of critical importance is the fact that the money he received from the employer was not wages or remuneration or vacation pay but was his own previously earned money which had been held by the employer for an extended period of time. In short, he had no employment for seven weeks and no remuneration from his employer, and the extension of certain fringe benefits did not change his situation.[19]

We find the New York court's understanding of comp time to be more persuasive, and more consistent with principles of Nebraska law. The Wisconsin court's analysis was focused on whether the claimant's comp time earnings were "wages" under Wisconsin law, and not the time period to which the wages should be applied. As previously explained, the issue under Nebraska law is not whether the payments Wadkins received were "wages"—they were—but with respect to what week those payments are considered "payable." And under Nebraska law,

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[16] See *id.*

[17] *Matter of Giandomenico*, 77 A.D.2d 294, 295, 433 N.Y.S.2d 267, 268 (1980).

[18] See *id.*

[19] *Id.* at 295-96, 433 N.Y.S.2d at 268.

for the same reasons articulated by the New York court, the payments Wadkins received were for services rendered before he was laid off and were earned and "payable" when Wadkins was working.

[6,7] We specifically reject the Department's assertion that comp time, at least under the facts of this case, is "vacation pay" under the Employment Security Law.[20] Vacation pay is generally regarded, not as a gratuity or gift, but as *additional* wages for services performed.[21] It is not in the nature of compensation for the calendar days it covers—it is more like a contracted-for bonus for a whole year's work.[22] By contrast, in this case, Wadkins was being separately and specifically paid for days he had already worked. A "vacation" is also understood to be a respite from active duty, during which activity or work is suspended, purposed for rest, relaxation, and personal pursuits.[23] While Wadkins was not working after he was laid off, the days for which he was being paid—the Saturdays and Sundays he *had* worked—were not "vacation" days within any reasonable understanding of the term.

[8-10] We have held that the Employment Security Law is to be liberally construed to accomplish its beneficent purpose of paying benefits to involuntarily unemployed workers.[24] And the legislative history of the vacation pay exclusion indicates that the Legislature was concerned with circumstances in which unemployment insurance benefits were being awarded to employees who were on vacation and receiving vacation pay benefits in the regular course of business and who were

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[20] See § 48-602(18).

[21] See, *In re Wil-Low Cafeterias*, 111 F.2d 429 (2d Cir. 1940); *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982).

[22] *Mathewson v. Westinghouse Elec. Corp.*, 394 Pa. 518, 147 A.2d 409 (1959).

[23] See, *City of Dallas v. Massingill*, 737 S.W.2d 334 (Tex. App. 1987); *Mtr. of Walker (Reader's Digest)*, 28 A.D.2d 256, 284 N.Y.S.2d 584 (1967).

[24] See *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995).

expected to return to work at the end of their vacation leaves.[25] In that context, we are not inclined to construe "vacation pay" to include circumstances in which an individual is admittedly being paid for time he actually worked. Instead, like *Pinzon*, the payments in this case are more akin to deferred compensation, generally understood to be payable with respect to the time it is earned, not the time it is paid.[26]

The Department also suggests that *Pinzon* is distinguishable because that case has been limited to circumstances in which the claimant's employment relationship has been severed.[27] Here, the Department asserts that Wadkins "was still employed by Americana, and still considered to be an employee, although there had been a 'temporary work slow down.'"[28]

[11-13] We recognize that some courts have distinguished, for various purposes, between a "layoff" and a "discharge" as the terms are commonly understood. The term "layoff" can, depending on the circumstances, denote either a permanent or a temporary termination of employment, although it often implies a temporary cessation of employment with the possibility of recall.[29] But there is little question that a "layoff" involves termination of employment at the employer's will.[30] It differs from a complete termination only in degree.[31] While Wadkins' layoff was temporary, and he was recalled to Americana after 3 months, there is no indication in the record that he voluntarily ceased work. In the absence of a specific statutory provision,[32]

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[25] See, e.g., Introducer's Statement of Intent, L.B. 608, Business and Labor Committee, 96th Leg., 1st Sess. (Feb. 1, 1999).

[26] See, *Pinzon, supra* note 9. See, also, *Buse v. Mississippi Emp. Sec. Com'n*, 377 So. 2d 600 (Miss. 1979); *Erie Ins. Gr. v. Unemployment Comp. Bd.*, 654 A.2d 105 (Pa. Commw. 1995).

[27] See *Vlasic Foods International, supra* note 9.

[28] Brief for appellee at 4.

[29] See *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031 (10th Cir. 2000).

[30] *Sanders v. Donovan*, 786 F.2d 920 (9th Cir. 1986).

[31] See *State ex rel. Ausburn v. Seattle*, 190 Wash. 222, 67 P.2d 913 (1937).

[32] See, e.g., § 48-628(8) (generally disqualifying employees of educational institutions who have "reasonable assurance" of reemployment in subsequent academic terms); § 48-628(9) (disqualifying professional athletes

the *possibility* of recall to work is not pertinent, so long as no services are performed for, nor wages payable with respect to, the relevant time period.[33] A "layoff," despite the possibility of recall, is considered to be involuntary "unemployment" within the meaning of unemployment insurance benefit laws.[34]

The Department also asserts that under the Social Security Act,[35] the "period" during which wages are paid refers to the financial quarter or calendar year during which the employer should report the wages,[36] and notes that Americana reported Wadkins' comp time wages when they were paid, after Wadkins was laid off. But when wages are reportable for Social Security purposes does not define the period with respect to which they are "payable" within the meaning of Nebraska's Employment Security Law.[37] That, as we have already explained, is established by when the wages were earned, not when they were actually paid or reported by the employer for tax purposes.[38]

Finally, we note that our decision is based solely on the appropriate attribution of Wadkins' comp time payments, and we do not consider the money Wadkins received for sales commissions. Commissions are included in the definition of "wages,"[39] but regardless of when the commissions were "payable," the amount did not exceed one-half of Wadkins' weekly benefit amount, and would not have affected Wadkins' eligibility for his full weekly benefit amount.[40] Therefore, our conclusion with respect to Wadkins' comp time is dispositive of this appeal, and we need not consider his commissions.

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during off-season who have "reasonable assurance" of reemployment in following season).

[33] See § 48-602(27).

[34] See *GMC v Erves*, 399 Mich. 241, 249 N.W.2d 41 (1976). Cf. *Goodyear Tire & Rubber Co. v. Employment Security Board of Review*, 205 Kan. 279, 469 P.2d 263 (1970).

[35] 42 U.S.C. § 301 et seq. (2000 & Supp. IV 2004).

[36] § 405(c)(1)(D).

[37] See § 48-602(27).

[38] See *Pinzon, supra* note 9.

[39] See § 48-602(29).

[40] See § 48-625(1). See, also, *McCord, supra* note 9.

CONCLUSION

The payments Wadkins received after being laid off were wages for comp time Wadkins had earned by working extra days before he was laid off, and were "payable" within the meaning of the Employment Security Law with respect to the weeks they were earned, not the weeks during which they were paid. The payments for Wadkins' comp time were deferred compensation for time Wadkins had actually worked and were not "vacation pay" within the meaning of the Employment Security Law.

The district court erred in concluding that Wadkins had been overpaid. The judgment of the district court is reversed, and the cause is remanded to the district court with directions to reverse the determination of the appeals tribunal affirming the decision of the Department.

REVERSED AND REMANDED WITH DIRECTIONS.

Connolly, J., participating on briefs.

JOHN DAVIS, APPELLEE AND CROSS-APPELLANT, V. CRETE CARRIER CORPORATION AND TRANSPORTATION CLAIMS, INC., ITS WORKERS' COMPENSATION INSURER, APPELLANTS AND CROSS-APPELLEES.

740 N.W.2d 598

Filed October 26, 2007. No. S-05-1328.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is no sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. ____: ____. In reviewing decisions of the Workers' Compensation Court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal.
5. **Workers' Compensation: Employer and Employee.** As a general rule, an employer may not unilaterally terminate a workers' compensation award of

indefinite temporary total disability benefits absent a modification of the award of benefits.

Petition for further review from the Court of Appeals, IRWIN, MOORE, and CASSEL, Judges, on appeal thereto from the Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Raymond P. Atwood, Jr., of Atwood, Holsten & Brown, P.C., L.L.O., for appellees.

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

MCCORMACK, J.

NATURE OF CASE

John Davis filed a motion in the Nebraska Workers' Compensation Court against Crete Carrier Corporation and its workers' compensation insurer, Transportation Claims, Inc. (collectively Crete Carrier). Davis sought to assess waiting-time penalties, interest, and attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004). Davis alleged that Crete Carrier unilaterally stopped paying temporary total disability benefits awarded under a February 2, 1993, award on rehearing. Davis asserted entitlement to ongoing temporary total disability benefits from the time his temporary total disability benefits were stopped until the hearing on the motion, or at least when he filed the motion. The single judge denied Davis' motion. Davis appealed and Crete Carrier cross-appealed to the compensation court three-judge review panel, which reversed. The review panel held, citing *ITT Hartford v. Rodriguez*,[1] *Starks v. Cornhusker Packing Co.*,[2] and *Hagelstein v. Swift-Eckrich*,[3] that there must be a hearing to terminate benefits and that benefits may not be summarily terminated, as was done in this case.

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[1] *ITT Hartford v. Rodriguez*, 249 Neb. 445, 543 N.W.2d 740 (1996).

[2] *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998).

[3] *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001).

Crete Carrier appealed to the Nebraska Court of Appeals, which affirmed in part, and in part reversed.[4] The Court of Appeals held that the November 1993 order, based upon the stipulation of the parties, modified the duration of the prior award and that, therefore, no specific application was necessary because the award was modified by agreement of the parties as set forth in Neb. Rev. Stat. § 48-141 (Reissue 2004). Davis now seeks further review from this court.

BACKGROUND

Davis sustained a compensable back injury on March 26, 1989, while employed by Crete Carrier Corporation. On February 2, 1993, after other proceedings not relevant to the present appeal, the review panel entered an award on rehearing. With regard to disability, the review panel determined in paragraph II of the award as follows:

> As a result of said accident and injury [Davis] incurred medical and hospital expense [sic] and was temporarily totally disabled from and including March 31, 1989 to and including April 5, 1991, a period of 105-1/7 weeks, and thereafter sustained a 35 percent permanent partial disability to the body as a whole from and including April 6, 1991 to and including June 14, 1991, a period of 10 weeks and thereafter was again temporarily totally disabled from and including June 15, 1991 to the date of this rehearing on September 28, 1992, is still temporarily totally disabled and will remain temporarily totally disabled for an indefinite future period of time.

In paragraph III of the award, the review panel stated in pertinent part, "When [Davis'] total disability ceases, he shall be entitled to the statutory amounts of compensation for any residual permanent partial disability due to this accident and injury."

In paragraph IX of the award, the review panel stated, "[Davis] is still entitled to vocational rehabilitation services at such time as he is able to participate in said services. If the parties are unable to eventually agree on the nature and/or extent of said

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[4] *Davis v. Crete Carrier Corp.*, 15 Neb. App. 241, 725 N.W.2d 562 (2006).

vocational rehabilitation services, either party may request a hearing on this issue." And in paragraph XII of the award, the review panel stated, "When [Davis'] total disability ceases if thereafter the parties cannot agree on the extent of [Davis'] disability, if any, then a further hearing may be had herein on the application of either party."

On November 23, 1993, one of Davis' treating physicians opined that Davis had reached maximum medical improvement and had a 25-percent medical impairment rating of the body as a whole. On approximately the same date, the single judge entered an order stating that "[p]ursuant to the stipulation of [Davis] and [Crete Carrier], received November 18, 1993, [Crete Carrier] is hereby ordered to pay to [Davis] temporary disability compensation while [Davis] is undergoing vocational rehabilitation and maintaining satisfactory progress in the plan of which the stipulation is a part." The parties' actual stipulation is not contained in the record before this court.

The record shows that Davis participated in a training program at a motorcycle mechanics' institute in Phoenix, Arizona, from December 13, 1993, through October 28, 1994. On October 29, Crete Carrier began paying Davis permanent partial disability benefits. On December 29, 1994, after paying 300 weeks of benefits, Crete Carrier stopped all disability payments to Davis. This cessation of benefits was done without a hearing before the compensation court. Neither Crete Carrier nor Davis filed a petition to modify the February 2, 1993, award on rehearing.

On October 2, 2003, 9 years after payments ceased, Davis filed a motion seeking an order to assess waiting-time penalties, interest, and attorney fees pursuant to § 48-125. Davis alleged that on February 2, 1993, he received a running award of temporary total disability benefits, and that in 1994, Crete Carrier unilaterally stopped paying such benefits to him. Davis alleged that Crete Carrier was in arrears and liable to him for such delinquent benefits from the date of termination of payment to the date of the hearing on his motion. Davis further alleged that there was no reasonable controversy regarding Crete Carrier's liability to him and that Crete Carrier was, therefore, also liable to him for waiting-time penalties, interest, and attorney fees

for all delinquent payments due. Davis asked the single judge to sustain his motion, determine the delinquencies of Crete Carrier, and order Crete Carrier to pay waiting-time penalties, interest, and attorney fees.

On May 5, 2005, the single judge entered an order overruling Davis' motion. In its order, the single judge stated that it is significant that the February 1993 award on rehearing provided that Davis was temporarily totally disabled "'to the date of this rehearing on September 28, 1992, is still temporarily totally disabled and will remain temporarily totally disabled for an indefinite future period of time.'" The single judge found that when Davis reached maximum medical improvement as established by a treating physician on November 23, 1993, Davis was no longer temporarily totally disabled. At that point, he became permanently disabled, and the extent and nature of that permanent disability would be an issue to be decided by the compensation court, if necessary. The single judge found that the November 18 order entered pursuant to a stipulation by the parties did nothing to change the analysis set forth above except for continuing temporary disability payments until Davis finished the agreed-upon and court-ordered vocational retraining.

Davis argued to the single judge that under *Sheldon-Zimbelman v. Bryan Memorial Hosp.*[5] and *Starks*,[6] it is required that Crete Carrier file an application to modify the award on rehearing before terminating benefits. The single judge found, however, that those cases dealt with awards of permanent disability, not temporary disability, and did not apply. The single judge stated:

> Such a result would leave this Court subjected to hundreds, if not thousands, of potential modification actions which would need to be filed before various plaintiffs attained maximum medical improvement in order to change the benefit amounts on the date of maximum medical improvement. Such an interpretation is simply not a feasible interpretation of Sheldon-[Z]imbelman and Starks,

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[5] *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000).

[6] *Starks v. Cornhusker Packing Co.*, *supra* note 2.

> *supra*[,] and has never been applied by this Court for running awards of temporary total disability.

The single judge concluded that when a running award of temporary total disability is entered, a hearing is not necessary unless the parties disagree about the extent and nature of the permanent partial disability.

The single judge also found that under Neb. Rev. Stat. § 48-121(2) (Reissue 2004), unless an injured employee is permanently and totally disabled, the employee's entitlement to benefits for partial disability is limited to a total of 300 weeks, less any weeks of total disability indemnification received. The single judge found that Crete Carrier fulfilled its statutory obligation under the language of the award on rehearing. The single judge stated that when Davis attained maximum medical improvement on November 23, 1993, he was not permanently and totally disabled. The judge noted that Davis was able to successfully complete his vocational rehabilitation program and that he is not entitled to any additional benefits. As to Davis' claim for waiting-time penalties, the single judge found that a reasonable controversy existed as to Crete Carrier's obligation to pay additional indemnification benefits to Davis after 300 weeks of payments were made.

Davis filed an application for review with the three-judge review panel of the compensation court. The review panel reversed the single judge's decision and remanded the matter. The review panel found that Nebraska case law requires a hearing to terminate benefits and that benefits may not be summarily terminated, as was done in this case. The review panel further found that *Sheldon-Zimbelman* and *Starks* set forth the correct statement of the law requiring a modification application to terminate payment of benefits under an award.

Crete Carrier appealed the review panel's decision to the Court of Appeals, which reversed. Without directly addressing the applicability of *Sheldon-Zimbelman* and *Starks*, the Court of Appeals held that the November 1993 order was an agreed-upon modification which satisfied the requirements of § 48-141. After noting that the meaning of the November order was a matter of law, the Court of Appeals concluded that the language in the order specifying temporary total disability compensation

would be paid "'while . . . undergoing the vocational rehabilitation plan'" changed the duration of Davis' temporary total disability.[7] Davis now seeks further review from this court.

ASSIGNMENTS OF ERROR

Davis assigns that the Court of Appeals erred in (1) finding that Crete Carrier properly preserved the issue of whether the single judge's November 1993 order modified the review panel's February 1993 award on rehearing and failing to find that this issue was waived and res judicata; (2) holding that the stipulation of the parties and the November order constituted a § 48-141 judicially approved agreement that modified the duration of Davis' running temporary total disability under the February award on rehearing and that specific § 48-141 application was not required to terminate Davis' temporary total disability benefits; (3) reversing the review panel's remand to the single judge to determine and enforce the benefits due under the February award; (4) failing to award Davis waiting-time penalties, interest, and attorney fees; and (5) failing to award Davis attorney fees in all lower levels of this proceeding.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is no sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[8]

[2,3] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[9] An

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[7] *Davis v. Crete Carrier Corp., supra* note 4, 15 Neb. App. at 255, 725 N.W.2d at 574 (emphasis omitted).

[8] *Hagelstein v. Swift-Eckrich, supra* note 3.

[9] *Id.*

appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[10]

ANALYSIS

PRESERVATION OF ISSUE

Davis first contends that the Court of Appeals erred in finding that Crete Carrier's assignments of error were sufficiently definite and certain to preserve for appellate review the question of whether the November 1993 order and the vocational rehabilitation stipulation modified the February 1993 award on rehearing. Davis argues that on September 30, 2005, the review panel held that the stipulation of the parties and the November 1993 order did not act "'as an "agreement of the parties" to terminate benefits for a running award pursuant to Neb. Rev. Stat. §48-141.'"[11] Davis argues that Crete Carrier did not assign this finding as an error on appeal to the Court of Appeals as required by Neb. Ct. R. of Prac. 9D(1)(e) (rev. 2006) and Neb. Rev. Stat. § 25-1919 (Reissue 1995).

[4] The general rule is that an appellate court will consider only those errors specifically assigned in a lower court and again assigned as error on appeal to the appellate court.[12] In *Dietz v. Yellow Freight Sys.*,[13] we stated that this rule is also applicable in workers' compensation cases. Thus, in reviewing decisions of the compensation court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal.[14]

On appeal to the review panel, Davis assigned, consolidated and restated, that the single judge erred in failing to enforce the February 1993 award on rehearing and in failing to order Crete Carrier to pay continuing disability benefits and the requisite penalties under § 48-125. In reversing the single judge's decision, the review panel found that the stipulation between

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[10] *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, *supra* note 5.

[11] Supplemental brief on petition for further review for appellee at 17.

[12] See *Dietz v. Yellow Freight Sys.*, 269 Neb. 990, 697 N.W.2d 693 (2005).

[13] *Id.*

[14] See *id.*

the parties and the compensation court's November 1993 order did not act as an agreement of the parties to terminate benefits. The review panel found instead that the stipulation and order allowed Davis to receive indemnity benefits while undergoing vocational rehabilitation. The review panel further found, based on Nebraska case law,[15] that a hearing must be held to terminate benefits and that benefits may not be summarily terminated. The review panel then found that the single judge misstated the law in Nebraska to be that an application to modify is not required when terminating temporary total disability benefits. The review panel concluded that regardless of whether a party is terminating temporary total disability benefits or permanent total disability benefits, a modification application to terminate benefits under such an award is needed.

To the Court of Appeals, Crete Carrier broadly assigned as error the review panel's ruling that Crete Carrier had not properly paid benefits to Davis based on the February 1993 award on rehearing and the November order. As noted by the Court of Appeals, encompassed within this broad assignment of error was the question of whether the review panel incorrectly found that an application to modify the February award on rehearing was necessary to terminate Davis' temporary total disability benefits. Accordingly, we conclude that this assignment of error is without merit.

Modification Requirement

In Davis' second and third assignments of error, he contends that the Court of Appeals erred in determining that the stipulation and November 1993 order constituted a § 48-141 judicially approved agreement which modified the February 1993 award on rehearing and Davis' temporary total disability award. Davis further contends that the Court of Appeals erred in concluding that a § 48-141 application is not required to terminate Davis' benefits. Davis claims error in the Court of Appeals' reversing the review panel's remand of the matter to the single judge to determine and enforce the benefits due under the February

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[15] See, *Hagelstein v. Swift-Eckrich, supra* note 3; *Starks v. Cornhusker Packing Co., supra* note 2; *ITT Hartford v. Rodriguez, supra* note 1.

award on rehearing. The broad question presented by these assignments of error is whether Crete Carrier complied with the proper procedures when terminating Davis' temporary total disability benefits.

[5] Our case law has established that as a general rule, an employer may not unilaterally terminate a workers' compensation award of indefinite temporary total disability benefits absent a modification of the award of benefits. For example, in *Starks*,[16] we held that an employer was required to pay an employee permanent disability benefits until an application to modify the original award was filed. In *Starks*, the single judge determined that the employee was permanently and totally disabled. Approximately 2 years later, the employer unilaterally terminated the employee's benefits. The employee filed a motion with the compensation court requesting an order requiring the employer to resume making total disability payments. The employer then filed an application for modification, claiming the employee's disability ceased the day after payments were terminated.

We stated on appeal, "[A] workers' compensation award is in full force and effect, as originally entered, until the award is modified pursuant to the procedure set forth in § 48-141. . . . [E]mployers are prohibited from unilaterally modifying workers' compensation awards."[17] We concluded that the employer in *Starks* had unilaterally terminated the employee's benefit payments. We further concluded that the employer owed the employee total and permanent disability payments from the time it unilaterally terminated benefit payments until the date the employer filed an application for modification.

Similarly, we held in *Hagelstein*[18] that an employer had an obligation to pay an injured employee the originally ordered workers' compensation benefits until an application to modify the award of benefits was filed. In *Hagelstein*, the single judge found that the employee was totally disabled and was entitled to

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[16] *Starks v. Cornhusker Packing Co.*, *supra* note 2.

[17] *Id.* at 38, 573 N.W.2d at 763-64 (citation omitted).

[18] *Hagelstein v. Swift-Eckrich*, *supra* note 3.

benefits for an indefinite period. Thereafter, the employee filed a petition with the compensation court alleging that his employer had ceased paying total disability and had begun paying permanent partial disability on June 19, 1995. The single judge found that the employee had reached maximum medical improvement on April 24 and ordered the employer to pay reduced benefits as of that date. The review panel reversed the portion of the trial court's order requiring payment of permanent partial disability beginning in April and ordered payments to commence on March 6, 1996, the day on which the employee's petition was filed.

On appeal, we treated the employer as the applicant for modification and the date the employer filed its answer as the "application" date. We explained that it was in its answer that the employer set out its claim requesting a modification of the award of temporary total disability benefits. And we reiterated our statements from *Starks*,[19] that an employer is prohibited from unilaterally modifying a workers' compensation award and that an employer's unilateral cessation of benefits is not the basis for the modification of an award of benefits.

We believe the present case presents a factually distinct case from *Starks* and *Hagelstein*. Paragraph III of the February 1993 award on rehearing provided in pertinent part, "When [Davis'] total disability ceases, he shall be entitled to the statutory amounts of compensation for any residual permanent partial disability due to this accident and injury." Paragraph XII further provided, "When [Davis'] total disability ceases if thereafter the parties cannot agree on the extent of [Davis'] disability, if any, then a further hearing may be had herein on the application of either party."

The terms of the February 1993 award on rehearing are clear. Davis, like the employees in *Starks* and *Hagelstein*, was awarded temporary total disability benefits for an indefinite period of time. Davis' award on rehearing further provided, however, that when Davis' total disability ceased, he was entitled to any statutory amounts of permanent partial disability benefits due. Under the terms of this award, if Davis and Crete

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[19] *Starks v. Cornhusker Packing Co.*, *supra* note 2.

Carrier could not agree on the extent of Davis' permanent partial disability benefits, either party could request a hearing on the matter. Thereafter, as previously noted in this opinion, an order file stamped November 18, 1993, was entered directing Crete Carrier to pay Davis temporary total disability benefits while Davis was undergoing vocational rehabilitation and making satisfactory progress. This order was based upon a stipulation between the parties. On November 23, a treating physician opined that Davis had reached maximum medical improvement. Then, on October 29, 1994, following Davis' completion of his vocational rehabilitation program, Crete Carrier ceased paying Davis temporary total disability payments. At that point, there were only approximately 8⅔ weeks left of the 300 weeks of permanent partial disability benefits due to Davis, for which he was paid.

Based upon the facts of this case, we conclude that no application to modify the award was needed to terminate Davis' temporary total disability benefits and to begin payment of his permanent partial disability benefits. Under the terms of the award, had Davis wished to dispute the termination of his temporary total disability benefits, he could have requested a hearing with the compensation court.

Waiting-Time Penalties, Interest, and Attorney Fees

In Davis' final assignments of error, he contends that the Court of Appeals erred in failing to award him waiting-time penalties, interest, and attorney fees. Section 48-125 authorizes a 50-percent penalty payment of compensation and an attorney fee where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits. Having determined that Crete Carrier properly terminated Davis' temporary total disability benefits, we conclude that the Court of Appeals correctly determined that a reasonable controversy existed with respect to Crete Carrier's obligation to pay additional indemnity benefits.

CONCLUSION

For the reasons discussed above, we affirm the judgment of the Court of Appeals. Although our reasoning differs in part

from that employed by the Court of Appeals, this court will not reverse a judgment which it deems to be correct.[20]

AFFIRMED.

HEAVICAN, C.J., not participating.

[20] See *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

JERRY ALSOBROOK, APPELLANT, V. JIM EARP CHRYSLER-PLYMOUTH, LTD., A NEBRASKA CORPORATION, APPELLEE.

740 N.W.2d 785

Filed October 26, 2007. No. S-06-383.

1. **Summary Judgment.** 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.
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. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place a sensible construction upon the statute to effectuate the object of the legislation, rather than a construction that defeats the purpose of the statute.
4. **Insurance: Contracts: Appeal and Error.** The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
5. **Insurance: Contracts.** In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.
6. **Insurance: Contracts: Intent: Appeal and Error.** In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded for further proceedings.

Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, P.C., for appellant.

Joseph F. Gross, Jr., of Timmermier, Gross & Prentiss, for appellee.

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

GERRARD, J.

Jerry Alsobrook alleges that Jim Earp Chrysler-Plymouth, Ltd. (Earp), negligently repaired his vehicle, which caused Alsobrook to lose control of his car and collide with construction barrels. Alsobrook's insurer paid the damages and now, through Alsobrook, brings a subrogation claim against Earp. While this action was pending, Earp's insurer became insolvent. The primary issue presented in this appeal is whether Alsobrook's claim against Earp is barred by the application of the Nebraska Property and Liability Insurance Guaranty Association Act.[1]

STATEMENT OF FACTS

On July 15, 1999, Alsobrook filed a petition against Earp. In his petition, Alsobrook alleged as follows: In April and May 1998, Earp performed repairs on Alsobrook's vehicle that required Earp to disconnect the retaining nut and threaded connecting post so that the suspension could be dropped down to allow the transmission to be removed from the engine. After making the repairs to Alsobrook's vehicle, Earp did not properly secure the retaining nut to the connecting post and failed to replace the parts necessary to adequately secure the front passenger side wheel to the steering assembly. Alsobrook further alleged that on July 30, 1998, while driving his vehicle, a retaining nut disconnected from the connecting post, which caused him to lose his ability to steer the car. The vehicle ran off the road and collided with construction barrels lining the side of the road.

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[1] Neb. Rev. Stat. § 44-2401 et seq. (Reissue 1998).

Following the accident, Alsobrook filed a claim with his own insurer, Shelter Mutual Insurance Company (Shelter). Shelter paid the claim, less a $1,000 policy deductible. Sometime after Shelter had paid Alsobrook's claim, Alsobrook filed the present lawsuit against Earp seeking $10,190.08 in damages, composed of his $1,000 deductible plus the balance of the damages representing Shelter's subrogation interest.

On November 7, 2001, Earp filed a motion for stay and notice of hearing because its insurer, Reliance Insurance Company (Reliance), had gone into liquidation based on an order entered in the Commonwealth Court of Pennsylvania. On March 22, 2002, Alsobrook's counsel filed a claim with the Nebraska Property and Liability Insurance Guaranty Association (the Association) which, pursuant to the Nebraska Property and Liability Insurance Guaranty Association Act (the Act), provides for the payment of certain claims against insolvent insurance companies. The Association denied Alsobrook's claim, explaining in a letter to Alsobrook that "[i]t appears that the claim is a subrogation claim by Shelter" and that under the Act, the Association is "unable to pay subrogation claims or policy deductibles."[2]

In May 2002, Earp filed a motion for summary judgment which was later converted to a motion for partial summary judgment. The district court granted Earp's motion for partial summary judgment, concluding that the claim filed by Alsobrook's attorney with the Association, and the Association's denial of that claim, constituted "an unconditional general release of all liability of . . . Earp in connection with the Alsobrook claim pursuant to § 44-2406(4)" of the Act. The court further found that, even though Shelter had a subrogation right for what it had paid to Alsobrook, neither Shelter nor Alsobrook could pursue Earp for recovery of any such subrogation interest because of the effect of the Act. Finally, the court determined that Alsobrook does have a cause of action against Earp for the $1,000 deductible not paid by Shelter.

Alsobrook filed a motion for reconsideration, alleging that the Act did not apply to the case. The court denied Alsobrook's motion to reconsider and ordered that "[p]ursuant to [Earp's]

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[2] See § 44-2403(4)(b).

stipulation," judgment was to be entered in favor of Alsobrook for the $1,000 deductible. Alsobrook appealed to the Nebraska Court of Appeals.

The Court of Appeals reversed the district court's decision and remanded the cause because there was "both a pleading and a proof deficiency."[3] The court explained that "the evidence [did] not show, nor [was] it admitted in the pleadings, that Shelter paid Alsobrook any portion of his property damages."[4] The court further noted that a "second problem [was] that Shelter's alleged subrogation and the resulting effect of the Act [were] not pled as an affirmative defense by Earp to Alsobrook's suit."[5]

On remand, Earp filed an amended answer asserting the application of the Act as an affirmative defense and submitted evidence establishing that Shelter had paid Alsobrook's claim, less the $1,000 policy deductible. Earp also offered into evidence the affidavit of Victor Kovar, a claims manager for the Association. Generally, Kovar opined that the Reliance policy covered Alsobrook's claim against Earp but that Shelter's subrogation claim was barred by the Act.

Alsobrook objected, arguing that the affidavit contained legal conclusions as to the proper interpretation of the Act and Reliance's insurance policy. The district court overruled this objection. Earp again filed a motion for partial summary judgment, which was granted. The court explained that because Earp had made an offer to confess judgment in favor of Alsobrook with respect to the deductible amount, judgment was entered for Alsobrook and against Earp in the amount of $1,000. Alsobrook appealed.

ASSIGNMENT OF ERROR

Alsobrook assigns, consolidated, restated, and renumbered, that the district court erred in (1) applying the Act to limit his recovery to $1,000 and (2) receiving into evidence the legal conclusions contained in Kovar's affidavit.

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[3] *Alsobrook v. Jim Earp Chrysler Plymouth*, No. A-02-1065, 2004 WL 726810 at *5 (Neb. App. Apr. 6, 2004) (not designated for permanent publication).

[4] *Id.* at *2

[5] *Id.*

STANDARD OF REVIEW

[1,2] 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.[6] 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.[7]

ANALYSIS

At issue in this case is whether Alsobrook's claim against Earp is barred by the application of the Act. Earp argues that pursuant to the provisions of the Act, Alsobrook—or, more to the point, Shelter—is precluded from bringing a subrogation claim against an insured of an insolvent insurer, such as Earp. Alsobrook contends, however, that the Act does not apply in this case because his claim is not a "covered claim" as that term is defined in the Act.

Application of Guaranty Association Act

Before addressing the legal issues presented in this appeal, it is necessary to set forth the relevant provisions of the Act. The Act applies "to all kinds of direct insurance"[8] and its purpose is

> to provide a method for the payment of certain claims against insolvent insurance companies . . . to avoid unnecessary delay in payment of such claims, to avoid financial loss to claimants or to policyholders, to assist in the detection and prevention of insurer insolvencies, and to provide an association of insurers against which the cost of such protection may be assessed in an equitable manner.[9]

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[6] *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007).

[7] *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007).

[8] § 44-2402.

[9] § 44-2401.

The Act further states that "[t]he association shall be obligated only to the extent of the covered claims existing prior to the date a member company becomes an insolvent insurer . . . ."[10]

A "covered claim" is defined in § 44-2403(4)(a) of the Act as

> an unpaid claim which has been timely filed with the liquidator as provided for in the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act and which arises out of and is within the coverage of an insurance policy to which [this Act] applies issued by a member insurer that becomes insolvent . . . .

Section 44-2403(4)(b) explains that a "[c]overed claim shall not include any amount due any . . . insurer . . . as subrogation recoveries or otherwise . . . ." Section 44-2403(4)(b) further provides that

> this section shall not prevent a person from presenting the excluded claim to the insolvent insurer or its liquidator, but the claim shall not be asserted against any other person, including the person to whom benefits were paid or the insured of the insolvent insurer, except to the extent that the claim is outside the coverage or is in excess of the limits of the policy issued by the insolvent insurer[.]

Given these provisions and the undisputed evidence that Alsobrook did not file his claim with the liquidator, it is clear that Alsobrook's claim is not a "covered claim" as that term is defined in the Act. Alsobrook argues that because his claim is not a "covered claim," the entire Act is inapplicable. Specifically, Alsobrook contends that § 44-2403(4)(b) cannot be used by Earp as a defense to Alsobrook's subrogation claim. We disagree.

The plain language of the Act reveals that the Legislature intended the Act to protect not only the claimants making claims on the Association, but also the insureds of an insolvent insurance company. One of the stated purposes of the Act is to avoid financial loss to policyholders.[11] And one of the ways in which the Legislature has accomplished this purpose is by

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[10] § 44-2406.

[11] § 44-2401.

prohibiting excluded claims from being asserted against the insured, except to the extent that a claim is outside the policy coverage or is in excess of the policy limits.[12]

[3] In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place a sensible construction upon the statute to effectuate the object of the legislation, rather than a construction that defeats the purpose of the statute.[13] To conclude that the claim must first be a "covered claim" before an insured is entitled to the defense granted in § 44-2403(4)(b), as urged by Alsobrook, would provide an insured the protection guaranteed by the Act only when the claimant has filed his or her claim with the liquidator.

Alsobrook's interpretation of the Act would give claimants the authority to determine if and when an insured is entitled to the protection of the Act. Alsobrook's interpretation is not dictated by the plain language of the Act and would circumvent one of the Act's express purposes, which is to protect policyholders of insolvent insurers. Accordingly, we conclude that a claim need not be a "covered claim" as defined by § 44-2403(4)(a) to be barred by § 44-2403(4)(b). Here, Alsobrook's claim against Earp is a subrogation claim and, therefore, pursuant to § 44-2403(4)(b), cannot be asserted against Earp, except to the extent that Alsobrook's claim is outside of or in excess of the insurance policy issued by Earp's insolvent insurer.[14]

Coverage Under Earp's Policy

Having determined that § 44-2403(4)(b) is applicable in the present case, we now apply its provisions. Section 44-2403(4)(b) bars Alsobrook's claim except to the extent the claim is outside the scope of Earp's insurance policy.

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[12] § 44-2403(4)(b).

[13] See, *Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007); *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007).

[14] See, e.g., *Horton v. State Farm Ins. Co.*, 641 So. 2d 993 (La. App. 1994); *Window Coverings, Inc. v. Campbell*, 91 Ore. App. 335, 755 P.2d 719 (1988).

[4-6] The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.[15] In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.[16] In appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.[17]

Generally, the purpose of a garage policy is to protect automobile dealers, garage keepers, and owners of automobile service stations against loss by reason of injury to other property or persons by the use of their automobiles. Such policies are designed to care for the specialized needs of the particular operation.[18] As relevant here, the liability section of Earp's garage liability policy provides:

> SECTION II – LIABILITY COVERAGE
> A. COVERAGE
> . . . .
> We will pay all sums an "insured" legally must pay as damages because of . . . "property damage" to which this insurance applies, caused by an "accident" and resulting from "garage operations" involving the ownership, maintenance or use of covered "autos."
> . . . .
> B. EXCLUSIONS
> This insurance does not apply to any of the following:
> . . . .
> 13. WORK YOU PERFORMED

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[15] *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005).

[16] *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571 (2004).

[17] *Olson v. Le Mars Mut. Ins. Co., supra* note 15.

[18] *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986).

> "Property damage" to "work you performed" if the "property damage" results from any part of the work itself or from the parts, materials or equipment used in connection with the work.

Earp's garage liability policy also included a section dealing specifically with "garagekeepers coverage." This section states in relevant part:

> SECTION III – GARAGEKEEPERS COVERAGE
>
> A. COVERAGE
>
> 1. We will pay all sums the "insured" legally must pay as damages for "loss" to a covered "auto" or "auto" equipment left in the "insured's" care while the "insured" is attending, servicing, repairing, parking or storing it in your "garage operations" . . . .
>
> . . . .
>
> B. EXCLUSIONS
>
> 1. This insurance does not apply to any of the following:
>
> . . . .
>
> d. Faulty Work.
>
> Faulty "work you performed."

Given this policy language, Alsobrook argues that his claim against Earp does not fall within the policy's coverage. Alsobrook contends that because his claim is based on Earp's alleged negligent repair of Alsobrook's car, his claim is excluded under the "work you performed" and "faulty work" exclusions of the insurance policy, and can be brought directly against Earp. Earp, however, argues that its insurance policy with Reliance provided coverage for Alsobrook's claim and that because Reliance is now insolvent, Alsobrook's claim is barred by application of the Act.

As an initial matter, we conclude that the "faulty work" exclusion in section III of the policy is irrelevant. For section III to apply, the damages to the vehicle must have occurred "while [Earp was] attending, servicing, repairing, parking or storing [the car]." However, Alsobrook alleged in his complaint that the damages to his car occurred approximately 2 or 3 months after Earp negligently performed the repair work. Because the damages did not occur while Earp was performing work on

Alsobrook's car, section III of the policy does not cover those damages. In other words, Alsobrook need not concern himself with the "faulty work" exclusion, because section III is entirely inapplicable.

But Alsobrook's claim may be covered under section II of the policy, the liability coverage, unless it is excluded by the "work you performed" exclusion. We recently considered a similar provision in *Auto-Owners Ins. Co. v. Home Pride Cos.*[19] In *Auto-Owners Ins. Co.*, an apartment complex, Appletree Apartments, Inc. (Appletree), entered into a contract with Home Pride Companies, Inc. (Home Pride), to install new shingles on a number of apartment buildings. Following completion of the project, Appletree began to notice problems with the roof. Appletree eventually filed suit against Home Pride alleging that Home Pride failed to install the shingles in a workmanlike manner and that such faulty workmanship caused substantial and material damage to the roof structures and buildings. After the suit was filed, Home Pride made a claim to its insurer, Auto-Owners Insurance Company (Auto-Owners), for coverage under its commercial general liability policy. Auto-Owners brought a declaratory judgment action against Home Pride claiming that the insurance policy did not provide coverage because the faulty workmanship was not an "occurrence" under the policy.

We explained that "although faulty workmanship, *standing alone*, is not an occurrence under a [commercial general liability] policy, an accident caused by faulty workmanship is a covered occurrence."[20] We further explained that "if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists."[21] We noted that Appletree had alleged that Home Pride negligently installed shingles on the apartment buildings, which caused the shingles to fall off. Additionally, Appletree alleged that

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[19] *Auto-Owners Ins. Co. v. Home Pride Cos.*, *supra* note 16.

[20] *Id.* at 535, 684 N.W.2d at 577 (emphasis in original).

[21] *Id.* at 535, 684 N.W.2d at 578.

as a consequence of the faulty work, the roof structures and buildings experienced substantial damage. We concluded that the latter allegation "represent[ed] an unintended and unexpected consequence of the contractors' faulty workmanship and goes beyond damages to the contractors' own work product."[22] Therefore, Appletree had properly alleged an "occurrence" within the meaning of the insurance policy.

Auto-Owners further argued that coverage was excluded under the "your work" exclusion in the policy. The "your work" exclusion provided that "'[t]his insurance does not apply to: . . . . Damages claimed for any loss, cost or expense incurred by you . . . for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of: . . . . "Your work". . . .'"[23] We explained that "[g]enerally speaking, the 'your work' exclusions . . . operate to prevent liability policies from insuring against an insured's own faulty workmanship, which is a normal risk associated with operating a business."[24] We noted that "the rationale behind the 'your work' exclusions is that they discourage careless work by making contractors pay for losses caused by their own defective work, while preventing liability insurance from becoming a performance bond."[25]

In rejecting Auto-Owner's argument, we concluded that the "your work" exclusion did not exclude Appletree's damage claim "because [its] claim extends beyond the cost to simply repair and replace the contractors' work, i.e., to reshingle the roofs."[26] The claimed damages to the roof structure and buildings fell outside of the exclusion, and "to the extent that Home Pride may be found liable for the resulting damage to the roof structures and the buildings, Auto-Owners is obligated to provide coverage."[27] Courts in other jurisdictions that have addressed this issue have similarly concluded that damages

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[22] *Id.* at 537, 684 N.W.2d at 579.

[23] *Id.*

[24] *Id.* at 538, 684 N.W.2d at 579.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 539, 684 N.W.2d at 580.

to property outside of the cost of repairing or replacing the insured's own work is not excluded under a "your work" exclusion and is therefore covered under the policy.[28]

In the present case, the "work you performed" exclusion in section II of Earp's policy excludes only those damages that represent the cost to either repair or replace the work that Earp was contracted to perform. But this exclusion does not act to exclude damages to property other than the work that Earp was contracted to perform, i.e., the damages to Alsobrook's vehicle that go beyond the cost to repair or replace Earp's allegedly negligent work. Here, the only indication in the record with respect to the actual repairs performed on Alsobrook's vehicle is found in Alsobrook's petition. The petition does not state with any clarity what exact repairs were requested. Nor is it evident from the petition what portion of the alleged damages represents the cost to repair or replace the work Earp was contracted to perform, versus damages to property beyond the scope of Earp's repair work. The petition simply provides a dollar amount representing the total damage to the car.

On this record, there is a genuine issue of material fact as to how much of Alsobrook's damages are covered under section IIA of the policy and how much is excluded by the "work you performed" exclusion. Therefore, the district court erred in concluding that Alsobrook's entire claim against Earp, besides the deductible, was barred as a matter of law.

With respect to Alsobrook's remaining assignment of error relating to the admission of Kovar's affidavit, we note that the record does not establish to what extent, if any, the court relied on that evidence in reaching its conclusion. Nonetheless, as Alsobrook argues, the scope of an insurance policy is a question of law, with respect to which we have made an independent determination, without reference to the Kovar affidavit. Because our independent analysis cures any error in receiving the affidavit, we need not consider this assignment of error.

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[28] See, e.g., *Garrett v. Auto-Owners Ins. Co.*, 689 So. 2d 179 (Ala. App. 1997); *Travelers Ins. Co. v. Volentine*, 578 S.W.2d 501 (Tex. Civ. App. 1979).

CONCLUSION

We conclude that a claim need not be a "covered claim" as defined in § 44-2403(4)(a) to be barred by § 44-2403(4)(b). Section 44-2403(4)(b) prohibits subrogation claims from being asserted against an insured of an insolvent insurer, except to the extent that the claim is outside of or in excess of the insurance policy issued by the insolvent insurer. The district court erred in concluding, as a matter of law, that Alsobrook's entire claim, in excess of the deductible, is barred by the Act. Because there is a genuine issue of material fact as to what damages are covered and excluded under the insurance policy, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

CITIZENS OPPOSING INDUSTRIAL LIVESTOCK AND VILLAGE BOARD OF REYNOLDS, NEBRASKA, APPELLANTS, V. JEFFERSON COUNTY BOARD OF ADJUSTMENT, APPELLEE.

740 N.W.2d 362

Filed October 26, 2007. No. S-06-486.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) is subject to de novo review.
2. **Standing: Jurisdiction.** The defect of standing is a defect of subject matter jurisdiction.
3. **Motions to Dismiss.** The stage of the litigation at which a motion to dismiss is filed informs the court of the necessity of holding an evidentiary hearing on the motion.

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

Steven M. Virgil, Patricia Knapp, and, on brief, James M. Buchanan for appellants.

Daniel L. Werner, P.C., L.L.O., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This is the second appearance of this case before this court. Citizens Opposing Industrial Livestock (COIL) and the village board of Reynolds (the village), appellants, filed an action with the district court for Jefferson County against appellee, the Jefferson County Board of Adjustment (the board). Appellants challenged the board's ruling that approved a special use permit allowing the operation of a finishing site for swine. In *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 269 Neb. 725, 695 N.W.2d 435 (2005) (*COIL I*), we concluded that the lack of verification of the petition did not defeat jurisdiction, and we reversed the district court's order of dismissal and remanded the cause for further proceedings.

Following remand, a bench trial was conducted on appellants' amended petition. After the trial had concluded, the board filed a motion to dismiss, claiming that the district court did not have subject matter jurisdiction because appellants lacked standing to bring the action. Appellants objected to the motion. Following a nonevidentiary hearing, the district court entered an order sustaining the board's motion and dismissing the action. Appellants appeal. Because we conclude that the district court erred by failing to hold an evidentiary hearing on the board's motion challenging appellants' standing, we reverse the district court's order and remand the cause for further proceedings.

STATEMENT OF FACTS

As noted above, this is the second appearance of this case before this court. The following facts are recited in *COIL I*:

> In February 2004, the Jefferson County Board of Commissioners approved a special use permit to allow the operation of a finishing site for swine. In March, the board of adjustment affirmed the board of commissioners' decision.
>
> COIL and the village filed a petition in the district court challenging the ruling by the board . . . . The petition

> was signed by COIL and the village's attorney, but did not include a verification affidavit. The board of adjustment moved to dismiss, contending that the district court lacked jurisdiction because the petition was not verified as required by [Neb. Rev. Stat.] § 23-168.04.
>
> The district court determined that the petition was not duly verified and that the failure to file a verified petition was jurisdictional. So the court dismissed the petition, and COIL and the village appeal[ed].

COIL I, 269 Neb. at 726, 695 N.W.2d at 436.

Neb. Rev. Stat. § 23-168.04 (Reissue 1997) provides, inter alia, that anyone aggrieved by a decision of a board of adjustment may file a "petition" with the district court, "duly verified," setting forth the purported illegality in the board's decision. In *COIL I*, we determined that the verification requirement contained in § 23-168.04 was not jurisdictional, and as a result, we reversed the district court's order dismissing appellants' petition, and we remanded the cause for further proceedings.

After remand, appellants filed an amended petition in which the only change from the original petition was the addition of a verification. Subsequent to appellants' filing their amended petition, the district court ruled that the board's original answer would "serve as answer to the amended petition." In its answer, the board generally denied appellants' allegations in their amended petition to the effect that they possessed an interest in the litigation. The board did not specifically assert that appellants lacked standing to bring the instant action.

On September 16, 2005, the district court held a bench trial on appellants' amended petition. The evidence at trial focused on the merits of the amended petition. No discussion or challenge to appellants' standing was raised at trial. On November 14, following trial and before resolution of the underlying case, the board filed a motion to dismiss, claiming that "neither [COIL] nor [the village] has standing to invoke the jurisdiction of this court." On December 9, an objection to the board's motion was filed on behalf of appellants.

Both the motion to dismiss and the objection to the motion were argued on January 19, 2006. The board argued that appellants had failed to prove at trial that they had standing to bring

the lawsuit, and as a result, the district court lacked subject matter jurisdiction. None of the parties offered evidence at the hearing. Counsel for appellants argued that an evidentiary hearing was needed in order to address the board's assertion that appellants lacked standing. The district court did not set the motion for an evidentiary hearing.

In an order filed March 30, 2006, the district court concluded that it lacked subject matter jurisdiction because appellants had not adduced evidence at trial demonstrating that either COIL or the village was a proper party plaintiff in the litigation. The district court sustained the board's motion and dismissed appellants' amended petition for lack of standing. Appellants appeal.

ASSIGNMENT OF ERROR

On appeal, appellants assign two errors that can be summarized as claiming that the district court erred in dismissing appellants' amended petition for lack of jurisdiction.

STANDARD OF REVIEW

[1] This action was filed on March 25, 2004, and thus, we apply the new rules for notice pleading. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) is subject to de novo review. See *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006).

ANALYSIS

The issue presented to this court on appeal is whether, given the stage of the litigation, the district court erred in granting the board's motion to dismiss for lack of standing without first holding an evidentiary hearing. As we have noted above, appellants' action was filed on March 25, 2004, and thus, we apply the new rules for notice pleading. Initially, we note that the board's motion was captioned "Motion to Dismiss." The board did not specifically identify its motion as one filed under rule 12(b)(1). Rule 12(b)(1) provides as follows:

> **(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim,

> counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (1) lack of jurisdiction over the subject matter.

[2] The board's motion stated that appellants lacked standing. The defect of standing is a defect of subject matter jurisdiction. See, generally, *Chambers v. Lautenbaugh*, 263 Neb. 920, 927, 644 N.W.2d 540, 547 (2002) (stating that "[a]s an aspect of jurisdiction . . . , standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf"). Accordingly, we review the board's motion as one seeking dismissal of appellants' amended petition for lack of subject matter jurisdiction filed under rule 12(b)(1).

On appeal, appellants argue that the district court erred when it sustained the board's motion to dismiss based on lack of standing without conducting an evidentiary hearing. Appellants note that although a trial was held on their amended petition, the board did not raise a specific challenge to appellants' standing until after the trial had concluded. Given the procedural posture of the case and the stage of the litigation, appellants assert they were entitled to an evidentiary hearing on the standing issue raised in the board's posttrial motion to dismiss. Appellants assert they are entitled to a reversal of the order of dismissal. We agree with appellants that the district court erred in dismissing appellants' amended petition without affording the parties the opportunity to establish the factual background necessary to permit the district court to resolve the standing issue.

Because Nebraska's notice pleading rules are modeled after the Federal Rules of Civil Procedure, we look to federal court decisions for guidance. See *Bohaboj v. Rausch, supra*. We recently considered the nature of a motion to dismiss under rule 12(b)(1) in *Washington v. Conley*, 273 Neb. 908, 912-13, 734 N.W.2d 306, 311 (2007), stating as follows:

> It is well established in federal courts that there are two ways a party may challenge the court's subject matter jurisdiction under rule 12(b)(1). The first way is a facial

attack which challenges the allegations raised in the complaint as being insufficient to establish that the court has jurisdiction over the subject matter of the case. [See, *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000); *Courtney v. Choplin*, 195 F. Supp. 2d 649 (D.N.J. 2002); *Zelaya v. J.M. Macias, Inc.*, 999 F. Supp. 778 (E.D.N.C. 1998).] In a facial attack, a court will look only to the complaint in order to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction. [See *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007). See, also, *Beatty v. U.S. Food and Drug Admin.*, 12 F. Supp. 2d 1339 (S.D. Ga. 1997); *Cohen v. Temple Physicians, Inc.*, 11 F. Supp. 2d 733 (E.D. Pa. 1998).] The second type of challenge is a factual challenge where the moving party alleges that there is in fact no subject matter jurisdiction, notwithstanding the allegations presented in the complaint. [See, *St. Clair v. City of Chico*, 880 F.2d 199 (9th Cir. 1989); *Beatty v. U.S. Food and Drug Admin., supra.*] In a factual challenge, the court may consider and weigh evidence outside of the pleadings to answer the jurisdictional question. [See, *Krohn v. Forsting*, 11 F. Supp. 2d 1082 (E.D. Mo. 1998); *Rodriguez v. Texas Com'n on Arts*, 992 F. Supp. 876 (N.D. Tex. 1998), *affirmed* 199 F.3d 279 (5th Cir. 2000).]

[3] The federal courts have recognized that the stage of the litigation at which a motion to dismiss is filed informs the court of the necessity of holding an evidentiary hearing on the motion. If the motion is filed at the pleadings stage and the motion challenges the sufficiency of the complaint to invoke the court's jurisdiction, then the district court will review the pleadings to determine whether there are sufficient allegations to establish the plaintiff's standing. See, *Bischoff v. Osceola County, Fla.*, 222 F.3d 874 (11th Cir. 2000); *Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987). See, also, 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. 2004 & Supp. 2007). As indicated above, this is considered a facial challenge to standing.

If, however, the motion to dismiss is filed at a later stage in the litigation, then the parties can no longer rely on the "'mere

allegations'" in the complaint. See *Bischoff v. Osceola County, Fla.*, 222 F.3d at 878 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). This is considered a factual challenge to standing. When a defendant has raised a factual challenge to the plaintiff's standing, the federal courts have stated that the trial court should conduct an evidentiary hearing to squarely present the standing issue before the court and resolve the factual dispute. See *Bischoff v. Osceola County, Fla.*, 222 F.3d at 879 (discussing that evidentiary hearing "must" be held in order to "decide disputed factual questions or make findings of credibility essential to the question of standing"). See, also, *Linnemeier v. Indiana University-Purdue University*, 155 F. Supp. 2d 1044, 1050 (N.D. Ind. 2001) (stating that "when faced with standing issues, courts are required to hold an evidentiary hearing to determine disputed factual issues").

In the instant case, the board's unsupported motion to dismiss appellants' amended petition for lack of standing was filed after trial during the later stages of the litigation and asserted a factual challenge to appellants' standing in the case. The district court did not hold an evidentiary hearing on the board's motion. Before the district court and on appeal, the board argues to the effect that an evidentiary hearing was not needed regarding the standing issue because the parties had just concluded a trial on the merits and the district court could rely on the evidence adduced at trial. While the record below is unclear, it appears that the district court accepted this approach and decided the board's motion, relying, at least in part, on the trial record, despite appellants' argument during the proceedings below that an evidentiary hearing was required on the standing issue. In this regard, we quote the following pronouncement from the district court at the conclusion of the argument on the board's motion to dismiss: "Well, obviously, I've deferred ruling. I have read the briefs and reviewed all of the evidence and the Bill of Exceptions or transcription of the hearing. So I will try to get a decision to you fairly promptly."

The district court's failure to hold an evidentiary hearing denied appellants the opportunity to address the board's factual assertion that appellants lacked standing. Although the board

generally denied appellants' allegations in their amended petition with respect to their individual interests in the litigation, the board did not put appellants on notice that standing was contested until after the trial had concluded, thereby effectively depriving appellants of an opportunity to offer evidence at trial on the standing issue. See *Church v. City of Huntsville*, 30 F.3d 1332, 1336 (11th Cir. 1994) (stating that "as a matter of fairness, the City's failure to question the plaintiffs' standing" until later in proceedings "does affect the standard to which we will hold plaintiffs . . . . It might well be unfair . . . to impose a standing burden beyond the sufficiency of the allegations of the pleadings on a plaintiff . . . unless the defendant puts the plaintiff on notice that standing is contested").

Given the board's factual challenge to appellants' standing, we conclude that the parties should have been given an opportunity to present evidence relating to the standing issue raised in the board's motion to dismiss. See, *Bischoff v. Osceola County, Fla.*, 222 F.3d 874 (11th Cir. 2000); *Church v. City of Huntsville*, *supra*; *Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987). We conclude that the district court erred in failing to give the parties the opportunity to establish the factual background necessary to permit the district court to resolve the factually disputed standing issue. We therefore reverse the district court's order dismissing appellants' amended petition and remand the cause for further proceedings consistent with this opinion.

CONCLUSION

For the reasons stated above, given the stage of the litigation at which standing was raised as an issue, we conclude that the district court erred in failing to hold an evidentiary hearing on the board's motion to dismiss for lack of subject matter jurisdiction due to lack of standing filed pursuant to rule 12(b)(1). Accordingly, we reverse the district court's decision dismissing the action and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ELROY L. WABASHAW, ALSO KNOWN AS ELROY L. WABASHA, ALSO KNOWN AS JOHNNY LEE BEARSHIELD, APPELLANT.

740 N.W.2d 583

Filed October 26, 2007. No. S-06-642.

1. **Criminal Law: Jurisdiction.** By enacting Public Law 280 in 1953, Congress granted Nebraska jurisdiction over criminal offenses committed by or against Indians in Indian country within Nebraska.
2. **Jurisdiction: Time.** A state's retrocession of jurisdiction over Indian country is not effective until the federal government accepts it.
3. ____: ____. Nebraska's retrocession of jurisdiction over the Santee Sioux Reservation was not effective until February 15, 2006.
4. **Criminal Law: Jurisdiction: Time.** Nebraska did not lose jurisdiction over crimes committed before the effective date of its retrocession of jurisdiction.
5. **Criminal Law: Jurisdiction.** Nebraska has jurisdiction over offenses in Indian country when a non-Indian commits a crime against another non-Indian.
6. **Intent.** Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.
7. **Criminal Law: Jurisdiction.** By enacting Public Law 280, Congress intended to subject Indians to Nebraska's jurisdiction and criminal laws and to abrogate any inconsistent treaty provisions.
8. **Right to Counsel.** An indigent defendant's right to have counsel does not give the defendant the right to choose his or her own counsel.
9. ____. Mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
10. **Habitual Criminals.** A prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including oral testimony of the accused and authenticated records maintained by the courts or penal and custodial authorities.
11. **Evidence: Expert Witnesses: Identification Procedures.** Fingerprint identity testified to by an expert is perhaps the best known method of the highest probative value in establishing identification.
12. **Prior Convictions: Records: Names.** An authenticated record establishing a prior conviction of a defendant with the same name is prima facie evidence sufficient to establish identity for enhancing punishment.
13. ____: ____: ____. Absent any denial or contradictory evidence, an authenticated record establishing a prior conviction of a defendant with the same name is sufficient to support a finding of a prior conviction.
14. **Names.** Under the idem sonans doctrine, a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance.
15. **Sentences: Prior Convictions: Habitual Criminals: States: Time.** Nebraska's habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1995), does not impose a time limit for using a prior conviction or provide that an out-of-state conviction may be used only if it could be used for enhancement in that other state.

16. **Constitutional Law: Sentences: Prior Convictions: States.** The Full Faith and Credit Clause does not prevent a Nebraska court from enhancing a defendant's sentence based upon a conviction in another state that could not be used for enhancement in that state.
17. **Effectiveness of Counsel: Appeal and Error.** An appellate court need not dismiss an ineffective assistance of counsel claim merely because a defendant raises it on direct appeal.
18. **Effectiveness of Counsel: Records: Appeal and Error.** When a claim of ineffective assistance of counsel is made on direct appeal, the determining factor is whether the record is sufficient to adequately review the question.
19. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** If an ineffective assistance of counsel claim is not raised at the trial level and it requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
20. **Trial: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to relief because of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
21. **Effectiveness of Counsel: Proof: Words and Phrases.** In an ineffective assistance of counsel claim, to prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
22. **Convictions.** When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt.
23. **Effectiveness of Counsel: Conflict of Interest.** The right to effective assistance of counsel generally requires that the defendant's attorney be free from any conflict of interest.
24. ____: ____. The phrase "conflict of interest" denotes a situation in which a lawyer might disregard one duty for another or when a lawyer's representation of one client is rendered less effective because of his or her representation of another client.
25. ____: ____. A conflict of interest must be actual, rather than speculative or hypothetical, before a court can overturn a conviction because of ineffective assistance of counsel.
26. **Attorneys at Law: Conflict of Interest.** Disqualification is appropriate when a conflict of interest could cause the defense attorney to improperly use privileged communications or deter the defense attorney from intense probing on cross-examination.

Appeal from the District Court for Knox County: PATRICK G. ROGERS, Judge. Affirmed.

Jerry L. Soucie, of Nebraska Commission on Public Advocacy, and, on brief, Mark A. Johnson, of Johnson, Morland, Easland & Lohrberg, P.C., for appellant.

Jon Bruning, Attorney General, James D. Smith, and, on brief, Susan J. Gustafson for appellee.

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

CONNOLLY, J.

Elroy L. Wabashaw appeals his convictions for robbery and use of a firearm to commit a felony. Before his jury trial, Wabashaw moved to quash the information. He argues that article I of the "1868 Treaty between the United States of America and different Tribes of Sioux Indians" (1868 Treaty) and article VI of the U.S. Constitution barred his prosecution. The district court overruled the motion. A jury found Wabashaw guilty on both charges, and the district court sentenced Wabashaw as a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1995).

Although Wabashaw raises several issues on appeal, the main issue is whether the district court had jurisdiction over the robbery that occurred in Indian country. We conclude that the district court had jurisdiction over the offense and that the relevant provision of the 1868 Treaty did not divest the district court of jurisdiction. We affirm.

I. BACKGROUND

Monica Kitto testified that she was working at a gas station on April 8, 2005, when a person dressed in black and wearing a white scarf around his face came into the gas station. The robber pointed a gun at Kitto and gave her a note directing her to put money in a bag, and she did as instructed. Kitto estimated that the total amount taken was a little more than $500. The robber then took the women's restroom key, threw it at Kitto, and told her to go to the restroom. Kitto stayed inside the restroom 2 to 3 minutes before she came out and called the police.

Kitto testified that she could not see the robber's face or hands because they were covered. Although she could not recognize the robber's voice, she described him as slim, 5 feet 8 inches to 5 feet 10 inches tall.

Acting on a tip, Santee Police Chief Michael G. Vance met with Wabashaw at the police station. As Vance began questioning Wabashaw, Officer Robert Henry was present, but Henry left on a police call and did not witness the entire interview. Vance read Wabashaw his *Miranda* rights and told Wabashaw that Vance wanted to talk about the robbery. Wabashaw signed a waiver of his *Miranda* rights and initially stated he had nothing to do with the robbery. Vance then told him that police had recovered some clothing articles left at a sweat lodge. Vance also told him a DNA analysis on the clothing would match Wabashaw. Upon hearing this, Wabashaw told Vance that he "'did it'" and that he had acted alone. When Vance asked Wabashaw about the gun used in the robbery, he stated he left the rifle in a field when he was running from a police officer. After making this admission to Vance, Wabashaw wrote and signed a statement stating he committed the robbery. Because Henry was present at part of the interview, Vance signed Henry's name and his own at the bottom of Wabashaw's written statement.

Later, the State charged Wabashaw with robbery and use of a weapon to commit a felony. Wabashaw moved to quash the information. He alleged that the prosecution was unconstitutional, as prohibited by the 1868 Treaty and article VI of the U.S. Constitution. The court overruled the motion to quash.

Before trial, the State submitted handwriting samples to a laboratory for analysis. Claiming the written confession was a forgery, Wabashaw moved to have a handwriting expert appointed. The court granted his motion. The record does not show whether Wabashaw's trial counsel ever obtained the expert. Wabashaw argues on appeal that he was denied effective assistance of counsel because counsel failed to obtain a handwriting expert.

At trial, the State called four witnesses, including Vance and a handwriting expert. The handwriting expert compared more than 26 known writings and concluded that Wabashaw was the

individual who wrote the written confession. Wabashaw's counsel cross-examined each of the State's witnesses except Vance, reserving examination of Vance for Wabashaw's case in chief.

A jury found Wabashaw guilty of robbery and use of a firearm to commit a felony. At the enhancement hearing, the court received certified records for a 1977 South Dakota conviction. The court admitted records of the 1977 conviction and another prior conviction. The court found Wabashaw to be a habitual criminal. It sentenced him to consecutive prison terms of 12 to 14 years for the robbery conviction and 10 to 12 years on the weapons conviction.

II. ASSIGNMENTS OF ERROR

Wabashaw assigns, rephrased and reordered, that the district court erred by (1) overruling Wabashaw's motion to quash, (2) not conducting an evidentiary hearing on Wabashaw's motions to allow counsel to withdraw and to appoint substitute counsel, (3) determining that the State sufficiently proved identity to use a prior conviction to enhance Wabashaw's sentence, and (4) accepting a prior conviction from South Dakota for enhancement when South Dakota law precludes the use of the conviction for enhancement purposes.

Wabashaw also assigns that he was denied effective assistance of counsel. He claims his attorney (1) had a conflict of interest when he had previously represented Henry, who was called as a witness; (2) failed to request an evidentiary hearing on Wabashaw's motion to quash; (3) failed to object to references to evidence recovered by the police; (4) failed to file a motion to suppress Wabashaw's confession as fruit of the poisonous tree; (5) failed to cross-examine Vance during the State's case in chief; and (6) failed to obtain a handwriting expert.

III. STANDARD OF REVIEW

Regarding questions of law presented by a motion to quash, we resolve the questions independently of the lower court's conclusions.[1]

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[1] See *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

IV. ANALYSIS

1. The District Court Had Jurisdiction Over Wabashaw's Prosecution

Wabashaw argues that the district court did not acquire jurisdiction over him because his arrest, detainment, and prosecution violated article I of the 1868 Treaty and article VI of the U.S. Constitution. After Wabashaw's counsel had briefed to this court, we appointed Wabashaw new counsel. During oral argument, Wabashaw's new counsel argued that the record is insufficient for us to decide the jurisdictional issue. Counsel suggested that to address the issue, we would need to know whether Wabashaw is an Indian, and that evidence is not in the record. We have determined, however, that the court had jurisdiction regardless of whether Wabashaw is an Indian or a non-Indian.

(a) Background Concerning Public Law 280

[1] By enacting Public Law 280 in 1953, Congress granted Nebraska jurisdiction over criminal offenses committed by or against Indians in Indian country. Public Law 280 is now codified at 18 U.S.C. § 1162(a) (2000), which provides that Nebraska

> shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that [Nebraska] has jurisdiction over offenses committed elsewhere within [Nebraska], and the criminal laws of [Nebraska] shall have the same force and effect within such Indian country as they have elsewhere within [Nebraska].

The record shows that the gas station is in Knox County, Nebraska, within the Santee Sioux Nation—Indian country—which brings the robbery within the purview of Public Law 280.

[2,3] In 1968, Congress provided for the voluntary abandonment of the jurisdiction granted by Public Law 280.[2] In 2001, the Nebraska Legislature offered retrocession of criminal and

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[2] See 25 U.S.C. § 1323 (2000).

civil jurisdiction over the Santee Sioux Reservation.[3] We note that the Legislature's resolution called for an effective date of July 1, 2001, but retrocession is not effective until the federal government accepts it.[4] The federal government did not immediately accept the Legislature's 2001 offer of retrocession; it was not effective until February 15, 2006.[5] The retrocession, therefore, was not yet effective when the robbery occurred in April 2005 or when the State charged Wabashaw in the district court that same month.

[4] In a case involving retrocession of jurisdiction over a different reservation, we considered the effect of retrocession on pending cases and crimes committed before acceptance.[6] We decided that Nebraska did not abandon jurisdiction over crimes committed before the federal government's acceptance of retrocession.[7] So, any jurisdiction the State had over the robbery under Public Law 280 in 2005 was not lost when the retrocession became effective in 2006.

(b) District Court Had Jurisdiction Regardless of the Indian Status of Wabashaw or His Victim

Wabashaw's counsel stated during oral argument that we did not have a sufficient record to determine jurisdiction because the record failed to state whether Wabashaw is an Indian. We determine that regardless of whether Wabashaw is an Indian, the court had jurisdiction.

Public Law 280 gives Nebraska jurisdiction "over offenses committed *by or against Indians* in the areas of Indian country."[8] The robbery occurred in Indian country. Therefore, if

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[3] L.R. 17, Legislative Journal, 97th Leg., 1st Sess. 2356, 2358-59 (May 31, 2001).

[4] See *State v. Goham*, 187 Neb. 34, 187 N.W.2d 305 (1971). See, also, Executive Order No. 11435, 33 Fed. Reg. 17,339 (Nov. 21, 1968).

[5] See Notice of Acceptance of Retrocession of Jurisdiction for the Santee Sioux Nation, NE, 71 Fed. Reg. 7994 (Feb. 15, 2006).

[6] See *State v. Goham*, 191 Neb. 639, 216 N.W.2d 869 (1974).

[7] *Id.*

[8] See 18 U.S.C. § 1162(a) (2000) (emphasis supplied).

either Wabashaw or his victim is an Indian, Nebraska has jurisdiction.

[5] The only other possibility is that neither Wabashaw nor his victim is an Indian. Yet even in that scenario, Nebraska has jurisdiction because when a non-Indian commits a crime against another non-Indian in Indian country, jurisdiction rests in the state.[9]

Under all possible permutations, the court had jurisdiction. So, we can resolve the jurisdictional issue despite the record's lack of information regarding Wabashaw's Indian status.

(c) The 1868 Treaty Did Not Divest the District Court of Jurisdiction

Having determined that jurisdiction does not depend on Wabashaw's Indian status, we now analyze the 1868 Treaty. We assume that Wabashaw is an Indian because the 1868 Treaty provision on which he relies is irrelevant if he is not an Indian.

Wabashaw argues that the court lacked jurisdiction over him because his arrest, detainment, and prosecution violated article I of the 1868 Treaty and article VI of the U.S. Constitution. Thus, he concludes that the court erred in overruling his motion to quash.

Wabashaw relies on article I of the 1868 Treaty, which states:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws . . . .[10]

Wabashaw argues that no notice was given to a designated Santee tribal agent to deliver him over to U.S. authorities.

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[9] See *United States v. McBratney*, 104 U.S. 621, 26 L. Ed. 869 (1881).

[10] Treaty between the United States of America and different Tribes of Sioux Indians, April 29, 1868, 15 Stat. 635.

Therefore, he argues the court was without jurisdiction until he was brought properly before it under the method described in the 1868 Treaty.

We do not believe the plain language of the 1868 Treaty imposes the notice requirement that Wabashaw suggests. Yet, even if we construe the language to impose such a notice requirement, we determine that Congress has abrogated the requirement.

[6,7] Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.[11] By enacting Public Law 280, Congress clearly intended to subject Indians to Nebraska's jurisdiction and criminal laws and to abrogate any inconsistent treaty provisions. The purported notice requirement in the 1868 Treaty imposes an obligation that does not exist under Nebraska criminal law and, as such, is inconsistent with Nebraska law. Additionally, if we concluded that the State lacks jurisdiction because the arresting authority did not comply with the notice requirement, it would be inconsistent with Congress' clear intent to subject Indians to Nebraska's jurisdiction.

We conclude that even if we construe the 1868 Treaty language to impose a notice requirement, Congress abrogated the provision by enacting Public Law 280.

In passing, we note that the U.S. Court of Appeals for the Eighth Circuit recently rejected an argument similar to Wabashaw's claim.[12] Although the Eighth Circuit did not rely on Public Law 280, the court determined that Congress had abrogated any notice provision in the 1868 Treaty when it enacted a separate statute to give Indians citizenship.

We conclude that Wabashaw's first assignment of error is without merit because the 1868 Treaty did not divest the court of jurisdiction. The court did not err in overruling Wabashaw's motion to quash.

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[11] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).

[12] See *U.S. v. Drapeau*, 414 F.3d 869 (8th Cir. 2005), *cert. denied* 546 U.S. 1119, 126 S. Ct. 1090, 163 L. Ed. 2d. 906 (2006).

2. The District Court Did Not Err in Failing to Conduct an Evidentiary Hearing

Wabashaw contends that the court erred when it did not hold an evidentiary hearing on his motion to allow trial counsel to withdraw and to appoint substitute counsel. Wabashaw made two motions to allow his trial counsel to withdraw: the first was for an alleged conflict of interest, and the second was for Wabashaw's assertion that counsel was not giving Wabashaw all the materials he requested. The court denied both motions. Wabashaw now argues that the court had a duty to conduct an evidentiary hearing to determine whether a basis existed for substituting counsel.

Wabashaw's argument is without merit. First, assuming the court erred in failing to conduct an evidentiary hearing on the alleged conflict of interest, it was not prejudicial. As shown later in our discussion, the alleged conflict of interest did not result in ineffective assistance. So, any error by the court in failing to conduct an evidentiary hearing on the first motion did not prejudice Wabashaw's defense.

[8,9] Next, the court did not err in failing to hold an evidentiary hearing on Wabashaw's second motion to appoint substitute counsel. An indigent defendant's right to have counsel does not give the defendant the right to choose his or her own counsel.[13] Mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.[14] At the hearing on Wabashaw's second motion, he stated that trial counsel had not given him materials to prepare "live questions" for the witnesses. For this reason—and other similar dissatisfactions with trial counsel's conduct—Wabashaw sought to have the court discharge counsel and appoint substitute counsel. Wabashaw did not have the right to choose counsel, and his dissatisfaction with trial counsel was insufficient to secure substitute counsel. Because Wabashaw's asserted grounds for discharging counsel and appointing new counsel were insufficient, there was no reason for the court to conduct an evidentiary hearing.

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[13] See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

[14] *Id.*

3. The State Provided Sufficient Proof of Identity to Use a South Dakota Conviction for Enhancement

Wabashaw contends that the district court erred during the enhancement stage. He argues that the State failed to prove that an "Elroy Wabasha" who was convicted for robbery in 1977 in South Dakota was the same person as the defendant in this case, "Elroy Wabashaw." The State contends that the evidence at the enhancement hearings established the two defendants were the same.

Wabashaw argues that during the enhancement hearing, the court received testimony comparing two photographs, both alleged to be of Wabashaw. He argues that the court erred in overruling his hearsay and authentication objection and that the ruling was prejudicial. However, we need not determine whether the court erred in overruling Wabashaw's objection. Assuming the court committed an error, it did not prejudice Wabashaw because the record contained sufficient evidence to prove his identity.

[10,11] A prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence.[15] This includes the oral testimony of the accused and authenticated records maintained by the courts or penal and custodial authorities.[16] We have stated that fingerprint identity testified to by an expert is perhaps the best known method of the highest probative value in establishing identification.[17]

Fingerprints of "Elroy Wabasha" were taken in 1981 when he was serving his 15-year sentence for the 1977 robbery conviction. Knox County authorities also took fingerprints from Wabashaw when he was in jail in April 2005. At the enhancement hearing, the parties stipulated that if called to testify, a fingerprint examiner would conclude that the same individual contributed the fingerprints in both the 1981 set and the 2005 set. As we have stated, this fingerprint evidence is perhaps the best known method of establishing identity.

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[15] See *State v. Luna*, 211 Neb. 630, 319 N.W.2d 737 (1982).

[16] *Id.*

[17] *Id.*

[12,13] We have also stated that an authenticated record establishing a prior conviction of a defendant with the same name is prima facie evidence sufficient to establish identity for enhancing punishment. And absent any denial or contradictory evidence, it is sufficient to support a finding of a prior conviction.[18]

The court received a certified copy of the conviction from the 1977 robbery case. The defendant's name appears as "Elroy Wabasha" in the authenticated record, though the defendant's name in the present case is "Elroy Wabashaw."

[14] Under the idem sonans doctrine, a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance.[19] Here, the spelling discrepancy is immaterial. Thus, the certified copy of the conviction in the 1977 robbery case was an "authenticated record establishing a prior conviction of a defendant *with the same name.*" Therefore, the record is prima facie evidence sufficient to establish identity for enhancing punishment.[20] Furthermore, Wabashaw has not offered any evidence or claimed that he is not the same person referred to in the prior conviction record.

We conclude that the court did not err in determining the State sufficiently proved Wabashaw was the same person as the "Elroy Wabasha" who was convicted in the 1977 South Dakota robbery case.

4. Nebraska Could Use Wabashaw's 1977 Conviction for Enhancement Although South Dakota Would No Longer Permit Use of the Conviction for Enhancement

Wabashaw contends that the district court erred in accepting his 1977 South Dakota robbery conviction to enhance his sentence. He argues South Dakota law precludes use of the conviction for enhancement purposes. Wabashaw relies on S.D. Codified Laws § 22-7-9 (2004), which states in part: "A prior conviction may not be considered under [South Dakota's

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[18] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[19] *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006); *State v. Laymon*, 217 Neb. 464, 348 N.W.2d 902 (1984).

[20] See *State v. Thomas, supra* note 18.

enhancement statutes] unless the defendant was, on such prior conviction, discharged from prison, jail, probation, or parole within fifteen years of the date of the commission of the principal offense." Wabashaw argues that the South Dakota law operates as an "'expungement'" or "'pardon'" of any prior felony convictions, for enhancement purposes, 15 years after discharge.[21] Wabashaw argues that "[t]o deny South Dakota's treatment of his prior offense as 'expunged' would be denying the Full Faith and Credit of South Dakota's laws and their treatment of judgments of convictions."[22]

(a) The Plain Language of Nebraska's Habitual Criminal Statute Does Not Preclude Use of the 1977 Conviction

[15] Nebraska's habitual criminal statute does not preclude the use of Wabashaw's 1977 conviction. Nebraska's habitual criminal statute, § 29-2221, states:

> (1) Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal . . . .

The statute's plain language does not impose a time limit for using a prior conviction. Nor does it provide that an out-of-state conviction may be used only if it could be used for enhancement in that other state. The statute simply requires that the defendant was twice previously (1) convicted, (2) sentenced, and (3) committed to prison for a term not less than 1 year.

Section 29-2221 does contain one, but only one, exception to the use of a prior conviction. That exception, found in subdivision (3), provides that if the state grants a person a pardon because he is innocent, the state cannot use the conviction for enhancement. Wabashaw claims that the South Dakota statute operated as a "pardon" of his 1977 conviction and that Nebraska cannot use the conviction for enhancement. But this so-called

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[21] Brief for appellant at 36.

[22] *Id.*

"pardon" was not granted because he was innocent and therefore does not fit the exception under the Nebraska statute.

Nothing in the language of the Nebraska habitual criminal statute suggests the court erred in using Wabashaw's 1977 South Dakota conviction for enhancement purposes.

(b) The Full Faith and Credit Clause Does Not Require Nebraska to Recognize South Dakota's Treatment of the 1977 Conviction

Wabashaw argues that Nebraska must give full faith and credit to South Dakota's treatment of his conviction. We are not convinced that the Full Faith and Credit Clause of the U.S. Constitution requires Nebraska to recognize South Dakota's treatment of the 1977 conviction as "expunged" for enhancement purposes.

The New Mexico Court of Appeals faced a similar, although not identical, issue in *State v. Edmondson*.[23] In *Edmondson*, a New Mexico trial court enhanced the defendant's sentence, using a Texas conviction that had been set aside by a Texas court. The defendant argued on appeal that the Full Faith and Credit Clause prohibited use of the Texas conviction because Texas law did not permit such convictions for habitual offender sentencing. The New Mexico Court of Appeals decided that the Texas conviction could be used to enhance the defendant's sentence in New Mexico, even though it could not be used under the Texas habitual offender statute.

The court refused to apply the Full Faith and Credit Clause. It stated the clause would "rarely, if ever, compel one state to be governed by the law of a second state regarding the punishment that can be imposed for a crime committed within the first state's boundaries."[24] The court relied on *Hughes v. Fetter*.[25] In *Fetter*, the U.S. Supreme Court stated, "[F]ull faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state;

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[23] *State v. Edmondson*, 112 N.M. 654, 818 P.2d 855 (N.M. App. 1991).

[24] *Id.* at 659, 818 P.2d at 860.

[25] *Hughes v. Fetter*, 341 U.S. 609, 71 S. Ct. 980, 95 L. Ed. 1212 (1951).

rather, it is for this Court to choose in each case between the competing public policies involved."[26]

The *Edmondson* court reasoned that a state's penal code is the strongest expression of the state's public policy. It stated that "[f]ull faith and credit ordinarily should not require a state to abandon such fundamental policy in favor of the public policy of another jurisdiction."[27] The court ultimately decided that the policies behind the Texas rule precluding the use of the conviction were not so compelling that full faith and credit required the rule to prevail over New Mexico law.

[16] We find the *Edmondson* court's analysis persuasive. We conclude that the Full Faith and Credit Clause does not prevent a Nebraska court from using Wabashaw's 1977 robbery conviction. The court did not err in using Wabashaw's conviction to enhance his sentence.

5. Wabashaw's Claims of Ineffective Assistance of Counsel

[17-19] Wabashaw claims he received ineffective assistance of counsel in several respects. We need not dismiss an ineffective assistance of counsel claim merely because a defendant raises it on direct appeal.[28] The determining factor is whether the record is sufficient to adequately review the question.[29] But if the defendant has not raised ineffective assistance of counsel at the trial level and it requires an evidentiary hearing, we will not address the matter on direct appeal.[30]

[20-22] To establish a right to relief because of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[31] Next, the defendant must show that counsel's deficient performance

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[26] *Id.*, 341 U.S. at 611.

[27] *State v. Edmondson, supra* note 23, 112 N.M. at 659-60, 818 P.2d at 860-61.

[28] *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003).

[29] *Id.*

[30] See *id.*

[31] *Id.*

prejudiced the defense in his or her case.[32] To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.[33] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[34] When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt.[35]

(a) Wabashaw Was Not Denied Effective Assistance of Counsel Because of an Alleged Conflict of Interest

Wabashaw contends that he was denied effective assistance of counsel because of an alleged conflict of interest. Before trial, Wabashaw asked his trial counsel to file a motion to withdraw and for appointment of successor counsel. Counsel had previously represented Henry in an unrelated matter, and Wabashaw believed counsel would not fully and effectively examine Henry at trial because of that relationship. The court overruled the motion. Wabashaw now argues that this alleged conflict of interest denied him effective assistance of counsel. We believe the record is sufficient to adequately review this issue on direct appeal.

[23-25] The right to effective assistance of counsel generally requires that the defendant's attorney be free from any conflict of interest.[36] The phrase "conflict of interest" denotes a situation in which a lawyer might disregard one duty for another or when a lawyer's representation of one client is rendered less effective because of his or her representation of another client.[37] A conflict of interest must be actual, rather than speculative or

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[32] *Id.*

[33] *Id.*

[34] See *id.*

[35] *Id.*

[36] U.S. Const. amend. VI; Neb. Const. art. I, § 11; *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001); *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000).

[37] See, *State v. Dunster, supra* note 36; *State v. Narcisse, supra* note 36.

hypothetical, before a court can overturn a conviction because of ineffective assistance of counsel.[38]

[26] Wabashaw relies in part on *State v. Ehlers*.[39] In *Ehlers*, the concern was defense counsel's attorney-client relationship with a state witness. The State argued that the relationship gave rise to continuing obligations of loyalty and confidentiality that could prevent counsel from conducting a thorough cross-examination. We noted that the goal is to discover whether a defense lawyer has divided loyalties that prevent him or her from effectively representing the defendant. We stated that disqualification is appropriate when the conflict could cause the defense attorney to improperly use privileged communications in cross-examination. We also noted that disqualification is appropriate if the conflict could deter the defense attorney from intense probing on cross-examination.

At the hearing on the motion to withdraw, the State said it could not guarantee that it would not call Henry as a witness because "officers come and go from Santee" and that if Vance "moved on," it would be necessary to call Henry. Vance, however, ultimately testified for the State, and the State did not call Henry as a witness. Instead, Henry testified for the defense. Therefore, trial counsel was never in the position of cross-examining Henry, and the concern in *Ehlers* regarding counsel's inability to conduct a thorough cross-examination was not present.

Wabashaw further argues the written confession was a forgery. Therefore, he asserts that Vance and Henry's credibility was crucial. He claims that trial counsel should have established the statement's unreliability. He argues that although counsel asked Henry if he witnessed the statement, counsel failed to ask why Henry did not strike his name from the statement. Nor did counsel ask why he allowed the statement to go forward without alerting the court that his signature had been "forged."

Wabashaw has failed to show how counsel's failure to further question Henry prejudiced his defense. It is unclear how any

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[38] *Id.*

[39] *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001).

further probing of Henry could have swayed the jury. Henry's direct testimony established that he did not sign his own name to the statement. Further questioning regarding Henry's character or his conduct would not affect the statement's veracity because it was Vance, not Henry, who questioned Wabashaw and took Wabashaw's written statement.

Wabashaw has failed to show that counsel's alleged conflict of interest prejudiced his defense. Thus, we determine that he was not denied effective assistance of counsel because of an alleged conflict of interest.

(b) Counsel's Failure to Request an Evidentiary Hearing on the Motion to Quash Was Not Ineffective Assistance

Wabashaw also argues that trial counsel was ineffective in failing to request an evidentiary hearing on Wabashaw's motion to quash. Wabashaw contends that counsel failed to preserve relevant evidence, thereby materially affecting his ability to challenge the court's denial of his motion to quash. Specifically, Wabashaw alleges that counsel failed to produce evidence showing Wabashaw is an American Indian or that he is a member of the Sioux tribe protected by the 1868 Treaty.

Counsel's failure to preserve the evidence did not prejudice Wabashaw. We have concluded that the 1868 Treaty did not provide a basis for granting the motion to quash. So, Wabashaw suffered no prejudice when counsel failed to produce evidence showing he was a member protected by the treaty. Counsel's failure to request an evidentiary hearing on the motion was not ineffective assistance of counsel.

(c) The Record on Direct Appeal Is Insufficient to Review the Remaining Ineffective Assistance Claims

Wabashaw further argues that counsel was ineffective by failing to (1) object to references to evidence recovered by the police, (2) file a motion to suppress Wabashaw's confession as fruit of the poisonous tree, (3) cross-examine Vance during the State's case in chief, and (4) obtain a forensic handwriting expert.

We conclude that the record on direct appeal is not sufficient to adequately review these claims of ineffective assistance.

V. CONCLUSION

We conclude that the district court had jurisdiction. The court did not err in (1) failing to conduct an evidentiary hearing on Wabashaw's second motion to allow counsel to withdraw, (2) determining that the State had made sufficient proof of identity to use the 1977 conviction to enhance Wabashaw's sentence, or (3) accepting the 1977 conviction for enhancement when South Dakota law precludes its use.

Assuming the court erred in failing to conduct an evidentiary hearing on Wabashaw's first motion to allow counsel to withdraw, it was not prejudicial.

Neither trial counsel's alleged conflict of interest nor his failure to request an evidentiary hearing on the motion to is insufficient to review Wabashaw's remaining ineffective assistance claims on direct appeal.

We affirm Wabashaw's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., not participating in the decision.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN C. KINNEY, RESPONDENT.

740 N.W.2d 607

Filed November 2, 2007. No. S-87-352.

1. **Disciplinary Proceedings: Appeal and Error.** In attorney discipline and admission cases, the Nebraska Supreme Court reviews recommendations de novo on the record, reaching a conclusion independent of the referee's findings; when credible evidence is in conflict on material issues of fact, however, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings.** The Nebraska Supreme Court owes a solemn duty to protect the public and the legal profession when considering an application for reinstatement to the practice of law.
3. ____. A mere sentimental belief that a disbarred lawyer has been punished enough will not justify his or her restoration to the practice of law. The primary concern is whether the applicant, despite the former misconduct, is now fit to be admitted to the practice of law and whether there is a reasonable basis to believe that the present fitness will permanently continue in the future.
4. ____. Reinstatement after disbarment should be difficult rather than easy.

5. **Disciplinary Proceedings: Proof.** A disbarred attorney has the burden of proof to establish good moral character to warrant reinstatement. The applicant can overcome this burden by clear and convincing evidence. The proof of good character must exceed that required under an original application for admission to the bar because it must overcome the former adverse judgment of the applicant's character.
6. ____: ____. The more egregious the misconduct, the heavier an applicant's burden to prove his or her present fitness to practice law.
7. **Disciplinary Proceedings: Attorneys at Law.** Legal professionals who are acquainted with an individual are in a unique position to assess that person's character and fitness to be a lawyer.
8. ____: ____. Besides moral reformation, an applicant for reinstatement after disbarment must also otherwise be eligible for admission to the bar as in an original application.
9. ____: ____. An applicant for reinstatement after disbarment must show that he or she is currently competent to practice law in Nebraska.

Original action. Judgment of conditional reinstatement.

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

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

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

PER CURIAM.

This court disbarred John C. Kinney in May 1987 after he embezzled about $23,000 from his employer's law firm.[1] Kinney applied for reinstatement. We appointed a referee, who recommended that we readmit Kinney contingent upon Kinney's taking a course in legal ethics and successfully passing the Nebraska bar examination. Counsel for Discipline filed exceptions to the referee's recommendations.

BACKGROUND

In 1981, Kinney was admitted to the practice of law in Nebraska. Robert G. Scoville, an attorney practicing in South Sioux City, Nebraska, hired Kinney as an associate attorney and

[1] *State ex rel. NSBA v. Kinney*, 225 Neb. 340, 405 N.W.2d 17 (1987).

paid Kinney a salary. As an employee, Kinney was obligated to turn over to the law firm all fees earned and paid to him. In 1984, however, Kinney kept about $20,000 in fees that he should have turned over to the firm. When this theft came to light, Scoville confronted Kinney, but agreed to give him another chance. Scoville did not report the theft to the police, and he allowed Kinney to continue his employment as an associate. Kinney's father paid Scoville the $20,000 restitution.

According to Kinney, he had an alcohol problem when the 1984 incident occurred. Once Scoville discovered the theft, Kinney entered a 30-day inpatient treatment program. After completing the program, Kinney became involved with Alcoholics Anonymous.

In 1986, Scoville discovered that Kinney had again misappropriated funds. This time, Kinney had stolen about $23,000. Scoville fired Kinney and filed a grievance against him with the Counsel for Discipline in January 1987. Kinney admitted to the Counsel for Discipline that he had embezzled about $23,000 from Scoville. Kinney agreed to make full restitution to Scoville over time. The county attorney did not charge Kinney with a crime.

In April 1987, Kinney signed a voluntary surrender of license, admitting that he violated DR 1-102(A)(1), (4), and (6) of the Code of Professional Responsibility. In May 1987, we disbarred Kinney.[2]

Kinney applied for reinstatement of his license in December 1998. We denied his application without a hearing. In October 2006, Kinney filed the current application for reinstatement. Counsel for Discipline resisted Kinney's application. We appointed a referee to conduct an evidentiary hearing. Following the hearing, the referee recommended that we readmit Kinney to the practice of law, contingent upon Kinney's taking a course in legal ethics and successfully passing the Nebraska bar examination. Counsel for Discipline filed exceptions to the referee's recommendations.

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[2] *Id.*

ASSIGNMENTS OF ERROR

Counsel for Discipline takes exception to the referee's finding that Kinney has overcome the former adverse judgment as to his character and that he currently possesses good moral character sufficient to warrant reinstatement.

STANDARD OF REVIEW

[1] In attorney discipline and admission cases, we review recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[3] When credible evidence is in conflict on material issues of fact, however, we consider and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[4]

ANALYSIS

[2-4] As the court that disbarred Kinney, we have inherent power to reinstate him to the practice of law.[5] As recently noted in *State ex rel. Counsel for Dis. v. Mellor*,[6] this court owes a solemn duty to protect the public and the legal profession when considering an application for reinstatement.[7] A mere sentimental belief that a disbarred lawyer has been punished enough will not justify his or her restoration to the practice of law.[8] The primary concern is whether the applicant, despite the former misconduct, is now fit to be admitted to the practice of law. Also, we must determine whether there is a reasonable basis to believe that the present fitness will permanently continue in the future.[9] In other words, reinstatement after disbarment should be difficult rather than easy.[10]

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[3] See *State ex rel. Counsel for Dis. v. Mellor*, 271 Neb. 482, 712 N.W.2d 817 (2006).

[4] See *id.*

[5] See *id.*

[6] *Id.*

[7] See *id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[5,6] A disbarred attorney has the burden of proof to establish good moral character to warrant reinstatement.[11] The applicant can overcome this burden by clear and convincing evidence.[12] The proof of good character must exceed that required under an original application for admission to the bar because it must overcome the former adverse judgment of the applicant's character.[13] "It follows that '[t]he more egregious the misconduct, the heavier an applicant's burden to prove his or her present fitness to practice law.'"[14]

We disbarred Kinney in 1987 after he embezzled nearly $23,000 from his employer's law firm. This was not the first time Kinney had taken money from his employer. In 1984, he had embezzled about $20,000 in fees from the same employer. Despite the misconduct that led to Kinney's disbarment, the referee determined that Kinney had proved by clear and convincing evidence that he currently possesses good moral character that would warrant reinstatement. We agree.

After we disbarred Kinney, he sought alcohol and drug treatment. He completed a 30-day inpatient program for alcohol, drugs, and gambling, and then lived at a halfway house for an additional 90 days. Kinney also participated in Alcoholics Anonymous following his completion of these programs. Kinney testified that he has not had any alcohol or drug problems since completing rehabilitation in 1987. He explained that he might have a glass of wine occasionally when he is at dinner with friends, but that is the extent of his current alcohol consumption. He further stated that he has attended many social activities where free alcohol is provided, but has had no recurrence of his previous alcohol problems. In *Mellor*,[15] we were unable to predict whether the respondent could function as a lawyer without reverting to addictive and potentially unlawful behavior.

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[11] *Id.*

[12] Neb. Ct. R. of Discipline 10(J) and (V) (rev. 2005); *State ex rel. Counsel for Dis. v. Mellor, supra* note 3.

[13] *State ex rel. Counsel for Dis. v. Mellor, supra* note 3.

[14] *Id.* at 485, 712 N.W.2d at 820, quoting *Matter of Robbins*, 172 Ariz. 255, 836 P.2d 965 (1992).

[15] *State ex rel. Counsel for Dis. v. Mellor, supra* note 3.

Here, the record shows that Kinney is effectively addressing his drug and alcohol problems.

In addition, Kinney has paid restitution to Scoville. According to Kinney, by 1995, he had already paid Scoville an amount "in the high teens or low 20s." He settled his remaining restitution with a $2,000 lump-sum payment to Scoville's estate in 1995.

One concern Counsel for Discipline raised was that Kinney had filed for bankruptcy in 1995. Counsel for Discipline argues that although Kinney made restitution to Scoville and his estate, Kinney discharged about $30,000 owed to other creditors. We determine, however, that Kinney had a right to seek relief under the bankruptcy laws just as any other citizen would. We will not penalize him for exercising this right under these circumstances.

Kinney also presented extensive evidence regarding his work history following his disbarment. In 1988, Kinney moved to Kansas City, Missouri. There he worked as a contract administrator for a geotechnical environmental engineering firm. After leaving the engineering firm in April 2001, Kinney did legal research as an independent contractor for a staff attorney at another company. In 2005, Kinney began working with the staff attorney as a legal assistant 3 days per week. His duties included conducting legal research and preparing witnesses and exhibits. The record concerning Kinney's work history reflects that Kinney was a responsible and trusted employee.

Kinney has been involved with many charitable organizations in the Kansas City area. These organizations include the EVE project (Elders Volunteering for Elders), where he has served as a volunteer, board member, and board chairman; the First Step Fund, where as a volunteer, he would help review leases and offer business assistance; Operation Breakthrough; Friendship House; Shepherd's Center; and the Cleaver YMCA project.

At the hearing, two persons testified for Kinney. When asked his opinion about Kinney's reputation for honesty and integrity, one responded, "I believe [Kinney is] a trustworthy and dedicated individual that has used the last 20 years to his great credit to benefit those around him." The other individual, a lawyer, described Kinney as "trustworthy" and "honest."

[7] Besides this testimony, Kinney offered 11 letters supporting his reinstatement, including letters from his wife, friends, supervisors, and other professional and community acquaintances. Unlike *Mellor*, where the record contained no testimony or written support from lawyers or judges regarding the respondent's character and fitness to practice law, two lawyers wrote letters supporting Kinney. As we noted in *Mellor*, legal professionals who are acquainted with an individual are in a unique position to assess that person's character and fitness to be a lawyer.[16] The lawyers writing for Kinney were aware of Kinney's past, and yet they fully supported his reinstatement. We have placed considerable weight on such evidence in deciding whether a disbarred lawyer has met the burden of showing rehabilitation sufficient to warrant reinstatement.[17]

The referee found Kinney's testimony to be "honest, forthright and compelling." The record reflects that Kinney takes full responsibility for his past mistakes. We determine that given his successful rehabilitation, restitution payments, responsible work history, and volunteer service, Kinney has taken positive steps over the last 20 years to turn his life around. We conclude that Kinney has met his burden of establishing good moral character to warrant reinstatement.

[8,9] Besides moral reformation, an applicant for reinstatement after disbarment must also otherwise be eligible for admission to the bar as in an original application.[18] The applicant must show that he or she is currently competent to practice law in Nebraska.[19]

Although Kinney has engaged in law-related employment, he has not practiced law in the last 20 years. He testified that he attended continuing education programs through his employment. These included seminars on contracts, insurance, and loss prevention. The only actual continuing legal education he has had, however, was a 3-hour ethics seminar put on by the

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[16] *State ex rel. Counsel for Dis. v. Mellor, supra* note 3.

[17] *Id.*

[18] *Id.*

[19] See *id.*

Missouri Bar Association in October 2006. Therefore, we agree with the referee's recommendation that Kinney's readmission to practice law should be contingent upon his successfully passing the Nebraska bar examination.

CONCLUSION

We conclude that Kinney has met his burden of showing by clear and convincing evidence that if he passes the Nebraska bar examination, his license to practice law in Nebraska should be reinstated. His application is conditionally granted. Costs taxed to respondent.

JUDGMENT OF CONDITIONAL REINSTATEMENT.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH EDGAR WHITE, APPELLANT.
740 N.W.2d 801

Filed November 2, 2007. No. S-06-919.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.

Appeal from the District Court for Jefferson County: VICKY L. JOHNSON, Judge. Reversed and remanded for further proceedings.

Douglas J. Stratton, of Stratton & Kube, P.C., for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Joseph Edgar White appeals the order of the district court for Jefferson County which denied White's motion for DNA testing filed under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Cum. Supp. 2006). The district

court determined that testing would not result in noncumulative, exculpatory evidence and denied DNA testing. We conclude that the district court erred in such determination, and we therefore reverse the denial and remand for further proceedings.

STATEMENT OF FACTS

Following a jury trial, White was convicted of first degree felony murder in connection with the death of 68-year-old Helen Wilson. White was sentenced to life imprisonment. White's conviction and sentence were affirmed on appeal to this court. *State v. White*, 239 Neb. 554, 477 N.W.2d 24 (1991). The facts of the case were described in this court's opinion as follows:

> The record shows that on the night of February 5, 1985, White, James Dean, Thomas Winslow, Ada JoAnn Taylor, and Debra Shelden forcibly entered the victim's apartment in Beatrice[, Nebraska,] for the purpose of robbing her. A sixth accomplice, Kathy Gonzalez, entered the apartment during the course of the robbery. The record shows that White participated in at least four planning sessions concerning this incident. During those discussions, White proposed sexually assaulting Mrs. Wilson as well as robbing her.
>
> Most of the details of the Wilson homicide are set out in *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991). Specifically, Mrs. Wilson was forced into her bedroom and was threatened and physically abused when she refused to tell the intruders where she kept her money. She was then forced back to the living room, screaming and kicking, and either tripped or was pushed to the floor. At this point, White and Winslow took turns sexually assaulting Mrs. Wilson. According to Taylor, White had vaginal intercourse with the victim, saying that she "deserved it," while Winslow held the victim's legs. Winslow then sodomized the victim while White held her down. Meanwhile, Taylor suffocated Mrs. Wilson with a pillow.
>
> Mrs. Wilson did not move after she was raped, and appeared to be either dead or near death. The intruders proceeded to search the apartment for money. Taylor went into the kitchen and made some coffee for White and

> Winslow. Dean testified that after they left the apartment building, there was a general conversation between Taylor and White "about how nice it was to do it. They would do it again. It was fun. If they had the opportunity, they would do it again." White, Taylor, Winslow, and Dean then went to a truckstop and had breakfast.
>
> When Mrs. Wilson's body was found the next morning by her brother-in-law, she had a complete fracture through the lower part of the left humerus, fractured ribs, a fractured sternum, a 2-centimeter vaginal tear, and numerous bruises, abrasions, and scratches. Her hands were loosely tied with a towel, and a scarf was tightly wrapped around her head and tied.

239 Neb. at 555-56, 477 N.W.2d at 24-25.

On October 26, 2005, White filed a motion for DNA testing under the DNA Testing Act. White sought DNA testing of "any biological material that is related to the investigation or prosecution" that had resulted in the judgment against him. A hearing on the motion was held April 7, 2006. On August 2, the district court entered an order denying White's motion.

In its order denying White's motion, the court noted various facts that it found relevant to its decision. In addition to the prosecution of White, the court noted that the State filed charges against James Dean, Thomas Winslow, Ada JoAnn Taylor, Debra Shelden, and Kathy Gonzalez in connection with Wilson's death. Dean, Taylor, and Shelden pled guilty to aiding and abetting second degree murder, and Gonzalez pled guilty to second degree murder. Dean, Taylor, Shelden, and Gonzalez all testified against White at his trial. Winslow did not testify against White, but Winslow pled no contest to aiding and abetting second degree murder. At White's trial, Dean, Taylor, and Shelden all testified that they saw White and Winslow sexually assault Wilson. Gonzalez testified that White was at the scene of the crime. A pathologist testified at trial that Wilson had suffered vaginal injuries and that her vagina and rectum had been penetrated. Samples of semen that were found "on the scene" were subjected to forensic testing, and one sample was found to be similar to Winslow's blood type, but no forensic testing indicated that any sample belonged to White. White

testified in his own defense and denied that he was present at Wilson's death.

In the August 2, 2006, order, the court first determined that DNA testing was effectively not available at the time of White's trial. The court did not determine but assumed for purposes of analysis that biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition. Finally, the court determined that DNA testing would not result in noncumulative, exculpatory evidence relevant to any claim that White was wrongfully convicted or sentenced. The court therefore denied White's motion for DNA testing.

White appeals the denial of his motion for DNA testing.

ASSIGNMENT OF ERROR

White asserts that the district court erred in denying his motion for DNA testing and particularly in finding that DNA testing would not result in noncumulative, exculpatory evidence.

STANDARD OF REVIEW

[1] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Phelps*, 273 Neb. 36, 727 N.W.2d 224 (2007).

ANALYSIS

We recently set forth the procedure for obtaining DNA testing pursuant to the DNA Testing Act as follows:

> A person in custody takes the first step toward obtaining possible relief under the DNA Testing Act by filing a motion requesting forensic DNA testing of biological material. See § 29-4120(1). Forensic DNA testing is available for any biological material that (1) is related to the investigation or prosecution that resulted in the judgment, (2) is in the actual or constructive possession of the State or others likely to safeguard the integrity of the biological material, and (3) either was not previously subjected to DNA testing or can be retested with more accurate current techniques. See *id.* After a motion seeking forensic DNA testing has been filed, the State is required

> to file an inventory of all evidence that was secured by the State or a political subdivision in connection with the case. See § 29-4120(4).
>
> If the threshold requirements of § 29-4120(1) have been met, then a court is required to order testing only upon a further determination that "such testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced." § 29-4120(5).

State v. Phelps, 273 Neb. at 40, 727 N.W.2d at 227-28.

In its order in the present case, the district court implicitly found that the threshold requirements of § 29-4120(1) paraphrased above were met. The court then considered whether the three requirements listed in § 29-4120(5) and quoted above were met. It first found that DNA testing was not available at the time of White's trial. The State does not challenge this finding. Because the court would ultimately deny White's motion based on the third requirement, the court assumed for purposes of analysis of the second requirement that the biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition. The court thereafter determined that DNA testing would not produce noncumulative, exculpatory evidence relevant to the claim that White was wrongfully convicted or sentenced, and the court therefore denied White's motion. The court's determination on the final requirement is challenged on appeal.

The district court characterized White's argument with regard to wrongful conviction and sentence as a claim by White that with the aid of DNA testing, he could establish that he was not present and did not participate in the crime. The court determined that even if DNA testing indicated that the biological samples did not belong to White, such evidence would not compel the conclusion that White was not present. The court further noted that White was not charged with sexually assaulting Wilson but with felony murder, which could have been proved based on White's participation in the felony robbery even if he

did not participate in a sexual assault. The court noted that even without biological evidence, there was other evidence, mainly witness testimony, that White was present at Wilson's death and that he participated in the sexual assault. Thus, even if DNA testing proved that the semen belonged to Winslow and not to White, such evidence would merely be an additional piece of evidence to be considered by a jury and would not preclude a jury from finding White guilty of first degree murder based on other evidence. In this respect, the court noted that White was convicted in the original trial despite testimony that biological evidence found at the scene could not be tied to him. The court therefore concluded that even if DNA testing were favorable to White, "the result would be at best inconclusive, and certainly not exculpatory," and that such DNA evidence "would be, at best, cumulative of the other biological evidence." Finally, the district court noted that the court that had sentenced White had "found that there was little appreciable difference in the degree of culpability between" White and his codefendants, and the district court in the present case therefore concluded that DNA evidence favorable to White would not have affected his sentence.

White argues on appeal that the district court's analysis was limited to a consideration of the possible results of DNA testing as being that the samples belonged to Winslow or to White or to both, with the most favorable result to White being that the samples belonged only to Winslow. White asserts that the district court failed to consider the possibility that DNA testing would exclude both White and Winslow as contributors to the samples. White argues that such result would be the most favorable to him because it would call into question the testimony of the State's witnesses against him and would be consistent with his defense that he was not present at the scene of the crime.

Three witnesses testified that *only* White and Winslow carried out the sexual assault of Wilson. If DNA testing excluded White and Winslow, then, White argues, the sample necessarily belongs to another person, possibly Dean or some other unidentified male. A result showing that neither White nor Winslow contributed to the sample would raise serious doubts as to the credibility of the witnesses who stated that only White and

Winslow carried out the sexual assault. Such evidence could be used by the defense to cross-examine the witnesses and undermine their testimony regarding the sexual assault and the murder which, White argues, would be "devastating" to the prosecution's case. Brief for appellant at 17.

The heart of the State's case was the testimony of White's codefendants, Dean, Taylor, and Shelden, who each testified that they saw only White and Winslow sexually assault Wilson. We agree with White that if DNA testing showed that the semen samples belonged to neither White nor Winslow, such evidence would raise questions regarding the identity of the person or persons who actually contributed to the sample and who presumably committed the assault. Such a favorable test result could cause jurors to question the credibility of Dean, Taylor, and Shelden. Evidence that contradicted such witnesses' testimony that White and Winslow carried out the sexual assault could cause jurors to question their testimony regarding other matters. Evidence that raised serious doubts regarding the credibility of these witnesses would be favorable to White and material to the issue of his guilt and, therefore, "exculpatory" as defined under the DNA Testing Act.

We determine that a DNA test result that excluded both White and Winslow as contributors to the semen samples would be exculpatory under the DNA Testing Act's unique definition of "exculpatory evidence." The DNA Testing Act defines "exculpatory evidence" as evidence "which is favorable to the person in custody and material to the issue of the guilt of the person in custody." § 29-4119. As noted above, DNA test results that excluded both White and Winslow could raise serious doubts regarding the testimony of the main witnesses against White. Although there was other evidence regarding White's presence at the crime scene and his involvement in planning the crime, the testimonies of Dean, Taylor, and Shelden were critical to the State's case against White resulting in White's conviction for first degree murder.

For the sake of completeness, we note that in addition to finding that DNA testing would not produce exculpatory evidence, the district court found that DNA evidence excluding White as a contributor would be cumulative to forensic

evidence presented at White's trial, which failed to indicate that the semen samples belonged to White. The State argues that White was convicted despite the lack of such forensic evidence and that DNA evidence excluding White would thus be cumulative of such evidence. However, we note that there is a difference between forensic evidence that fails to identify a person and DNA evidence that excludes the person. See *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992) (noting probative value of DNA evidence). If DNA testing results specifically exclude White as a contributor, such evidence would not be merely cumulative of the forensic evidence, which simply failed to identify White.

Because DNA testing could result in evidence excluding both White and Winslow as contributors to the semen samples, we determine that DNA testing may produce noncumulative, exculpatory evidence relevant to the claim that White was wrongfully convicted or sentenced and that the district court erred when it failed to so determine. The district court therefore abused its discretion when it denied White's motion for DNA testing.

We note that in its order denying DNA testing, the district court, for purposes of analysis, assumed without deciding that biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition. Because the court denied White's motion for DNA testing for other reasons, the court did not make a determination on the retention issue. In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003). Without a determination of this issue, we cannot order the district court to order DNA testing. We therefore remand the cause to the district court with orders to determine whether biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition. If the court so finds, it should order DNA testing of such material.

CONCLUSION

We conclude that the district court erred in its determination that DNA testing would not produce noncumulative, exculpatory

evidence and that the court therefore abused its discretion when it denied White's motion for DNA testing. We reverse the denial and remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
THOMAS W. WINSLOW, APPELLANT.
740 N.W.2d 794

Filed November 2, 2007. No. S-06-983.

1. **Statutes: Appeal and Error.** The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
3. **DNA Testing: Pleas.** The DNA Testing Act does not exclude persons who were convicted and sentenced pursuant to pleas.

Appeal from the District Court for Gage County: VICKY L. JOHNSON, Judge. Reversed and remanded for further proceedings.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Thomas W. Winslow appeals the order of the district court for Gage County which denied Winslow's motion for DNA testing filed under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Cum. Supp. 2006). The district

court determined that Winslow was not eligible for DNA testing because he was convicted based on his plea of no contest. As an alternate ground for denying the motion, the district court determined that DNA testing would not result in noncumulative, exculpatory evidence. We conclude that the district court erred in both determinations, and we therefore reverse, and remand for further proceedings.

STATEMENT OF FACTS

On April 24, 1989, Winslow was charged with first degree murder in connection with the death of 68-year-old Helen Wilson. After a codefendant, Joseph Edgar White, was convicted by a jury of first degree murder, Winslow reached a plea agreement with the State, and on December 8, 1989, Winslow pled no contest to a reduced charge of aiding and abetting second degree murder. As a factual basis in support of Winslow's plea, the State relied on the evidence and testimony of witnesses presented at White's trial. The trial court accepted Winslow's plea, and Winslow was sentenced to imprisonment for 50 years. Winslow's sentence was summarily affirmed by this court. *State v. Winslow*, 236 Neb. xxvii (No. S-90-193, Jan. 4, 1991).

The facts of the underlying crime were described in this court's opinion in codefendant White's appeal as follows:

> The record shows that on the night of February 5, 1985, White, James Dean, Thomas Winslow, Ada JoAnn Taylor, and Debra Shelden forcibly entered the victim's apartment in Beatrice[, Nebraska,] for the purpose of robbing her. A sixth accomplice, Kathy Gonzalez, entered the apartment during the course of the robbery. The record shows that White participated in at least four planning sessions concerning this incident. During those discussions, White proposed sexually assaulting Mrs. Wilson as well as robbing her.
>
> Most of the details of the Wilson homicide are set out in *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991). Specifically, Mrs. Wilson was forced into her bedroom and was threatened and physically abused when she refused to tell the intruders where she kept her money. She was

then forced back to the living room, screaming and kicking, and either tripped or was pushed to the floor. At this point, White and Winslow took turns sexually assaulting Mrs. Wilson. According to Taylor, White had vaginal intercourse with the victim, saying that she "deserved it," while Winslow held the victim's legs. Winslow then sodomized the victim while White held her down. Meanwhile, Taylor suffocated Mrs. Wilson with a pillow.

Mrs. Wilson did not move after she was raped, and appeared to be either dead or near death. The intruders proceeded to search the apartment for money. Taylor went into the kitchen and made some coffee for White and Winslow. Dean testified that after they left the apartment building, there was a general conversation between Taylor and White "about how nice it was to do it. They would do it again. It was fun. If they had the opportunity, they would do it again." White, Taylor, Winslow, and Dean then went to a truckstop and had breakfast.

When Mrs. Wilson's body was found the next morning by her brother-in-law, she had a complete fracture through the lower part of the left humerus, fractured ribs, a fractured sternum, a 2-centimeter vaginal tear, and numerous bruises, abrasions, and scratches. Her hands were loosely tied with a towel, and a scarf was tightly wrapped around her head and tied.

State v. White, 239 Neb. 554, 555-56, 477 N.W.2d 24, 24-25 (1991).

On February 22, 2006, Winslow filed a motion for DNA testing under the DNA Testing Act. Winslow sought DNA testing of "any biological material that is related to the investigation or prosecution" that resulted in the judgment against him. Hearings on the motion were held April 7 and 18. On August 29, the district court entered an order denying Winslow's motion.

In the order, the court noted various facts related to Winslow's case that it found relevant to its decision. In addition to the prosecutions of Winslow and White, the court noted that the State filed charges against James Dean, Ada JoAnn Taylor, Debra Shelden, and Kathy Gonzalez in connection with Wilson's death. Dean, Taylor, and Shelden pled guilty to aiding and abetting

second degree murder, and Gonzalez pled guilty to second degree murder. Dean, Taylor, Shelden, and Gonzalez all testified against White at his trial. Winslow did not testify against White. At White's trial, Dean, Taylor, and Shelden all testified that they saw White and Winslow, and only White and Winslow, sexually assault Wilson. Gonzalez testified that White was at the scene of the crime. A pathologist testified at White's trial that Wilson had suffered vaginal injuries and that her vagina and rectum had been penetrated. Samples of semen that were found "on the scene" were subjected to forensic testing, and one sample was found to be similar to Winslow's blood type, but no forensic testing indicated that any sample belonged to White.

In its August 29, 2006, order, the district court first addressed the State's argument that Winslow waived his right to DNA testing because he pled no contest rather than being convicted after a trial. The court noted that ordinarily, the voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. Based on this principle, the court concluded that Winslow had waived his right to DNA testing because of his plea of no contest.

In the event it was incorrect in its conclusion that Winslow waived his right to DNA testing, the district court considered Winslow's motion on its merits. The court first determined that DNA testing was effectively not available at the time of Winslow's prosecution. The court did not determine but assumed for purposes of analysis that biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition. Finally, the court determined that DNA testing would not result in noncumulative, exculpatory evidence relevant to any claim that Winslow was wrongfully convicted or sentenced.

Regarding wrongful conviction, the court characterized Winslow's objective of testing as a claim by Winslow that with the aid of DNA testing, he could establish that he was not present and, therefore, did not participate in the crime of which he stood convicted. The court determined that even if DNA testing indicated that the biological samples did not belong to Winslow, such evidence would not compel a conclusion that

Winslow was not present or did not aid and abet the murder. The court noted that even without biological evidence, there was other evidence, mainly witness testimony from White's trial, that Winslow was present at Wilson's death and that he participated in the sexual assault and robbery. Thus, even if DNA testing proved that the semen belonged to White and not to Winslow, such evidence would merely be an additional piece of evidence to be considered by a jury and would not preclude a jury from finding Winslow guilty of aiding and abetting second degree murder based on other evidence. The court therefore concluded that even if DNA testing were favorable to Winslow, "the result would be at best inconclusive, and certainly not exculpatory." Because the court found that DNA testing would not result in noncumulative, exculpatory evidence, the court denied Winslow's motion for DNA testing. Finally, the district court noted that the court that had sentenced Winslow relied on Winslow's significant prior criminal record, his psychiatric records, the plea agreement, and Winslow's failure to testify against White in setting Winslow's sentence. The court in the present case therefore concluded that DNA evidence favorable to Winslow would not have changed his sentence.

Winslow appeals the denial of his motion for DNA testing.

ASSIGNMENTS OF ERROR

Winslow asserts that the district court erred in denying his motion for DNA testing and particularly in (1) concluding that his entry of a plea of no contest waived his right to DNA testing and (2) finding that DNA testing would not result in noncumulative, exculpatory evidence.

STANDARDS OF REVIEW

[1] The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Neiman v. Tri R Angus, ante* p. 252, 739 N.W.2d 182 (2007).

[2] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Phelps*, 273 Neb. 36, 727 N.W.2d 224 (2007).

ANALYSIS

DNA Testing Act Allows Testing in Connection With Plea-Based Convictions.

The district court denied Winslow's motion for DNA testing on the basis that Winslow waived his right to DNA testing because he pled no contest rather than being convicted after a trial. Contrary to the district court's reasoning, we conclude as a matter of law that under the DNA Testing Act, a defendant who was convicted based on a plea is eligible for testing, and that a defendant does not waive such rights if his or her conviction was based on a plea.

The district court reasoned that a defendant who pleads waives relief under the DNA Testing Act because normally a plea waives all defenses to a criminal charge and, therefore, the defendant has already waived any defense that may be supported by DNA testing results. Initially, we note that the entry of a plea does not invariably waive all forms of relief pertaining to a plea-based conviction. Thus, for example, we have stated that a court will consider an allegation that the plea and associated conviction were the result of ineffective assistance of counsel brought under the postconviction act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995). *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006). Further, the court's analysis did not focus on the specific language pertaining to the relief available under the DNA Testing Act, which we believe controls our analysis. The district court's reasoning ignores the fact that under the DNA Testing Act, a court is required to order DNA testing if, among other requirements, the court determines that such testing may produce evidence "relevant to the claim that the person was wrongfully convicted *or sentenced*." § 29-4120(5) (emphasis supplied). With respect to the impact the results of DNA testing might have on a sentence, we note that we customarily consider challenges to sentences in plea-based convictions. See *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000) (guilty plea waived right to challenge factual basis for conviction, but this court considered challenge to sentence). Because DNA testing results may be used to support a claim that the person was wrongfully sentenced, it does not follow that a person who was convicted

based on a plea has waived his or her rights to relief under the DNA Testing Act.

More importantly, contrary to the reasoning of the district court, the language of the DNA Testing Act does not limit the scope of its relief to persons convicted following a trial. In this regard, we note that § 29-4120(1) of the DNA Testing Act provides, "Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing . . . ." The language of the DNA Testing Act affords relief to persons "in custody pursuant to the judgment of a court," and such persons may include those in custody pursuant to either a conviction following trial or a plea-based conviction.

The language of Nebraska's DNA Testing Act may be contrasted to the language of DNA testing statutes in other states where courts have determined, based on the specific language of their relevant DNA testing statutes, that relief pursuant to such statutes is limited to defendants who were found guilty following trial and testing is not available to defendants convicted pursuant to a plea. In *People v. Byrdsong*, 33 A.D.3d 175, 180, 820 N.Y.S.2d 296, 299 (2006), the court noted that New York's statute referred a number of times to "'trial resulting in the judgment.'" Based on such language, the court concluded that "the New York State statute explicitly requires conviction by verdict and judgment after trial" and that therefore, a defendant who pled guilty was not entitled to relief under the New York statute. *Id.* See, also, *Stewart v. State*, 840 So. 2d 438 (Fla. App. 2003) (stating that Florida DNA testing statute referring to defendant who "'has been *tried* and found guilty'" excludes defendant who pled guilty or nolo contendere) (abrogated by amendment of statute as recognized in *Lindsey v. State*, 936 So. 2d 1213 (Fla. App. 2006)); *People v. Lamming*, 358 Ill. App. 3d 1153, 1155, 833 N.E.2d 925, 927, 295 Ill. Dec. 719, 721 (2005) (stating that Illinois DNA testing statute requiring that "identity was at issue at his trial" excludes defendant who pled guilty). We recognize that Nebraska's DNA Testing Act contains a reference to

"trial" in that an order for DNA testing requires, inter alia, "a determination that such testing was effectively not available at the time of trial." § 29-4120(5). However, reading Nebraska's DNA Testing Act as a whole, we do not read this reference to limit the scope of the relief granted under the DNA Testing Act to persons convicted after a trial. See *Weeks v. State*, 140 S.W.3d 39 (Mo. 2004) (stating that despite some references to "time of trial," Missouri DNA testing statute, when read as a whole, applied both to those convicted after plea and to those convicted after trial).

Nebraska's DNA Testing Act applies to "a person in custody pursuant to the judgment of a court," § 29-4120(1), and is more similar to the language of the Kansas statute at issue in *State v. Smith*, 34 Kan. App. 2d 368, 119 P.3d 679 (2005). The Kansas statute referred to "'a person in state custody, at any time after conviction.'" *Id.* at 370, 119 P.3d at 682. The Kansas court noted that the "statute itself fails to restrict its ambit based upon the plea entered by the defendant" and concluded that it would be inconsistent with the statute if DNA testing were denied solely because the conviction was the result of a guilty plea. *Id.* at 371, 119 P.3d at 683. The Kansas court stated, "The legislature is perfectly capable of limiting such postconviction relief to those who pled not guilty or no contest to the material charges, and no such limitation appears in the text of the statute." *Id.*

[3] Nebraska's DNA Testing Act, read as a whole, does not limit its application to those who were convicted following a trial. The Legislature expressed a broad intent that "wrongfully convicted persons have an opportunity to establish their innocence through [DNA] testing," § 29-4117, and that the court shall order DNA testing upon a showing that the biological material may be "relevant to the claim that the person was wrongfully convicted or sentenced," § 29-4120(5). Based on such intent and the language of the DNA Testing Act, we conclude that the DNA Testing Act does not exclude persons who were convicted and sentenced pursuant to pleas. The district court in this case therefore erred in concluding that because of his plea, Winslow was not entitled to relief under the DNA Testing Act.

DNA Testing May Produce Noncumulative, Exculpatory Evidence.

In the event it was incorrect in its conclusion that Winslow waived his right to DNA testing, the district court considered the merits of Winslow's motion. Winslow asserts on appeal that the court erred in its determination that testing would not produce noncumulative, exculpatory evidence. We agree with Winslow and conclude that the court erred in such determination.

We recently set forth the procedure for obtaining DNA testing pursuant to the DNA Testing Act as follows:

> A person in custody takes the first step toward obtaining possible relief under the DNA Testing Act by filing a motion requesting forensic DNA testing of biological material. See § 29-4120(1). Forensic DNA testing is available for any biological material that (1) is related to the investigation or prosecution that resulted in the judgment, (2) is in the actual or constructive possession of the State or others likely to safeguard the integrity of the biological material, and (3) either was not previously subjected to DNA testing or can be retested with more accurate current techniques. See *id.* After a motion seeking forensic DNA testing has been filed, the State is required to file an inventory of all evidence that was secured by the State or a political subdivision in connection with the case. See § 29-4120(4).
>
> If the threshold requirements of § 29-4120(1) have been met, then a court is required to order testing only upon a further determination that "such testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced." § 29-4120(5).

State v. Phelps, 273 Neb. 36, 40, 727 N.W.2d 224, 227-28 (2007).

We note that as a factual basis in support of Winslow's plea, the State relied on the evidence and testimony of witnesses at the trial of Winslow's codefendant, White. Around the time

Winslow filed his motion for DNA testing, White also filed a motion for DNA testing. White's motion was also denied. The appeals of Winslow's and White's motions for DNA testing were consolidated for briefing and oral argument before this court.

In White's appeal, we concluded that the district court erred in its determination that DNA testing would not result in noncumulative, exculpatory evidence. We adopt the reasoning and conclusion in *State v. White, ante* p. 419, 740 N.W.2d 801 (2007), in the present case. We noted in *State v. White, supra*, that DNA testing could exclude both White and Winslow as contributors to the semen samples collected at the scene of the crime, and we determined that such DNA test result would be "exculpatory evidence" under the unique definition of "exculpatory" in Nebraska's DNA Testing Act. Section 29-4119 defines exculpatory evidence as follows: "For purposes of the DNA Testing Act, exculpatory evidence means evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody." In *State v. White*, we noted that if White and Winslow were excluded as contributing to the semen sample, such evidence would be favorable to White and material to the issue of White's guilt, because it would undermine the credibility of witnesses against White who testified that *only* White and Winslow had sexually assaulted Wilson. We therefore reversed the denial of White's motion for DNA testing and remanded the cause to the district court with directions.

We similarly conclude that the court in the present case erred in determining that DNA testing could not result in noncumulative, exculpatory evidence relevant to the claim that Winslow was wrongfully convicted or sentenced. As in *State v. White, supra*, DNA testing could exclude White and Winslow as contributors to the semen sample. Because the factual basis for Winslow's plea consisted of the evidence and testimony from White's trial, the potential test results that would be noncumulative, exculpatory evidence in White's case would also be noncumulative, exculpatory evidence in Winslow's case. Such evidence could raise doubts regarding the veracity of the testimony at White's trial that served as the factual basis for Winslow's plea and would therefore be favorable to Winslow and relevant to his claim of wrongful conviction. Evidence raising serious doubt

regarding such testimony could also be favorable to Winslow and relevant to a claim that he was wrongfully sentenced. That is, even if Winslow were placed at the scene of the crime, such evidence excluding Winslow as a contributor would also be relevant to a claim by Winslow that he was less culpable than the sentencing court had believed him to be and that therefore, he was wrongfully sentenced.

We conclude that the district court erred in concluding that DNA testing would not result in noncumulative, exculpatory evidence and that therefore, the district court abused its discretion when it denied Winslow's motion for DNA testing on such basis. Similar to the situation in *State v. White, supra*, the court assumed for purposes of analysis, but did not decide, that biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition. We therefore remand the cause to the district court to make a finding on the retention issue and, if proper circumstances exist, to order DNA testing of such material.

CONCLUSION

We conclude that under the DNA Testing Act, relief is available to defendants whether they were convicted following trial or convicted based on a plea. The district court therefore erred in concluding that because Winslow pled no contest, he waived his rights under the DNA Testing Act. The court also erred in determining that DNA testing would not produce noncumulative, exculpatory evidence. The court abused its discretion when it denied Winslow's motion for DNA testing. We reverse the denial and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.