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REPORTS OF CASES

DECIDED BETWEEN

JUNE 24, 2005 and FEBRUARY 2, 2006

IN THE

Supreme Court of Nebraska

VOLUME CCLXX

PEGGY POLACEK

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

2008

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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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WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

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

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

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 Bryan, Jr.	Auburn
		Vicky L. Johnson	Wilber
Second	Cass, Otoe, and Sarpy	George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	Papillion
Third	Lancaster	Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen 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
		Richard J. Spethman	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

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 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	Ronald D. Olberding	Burwell
		Mark D. Kozisek	Ainsworth
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James Livingston	Grand Island
		Teresa K. Luther	Grand Island
Tenth	Adams, Harlan, Kearney, Phelps, and Webster	Stephen Illingworth	Hastings
		Terri Harder	Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell	McCook
		John P. Murphy	North Platte
		Donald E. Rowlands II	North Platte
		James E. Doyle IV	Lexington
		David Urbom	McCook
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson	Chadron
		Robert O. Hippe	Gering
		Brian Silverman	Alliance
		Randall L. Lippstreu	Gering
		Kristine R. Cecava	Sidney

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven Bruce Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd Hutton	Papillion
		Max J. Kelch	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Jack B. Lindner	Lincoln
		Mary L. Doyle	Lincoln
		Laurie J. Yardley	Lincoln
		Jean A. Lovell	Lincoln
Fourth	Douglas	Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna R. Atkins	Omaha
		Lawrence Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
		Craig Q. McDermott	Omaha
Fifth	Boone, Butler, Colfax, Dodge, 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 Luebe	Hartington
		Kenneth Vampola	Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Philip R. Riley	Creighton
		Richard W. Krepela	Madison
		Donna F. Taylor	Madison
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	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack Robert Ott	Hastings
		Robert A. Ide	Holdrege
		Michael Offner	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom	North Platte
		Cloyd Clark	McCook
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
		Edward D. Steenburg	Ogallala
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		G. Glenn Camerer	Gering
		Thomas H. Dorwart	Sidney
		James M. Worden	Gering

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth G. Crnkovich	Omaha
	Wadie Thomas, Jr.	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
	Linda S. Porter	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert 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
James M. Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 269

FREDERICK LEWIS ABBOUD, JR.
KAREN LORETTA ACKLAND
WILLIAM JAMES ACOSTA-TREJO
JULIE LUCILLE AGENA
ANNE MARIE ARMITAGE
RYAN PATRICK BAILEY
ALLISON DANA BALUS
RYAN BRUCE BEACH
AMY CINDA BECKER
REBECCA K. BEERLING
WAYNE JEFFREY BENA
JAMI LYN BIRKEL
RONEE KAYE BLUE
NATHAN MORRIS BOURAY
TIMOTHY WILLIAM BOWMAN
MICAELA MARIE BRANDT
KELLY LEIGH BRODER
TRACY LYNN BRODERICK
JAMES MARSHALL BUCHANAN
BRIAN WILLIAM BUGE
KEVIN EUGENE BURR
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PATRICK JOSEPH CALKINS
BREN HOLLOWAY CHAMBERS
DAVID VICTOR CHIPMAN
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AMANDA ANN DUTTON
LIBBY KATE ELDER
RENEE ANN EVELAND
SCOTT RAYMOND FARMEN
AUSTIN HUNTER FEARNOW
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KATIE ANN FOUGERON
BRADY MARIE FRITZ
DAVID A. FROSCHEISER
JONATHAN EVERETT GASS
OWEN EDWARD GIRARD
GARNER R. GIRTHOFFER
SEAN MICHAEL GLEASON
SARAH ANN GLODEN
RICHARD GLUCKSELIG
STACIE ANN GODING
SCOTT MICHAEL GOING
VANESSA JEAN GORDEN
KATIE SUE GOSHORN
JULIE ANN GREENAMYRE
MITCHEL LEE GREENWALL
ANGELA YONG GRUBER-GARDNER
RAINA MARIE GULBRANDSON
SUSANNE SARAH NOVAK HAAS
JILL KRISTINE HAMER
BRANDON DUANE HAMM
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JERRY MATT HARRE
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ROBERT LEO LIBERTY
AMBER LEE LICHTI
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AUSTIN LAMOINE MCKILLIP
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KELLY DENE MEIER
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DMITRY PANIOTTO
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DUC TRAN
ANASTASIA MEREDITH TROUT
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JAMES BOONE WARD
SHANE MARK WARNER
KIMBERLY MARIE WATSON
KENNETH SHANNON WEAR
KATHRYN SUE KIMBRO WHITFIELD
AMY KRISTINE WIEBELHAUS
KYLIE ANN WOLF
DAMIEN JAMES WRIGHT
TRAVIS JON WRIGHT
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No. S-03-1291: **Gallner v. Gallner**. Affirmed. Appellee's motion for award of attorney fees overruled. McCormack, J.

No. S-04-131: **Schulz v. Memorial Health Care Sys.** Affirmed. Per Curiam.

No. S-04-293: **Omaha Pub. Power Dist. v. Tract No. 2**. Affirmed. Wright, J.

No. S-04-605: **Dillon v. Hawthorne**. Affirmed. Wright, J.

No. S-04-929: **Purcella v. Purcella**. Affirmed. Per Curiam. Connolly, J., participating on briefs.

Nos. S-04-1017, S-05-283: **Marcovitz v. Rogers**. Affirmed. Per Curiam. Connolly, J., not participating.

No. S-04-1042: **State v. Cody**. Affirmed. McCormack, J.

No. S-04-1084: **Johnson v. Johnson**. Affirmed. Per Curiam.

No. S-04-1317: **Burford v. Bingham**. Affirmed. Connolly, J.

No. S-05-260: **In re Interest of Jaden H. & Dejhin H.** Affirmed. Connolly, J.

No. S-05-785: **State v. Mowell**. Affirmed. Connolly, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-02-552: **State ex rel. Counsel for Dis. v. Dunker**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-03-239: **State ex rel. Counsel for Dis. v. Starrett**. Motion of relator to dismiss sustained; application for temporary suspension dismissed.

No. S-04-609: **Walters v. Department of Health and Human Servs**. Stipulation allowed; appeal dismissed.

No. S-04-1169: **Zimmerman v. Department of Motor Vehicles**. Reversed and remanded. See, rule 7A(3); *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005).

No. S-05-013: **State v. Davlin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-053: **State v. Fields**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-057: **Witham v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. S-05-207: **State v. Ray**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-05-209: **State ex rel. Counsel for Dis. v. Koenig**. Motion sustained; formal charges dismissed with prejudice.

No. S-05-217: **State ex rel. Counsel for Dis. v. Riskowski**. Motion of relator to dismiss formal charges sustained; formal charges dismissed.

No. S-05-271: **State v. Watkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-294: **State v. Luschen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7A(1).

No. S-05-330: **State v. Meers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-528: **State v. Glover**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-546: **State v. Buckman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-593: **Jeffrey Lake Dev. v. Central Neb. Pub. Power**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-608: **State v. Young**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-672: **State v. Alvarez**. Appeal dismissed. See rule 7A(2). Appellee's motion for summary affirmance overruled as moot.

No. S-05-797: **Hall v. Houston**. Affirmed. See rule 7A(1).

No. S-05-887: **State v. Jackson**. Reversed and remanded with directions. See, Neb. Rev. Stat. § 29-3001 (Reissue 1995); *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990).

No. S-05-978: **State v. Haukaas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-1036: **State v. Banuelos-Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-05-1374: **Detter v. Miracle Hills Animal Hosp**. Stipulation allowed; appeal dismissed at costs of appellant.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-03-560: **Keller v. State**. Petition of appellant for further review overruled on October 13, 2005.

No. A-03-630: **C & L Industries v. Kiviranta**, 13 Neb. App. 604 (2005). Petition of appellee for further review overruled on September 21, 2005.

No. S-03-670: **State v. Rieger**, 13 Neb. App. 444 (2005). Petition of appellant for further review sustained on July 13, 2005.

No. A-03-686: **Nolan v. Campbell**, 13 Neb. App. 212 (2004). Petition of appellant for further review overruled on June 29, 2005.

No. A-03-721: **McDermott v. Keenan**, 13 Neb. App. 710 (2005). Petition of appellant for further review overruled on September 14, 2005.

No. A-03-877: **Olson v. Olson**, 13 Neb. App. 365 (2005). Petition of appellant for further review overruled on June 22, 2005.

No. A-03-877: **Olson v. Olson**, 13 Neb. App. 365 (2005). Petition of appellee for further review overruled on June 22, 2005.

No. A-03-956: **Stumbaugh v. Allstate Ins. Co**. Petition of appellant for further review overruled on July 13, 2005.

No. A-03-969: **Ourada v. Ourada**. Petition of appellant for further review overruled on June 15, 2005.

No. A-03-1025: **Nielson v. Nielson**. Petition of appellant for further review overruled on July 13, 2005.

No. A-03-1069: **Dinsmore v. Gateway Realty of McCook**. Petition of appellant for further review overruled on June 29, 2005.

No. A-03-1112: **Gies v. City of Gering**, 13 Neb. App. 424 (2005). Petition of appellee for further review overruled on June 15, 2005.

No. A-03-1136: **Meredith v. Schwarck Quarries**, 13 Neb. App. 765 (2005). Petition of appellant for further review overruled on October 13, 2005.

Nos. A-03-1153, A-03-1154: **State v. Leonor**. Petitions of appellant for further review overruled on June 29, 2005.

No. A-03-1157: **Meister v. Meister**. Petition of appellant for further review overruled on July 13, 2005.

No. A-03-1167: **Hornbarger v. TMS Design Servs**. Petition of appellant for further review overruled on September 28, 2005.

No. A-03-1209: **Westergaard v. Westergaard**. Petition of appellant for further review overruled on September 14, 2005.

No. A-03-1217: **Kramper Family Farm v. Beef Products, Inc**. Petition of appellant for further review overruled on October 26, 2005.

No. A-03-1288: **State v. Gunter**. Petition of appellant for further review overruled on July 26, 2005, for lack of jurisdiction.

No. A-03-1318: **Lynn v. Jelinek**. Petition of appellant for further review overruled on October 26, 2005.

No. A-03-1335: **Kramper Family Farm v. Beef Products, Inc**. Petition of appellant for further review overruled on July 13, 2005.

No. A-03-1345: **Vande Guchte v. Hoffman**. Petition of appellant for further review overruled on December 14, 2005.

No. A-03-1361: **McCombs v. Haley**, 13 Neb. App. 729 (2005). Petition of appellant for further review overruled on September 28, 2005.

No. A-03-1405: **Gibraltar Constr. Co. v. R.G.G. Service**. Petition of appellant for further review overruled on August 31, 2005.

No. A-03-1425: **Edlund v. 4-S, LLC**, 13 Neb. App. 800 (2005). Petition of appellee for further review overruled on November 23, 2005.

No. A-03-1427: **Miller v. Miller**. Petition of appellant for further review overruled on June 15, 2005.

No. A-04-030: **Lecher-Zapata v. Board of Regents**. Petition of appellant for further review overruled on July 7, 2005.

No. A-04-032: **Hodge v. Biskup**. Petition of appellants for further review overruled on August 31, 2005.

No. A-04-034: **Thille & Son Constr. v. Thille**. Petition of appellee for further review overruled on September 28, 2005.

No. A-04-066: **Johnson v. B & K Enters**. Petition of appellant for further review overruled on November 23, 2005.

No. A-04-077: **Vital Learning Corp. v. Talent Plus**. Petition of appellant for further review overruled on October 13, 2005.

No. S-04-079: **Blinn v. Beatrice Community Hosp. & Health Ctr.**, 13 Neb. App. 459 (2005). Petition of appellant for further review sustained on July 13, 2005.

Nos. A-04-153, A-04-437: **Ord v. AmFirst Invest. Servs.**, 14 Neb. App. 97 (2005). Petitions of appellee AmFirst Bank for further review overruled on December 14, 2005.

No. S-04-237: **Bronsen v. Dawes County**, 14 Neb. App. 82 (2005). Petition of appellant for further review sustained on November 16, 2005.

No. A-04-266: **Helvering v. Union Pacific RR. Co.**, 13 Neb. App. 818 (2005). Petition of appellant for further review dismissed on October 11, 2005, for failure to timely file the fee. See, rule 2F(1); *Robertson v. Rose*, 270 Neb. 466, 704 N.W.2d 227 (2005).

No. A-04-282: **Vater v. County of Lancaster**. Petition of appellant for further review overruled on November 16, 2005.

No. A-04-357: **Niedbalski v. Jensen**. Petition of appellant for further review overruled on August 31, 2005.

No. A-04-359: **Jensen v. Niedbalski**. Petition of appellant for further review overruled on August 31, 2005.

No. A-04-362: **State v. Cabrera**. Petition of appellant for further review overruled on August 31, 2005.

No. A-04-480: **State v. Gibilisco**. Petition of appellant for further review overruled on July 13, 2005.

No. A-04-486: **State v. White**. Petition of appellant for further review overruled on August 31, 2005.

No. A-04-521: **State v. Schmidt**. Petition of appellant for further review overruled on November 30, 2005.

No. A-04-536: **State v. O'Neal**. Petition of appellant for further review overruled on July 7, 2005.

Nos. A-04-565, A-04-566: **State v. Policky**. Petitions of appellant for further review overruled on September 28, 2005.

No. A-04-607: **State v. Moyer**. Petition of appellant for further review overruled on January 5, 2006.

No. A-04-617: **In re Guardianship of Brenda B. et al.**, 13 Neb. App. 618 (2005). Petition of appellee for further review overruled on September 21, 2005.

No. A-04-684: **Hute v. County of Lancaster**. Petition of appellant for further review overruled on January 5, 2006.

No. A-04-717: **State v. Ladwig**. Petition of appellant for further review overruled on August 31, 2005.

No. A-04-725: **State v. Feldhacker**. Petition of appellant pro se for further review overruled on October 26, 2005.

No. A-04-766: **Arbtin v. Puritan Mfg. Co.**, 13 Neb. App. 540 (2005). Petition of appellant for further review overruled on August 31, 2005.

No. A-04-770: **Anderson v. Anderson**. Petition of appellant for further review overruled on October 26, 2005.

No. A-04-770: **Anderson v. Anderson**. Petition of appellant pro se for further review overruled on October 26, 2005.

No. A-04-773: **Gann v. Vickers, Inc**. Petition of appellant for further review overruled on July 7, 2005.

No. A-04-777: **Vande Guchte v. Kort**, 13 Neb. App. 875 (2005). Petition of appellant for further review overruled on November 16, 2005.

No. A-04-817: **Lindner v. Lindner**. Petition of appellant for further review overruled on June 15, 2005.

No. S-04-844: **State v. Lykens**, 13 Neb. App. 849 (2005). Petition of appellee for further review sustained on October 19, 2005.

No. A-04-894: **Nielsen v. Nielsen**. Petition of appellee for further review overruled on October 19, 2005.

No. A-04-900: **McDermott v. McDermott**. Petition of appellant for further review overruled on July 7, 2005.

No. A-04-938: **Knowles v. Midland Motors**. Petition of appellant for further review overruled on July 13, 2005.

No. A-04-1011: **State v. Groves**. Petition of appellant for further review overruled on October 26, 2005.

No. A-04-1037: **State v. Nguth**, 13 Neb. App. 783 (2005). Petition of appellee for further review overruled on October 13, 2005.

No. A-04-1063: **State v. Stewart**. Petition of appellant for further review overruled on August 31, 2005.

No. A-04-1123: **Michael L. v. Angelita S.** Petition of appellant for further review overruled on September 21, 2005.

No. S-04-1125: **State v. Alba**, 13 Neb. App. 519 (2005). Petition of appellee for further review sustained on June 22, 2005.

No. A-04-1127: **State v. Llanes**. Petition of appellant for further review overruled on August 31, 2005.

No. A-04-1148: **State on behalf of Durnal v. Johnson**. Petition of appellant for further review overruled on August 31, 2005.

No. A-04-1153: **State v. Leas**. Petition of appellant for further review overruled on August 31, 2005.

No. S-04-1158: **State v. Furrey**. Petition of appellant for further review sustained on September 21, 2005.

No. A-04-1183: **State v. Stevens**. Petition of appellant for further review overruled on August 31, 2005.

No. A-04-1249: **In re Interest of Sadie W. & Noah W.** Petition of appellant for further review overruled on November 30, 2005.

No. A-04-1254: **In re Interest of Olivia W. & Lucien W.** Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1257: **State v. McCardle**. Petition of appellant for further review overruled on September 21, 2005.

No. A-04-1259: **State v. Dunn**, 14 Neb. App. 144 (2005). Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1259: **State v. Dunn**, 14 Neb. App. 144 (2005). Petition of appellee for further review overruled on December 14, 2005.

No. A-04-1272: **State v. Wells**. Petition of appellant for further review overruled on September 21, 2005.

No. A-04-1274: **State v. Ramsay**. Petition of appellant for further review overruled on December 21, 2005.

Nos. A-04-1288 through A-04-1290: **State v. Martin**. Petitions of appellant for further review overruled on June 29, 2005.

No. A-04-1293: **State v. Thompson**. Petition of appellant for further review overruled on July 7, 2005.

No. A-04-1295: **Joplin v. State Patrol**. Petition of appellant for further review overruled on June 29, 2005.

No. A-04-1310: **State v. Quijada**. Petition of appellant for further review overruled on June 15, 2005.

No. A-04-1318: **Henderson v. Henderson**. Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1321: **In re Interest of Giovanni Z.B.R.** Petition of appellant for further review overruled on July 13, 2005.

No. A-04-1322: **Adams v. Don Hagan & Son's**. Petition of appellant for further review overruled on July 7, 2005.

No. A-04-1337: **Dworak v. Dworak**. Petition of appellant for further review overruled on November 16, 2005.

No. A-04-1351: **State v. Smith**. Petition of appellee for further review overruled on September 28, 2005.

No. A-04-1352: **State v. Wayt**, 13 Neb. App. 759 (2005). Petition of appellant for further review overruled on January 5, 2006.

No. A-04-1361: **In re Guardianship of Breeahana C.**, 14 Neb. App. 182 (2005). Petition of appellant for further review overruled on January 5, 2006.

No. A-04-1366: **State v. Abboud**. Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1394: **State v. Summers**. Petition of appellant for further review overruled on June 29, 2005.

No. A-04-1403: **State v. Hyde**. Petition of appellant for further review overruled on January 19, 2006.

No. A-04-1415: **Arias v. Board of Parole**. Petition of appellant for further review overruled on September 14, 2005.

No. A-04-1417: **State v. Monje**. Petition of appellant for further review overruled on July 7, 2005.

No. A-04-1424: **State v. Soto**. Petition of appellant for further review overruled on June 29, 2005.

No. A-04-1431: **State v. Hall**. Petition of appellant for further review overruled on June 15, 2005.

No. A-04-1432: **Stauffer v. Stauffer**. Petition of appellant for further review overruled on November 23, 2005.

No. A-04-1434: **State v. Rodriguez**. Petition of appellant for further review overruled on November 16, 2005.

No. A-04-1438: **In re Interest of Keisha B. et al**. Petition of appellant for further review overruled on August 31, 2005.

No. A-04-1448: **Calm 4839, Inc. v. Clarke**. Petition of appellant for further review overruled on July 7, 2005.

No. A-04-1487: **Spence v. Bush**, 13 Neb. App. 890 (2005). Petition of appellant for further review overruled on November 16, 2005.

No. A-04-1488: **State on behalf of Ephraim H. v. Jon P**. Petition of appellee Phillip R. for further review overruled on November 16, 2005.

No. A-05-009: **State v. Webb**. Petition of appellant for further review overruled on July 7, 2005.

No. A-05-026: **State v. Gilbert**. Petition of appellant for further review overruled on October 26, 2005.

No. A-05-028: **State v. Brown**. Petition of appellant for further review overruled on November 16, 2005.

No. A-05-033: **In re Estate of Jefferson**. Petition of appellant for further review overruled on August 19, 2005, as untimely filed.

No. A-05-041: **Cash v. Brook**. Petition of appellant for further review overruled on June 29, 2005.

No. A-05-050: **State v. Rodriguez**. Petition of appellant for further review overruled on October 19, 2005.

No. A-05-055: **In re Interest of Cody S**. Petition of appellant for further review overruled on November 30, 2005.

No. A-05-075: **State v. Clapper**. Petition of appellant for further review overruled on July 7, 2005.

No. A-05-108: **State v. Knight**. Petition of appellant for further review overruled on August 31, 2005.

No. A-05-109: **State v. Knight**. Petition of appellant for further review overruled on August 31, 2005.

No. A-05-110: **Matthews v. Drivers Mgmt., Inc**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-111: **State v. Jones**. Petition of appellant for further review overruled on August 31, 2005.

No. A-05-131: **State v. Gade**. Petition of appellant for further review overruled on December 21, 2005.

No. A-05-162: **State v. Kirby**. Petition of appellant for further review overruled on August 31, 2005.

Nos. A-05-177 through A-05-179: **State v. Tvrdy**. Petitions of appellant for further review overruled on August 31, 2005.

No. A-05-218: **State v. Davey**. Petiton of appellant for further review overruled on September 21, 2005.

No. A-05-223: **State v. Burks**. Petition of appellant for further review overruled on January 19, 2006.

No. A-05-224: **State v. Parnell**. Petition of appellant for further review overruled on January 19, 2006.

No. A-05-249: **State v. Romero**. Petition of appellant for further review overruled on September 26, 2005, as untimely filed.

No. A-05-258: **In re Interest of Tyreek T. & Asia R**. Petition of appellant for further review overruled on November 16, 2005.

No. A-05-274: **State v. Alm**. Petition of appellant for further review overruled on October 13, 2005.

No. A-05-308: **State v. Roman**. Petition of appellant for further review overruled on September 28, 2005.

No. A-05-352: **State v. Stevens**. Petition of appellant for further review filed July 26, 2005, overruled on August 31, 2005. See *State v. Dreimanis*, 258 Neb. 239, 603 N.W.2d 17 (1999).

No. A-05-352: **State v. Stevens**. Petition of appellant for further review filed August 15, 2005, overruled on August 31, 2005. See *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005).

No. A-05-352: **State v. Stevens**. Petition of appellant pro se "to bypass and for direct review by the Nebraska Supreme Court" dismissed on August 31, 2005, as moot. See rule 2B.

No. A-05-382: **In re Interest of Emma B**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-395: **Shepard v. Hill**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-397: **State v. Starks**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-419: **State v. Shelby**. Petition of appellant for further review overruled on October 13, 2005.

No. A-05-432: **State v. Wells**. Petition of appellant for further review overruled on November 30, 2005.

No. A-05-442: **In re Interest of Kayla F. et al.**, 13 Neb. App. 679 (2005). Petition of appellee for further review overruled without prejudice on August 31, 2005.

No. A-05-456: **State v. Munoz**. Petition of appellant for further review overruled on October 13, 2005.

No. A-05-470: **State v. Harwell**. Petition of appellant for further review overruled on October 19, 2005.

No. A-05-471: **State v. Lopez**. Petition of appellant for further review overruled on September 28, 2005.

No. A-05-473: **State v. Hayes**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-493: **State v. Grosvenor**. Petition of appellee for further review overruled on January 17, 2006, as filed out of time. See rule 2F(1).

No. A-05-503: **State v. Carter**. Petition of appellant for further review overruled on September 28, 2005.

No. A-05-512: **State v. Renteria**. Petition of appellant for further review overruled on October 3, 2005, as filed out of time.

No. A-05-515: **State v. Zimmerman**. Petition of appellant for further review overruled on July 13, 2005.

No. A-05-535: **State v. Schleiger**. Petition of appellant for further review overruled on December 21, 2005.

No. A-05-543: **State v. Brown**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-581: **State v. Johnson**. Petition of appellant for further review overruled on December 14, 2005.

Nos. A-05-647, A-05-648: **State v. Chapman**. Petitions of appellant for further review overruled on December 21, 2005.

No. A-05-671: **State v. Hansen**. Petition of appellant for further review overruled on November 16, 2005.

No. A-05-736: **State v. Heckenliable**. Petition of appellant for further review overruled on November 30, 2005.

No. A-05-791: **State v. Fry**. Petition of appellant for further review overruled on January 19, 2006.

Nos. A-05-842 through A-05-844: **State v. Young**. Petitions of appellant for further review overruled on January 19, 2006.

Nos. A-05-866, A-05-867: **In re Interest of Frederick A. & Elliott A.** Petitions of appellant for further review overruled on January 19, 2006.

No. A-05-907: **State ex rel. Bruning v. California Alternative High Sch**. Petition of appellant for further review overruled on November 23, 2005.

No. A-05-988: **Rab v. Muhammad**. Petition of appellant for further review overruled on November 16, 2005.

No. A-05-1135: **Villarreal v. Villarreal**. Petition of appellant for further review overruled on November 30, 2005.

Nebraska Supreme Court

In Memoriam

Justice Dale E. Fahrnbruch

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
November 8, 2005
2:00 p.m.

Proceedings before:
SUPREME COURT
Chief Justice John V. Hendry
Justice John F. Wright
Justice William M. Connolly
Justice John M. Gerrard
Justice Kenneth C. Stephan
Justice Michael McCormack

JUSTICE DALE E. FAHRNBRUCH

Proceedings

CHIEF JUSTICE HENDRY: Good afternoon.

The Nebraska Supreme Court is meeting in special ceremonial session on this 8th day of November 2005 to honor the life and memory of former Supreme Court Justice Dale E. Fahrnbruch 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 my far left is Justice Kenneth Stephan. 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. Justice Lindsey Miller-Lerman was unable to attend.

The Court further acknowledges the presence of members of Justice Dale Fahrnbruch's family, other members of the judiciary, members of the bar and friends of former Supreme Court Justice Fahrnbruch.

At this time the Court recognizes former Nebraska Supreme Court Chief Justice C. Thomas White, the chairman of the Supreme Court's Memorial Committee who will conduct these proceedings.

Mr. Chief Justice, good afternoon.

CHIEF JUSTICE WHITE: Good afternoon.

May it please the Court, the Supreme Court of Nebraska has a long tradition of remembering the service and noting the passing of former members of this Court. We have met to fulfill that solemn obligation. Indeed we could do no less. Each of you know that the duties of the office of Judge of the Supreme Court, the duties are enormous and at the same time both heavy and when done with devotion to the law, light and fulfilling.

To discharge that obligation of remembrance, three colleagues of Judge Fahrnbruch at various stages of his career will speak to you. My first speaker is the Honorable D. Nick Caporale, former

Judge of the District Court and Judge of the Supreme Court of Nebraska.

CHIEF JUSTICE HENDRY: Thank you. Good afternoon, Judge Caporale.

JUSTICE CAPORALE: Your honors.

May it please the Court, it's my honored privilege to address this tribunal in memory of the life of one of its former members, Dale Eugene Fahrnbruch. I pronounce it that way because I don't think I ever knew his middle name was Eugene.

Before I do that, however, I've been handed a letter from former Chief Justice Hastings who has sent a much more attractive representative in the person of his daughter Pamela. With the Court's permission I would read that letter.

CHIEF JUSTICE HENDRY: Yes, please.

JUSTICE CAPORALE: "I just returned home from the hospital this weekend after spending most of last week battling pneumonia and found the announcement of the memorial service for Judge Fahrnbruch. Normally I would be there, but still am so weak that I haven't yet strayed from the house. Nevertheless, I would be pleased to add a few words of tribute if it would please the court to receive them.

Dale and I served together for about seven years on the District Court for Lancaster County and again nearly eight years on the Supreme Court. Dale was a brilliant lawyer and brought that legal expertise with him to both courts. He was logical in his analysis of a problem, conscientious and dependable in all of his work. He contributed greatly to the judicial history of the State of Nebraska.

My very best wishes to you and the Court. William C. Hastings."

Because all of us are products of our experiences, it appears appropriate to reflect a bit on the road that brought Judge Fahrnbruch to this bench.

He was born in Lincoln. He was the youngest of three sons of parents of German stock. Though he attended a Lutheran grade school for a time, he was essentially a product of the Lincoln

Public School system, having attended Clinton grade school and having graduated from Lincoln High School.

During his time at Lincoln High he developed an interest in photography and journalism. A deep enough interest that he started working part time on the night staff of the Lincoln Journal.

On graduating from high school, he entered the University of Nebraska's School of Journalism. However, World War II came along and interrupted his studies. He volunteered for the Army and served throughout that war, spending much of his time in the Philippines as a cryptographer. Upon being discharged, he returned to the University of Nebraska and received an associate degree in journalism.

He then entered what was the four-year program at the University of Nebraska's College of Law. He didn't do that, however, with the thought of becoming a practicing lawyer, but because he thought a degree in law would help him in his journalistic pursuits.

After receiving a bachelor of science in law at the end of the second year, he learned he could complete his professional bachelor of law degree at Creighton University in one additional year rather than the two additional years the University of Nebraska would have required, so, being ever frugal, he transferred to Creighton.

That had a fortunate and very happy unintended consequence, for it was there that he met his future wife, Margaret Hunt, who would become one of the few women lawyers of that day. Together they had two children, their daughter, Becky, and son, Dan, who predeceased his parents in death.

On graduating from Creighton and being admitted to the bar, Dale returned to the Lincoln Journal and became city editor. During that period he helped the Journal win a Pulitzer Prize through his writings on Nebraska's election system.

But as is its want, the law continued to exert its pull and he left the news business to join the Lancaster County Attorney's Office where he worked his way up to Chief Deputy. He left the County Attorney's office to engage in the full practice of law as a private practitioner where his work was such that he earned an appointment to the Lancaster County District Court.

It soon became very clear to those who appeared before him that District Judge Fahrnbruch intended to be and was at all times in firm control of the proceedings before him. There were indeed two sides to the bench. Those in front of it were expected to behave professionally and courteously and respectfully not only with regard to the Court but with regard to the parties, with regard to the witnesses and most especially with regard to opposing counsel. The rules of law and the code of professional conduct were firmly, albeit politely, enforced by the man sitting behind the bench.

It was Judge Fahrnbruch's obvious commitment to his rule of law, his fairness and his thoughtful study and knowledge of the cases before him which earned the respect of the bar. It also became quickly apparent, however, that Judge Fahrnbruch had not checked his journalistic credentials at the courthouse door. Lawyers who presented documents for his signature knew that not only would their legal work be reviewed, so would their grammar and punctuation, and that all things were subject to revision and correction.

During the period that he served as a member of the district bench he earned a master of law in judicial administration from the University of Virginia. Shortly after graduating, he was appointed to this Court. In the nine years that he served this Court, he earned a reputation for careful and timely scholarship.

Because he was the quintessential quiet and private man, it was not easy to get to know Dale. But one soon learned that if the time was taken to discover the man, he was a man worth knowing and through whom much could be learned.

In keeping with his reserved nature, he never said more in our consultations than needed to be said, never used more words to say what needed to be said than were required to say. It would be a mistake, however, to conclude that because he was quiet, he was not committed to what he understood the law to be. While he listened respectfully and considered carefully the thoughts and opinions of his colleagues, unless he had been persuaded that his view of the law was wrong, he held fast.

Throughout he was considerate, he was fair, he was studious and he was even-tempered. Though he made no display of it, he

cared deeply about the people around him and those at a distance who would be affected by the Court's judgments.

Notwithstanding that compassion, when a difficult vote, popular or unpopular was required, he cast it. He cast it unflinchingly, he cast it without apology and having cast it, he moved on.

In short, Dale was a man of principle and impeccable integrity not only in his roles as judge but in all aspects of his life. To be in his presence was to know that one was in the presence of someone who stood for something and who knew for what he stood.

The juris prudence of this state has benefited because of his service as public and private practitioner of the law, by his service as a trial judge and most especially by his contributions to the work of this Court.

In commemoration of those contributions, I respectfully move that the foregoing comments be made a part of the records of this Court.

CHIEF JUSTICE HENDRY: And we shall. Thank you.

CHIEF JUSTICE WHITE: May it please the Court, the next speaker will be Judge Earl Witthoff, a District Judge of the State of Nebraska in and for the County of Lancaster.

CHIEF JUSTICE HENDRY: Thank you. Judge Witthoff. Good afternoon.

HONORABLE EARL J. WITTHOFF: Good afternoon.

May it please the Court. I was asked to talk a little bit about Judge Fahrnbruch's life as I recall it both as a friend and as a District Court Judge.

Judge Fahrnbruch became a District Judge in 1987 and he served in that capacity until 1996. When Judge Fahrnbruch became Justice Fahrnbruch I took his seat on the District Court bench. I was always grateful to Dale for creating that opportunity for me by moving up the ladder.

I first met Dale in the summer of 1964, some 40 years ago. I was a young lawyer just finishing my tour of duty in the Army and had not practiced a day in my life when I interviewed for the job. It was the only time I can remember that there were more jobs than lawyers.

Judge Fahrnbruch had a good practice in Lincoln at that time and agreed to talk to me. He was very courteous and considerate. He explained his practice and what would be expected of me if I worked for him. I always suspected that the interview was in part a quiz.

Halfway through the interview one of Dale's clients called and asked him a question about Colorado law. Dale asked me where I would go for a quick answer to the problem. I gave him the general thinking at the time which was either an encyclopedia or perhaps a trip to the library. This is, of course, before we had computers and the age of computers. Dale pointed out to me that Martindale was more than a list of lawyers but also had a summary of different laws of the states by topic, and this was certainly a practical tip that I appreciated.

I was exposed to other aspects of Dale's personality over the years. One was his sense of humor. I recall a court reporter who had gotten a divorce earlier and forgotten to have her name changed. She was a slim young lady and sort of shy and sensitive about her weight. When her lawyer asked her the usual questions, she gave the usual answers; such as you are not doing this to avoid predators, are you, and of course the answer was no, and he concluded by saying, by the way, I only have one more question, how much do you weigh? She objected to the question her own lawyer had asked her. She was sitting on the bench. And Judge Fahrnbruch, having been tipped off in advance, graciously sustained her objection.

Dale tried to stop smoking on a number of occasions. He finally succeeded in doing it. However, he was always careful if someone asked if he had stopped smoking to say, no, he had only suspended smoking.

As a district judge Dale took a great deal of pride in his sense of justice. Lawyers who practiced in front of him at that time will recall that he had a case involving the value of real estate. It was in a divorce case and the husband insisted that for various reasons the real estate had no value but that he wanted it. Well, when the decision came down, Judge Fahrnbruch assigned the land no value as the husband had requested but gave the land to the wife. The old adage of being careful what you asked for came to mind.

Judge Fahrnbruch took pride, as has been pointed out, in the wording of his decrees. He was a wordsmith and a very careful one. I suspect this came from his experience which Judge Caporale discussed as a city editor for the Lincoln Journal. He had a tendency to grammatically correct the wording of even default decrees that were submitted to him. He was very careful in the content of the decree as well.

He received a masters of law from the University of Virginia in Charlottseville and was very proud of that and the work that it took to accomplish that.

His record on cases that he decided in the District Court was a very enviable one. Few were appealed but the ones that were appealed, he was affirmed 70 times, sometimes approved as modified, very seldom, only had 10 cases that were reversed. I think a record that any of us would envy.

In his personal life, Dale was a family man. He enjoyed his family and his friends at his cabin first in Fremont and then near Central City, Nebraska. He spent weekends with Marge, his wife, at the cabin. The tragic death of his son, Dan, took a terrible toll on both Marge and Dale. He always was a supportive father to both his son, Dan, and his daughter, Rebecca.

Dale will be missed as a good friend and a respected jurist. Thank you.

CHIEF JUSTICE HENDRY: Thank you.

CHIEF JUSTICE WHITE: Our third and final speaker is Mr. Ronald Lahners, Administrative Law Judge of the Social Security Administration and former United States District Attorney. Mr. Lahners.

CHIEF JUSTICE HENDRY: Thank you. Mr. Lahners, good afternoon.

HONORABLE RONALD D. LAHNERS: Good afternoon, sir. Good afternoon.

May it please the Court, as the last speaker you may hear some things again, but in any event, hopefully it will be something that may be worthwhile.

I'm honored to have this opportunity to pay respect to Dale Fahrnbruch, who is a member of this honorable court.

As was mentioned, as a young man Dale was in the United States Army from 1942 until 1946, when the war ended. It's kind of interesting, as many veterans at that time, they didn't talk very much about what went on. One story that there was attributed at that time that occurred while he was in the service, however, was that they were unloading some cargo from one of the ships that had come into the Philippines and he noticed the Philippine workers were kind of all upset. So they got an interpreter over and come to find out, one of the people who was doing the unloading of the cargo happened to be a Japanese soldier so they had an instant POW at that time.

The other thing that happened while he was there was that he didn't forget the Lincoln Journal. He sent pictures and he sent articles back to the Lincoln Journal for printing while he was in the service.

He had started working for the Lincoln Journal actually when he was 16 years old and had kept up that all through the time that he was in law school and until after he got out of law school for a period of time. As has been mentioned, he managed to figure out a way to cut that two and four plan into two and three and certainly that's exactly the type of thing that you would think that Dale would be on top of and get accomplished.

In 1952 when he joined the County Attorney's Office, the County Attorney at that time was a fellow called Fritz Wagner, and Fritz had a very definite impression on Dale and persuaded him to come to work for the County Attorney's Office and convinced him to apply his trade as a lawyer instead of a journalist.

When Fritz then ran for governor, at that time Elmer Scheele was elected to the position of County Attorney and Dale became his Chief Deputy. And as Chief Deputy, his duties were pretty expansive. I don't think Elmer particularly liked managing an office too much, so guess who? Dale got the call. He was in complete managerial control of the office. He did the administration, he did the hiring, and along the way he managed to try several major cases as well.

In one of those cases he tried a case against a fellow by the name of Paul Douglas who represented a fellow by the name of Ramon Tapia who was involved in some prison riots here in

Lincoln, Nebraska. Dale was kind of impressed and was sufficiently impressed with the talent of Mr. Douglas that he persuaded Mr. Douglas to join the County Attorney's Office at that time.

Well, within a short period thereafter, Elmer Scheele was elected to the District Court bench and of course at that time we didn't have the Missouri plan. We were still under the elected terms, and Paul was convinced, with Dale's assistance, to become a candidate for the remaining two years of Elmer's term.

As I understand what had happened, Dale went in and talked to Elmer and said, I'm going into private practice. I will, you know, see you around. And the same afternoon Paul went in to see Elmer and said, I think I'm going to be leaving, I've got a job opportunity in California, at which time Elmer got both of them together and says, you can't do this to me. And Paul was persuaded to stay and Dale went into private practice with the law firm of Beynan, Hecht and Fahrnbruch.

Several events that have been mentioned happened during this period of time in his personal life. He married Margaret Hunt, who was a law school librarian, and Dale and Marge had their first child, Becky, in 1956 and Dale's life changed somewhat at that time. He quit playing golf, for instance. He became a very concerned parent and family man and when Dale left the Beynan, Hecht and Fahrnbruch position after numerous years, he then went to the District Court bench.

Now, the District Court bench was something that Dale was very proud of to be appointed to, and during those time periods in between '59 and when he was actually appointed to the bench in late 19 — I believe it was December of 1972, a second child had been born with Dan in 1963. Dale's family was a very, very important part of his life.

I remember a couple of cases that Dale tried that had some particular significance, I thought, at the time. There was a band leader by the name of Les Elgart, and Les Elgart got caught in Lincoln, Nebraska, with a quantity of marijuana. And so Mr. Douglas, of course, as County Attorney at that time, was the prosecutor and Dale ended up defending Mr. Elgart. Some of the calls that Dale got during that time included a call from Jackie

Gleason that he would be happy to come to Lincoln, Nebraska, on Mr. Elgart's behalf and testify for him.

However, that never, ever came about because Dale, as you know, was a student of the law. He found a very recent decision of the United States Supreme Court that said that the manner in which the marijuana was seized was illegal, and he proceeded to convince Mr. Douglas to dismiss the case against Mr. Elgart, so he won one at that point.

Now, what's not commonly known, however, was that after that occurred, Les Elgart stiffed him on the fee. Now, you can imagine somebody like Paul Douglas having that information and sort of maybe rubbing it in a little bit with Dale from time to time, but in any event, it caused Dale to pursue that matter to the extent that he got a judgment, he finally located Mr. Elgart, he transferred the judgment to another state and at that time managed to get his fee from Mr. Elgart for his representation.

The second case that I remember pretty well was one that I tried against Dale when he was in private practice. It was a motor vehicle homicide case. It was a very interesting case and it was a tough case. And during the course of the trial I noticed that Dale never changed his suit. He wore the same suit every day.

Well, he won the case, number two for Dale. And so I went over to congratulate him at the end of the trial and I said, "Dale," I said, "I do have one question," I said, "You know, why did you wear the same suit every day?" I thought maybe I was missing something.

And he said, "Well, Ron," he says, "it was sort of like, you know, you hear these people that are engaged in sports they don't change their socks as long as they are continuing to win." and I must have looked at him rather incredulously and he looked back up at me and he said, "Well, it worked, didn't it?"

When Dale became a District Judge in December of '72, I had the occasion to try numerous cases in front of Dale. From a trial lawyer's viewpoint, let me say that he was a trial lawyer's judge. He knew the law. He decided objections, instructions equally, both sides, without favoritism, right down the middle, and regardless of the type of case or the type of persons who were in front of him, they got that exact same fair justice.

The other thing was that you were always welcome in his office. I went up to his office on numerous occasions, being the County Attorney at the time, and the coffee pot was always on. He always loved to sit and chat with you. He loved to talk about the law. He loved to talk about his family.

And as Earl had indicated, he was having a little trouble quitting smoking about that time because Dale only smoked two or three packs of cigarettes a day, you understand, but he finally did. And maybe some of the members of the Court may have remembered subsequent thereto that Dale used to chew a little gum and he'd just chew the devil out of that gum, but he did quit after he went back and got his master's back East.

He was appointed to the Supreme Court in '87 by Governor Kay Orr and when that occurred, it was a real major goal of his professional career. That was exceptionally pleasing to Dale.

As has been mentioned along life's way he had some disappointments. His son, Dan, was killed in 1984. Dan had kind of followed in Dale's footsteps as a Deputy County Attorney and was a Deputy County Attorney in Lancaster County at the time of his death.

As someone who is devoted to family life such as Dale, he took that death very hard, but the other thing that you also saw if you were around him was that he then even cherished his wife, Marge, and his daughter, Becky, all the more.

Some personal observations that I have: He loved his family very, very much. He enjoyed his cabin at Fremont and later at Central City. He enjoyed spending time there with his family and with his friends. Actually he had a very good sense of humor and he really enjoyed a good story.

Some thought of him as a quiet man. I didn't really see him in that particular circumstance too often. It seemed like when he was the most quiet was when Douglas and Ardis and Marge got together and the poor guy couldn't get a word in edgewise.

Dale was a true friend. If you had been his friend, you were always going to be his friend. And regardless of what occurred, he was your friend. He was a good friend of mine and I think there are many here who will miss him.

CHIEF JUSTICE HENDRY: Thank you, Mr. Lahners.

CHIEF JUSTICE WHITE: If I may be indulged for a moment, I would like to take this opportunity to remember my colleague of many years. He was attentive in the proceedings before the Court. He was knowledgeable in the law, fully conversant with the facts and conscious always of his obligation to do justice within the law. These are my memories of my friend Dale Fahrnbruch.

He was, however, many other things, student, journalist, scholar, lawyer, advocate judge, husband, father and friend. We rightly honor his life and mourn his passing.

I wish to thank the Court for the honor it bestowed on me and the other speakers in permitting us to participate in this solemn occasion and I move to record these proceedings, that these proceedings be transcribed and a copy be placed in the archives of this Court and a copy presented to his family.

CHIEF JUSTICE HENDRY: All right. Thank you, Mr. Chief Justice.

CHIEF JUSTICE WHITE: This completes our presentation, Mr. Chief Justice.

CHIEF JUSTICE HENDRY: Thank you. Let me take just a moment to recognize for the record, which we are making here this afternoon, others present that I see in the audience who are here to help us honor Justice Fahrnbruch. I see Judge Rett Inbody, who is the Chief Judge of the Nebraska Court of Appeals is with us this afternoon; Federal District Judge Warren Urbom; Steve Willborn, the Dean of the University of Nebraska College of Law; our Reporter of Decisions, Peggy Polacek; our State Court Administrator, Janice Walker; former Attorney General Paul Douglas; and Administrative Assistants of the Supreme Court, Bette Johnson, Jackie Hladik and Kathy Miller are some of those that are with us here this afternoon to honor Judge Fahrnbruch. Also I see Court of Appeals Judge Arlen Beam as well.

So I thank you all for being here and I take this opportunity to note for those present that this entire proceeding has been memorialized by the court reporter. After these proceedings have been transcribed by the court reporter, copies will be distributed to

family members and those of you who have spoken on behalf of Justice Fahrnbruch. 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 who with the assistance of Janet Hammer from the Court Administrator's Office, who is primarily responsible for organizing this ceremonial session.

This concludes this special ceremonial session of the Nebraska Supreme Court. The Court would encourage any of the participants, family members and friends of Justice Dale E. Fahrnbruch to remain in the courtroom for a moment to greet each other on this occasion.

We are adjourned.

(Ceremonial session adjourned at 2:33 p.m.)

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

MELISSA STRONG, APPELLANT, V. OMAHA CONSTRUCTION INDUSTRY PENSION PLAN, APPELLEE, AND JOHN E. STRONG, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM DAVID STRONG, INTERVENOR-APPELLEE.

701 N.W.2d 320

Filed June 24, 2005. No. S-03-1403.

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. **New Trial: Words and Phrases.** A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court.
3. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
4. **Motions for New Trial: Pleadings: Time: Notice: Appeal and Error.** If filed no later than 10 days after the entry of judgment, a motion to alter or amend a judgment, like a motion for a new trial, terminates the period in which a party must file a notice of appeal.
5. **Pleadings: Judgments.** In determining what qualifies as a motion to alter or amend a judgment, the key is not the motion's title. If the motion seeks substantive alteration of the judgment—as opposed to the correction of clerical errors or relief wholly collateral to the judgment—a court may treat the motion as one to alter or amend the judgment.
6. ____: ____. A motion for reconsideration is the functional equivalent of a motion to alter or amend a judgment.
7. **Federal Acts: Insurance.** The preemption provision of the federal Employee Retirement Income Security Act is deliberately expansive and is consistently construed to accomplish the congressional purpose of ensuring certain minimum standards in the administration of employee benefit plans.
8. **Courts: States: Appeal and Error.** While Nebraska courts must treat U.S. Supreme Court decisions as binding authority, lower federal court decisions are only persuasive authority.
9. **Federal Acts: Insurance: Courts.** Courts are to develop a federal common law of rights and obligations for employee benefit plans regulated by the federal Employee Retirement Income Security Act, so, a court may resort to the federal common law to answer a question only when the act is silent on the issue.

10. **Federal Acts: Insurance: Divorce.** Because the federal Employee Retirement Income Security Act does not expressly control the issue whether an extraneous divorce decree can waive a beneficiary interest in a benefits plan governed by the act, the issue is controlled by the federal common law.
11. **Federal Acts: Insurance: States.** In developing a federal common law to govern issues arising under the federal Employee Retirement Income Security Act, it is appropriate to look to both the statute itself as well as analogous state law.
12. **Federal Acts: Insurance: Divorce: Property Settlement Agreements: Waiver: Intent.** Under the federal common law, a party waives his or her beneficiary interest in a benefits plan governed by the federal Employee Retirement Income Security Act by entering into a divorce decree if the decree and any property settlement agreement incorporated therein manifest the party's intent to relinquish all property rights in the plan.

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

Robert E. O'Connor, Jr., for appellant.

Lawrence G. Whelan for intervenor-appellee.

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

PER CURIAM.

Before his death, William David Strong participated in the Omaha Construction Industry Pension Plan (Plan), an employee benefit plan subject to the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (1994) (ERISA). When William joined the Plan, he designated his wife, Melissa Strong, as his beneficiary for the Plan's pension death benefit. Although Melissa and William divorced in 1998, William did not remove Melissa as his beneficiary before his death. The district court determined that under the divorce decree, Melissa waived her interest and granted summary judgment to William's estate (Estate).

We must decide whether under federal law Melissa waived her beneficiary interest in the death benefit by agreeing to the terms of the divorce decree. We conclude that under the federal common law, a divorce decree can waive a beneficiary interest in the death benefit of an ERISA-governed pension plan. Because the unambiguous language of the divorce decree shows that Melissa intended to waive her interest in the death benefit, we affirm the district court's grant of summary judgment.

I. BACKGROUND

Employees eligible for the Plan are provided with a summary plan description that includes a section entitled "How Can I Designate a Beneficiary?" It provides:

> Your spouse is your automatic beneficiary but if you do not have a spouse, your beneficiary will be the person or persons you so designate in your latest **written** notice to the Fund Office. You may change your beneficiary at any time you so desire prior to your death by **written notice to the Fund Office.**
>
> In the event that you fail to name a beneficiary, the Trustees will pay the Death Benefits to your dependent children, if any, in equal shares. If neither your legal spouse [n]or dependent children survive you, then the Death Benefits will be computed and shall be paid in a one-time lump sum amount to the executor or administrator of your estate.

(Emphasis in original.)

During William and Melissa's marriage, William signed a beneficiary designation card for the pension, naming Melissa as his beneficiary. William and Melissa divorced in 1998, but before his death in 2000, William did not change the beneficiary designation card. So, the only beneficiary designation provided to the Plan named Melissa. Melissa argues the beneficiary designation card controls to whom the pension death benefit must be paid.

The personal representative, however, argues that Melissa waived any interest she had in the pension death benefit by entering into the divorce decree. The decree provides:

> Each of the parties is awarded the ownership of the . . . personal property of every kind and description now in each party's possession, including bank accounts, automobiles, 401K plans, *retirement plans*, insurance policies, and other intangible property now possessed by each or owned by each in their separate names . . . .
>
> . . . .
>
> . . . All property and money received and retained by the parties pursuant hereto, except as specifically provided to the contrary, shall be the separate property of the respective parties, free and clear of any right, interest or claim of the other party and each party shall have the right to deal with

> and dispose of his or her separate property, both real and personal as fully and effectively as if the parties had never been married . . . .

(Emphasis supplied.)

We note that ERISA contains anti-alienation provisions that prevent plan participants from unwisely alienating their interests in ERISA-regulated pension plans. 29 U.S.C. § 1056(d). A qualified domestic relations order (QDRO) is an exception to the anti-alienation rule. Under this exception, persons may alienate their benefits for things such as child support and alimony. 29 U.S.C. § 1056(d)(3). To fall within the QDRO exception, the state domestic relations order must comply with specific requirements set out in 29 U.S.C. § 1056(d)(3). It is undisputed that the divorce decree failed to comply with these requirements and therefore was not a QDRO.

After William's death, Melissa claimed the pension death benefit. Initially, the Plan agreed to pay her. But William's personal representative then claimed the death benefit on behalf of the Estate. After receiving the Estate's claim, the Plan refused to pay the death benefit to either party until it had an order from an appropriate court.

After the Plan refused to pay the pension death benefit, Melissa brought this action. The Estate intervened and moved for summary judgment. After the court denied the motion, Melissa moved for summary judgment. In addition to opposing Melissa's motion, the Estate moved the court to reconsider the denial of its earlier motion for summary judgment. The court determined that its earlier order was incorrect and granted the Estate summary judgment. Melissa then filed a motion for new trial, which the court overruled.

II. ASSIGNMENTS OF ERROR

Melissa assigns that the court erred in (1) granting the Estate's motion for summary judgment, (2) failing to grant her motion for summary judgment, and (3) overruling her motion for new trial.

III. STANDARD OF REVIEW

[1] 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. *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004).

IV. ANALYSIS

1. JURISDICTION

The Estate argues we lack jurisdiction because Melissa failed to file a timely notice of appeal. The trial court entered summary judgment for the personal representative on September 17, 2003. A party must file a notice of appeal within 30 days of the judgment, decree, or final order from which the party is appealing. Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004). A motion for a new trial, however, terminates the time in which a notice of appeal must be filed. § 25-1912(3). And, if the court denies the motion, the party has 30 days from the entry of the order denying the motion to file a notice of appeal.

Here, Melissa filed a motion for new trial on September 24, 2003. The court overruled the motion on November 17, and Melissa filed her notice of appeal on December 15. The Estate, however, argues that a motion for new trial cannot follow a grant of summary judgment and thus that Melissa's motion for new trial did not terminate the time for filing a notice of appeal. If so, Melissa's notice of appeal was untimely because she filed it more than 30 days after September 17, the day the court granted summary judgment to the Estate.

[2,3] A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute. *Id.* So, Melissa's motion following the entry of summary judgment was not a proper motion for a new trial under Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2004).

[4] That, however, does not mean Melissa's motion failed to terminate the time for an appeal. Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002) authorizes a motion to alter or amend a judgment. If filed no later than 10 days after the entry of judgment, a motion to alter or amend a judgment, like a motion for a new

trial, terminates the period in which a party must file a notice of appeal. § 25-1912(3). Thus, if Melissa's motion qualified as a motion to alter or amend a judgment, she timely filed her notice of appeal.

[5,6] In determining what qualifies as a motion to alter or amend a judgment, the key is not the motion's title. If the motion seeks substantive alteration of the judgment—as opposed to the correction of clerical errors or relief wholly collateral to the judgment—a court may treat the motion as one to alter or amend the judgment. See *Woodhouse Ford v. Laflan, supra.* In her motion, Melissa claimed that there were irregularities in the proceedings and that the court erred on questions of law. For her relief, she sought "an Order granting a new trial" and any other "relief deemed equitable and just." In effect, she requested that the court reconsider its grant of summary judgment. A motion for reconsideration is the functional equivalent of a motion to alter or amend a judgment. *Woodhouse Ford v. Laflan, supra.* So, we treat Melissa's motion as one to alter or amend the judgment. We have jurisdiction.

2. Pension Death Benefit

In brief, the dispute over the death benefit centers on three factors. First, the documents governing the Plan provide: "Your spouse is your automatic beneficiary but if you do not have a spouse, your beneficiary will be the person or persons you so designate in your latest written notice to the Fund Office." (Emphasis omitted.) Second, the last written notice William had given to the fund office before his death designated Melissa as his beneficiary. Third, between the time William sent the notice and his death, he and Melissa divorced, and, according to the Estate, Melissa waived her beneficiary interest in the pension death benefit by agreeing to the terms of the divorce decree. Who is entitled to the death benefit depends on whether the beneficiary designation or the purported waiver in the non-QDRO divorce decree controls.

(a) Issue Preempted by Federal Law

[7] This case involves an ERISA-governed employee benefit plan. ERISA supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"

covered by the statutory scheme. 29 U.S.C. § 1144(a). This preemption provision is " 'deliberately expansive' and [is] consistently construed to accomplish the congressional purpose of [e]nsuring certain minimum standards in the administration of employee benefit plans." *Manning v. Hayes*, 212 F.3d 866, 870 (5th Cir. 2000) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987)). Determination of beneficiary status is an area of core ERISA concern. *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001) (holding that ERISA expressly preempted state statute providing that designation of spouse as beneficiary on nonprobate asset was automatically revoked upon divorce). Therefore, federal law controls. See, *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990); *Fox Valley & Vic. Const. Wkrs. Pension F. v. Brown*, 897 F.2d 275 (7th Cir. 1990) (en banc); *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989).

(b) Ascertaining Federal Rule

Having concluded that federal law preempts state law, we turn to the more difficult task of ascertaining what the federal rule is. To do this, we "look to either the statutory language or, finding no answer there, to federal common law which, if not clear, may draw guidance from analogous state law." See *McMillan v. Parrott*, 913 F.3d at 311. Courts that have considered the same issue presented by this case have split on whether the issue is controlled by the language of ERISA or the federal common law.

Some courts hold that 29 U.S.C. § 1104(a)(1)(D) controls. It provides that plan fiduciaries are to conduct their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter." *Id.* According to these courts, 29 U.S.C. § 1104(a)(1)(D) requires plan administrators to determine a plan's beneficiary by examining the plan documents. If, as here, the plan documents state that the employee's beneficiary will be determined by the last written beneficiary designation on file, an attempt to waive a beneficiary interest with language in an extraneous divorce decree is ineffective. See, *McMillan v. Parrott, supra*; *Estate of Zienowicz v. Metropolitan Life Ins. Co.*, 205 F. Supp. 2d 339 (D.N.J. 2002).

See, also, *Estate of Altobelli v. Intern. Bus. Machines Corp.*, 77 F.3d 78 (4th Cir. 1996) (Wilkinson, J., dissenting); *Fox Valley & Vic. Const. Wkrs. Pension F. v. Brown, supra* (Easterbrook, J., dissenting; Ripple, J., dissenting); *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003) (Hecht, J., dissenting). We will call this approach the plan-documents rule.

The plan-documents rule, however, is the minority rule. A majority of courts have concluded that 29 U.S.C. § 1104(a)(1)(D) does not govern the issue, and so one must look to the federal common law. These courts generally hold that when an employee's spouse waives a beneficiary interest in the employee's benefit plan under a divorce decree, the waiver is effective despite the employee's failure to change the beneficiary designation after the divorce. See, e.g., *National Auto. Dealers v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996); *Estate of Altobelli v. Intern. Bus. Machines Corp., supra*; *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994); *Fox Valley & Vic. Const. Wkrs. Pension F. v. Brown, supra* (en banc); *Keen v. Weaver, supra*. Cf. *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991). We will call this the waiver rule.

(i) Precedential Weight of Federal Court Decisions When Construing Federal Rule

Before determining whether to follow the plan-documents rule or the waiver rule, we need to resolve conflicting statements in our case law on what weight we will give lower federal court decisions when Nebraska courts must construe federal law. Some of our decisions in older cases treat lower federal court decisions as binding precedent. For example, in *Anderson v. Wagner*, 207 Neb. 87, 296 N.W.2d 455 (1980), we relied on decisions from lower federal courts in interpreting the federal Truth in Lending Act. We stated that "we are obligated to examine any existing federal court cases because, in the administration and interpretation of federal legislative acts, pertinent opinions of the federal courts are *binding* upon the state courts." (Emphasis supplied.) 207 Neb. at 91, 296 N.W.2d at 458. See, also, *First Data Corp. v. State*, 263 Neb. 344, 639 N.W.2d 898 (2002) (stating rule in dicta); *Darr v. Long*, 210 Neb. 57, 313 N.W.2d 215 (1981); *Hadley v. Union P. R. Co.*, 99 Neb. 349, 156 N.W. 765 (1916).

Of course, in cases like this, when federal courts disagree on what is the correct rule, it is impossible for us to apply the rule that federal court decisions are binding. If we treat one group of opinions as binding, we necessarily disregard the other group as nonbinding.

Our decisions in the older cases present a broader problem: They conflict with our more recent cases that have treated lower federal court decisions as persuasive rather than binding. See, *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003); *In re Search Warrant for 3628 V St.*, 262 Neb. 77, 628 N.W.2d 272 (2001). Accord *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 481, 658 N.W.2d 258, 267 (2003) ("[o]n matters of federal law, the decisions of federal courts are highly *persuasive*, particularly where federal legislative history and the interpretation of federal statutes are at issue"). For example, in *In re Application of Lincoln Electric System, supra*, we were required to interpret 47 U.S.C. § 253 (2000) of the federal Telecommunications Act to determine if it preempted a Nebraska statute. After noting that federal courts disagreed on the issue, we stated that "the Supreme Court has not addressed the specific preemption issue before us, and in the absence of an interpretation of § 253(a) by the Court, we are not bound by any circuit court's interpretation." 265 Neb. at 79, 655 N.W.2d at 371.

Similarly, in *In re Search Warrant for 3628 V St., supra*, we were confronted with a split in federal authority over whether the First Amendment guarantees access to a sealed affidavit used to support a search warrant. We rejected the argument that we were bound to follow the position adopted by the Eighth Circuit. In reaching that conclusion, we relied on Justice Thomas' concurring opinion in *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). He wrote:

> The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is

> located. . . . An Arkansas trial court is bound by this Court's (and by the Arkansas Supreme Court's and Arkansas Court of Appeals') interpretation of federal law, but if it follows the Eighth Circuit's interpretation of federal law, it does so only because it chooses to and not because it must.

(Citations omitted.) 506 U.S. at 376.

[8] To the extent that *First Data Corp. v. State, supra*; *Darr v. Long, supra*; *Anderson v. Wagner*, 207 Neb. 87, 296 N.W.2d 455 (1980); *Hadley v. Union P. R. Co., supra*, and any other case suggest that lower federal court decisions are binding, they are overruled. So, while Nebraska courts must treat U.S. Supreme Court decisions as binding authority, lower federal court decisions are only persuasive authority.

(ii) Adoption of Waiver Rule

Having concluded that we are not required to treat lower federal court decisions as binding precedent, we must now decide whether Nebraska will follow the waiver rule or the plan-documents rule. We determine the waiver rule is the better rule.

[9] Courts are to develop a federal common law of rights and obligations under ERISA-regulated plans. *Anderson v. HMO Nebraska*, 244 Neb. 237, 505 N.W.2d 700 (1993). But the "authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute." *Mertens v. Hewitt Associates*, 508 U.S. 248, 259, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993). So, a court may resort to the federal common law to answer a question only when ERISA is silent on the issue. See *Mers v. Marriott Intern.*, 144 F.3d 1014 (7th Cir. 1998).

Courts adopting the minority plan-documents rule have concluded that ERISA is not silent on whether a non-QDRO divorce decree can waive a beneficiary interest in an ERISA-governed benefit plan. As noted, these courts rely on 29 U.S.C. 1104(a)(1)(D), which requires that fiduciaries, including plan administrators, must discharge their duties "in accordance with the documents and instruments governing the plan." They reason that determining who is entitled to the death benefits under an ERISA-governed plan is one of the plan administrator's duties and that therefore, plan administrators should examine the plan

documents rather than turning to rules supplied by the federal common law.

We, however, are not persuaded by the statutory construction used by the court's adopting the plan-documents rule. Instead, we agree with the majority of courts that have recognized that 29 U.S.C. § 1104(a)(1)(D) only attempts to set out a plan administrator's duties. It is, therefore, "a very thin reed" upon which to conclude that ERISA expressly establishes a methodology for determining the beneficiary of an ERISA-governed benefits plan. *Manning v. Hayes*, 212 F.3d 866, 872 (5th Cir. 2000).

Nor are we persuaded by the dissent's argument that *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001), undermines the waiver rule. In *Egelhoff*, the court held that ERISA preempted a Washington statute that provided that a spouse's designation of a beneficiary of a nonprobate asset is revoked automatically upon divorce. But it did not answer the issue presented in this case: whether *under federal law* an extraneous divorce decree can waive a beneficiary interest in an ERISA-governed benefits plan. In fact, by our count, every court to consider this issue has rejected the argument that *Egelhoff* undermines the waiver rule. See, *Guardian Life Ins. Co. of America v. Finch*, 395 F.3d 238 (5th Cir. 2004); *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003); *MacInnes v. MacInnes*, 260 Mich. App. 280, 677 N.W.2d 889 (2004).

[10,11] Because ERISA does not expressly control the issue whether an extraneous divorce decree can waive a beneficiary interest in an ERISA-governed benefits plan, the issue is controlled by the federal common law. In developing a federal common law to govern ERISA issues, it is appropriate to look to both the statute itself as well as analogous state law. See, *Manning v. Hayes, supra*; *Fox Valley & Vic. Const. Wkrs. Pension F. v. Brown*, 897 F. 2d 275 (7th Cir. 1990).

Under Nebraska law, the general rule is that divorce, per se, does not affect a beneficiary designation in a non-ERISA life insurance policy, IRA, annuity, or similar financial investment. *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002). But a spouse may waive such a beneficiary interest in a divorce decree. See *id.* For example, in *Pinkard*, we held that when a former wife waived her beneficiary interest in an annuity

by entering into a property settlement agreement, the waiver was effective even though her former husband had not changed the beneficiary designation after the divorce. In determining whether a divorce decree waives a beneficiary interest,

> the inquiry should be upon the language of the dissolution decree and any agreement which sets forth the intentions of the parties concerning property rights. If the dissolution decree and any property settlement agreement incorporated therein manifest the parties' intent to relinquish all property rights, then such agreement should be given that effect.

Pinkard v. Confederation Life Ins. Co., 264 Neb. at 318, 647 N.W.2d at 89.

The rule we adopted in *Pinkard* for addressing beneficiary interests in non-ERISA financial investments and insurance policies is consistent with the federal common law developed by courts following the waiver rule. See, e.g., *Melton v. Melton*, 324 F.3d 941, 945-46 (7th Cir. 2003) (holding test is "whether a reasonable person would have understood that she was waiving her interest in the proceeds or benefits in question than with any magic language contained in the waiver itself"); *Manning v. Hayes*, 212 F.3d 866, 871 (5th Cir. 2000) (holding waiver is effective if "explicit, voluntary and made in good faith"). We see no problem then in using the same standard we announced in *Pinkard* to determine whether a person waived a beneficiary interest in an ERISA-governed benefit plan.

So, the issue in this case is whether the dissolution decree and any property settlement agreement incorporated therein manifested Melissa's intent to relinquish all property rights in the pension death benefit. If so, the agreement will be given effect.

Melissa and William's divorce decree provided:

> Each of the parties is awarded the ownership of the . . . personal property of every kind and description now in each party's possession, including bank accounts, automobiles, 401K plans, *retirement plans*, insurance policies, and other intangible property now possessed by each or owned by each in their separate names . . . .
>
> . . . .
>
> . . . All property and money received and retained by the parties pursuant hereto, except as specifically provided to

> the contrary, shall be the separate property of the respective parties, free and clear of any right, interest or claim of the other party and each party shall have the right to deal with and dispose of his or her separate property, both real and personal as fully and effectively as if the parties had never been married . . . .

Thus, the decree expressly stated not only that the retirement plan belonged to William, but that he would take it "free and clear of any right, interest or claim" of Melissa. We agree with the trial court that this unambiguously shows that Melissa, by entering into the divorce decree, intended to waive whatever interest she had in William's retirement plan, including her beneficiary interest in the plan's death benefit. Because there are no disputed fact questions regarding Melissa's intent, the court correctly entered summary judgment for the Estate.

V. CONCLUSION

[12] We hold that under the federal common law, a party waives his or her beneficiary interest in an ERISA-governed benefits plan by entering into a divorce decree if the decree and any property settlement agreement incorporated therein manifest the parties' intent to relinquish all property rights in the plan. Because it is undisputed that the divorce decree shows that Melissa intended to waive her beneficiary interest in the death benefit of the Plan, the Estate was entitled to summary judgment.

AFFIRMED.

CONNOLLY, J., dissenting.

I join the portion of the majority opinion holding that this court has jurisdiction, as well as the portion holding that Nebraska courts need only treat lower federal court decisions as persuasive authority. I respectfully dissent, however, from the decision to adopt the waiver rule. In my view, the plan-documents rule is based on the correct interpretation of the language of ERISA and better serves the policies underlying ERISA.

LANGUAGE OF ERISA

As the majority opinion acknowledges, a court may resort to the federal common law to answer a question *only* when ERISA is silent on the issue. See, *Mers v. Marriott Intern.*, 144 F.3d 1014 (7th Cir. 1998). Here, ERISA expressly states that fiduciaries,

including plan administrators, must discharge their duties "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). It is beyond question that one of a plan administrator's duties is to determine who is entitled to receive a plan's death benefit once an employee who belongs to the plan dies. See *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001). It necessarily follows that in carrying out their duty to determine who is entitled to receive benefits, plan administrators must examine the plan documents rather than turning to rules supplied by the federal common law. If, as here, the plan documents state that the beneficiary will be the person or persons that the employee designates in his or her last written notice, the written notice governs who the beneficiary will be. Extraneous attempts to waive the beneficiary interest are ineffective.

I recognize that a majority of courts has rejected this interpretation of 29 U.S.C. § 1104(a)(1)(D). Ordinarily, I might give this factor considerable weight in deciding which of two conflicting positions Nebraska should follow. But, not one of the courts in this majority has explained why the statutory analysis used by those courts adopting the plan-documents rule is flawed. In fact, the closest that any court has come to providing a reason for rejecting the claim that 29 U.S.C. § 1104(a)(1)(D) controls the issue is the Fifth Circuit's claim that the section is "a very thin reed" upon which to conclude that ERISA expressly controls whether a beneficiary interest can be waived in a divorce decree. *Manning v. Hayes*, 212 F.3d 866, 872 (5th Cir. 2000). Because the waiver rule is based, at best, on throwaway, conclusory statements rather than a careful analysis of statutory language, I believe the fact that a majority of cases have adopted it is entitled to little weight.

Moreover, the U.S. Supreme Court's decision in *Egelhoff v. Egelhoff, supra*, bolsters the conclusion that the language of ERISA, rather than the federal common law, controls the issue presented by this case. In *Egelhoff*, the court held that ERISA preempted a Washington statute that provided that the designation of a spouse as a beneficiary of a nonprobate asset is revoked automatically upon divorce. The court concluded that the statute

had an impermissible connection with the beneficiary determination. It reasoned that the statute ran counter to

> ERISA's *commands* that a plan shall "specify the basis on which payments are made to and from the plan," § 1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D), making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan." § 1002(8).

(Emphasis supplied.) 532 U.S. at 147.

Egelhoff, although not directly on point, undercuts the majority's claim that ERISA remains silent on how plan administrators should determine who the beneficiary of a death benefit is. According to the Court, 29 U.S.C. § 1104(a)(1)(D)—when coupled with other ERISA provisions—functions as a "command" that a plan administrator should determine the beneficiary in accordance with the documents and instruments governing the plan. If so, the plan administrator need not supplement ERISA with federal common-law rules that look outside the plan documents.

POLICY

Not only is the waiver rule more consistent with the plain language of ERISA, it also better serves the policy reasons that drove Congress' decision to adopt ERISA. "One of the principal goals of ERISA is to enable employers 'to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursements of benefits.' " *Egelhoff v. Egelhoff*, 532 U.S. 141, 148, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987)). Under the plan-documents rule, an employer can adopt rules providing that the beneficiary designation on file will control who will receive benefits. Then, no need exists to analyze the language of divorce decrees to determine if there has been a waiver. A plan administrator can look at the beneficiary designation on file and immediately know to whom it must pay the proceeds. This "yield[s] simple administration, avoid[s] double liability, and ensure[s] that beneficiaries get what's coming

quickly, without the folderol essential in less-certain rules." *Fox Valley & Vic. Const. Wkrs. Pension F. v. Brown*, 897 F.2d 275, 283 (7th Cir. 1990) (Easterbrook, J., dissenting).

In contrast, the "waiver rule" frustrates Congress' goal of easy and uniform administration. The Seventh Circuit, in *Fox Valley & Vic. Const. Wkrs. Pension F. v. Brown, supra*, was one of the first courts to adopt the waiver rule. At the time, it predicted that "the federal courts are charged with creating federal common law rules to govern ERISA . . . and the creation of such federal rules will provide the needed uniformity." 897 F.3d at 281-82. The reality, however, has been something far different.

A myriad of tests has been developed for determining whether language in a divorce decree was sufficient to act as a waiver. At one end of the spectrum is the Seventh Circuit, which invokes what appears to be an objective test; language in a decree satisfies the test if "a reasonable person would have understood that she was waiving her interest in the proceeds or benefits in question." *Melton v. Melton*, 324 F.3d 941, 945-46 (7th Cir. 2003).

In contrast, the Eighth Circuit ostensibly employs a test similar to the Seventh Circuit, asking whether the decree's language is "sufficiently specific to convey the intent of the parties to divest one or the other, or both, of a beneficiary interest." *Hill v. AT&T Corp.*, 125 F.3d 646, 648 (8th Cir. 1997). Yet, the Eighth Circuit will go beyond the decree's language and examine the parties' postdivorce relationship to determine whether a waiver was intended. For example, in *Mohamed v. Kerr*, 53 F.3d 911 (8th Cir. 1995), the court concluded that the former spouse of an employee had waived her interest in the employee's benefit plan. One of the reasons that the court gave was that after the former spouse of the employee found out he had Alzheimer's disease, she "could not get away fast enough, and she never looked back." *Id.* at 916.

The Fifth Circuit falls somewhere in between the Seventh and Eighth Circuits. It will look first to the language of the decree, but will apparently go beyond that language to ensure that the waiver was voluntary and made in good faith. See *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000).

Finally, other courts adopting the waiver rule have opted to avoid providing any guidance on how to determine if a waiver has occurred. See, *Estate of Altobelli v. Intern. Bus. Machines*

Corp., 77 F.3d 78 (4th Cir. 1996) (adopting waiver rule, but not stating test); *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991) (suggesting waiver was possible, but not stating test). Of course, this approach does little to provide guidance to plan administrators trying to figure out to whom they are to pay plan benefits.

The disparity in how courts determine whether a waiver exists has resulted in substantially similar language being treated differently. For example, in *Fox Valley & Vic. Const. Wkrs. Pension F. v. Brown, supra*, the court held that an ex-wife waived her interest in the death benefits of her former husband's pension plan when the divorce decree provided " 'the parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party.' " Likewise, in *Estate of Altobelli v. Intern. Bus. Machines Corp.*, 77 F.3d at 80-81, the court found that a wife "clearly intended" to waive her interest in her husband's pension, when the decree provided, " 'All of the following property is hereafter the sole and exclusive property of the Husband, and the Wife hereby waives and transfers to the Husband any interest that she may have in the property: . . . Husband's IBM pension . . . .' " But in *Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693 (8th Cir. 1989), the court held that language in a decree stating the employee " 'shall have as his own, free of any interest of [his wife], his interest in the profit-sharing plan of his employer . . .' " did not waive the wife's beneficiary interest in the profit-sharing plan because the language was not specific enough.

But the complications that arise from the waiver rule are not merely cross-jurisdictional. Even within a jurisdiction, whether a waiver has occurred often depends upon hairline distinctions. For example, in the Eighth Circuit, sometimes the failure to specify an exact interest in an employee benefit plan will result in a finding of no waiver. *Lyman Lumber Co. v. Hill, supra*. Yet, sometimes broad, sweeping language means that a waiver was intended. See *Mohamed v. Kerr, supra*. A decree that states a spouse is giving up "any interest" in a plan means no waiver was intended; but a decree that states giving up "any interest or claim" equates to a waiver. *Id.* Similarly, reciprocal language—both spouses giving up any interest in the other spouse's benefit plan—is, for reasons

that escape me, more indicative of an intent to waive than language in which only one spouse gives up an interest in the other spouse's benefit plan. *Id.*

So, the waiver rule has not resulted in the predicted uniformity, but instead has provided an array of muddled and sometimes contradictory precedents. Plan administrators (let alone attorneys drafting divorce decrees) have little hope of knowing what construction a court will give to particular language or if factors outside of the divorce decree should be considered. This confusion is the antithesis of what Congress intended and encourages "conflicts among parties asserting rights to plan benefits, miring plan assets in expensive litigation." *Estate of Altobelli v. Intern. Bus. Machines Corp.*, 77 F.3d 78, 83 (4th Cir. 1996) (Wilkinson, J., dissenting).

PERCEIVED FAIRNESS CREATED BY WAIVER RULE

Finally, I think it worth commenting on the factor that I believe is driving courts to adopt the waiver rule: the perception that it is fairer in individual cases than the plan-documents rule. To an extent, this is true. Under the plan-documents rule, a bargained-for agreement to give up a beneficiary interest in a spouse's ERISA-governed benefit plan will go unenforced if it appears in a non-QDRO divorce decree. As a result, the spouse who had intended to waive the interest will receive a windfall. In contrast, the waiver rule would prevent at least some of these windfalls from happening by allowing plan administrators and courts to examine the extraneous documents in which the waiver was made. It is a similar concern for individual fairness that led me to join the opinion in *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002), which holds that for non-ERISA investments and insurance policies, a beneficiary interest can be waived in a divorce decree.

But this concern for individual fairness comes at a price. It leads to a lack of uniformity that complicates administration, slows the payment of benefits, and encourages litigation. So, "what seem like small equitable steps in a particular case may lead to large administrative headaches in the aggregate." *Estate of Altobelli v. Intern. Bus. Machines Corp.*, 77 F.3d at 84. (Wilkinson, J., dissenting). Congress, hoping to avoid these "large headaches," required the plan administrator to administer

plans in accordance with the plan documents. In other words, it chose uniformity and ease of administration over individual fairness. That is a policy decision entrusted to Congress, and one that no court, including this one, has the power to disregard.

STEPHAN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
TODD D. SENTERS, APPELLANT.

699 N.W.2d 810

Filed June 24, 2005. No. S-03-945.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Constitutional Law: Due Process.** The Due Process Clause of the 14th Amendment contains a substantive component that provides at least some protection to a person's right of privacy.
4. **Constitutional Law.** The Nebraska Constitution does not contain a right of privacy broader than that recognized by the federal Constitution.
5. **Constitutional Law: Statutes.** Under rational basis review, a law is constitutional as long as it bears some rational relationship to a legitimate state purpose.
6. **Constitutional Law: Due Process.** When a right is fundamental, a law infringing upon it is constitutional only if the infringement is narrowly tailored to serve a compelling state interest.
7. **Statutes: Minors.** When a law regulates sexual conduct involving a minor, *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), is inapplicable.
8. **Courts.** Nebraska courts are not bound to follow Eighth Circuit precedent on federal questions.
9. **Courts: Statutes: Minors.** Even after *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), the State, in regulating child pornography, remains free to define children as persons under the age of 18, even if the age of consent is lower, as long as the law passes traditional rational basis review.
10. **Constitutional Law: Legislature: Intent.** When employing traditional rational basis review, it is constitutionally irrelevant what reasoning in fact underlay the legislative decision.
11. **Constitutional Law: Statutes: Presumptions: Proof.** When employing traditional rational basis review, a statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.
12. **Constitutional Law: Courts.** Even provisions that a court might deem foolish and misdirected are generally valid if subject only to traditional rational basis review.

13. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
14. **Constitutional Law: Statutes.** If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny.
15. **Equal Protection.** Age itself is not a suspect classification.
16. **Statutes: Minors: Due Process.** In setting out when a person is to be treated as a child rather than an adult, the only thing that procedural due process requires is that the penal statute must be sufficiently clear so that a person of ordinary intelligence has fair notice of exactly what conduct is forbidden.

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

James Martin Davis, of Davis & Finley Law Offices, for appellant.

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

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

CONNOLLY, J.

The appellant, Todd D. Senters, a 28-year-old high school teacher, videotaped himself and a 17-year-old female student-girl friend having consensual sexual relations. The student consented to the videotaping, and according to Senters, he made the videotape solely for private purposes. Nebraska generally does not criminalize sexual relations between individuals who are 16 years old or older. See Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995). But, under Neb. Rev. Stat. § 28-1463.03 (Reissue 1995) of the Child Pornography Prevention Act (the Act), it is unlawful for "a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." A child participant is a person under the age of 18. Neb. Rev. Stat. § 28-1463.02(1) (Reissue 1995). Thus, while the 17-year-old student could legally consent to having sexual relations with Senters, videotaping the act was illegal.

Senters argues that this supposed discrepancy violated his constitutional rights to privacy and equal protection under the law. He

also argues that the statute did not provide sufficient notice as to who a child was. We disagree and affirm Senters' conviction for violating the Act.

BACKGROUND

Senters and the student began their relationship while he was teaching at an Omaha high school. While the student was visiting Senters' apartment, the two decided to videotape themselves having sexual relations. Senters kept the videotape in his room, and it is undisputed that he did not intend to disseminate it.

Senters' roommate, an employee at the high school where Senters taught, later found the videotape. The roommate notified school officials. Police were later notified, though it is unclear by whom.

The State charged Senters with making child pornography under § 28-1463.03(1). The court rejected Senters' arguments that the Act was unconstitutional and, after a bench trial, convicted him of violating § 28-1463.03(1). The court sentenced Senters to 2 years of probation.

ASSIGNMENT OF ERROR

Senters assigns that the court erred in failing to find that the Act is unconstitutional on its face or that, in the alternative, the Act was unconstitutional as applied to him.

STANDARD OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, this court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

ANALYSIS

Senters appears to make three arguments: The Act (1) violates his substantive due process right to sexual privacy, (2) violates his right to equal protection under the law, and (3) does not provide sufficient notice under the Act of who is a child.

SUBSTANTIVE DUE PROCESS

[3,4] According to Senters, the Act, either on its face or as applied to him, offends the Due Process Clauses of both the federal and Nebraska Constitutions by infringing upon his right to sexual privacy. The Due Process Clause of the 14th Amendment contains a substantive component that provides at least some protection to a person's right of privacy. See, *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); *Carey v. Population Services International*, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Cf. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (suggesting right to privacy rooted in penumbra of specific guarantees in Bill of Rights rather than Due Process Clause). Although Senters also relies on the Nebraska Constitution, we note that our constitution does not contain a right of privacy broader than that recognized by the federal Constitution. See *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). In support of his right of sexual privacy argument, Senters relies on the U.S. Supreme Court's recent decision in *Lawrence v. Texas, supra.*

In *Lawrence*, the Court overruled *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986). In *Bowers*, the State of Georgia convicted a homosexual man of violating a Georgia statute banning sodomy. He claimed that the statute violated his right to privacy. The Court disagreed. It refused to read earlier precedents as standing for "the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription." 478 U.S. at 191. Instead, the Court defined the issue narrowly, asking whether there was a "fundamental right to engage in homosexual sodomy." *Id.* After reviewing the long history of laws banning sodomy, the Court concluded that the right to engage in homosexual sodomy was neither deeply rooted in our nation's history nor implicit in the concept of ordered liberty. Therefore, the Court held the right was not fundamental.

[5,6] Because it had concluded that the right to engage in homosexual sodomy was not fundamental, the Court in *Bowers* subjected the Georgia statute to rational basis review. Under rational basis review, a law is constitutional as long as it bears some

rational relationship to a legitimate state purpose. See *Robotham v. State, supra*. In contrast, when a right is fundamental, a law infringing upon it is constitutional only if the infringement is narrowly tailored to serve a compelling state interest. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001). In *Bowers*, the Court determined that the Georgia statute passed rational basis review because it was rationally related to the legitimate state purpose of moral disapproval of homosexual sodomy. See *Bowers v. Hardwick, supra*.

The facts of *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), were similar to those in *Bowers*. While investigating a reported weapons disturbance, police entered the defendant's house and found him engaged in an act of sodomy with another man. The State of Texas convicted him under a statute banning sodomy. The Court began by disagreeing with the manner in which *Bowers* had narrowly defined the liberty interest at stake as the right to engage in homosexual sodomy. The Court noted that while statutes banning sodomy "purport to do no more than prohibit a particular sexual act[, t]heir penalties and purposes . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, in the most private of places, the home." *Lawrence v. Texas*, 539 U.S. at 567. According to the Court, "[t]his, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." *Id.*

The Court went on to recognize "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." 539 U.S. at 572. It then struck down the Texas statute, stating, " 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.' . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." 539 U.S. at 578 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)).

The *Lawrence* decision has unleashed a controversy over its holding. Some have concluded that the Court recognized a fundamental right to sexual privacy. See *Williams v. Attorney General*

of Ala., 378 F.3d 1232 (11th Cir. 2004) (Barkett, J., dissenting). Others, however, have concluded that the Court did not recognize a new fundamental right. But even these courts are split over whether *Lawrence* applied traditional rational basis review or a modified, more stringent form of that test. Compare, *Williams v. Attorney General of Ala., supra*; *U.S. v. Extreme Associates, Inc.*, 352 F. Supp. 2d 578 (W.D. Pa. 2005); *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005).

[7] Regardless of what the Court intended to accomplish for cases that involve private sexual conduct between consenting adults, it cautioned:

> *The present case does not involve minors.* It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. . . . The case does involve *two adults* who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

(Emphasis supplied.) *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). Relying on this language, courts considering right-of-privacy challenges to laws regulating sexual conduct have agreed that *Lawrence* is inapplicable if the conduct involves minors. See, *U.S. v. Bach*, 400 F.3d 622 (8th Cir. 2005); *U.S. v. Peterson*, 294 F. Supp. 2d 797 (D.S.C. 2003); *State v. Oakley*, 167 N.C. App. 318, 605 S.E.2d 215 (2004). Cf. *State v. Limon*, 32 Kan. App. 2d 369, 83 P.3d 229 (2004). Like these courts, we conclude that when a law regulates sexual conduct involving a minor, *Lawrence* is inapplicable.

Senters acknowledges the Court's cautionary statement that the holding in *Lawrence* does not extend to cases involving minors. But he argues the warning does not apply to his case because under § 28-319(1)(c), the female student was legally capable of consenting to the sex act which they videotaped. Accord, *In re J.M.*, 276 Ga. 88, 575 S.E.2d 441 (2003) (concluding that right to privacy guaranteed by Georgia's constitution is triggered by age of consent); John Quigley, *Child Pornography and the Right to Privacy*, 43 Fla. L. Rev. 347 (1991). Therefore, according to Senters, *Lawrence* applies. But Senters' argument wilts under the light of a critical analysis.

In *U.S. v. Bach, supra*, the Eighth Circuit recently rejected an argument nearly identical to that made by Senters. In *Bach*, the defendant, a Minnesota man, had taken pictures of a 16-year-old boy engaging in sexually explicit conduct. The United States charged the defendant with violating a federal statute prohibiting the possession of child pornography. Under federal and Minnesota laws, the age of consent is 16. The defendant argued that the boy was not a minor and that the right to privacy recognized in *Lawrence* applied. The court disagreed, concluding that "Congress may regulate pornography involving all minors under the age of eighteen if it has a rational basis for doing so," regardless of the age of consent. 400 F.3d at 629. So, instead of applying *Lawrence*, the court employed traditional rational basis review. *Id.*

[8] We are not bound to follow Eighth Circuit precedent on federal questions. See, *Strong v. Omaha Constr. Indus. Pension Plan, ante* p. 1, 701 N.W.2d 320 (2005); *In re Search Warrant for 3628 V St.*, 262 Neb. 77, 628 N.W.2d 272 (2001). But we find *Bach* persuasive. Before *Lawrence*, Congress and the states were free to treat persons under the age of 18 as children, even if the age of consent was lower. When these laws were challenged on right-to-privacy grounds, they were subjected only to traditional rational basis review. *United States v. Freeman*, 808 F.2d 1290 (8th Cir. 1987); *State v. Farmer*, 116 Wash. 2d 414, 805 P.2d 200 (1991); *People v. Ewen*, 194 Ill. App. 3d 404, 551 N.E.2d 426, 141 Ill. Dec. 433 (1990).

[9] We agree with *Bach* that nothing in *Lawrence* requires a different rule. In *Lawrence*, the Court made clear that its holding does not extend to children, but it did not, as Senters suggests, define a child as someone under the age of consent. Thus, the State, in regulating child pornography, remains free to define children as persons under the age of 18, even if the age of consent is lower, as long as the law passes traditional rational basis review.

[10-12] As previously noted, under traditional rational basis review, a law is constitutional as long as it bears some rational relationship to a legitimate state purpose. See *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). When employing traditional rational basis review, "it is '"constitutionally irrelevant

[what] reasoning in fact underlay the legislative decision.'" *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (quoting *U. S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980)). Rather, "[a] statute is presumed constitutional . . . and '[t]he burden is on the one attacking the legislative arrangement to negat[e] every conceivable basis which might support it.'" *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). Even provisions that a court might deem "foolish and misdirected . . . are generally valid if subject only to rational basis review." *Craigmiles v. Giles*, 312 F.3d at 223-24. In short, traditional rational basis review is "a paradigm of judicial restraint." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993).

The State undoubtedly has a legitimate reason to ban the creation of child pornography. The creation of child pornography is often associated with child abuse and exploitation, resulting in physical and psychological harm to the child. See, *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990); *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). Moreover, a sex act reduced to a recording "'may haunt [the child] in future years, long after the original misdeed took place.'" *New York v. Ferber*, 458 U.S. at 759 n.10. Senters argues, however, that the Act, at least as applied to him, is not rationally related to the State's legitimate interest in controlling child pornography because it also prohibits a person from videotaping lawful sexual conduct for private, noncommercial purposes.

We are not persuaded. Even for those who record an intimate act and intend for it to remain secret, a danger exists that the recording may find its way into the public sphere, haunting the child participant for the rest of his or her life. It is reasonable to conclude that persons 16 and 17 years old, although old enough to consent to sexual relations, may not fully appreciate that today's recording of a private, intimate moment may be the Internet's biggest hit next week. Cf. *People v. Campbell*, 94 P.3d 1186 (Colo. App. 2004) (rejecting equal protection challenge to conviction for possession of child pornography, despite fact that child depicted was old enough to consent to depicted sex act).

Senters, however, contends that if the Legislature is concerned about the reputational harm that the child may suffer from the distribution of the videotape, it should punish the distribution rather than the making of the videotape. Were we reviewing this case under strict scrutiny analysis, this point might be persuasive, at least as applied to Senters. But, under traditional rational basis review, " '[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.' " *Star Scientific Inc. v. Beales*, 278 F.3d 339, 348 (4th Cir. 2002) (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955)). That is true here. If sexually explicit conduct is not recorded, it cannot be distributed. So, it is reasonable to conclude that criminalizing the making of recordings depicting persons under 18 years of age engaged in sexually explicit conduct furthers the goal of protecting those persons from the reputational harm that would occur if the recordings were distributed.

EQUAL PROTECTION

Next, Senters argues that the Act denied him "equal protection under the law by establishing an irrational, arbitrary and capricious classification for victims." Brief for appellant at 5.

[13,14] The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). In an equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive. *Id.* If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. *Id.* If it does not, then courts analyze the classification using rational basis review. See *id.*

[15] As we understand it, Senters argues that the Act classifies victims by age. A person is a victim if he or she is under the age of 18 and participates in the depicted sexual act; a person cannot be a victim if he or she is over the age of 18. Age itself is not a suspect classification. See, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000); *Caruso v. City of Omaha*, 222 Neb. 257, 383 N.W.2d 41 (1986). But Senters argues that under *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct.

2472, 156 L. Ed. 2d 508 (2003), he has a fundamental right to sexual privacy, and that because the age classification used in the Act infringes upon this right, it must pass strict scrutiny. Senters appears to recognize that the State has a compelling interest in regulating child pornography. But he contends that the age classification used in the Act is overinclusive because it prohibits recording sex acts, such as the one involved here, that are legal.

Senters' equal protection argument hinges on his claims that *Lawrence* recognized a fundamental right to sexual privacy and that this right protects him. As we have previously noted, controversy exists over whether *Lawrence* recognized a fundamental right to sexual privacy. But even if we assume that the Court recognized a fundamental right to sexual privacy, it built an age classification into its definition of that right. The right extends only to private sexual conduct between consenting adults. Thus, assuming without deciding that in *Lawrence* the Court recognized a fundamental right to sexual privacy, that right did not extend to Senters' decision to videotape a private sexual encounter with a minor.

Because the age classification in the Act does not infringe on any of Senters' fundamental rights, we review it using traditional rational basis. Senters argues that the classification is arbitrary and capricious. We conclude, however, that the classification survives rational basis review for the same reasons we set out in our discussion of Senters' substantive due process argument. See *People v. Campbell*, 94 P.3d 1186 (Colo. App. 2004).

Lack of Notice

Finally, Senters argues that the statutory scheme violates his procedural due process rights because it does not provide sufficient notice of who a child is under the Act. Senters notes that within the criminal code, the definition of "child" has multiple meanings. He asks, "How many definitions of child can we expect the public to recognize, let alone understand?" Brief for appellant at 13.

[16] Senters' argument has no merit. In setting out when a person is to be treated as a child rather than an adult, the only thing that procedural due process requires is that the "penal statute must be sufficiently clear so that a person of ordinary intelligence has fair notice of exactly what conduct is forbidden." *State v.*

Burke, 225 Neb. 625, 633, 408 N.W.2d 239, 246 (1987). Here, the Legislature has expressly set out that participants in a visual depiction of sexually explicit conduct under the age of 18 are children. That is enough notice to satisfy due process.

CONCLUSION

We conclude that the Act, neither on its face nor as applied to Senters, violates the right to privacy or the right to equal protection under the law. We also conclude that the Act provides sufficient notice of who is a child. To the extent Senters makes other constitutional arguments in his brief, we consider them to be too vague or too meritless to warrant comment.

AFFIRMED.

L. KENNETH POLIKOV, COUNTY ATTORNEY FOR THE COUNTY OF SARPY, NEBRASKA, AND SARPY COUNTY SAFETY PROGRAM, INC., A NEBRASKA CORPORATION, APPELLEES, V. BEVERLY NETH, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, IN HER OFFICIAL CAPACITY, AND NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLANTS.

699 N.W.2d 802

Filed June 24, 2005. No. S-04-081.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Constitutional Law: Statutes: Proof.** The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional.
4. **Constitutional Law.** The separation of powers clause in the Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives.
5. **Constitutional Law: Criminal Law: Prosecuting Attorneys.** When prosecuting criminal cases, the county attorney is functioning as an arm of the executive branch of the state government and the separation of powers clause applies.
6. **Constitutional Law: Prosecuting Attorneys.** Prosecutorial discretion is an inherent executive power.
7. **Criminal Law: Prosecuting Attorneys: Probable Cause.** As a result of the charging function, the prosecutor has the discretion to choose to charge any crime that probable cause will support, or if the prosecutor chooses, not to charge the accused at all.

8. **Constitutional Law: Criminal Law.** It is the legislative branch of government that is charged with defining crimes and punishments.
9. **Constitutional Law: Criminal Law: Legislature.** The formalization of pretrial diversion programs is the type of broad restructuring of the goals of the criminal justice system that is entrusted to the Legislature rather than to the executive branch.
10. **Constitutional Law: Legislature: Prosecuting Attorneys.** The Legislature cannot use its power to design formal pretrial diversion programs in a way so as to limit the prosecutor's power to engage in the informal diversion process.
11. **Constitutional Law: Criminal Law: Prosecuting Attorneys.** Although the power to design a pretrial diversion program is a legislative one, the power to determine whether to divert a particular person to an established formal pretrial diversion program, at least before the accused is charged, is an executive power, encompassed within the charging function.

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

Jon Bruning, Attorney General, and Lynn A. Melson for appellants.

L. Kenneth Polikov, Sarpy County Attorney, and Michael A. Smith for appellees.

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

CONNOLLY, J.

At issue is the constitutionality of Neb. Rev. Stat. §§ 29-3601 through 29-3609 (Cum. Supp. 2004), which purport to authorize and regulate pretrial diversion programs. The appellees, Sarpy County Safety Program, Inc., and L. Kenneth Polikov, the county attorney for Sarpy County, argue that the statutory scheme violates the constitutional principle of separation of powers by infringing upon a county attorney's prosecutorial discretion. The district court for Lancaster County agreed and permanently enjoined the enforcement of §§ 29-3601 through 29-3609 and the regulations implemented under the authority of these sections. We conclude that the power to design a formal pretrial diversion program is a legislative function and that thus, §§ 29-3601 through 29-3609 do not violate the separation of powers clause.

BACKGROUND

Broadly understood, pretrial diversion could include nearly every disposition of a criminal matter that occurs without a trial.

See Samuel J. Brakel, *Diversion from the Criminal Process: Informal Discretion, Motivation, and Formalization*, 48 Denv. L.J. 211 (1971). This case, however, involves a particular subset of pretrial diversion: situations when a prosecutor agrees to forgo prosecution in exchange for the accused's promise to perform a condition or set of conditions meant to rehabilitate the accused. As long as the accused completes the condition, charges will not be brought. When we refer to pretrial diversion, this is what we mean.

Individual prosecutors have always practiced pretrial diversion on an informal basis. See 4 Wayne R. LaFave et al., Criminal Procedure § 13.6(a) (2d ed. 1999). Generally, this had been done in a "haphazard way." *Id.* at 84. They used no eligibility guidelines to decide whether the accused should be allowed to avoid prosecution. Further, the conditions that the accused had to meet were set on a case-by-case basis and usually involved such things as paying restitution to the victim or joining the military. See, *id.*; Brakel, *supra.*

In the late 1960's, however, jurisdictions throughout the nation began to formalize pretrial diversion. These formal programs were different from informal diversion practices in two key respects. First, the formal programs usually had set eligibility guidelines, as well as standardized admission practices. Second, instead of setting the conditions that the accused would have to meet to avoid prosecution on a case-by-case basis, the accused agreed to complete a preexisting program of supervised rehabilitation. These programs involved elements like classwork, job training, and substance abuse treatment. See, generally, ABA Comm. on Corr. Facilities and Servs., Legal Issues and Characteristics of Pretrial Intervention Programs (1974); Note, *Criminal Practice—Pretrial Intervention Programs—An Innovative Reform of the Criminal Justice System*, 28 Rutgers L. Rev. 1203 (1975); Note, *Pretrial Diversion from the Criminal Process*, 83 Yale L.J. 827 (1974).

In Nebraska, as in many other jurisdictions, the county attorney began formalizing pretrial diversion programs in individual counties. Some county attorneys, however, expressed concern over whether they had the authority to implement formal diversion programs. To address these concerns, the Legislature, in 1979, made

its initial foray into the world of formalized pretrial diversion. See, Statement of Purpose and Judiciary Committee Hearing, L.B. 573, 86th Leg., 1st Sess. (March 6, 1979).

This initial attempt to regulate formal pretrial diversion programs was not extensive. The statutory scheme assured county attorneys that they had the authority to establish a formal pretrial diversion program, providing "[t]he county attorney of any county may establish a pretrial diversion program with the concurrence of the county board." § 29-3602. If the county attorney decided to create a formal program, he or she had wide discretion in designing the program. The only limits the Legislature placed on the county attorney's discretion were meant to ensure fair treatment for the accused. Specifically, the Legislature required (1) formal, written eligibility guidelines; (2) maximum time limits on participation; (3) the opportunity for defendants and their attorneys to review program requirements; (4) the dismissal of charges upon completion of the program; (5) a guarantee that participants could withdraw from the program and be returned to the court process; (6) that enrollment could not be conditioned upon a plea of guilty; and (7) that if enrollment in a program was denied, written reasons for the denial had to be made and the defendant had to be given the opportunity for administrative review of the denial. § 29-3603.

Between 1979 and 2002, only two minor changes were made to the statutory oversight of pretrial diversion programs. In 1982, the Legislature made any person charged with either driving while intoxicated or refusing to submit to a chemical test ineligible to participate in a pretrial diversion program. § 29-3604 (Reissue 1995). And, in 1999, the Legislature gave city attorneys express permission to establish pretrial diversion programs. § 29-3602 (Cum. Supp. 2004).

In 2002, however, the Legislature amended the pretrial statutory scheme to create a dichotomy between two types of offenses, "minor traffic violations" and "criminal offenses." Excluded from the definition of "minor traffic violations" are a wide variety of traffic violations as well as any felony or misdemeanor. § 29-3605 (Cum. Supp. 2004). "Criminal offenses," although not expressly defined, would seem to include any crime excluded from the definition of "minor traffic violations."

Under the 2002 amendments, the legislative oversight of pretrial diversion programs for "criminal offenses" is unchanged. If a county attorney decides to set up a program for "criminal offenses," it must include the requirements, set out in § 29-3603, that ensure the accused is treated fairly. But beyond these minimal limitations, county attorneys retain the same broad discretion to determine the type of diversion program or programs that they used under the 1979 legislation.

On the other hand, for the other class of offenses, i.e., minor traffic violations, the 2002 legislation reduced the authority of the county attorney to design a formal pretrial diversion program. Under § 29-3606(1), if a county attorney decides to set up a pretrial diversion program for minor traffic violations, the program must "consist of a driver's safety training program." The curriculum used in the driver's safety training program and the fee charged must be approved by the Department of Motor Vehicles (Department). § 29-3606(2)(a) and (b). In addition, program administrators are required to keep a record of attendees and share those records with similar programs throughout the state. § 29-3606(3). Program administrators are to use these records to ensure that no individual takes an approved driver's safety training course in Nebraska more than once within any 3-year period. *Id.* Before any organization or governmental entity can offer a driver's safety training program, it must obtain certification from the Department. § 29-3607. Finally, the amendments prevent the diversion of any person holding a commercial driver's license to a driver's safety training program to the extent that doing so would be "in noncompliance with federal law or regulation and subject the state to possible loss of federal funds." § 29-3608.

After the 2002 legislation was passed, the Department, acting under the authority granted to it by the Legislature, adopted regulations governing driver's safety training programs. See, generally, 250 Neb. Admin. Code, ch. 3 (2003). Among these regulations was the requirement that to be certified, a program had to include an 8-hour class. § 003.01

PROCEDURAL BACKGROUND

Before the 2002 amendments to the pretrial diversion statutes, Polikov, as the county attorney for Sarpy County,

diverted persons accused of minor traffic offenses to a driver's safety training program operated by Sarpy County Safety Program, a private, nonprofit corporation. The program, however, did not meet the requirements set out in the regulations adopted by the Department. Thus, after the 2002 legislation and the Department regulations became effective, the appellees filed this lawsuit, naming as defendants the Department and its director (collectively the DMV).

In the appellees' amended complaint, they alleged that §§ 29-3601 through 29-3609 violate the constitutional principle of separation of powers. They requested that the court grant an injunction staying the enforcement of the statutes as well as the regulations adopted under the statutes. The district court for Lancaster County agreed and granted a permanent injunction forbidding the enforcement of §§ 29-3601 through 29-3609 and the regulations implemented under the authority of these sections.

ASSIGNMENT OF ERROR

The DMV assigns that the district court erred in determining that §§ 29-3601 through 29-3609 and the Department regulations adopted under the authority of those statutes were unconstitutional.

STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

[2,3] A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.* The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional. *Id.*

ANALYSIS

[4] The powers of government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted. Neb. Const. art. II, § 1. This clause prohibits one branch of

government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives. *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997). It is the beam from which our system of checks and balances is suspended. *Id.*; *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991).

Because the Nebraska Constitution, unlike the federal Constitution and those of several other states, contains an express separation of powers clause, this court has been less willing to find overlapping responsibilities between the three branches of government. See *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994). Thus, regarding the separation between the legislative and executive branches, we have said that they should be " 'kept as distinct and independent as possible.' " *Shepherd*, 251 Neb. at 532, 557 N.W.2d at 695 (quoting 16 Am. Jur. 2d Constitutional Law § 323 (1979)).

Parties' Arguments

As we understand their argument, the appellees contend that the county attorney, at least when prosecuting criminal cases, is a member of the executive branch of government and that as a result, the county attorney has the authority to wield the inherent executive power of prosecutorial discretion. According to them, the power of prosecutorial discretion includes the authority to design a formal pretrial diversion program as the county attorney sees fit, and thus the separation of powers clause prevents the Legislature from regulating the design of formal pretrial diversion programs.

At trial, Polikov testified that §§ 29-3601 through 29-3609 and the regulations adopted under these sections have prevented him from designing the formal pretrial diversion program of his choice in three particular ways. First, he testified that his pretrial diversion program for minor traffic violations would require only a 4-hour class, while the regulations would require an 8-hour class. Second, the statutory scheme requires him to exclude persons who have taken a driver's safety training program once in the last 3 years, but according to Polikov, he would adopt a more flexible rule. Finally, Polikov claimed that in at least some situations, he would allow persons accused of committing criminal

offenses other than minor traffic violations to avoid prosecution by taking a driver's safety training program.

The DMV makes two counterarguments. First, it contends that the county attorney's office is part of a political subdivision rather than part of the executive branch and that therefore, the principle of separation of powers between the executive and the legislative branch is inapplicable. Second, it argues that to the extent § 29-3602 places limits on a county attorney's prosecutorial discretion, the limits are minimal and thus constitutional.

County Attorney and Applicability of Separation of Powers

First, we consider the DMV's argument that the office of the county attorney is part of a political subdivision rather than the executive branch and that therefore, the separation of powers clause is inapplicable.

The extent to which the separation of powers clause applies in the relationship between the Legislature and political subdivisions like cities and counties is not entirely clear. Compare *State v. Ure*, 91 Neb. 31, 37-38, 135 N.W. 224, 226-27 (1912) (stating separation of powers clause "does not attempt to limit the [L]egislature as to its power to prescribe the manner in which municipalities or local subdivisions of the state may administer their local affairs"), with *Searle v. Yensen*, 118 Neb. 835, 226 N.W. 464 (1929) (stating that Legislature may delegate part of its legislative function to subdivision but only to extent that recipient is member of same branch of government), and *State v. Neble*, 82 Neb. 267, 117 N.W. 723 (1908) (suggesting that separation of powers clause extends to counties).

[5] To answer the DMV's argument, however, we need not resolve this ambiguity. Although the county attorney is a county officer, when the county attorney prosecutes cases, he or she does so not only on behalf of the county, but also on behalf of the state. Neb. Rev. Stat. § 23-1201 (Cum. Supp. 2004). See, also, *Dinsmore v. State*, 61 Neb. 418, 85 N.W. 445 (1901). Thus, when prosecuting criminal cases, the county attorney is functioning as an arm of the executive branch of the state government and the separation of powers clause applies. Accord *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982).

Separation of Powers and Formal Pretrial Diversion Programs

Next, we turn to the heart of the matter: whether the pretrial diversion statutes violate the separation of powers clause. Sections 29-3601 through 29-3609 regulate the prosecutor's ability to design a formal diversion program as he or she sees fit. Thus, the issue is whether the power to design a formal pretrial diversion program is an executive function or a legislative function.

[6,7] In arguing that the power to design a formal pretrial diversion program is an executive function, the appellees rely on the power of prosecutorial discretion. We have recognized that prosecutorial discretion is an inherent executive power. See, *Moore, supra*; *State v. Grayer*, 191 Neb. 523, 215 N.W.2d 859 (1974). One of the key aspects of prosecutorial discretion is the charging function, the power to determine what, if any, charges should be brought against a person accused of committing a crime. See *Moore, supra*. As a result of the charging function, the prosecutor has the discretion to choose to charge any crime that probable cause will support or, if the prosecutor chooses, not to charge the accused at all. See, generally, 4 Wayne R. LaFave et al., Criminal Procedure § 13.2(a) (2d ed. 1999). Some commentators suggest that this discretion makes the prosecutor the single most powerful person in the criminal justice system. Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. Rev. 669 (1992); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717 (1996).

The informal diversion practices traditionally engaged in by prosecutors have been seen as a part of the charging function. See, *Davis v. Municipal Court (People)*, 46 Cal. 3d 64, 757 P.2d 11, 249 Cal. Rptr. 300 (1988); *State v. Greenlee*, 228 Kan. 712, 620 P.2d 1132 (1980); ABA Comm. on Corr. Facilities and Servs., Legal Issues and Characteristics of Pretrial Intervention Programs (1974). According to the appellees, the charging function is also broad enough to allow the county attorney to formalize diversion practices.

We recognize that other courts have endorsed language supporting the appellees' claim. See, e.g., *Irby v. United States*, 464

A.2d 136, 141 (D.C. 1983) ("diversion is a program initiated by the United States Attorney's Office and 'owes its existence and operation solely to prosecutorial discretion' "). We also recognize that other courts that follow a more malleable approach to separation of powers have characterized the power to design formal pretrial diversion programs as "quasi-legislative" and thus, within the purview of both the legislative and executive branches of government. See, e.g., *Davis, supra.* We conclude, however, that formalizing the diversion process is something separate and apart from the mere exercise of the charging function and is better understood as a legislative function.

The hallmark of the charging function is case-by-case decisionmaking; the prosecutor weighs the mitigating and aggravating factors surrounding a case and determines how to proceed. While informal diversion can fairly be described as an application of this power, the very purpose of formalizing pretrial diversion is to exchange this case-by-case analysis for uniform eligibility requirements and standardized, government-monitored rehabilitative programs. See Note, *Pretrial Diversion from the Criminal Process*, 83 Yale L.J. 827 (1974). So, in designing a formal pretrial diversion program, the prosecutor is no longer determining that a certain type of rehabilitation will benefit a particular person, but, rather, is making a broader public policy decision that a particular type of rehabilitative program is the best way to deal with a particular type of crime. Cf. *State v. Leonardis*, 73 N.J. 360, 375 A.2d 607 (1977) (concluding that setting up pretrial diversion program goes beyond prosecutor's charging function); *State v. Tracy M.*, 43 Wash. App. 888, 720 P.2d 841 (1986).

Moreover, formalization creates a mechanism to move large numbers of persons accused of committing particular types of crimes away from adjudication and into rehabilitative programs supervised by government officials. As a result, the adoption of formal pretrial diversion programs shifts the focus of the criminal justice system. When the system favors adjudication followed by punishment for a particular crime, the goals are primarily deterrence and retribution. But formal pretrial diversion programs, by creating greater access to the diversion process, make the rehabilitation of the accused the primary goal.

[8,9] Thus, formal pretrial diversion does not represent a natural outgrowth of the charging function, but, rather, a substantial change in the way society responds to the challenge of crime. It is the legislative branch of government that is charged with defining crimes and punishments. See, *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999); *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985). In doing so, 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. We believe that the formalization of pretrial diversion programs is the type of broad restructuring of the goals of the criminal justice system that is entrusted to the Legislature rather than to the executive branch. Therefore, we hold that the power to design formal pretrial diversion programs is a legislative power and that thus, the district court erred in holding that §§ 29-3601 through 29-3609 are unconstitutional.

[10] We find it necessary, however, to make two additional points to clarify the scope of our holding. First, although the power to design formal pretrial diversion programs is a legislative function, the use of informal diversion is included in the executive power of prosecutorial discretion. Thus, the Legislature cannot use its power to design formal pretrial diversion programs in a way so as to limit the prosecutor's power to engage in the informal diversion process. Here, the pretrial diversion statutes have not crossed this line; under § 29-3602, the prosecutor has the authority to continue to use informal diversion, i.e., case-by-case diversion decisions, rather then set up a formal pretrial diversion program.

[11] Second, although the power to design a pretrial diversion program is a legislative one, the power to determine whether to divert a particular person to an established formal pretrial diversion program, at least before the accused is charged, is an executive power, encompassed within the charging function. See *Clayton v. Lacey*, 256 Neb. 282, 589 N.W.2d 529 (1999) (concluding that person accused of burglary could not bring petition in error challenging county attorney's decision to exclude him from preestablished diversion program because county attorney's decision was exercise of prosecutorial discretion rather than judicial act).

CONCLUSION

We conclude that the power to design a pretrial diversion program is a legislative function and that therefore, in enacting §§ 29-3601 through 29-3609, the Legislature did not run afoul of the separation of powers clause. Accordingly, we reverse the decision of the district court.

REVERSED.

ROBERT SOTO, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

699 N.W.2d 819

Filed June 24, 2005. No. S-04-569.

SUPPLEMENTAL OPINION

Appeal from the Nebraska Workers' Compensation Court. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

James J. Paloucek, of Norman, Paloucek & Herman Law Offices, for appellant.

Jon Bruning, Attorney General, and Tom Stine for appellee.

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

PER CURIAM.

This matter is before the court on the motion for rehearing of the appellee, State of Nebraska, Department of Roads, regarding our opinion reported at *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005). We overrule the motion, but modify the opinion as follows:

In the second to last paragraph of the opinion, *id.* at 346, 693 N.W.2d at 499, the last two sentences of that paragraph are withdrawn, and the following is substituted in their place:

> In order to harmonize §§ 48-199, 48-1,102, and 48-125 in the context of waiting-time penalties in a manner which is consistent with the overall purpose of the act, we hold that

in order to avoid assessment of a waiting-time penalty with respect to that portion of a workers' compensation award against the State which exceeds $50,000, the State must request review and appropriation of such amount during the first legislative session following the date the award became final and must pay such amount within 30 calendar days after the approval of the appropriation by the Legislature.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

RODNEY G. ZWYGART, APPELLANT, V.
STATE BOARD OF PUBLIC ACCOUNTANCY
OF THE STATE OF NEBRASKA, APPELLEE.

699 N.W.2d 362

Filed June 24, 2005. No. S-04-598.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling.
4. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
5. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.

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

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

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

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

MCCORMACK, J.

NATURE OF CASE

Rodney G. Zwygart appeals from the judgment of the district court for Lancaster County affirming the revocation of his license to practice as a certified public accountant in Nebraska by the Nebraska State Board of Public Accountancy (the Board). Zwygart also appeals the district court's finding that he must pay the costs of the proceedings, including attorney fees and expenses.

BACKGROUND

Zwygart received his license to practice as a certified public accountant (C.P.A.) in the State of Nebraska in the 1970's. In 1997, two lawsuits were filed against him in the district court for Madison County alleging fraudulent acts and violation of duties as a corporate officer. The lawsuits involved two closely held corporations which owned and operated four liquor stores. Zwygart was a shareholder and officer of the corporations and maintained the books and records for the corporations. On September 1, 1998, the district court found that Zwygart had perpetrated a fraud on a former shareholder and had violated his fiduciary duty to another shareholder as a result of his fraudulent act. The district court entered judgment against Zwygart in the consolidated cases, and this court affirmed the judgment in a memorandum opinion on September 18, 2002. *Fauss v. Norfolk Avenue Liquor Mart*, 264 Neb. xxi (Nos. S-01-696, S-01-697, Sept. 18, 2002).

On February 14, 2003, the Board filed a formal complaint against Zwygart under Neb. Rev. Stat. § 1-137 (Reissue 1997). Section 1-137 provides that the Board may suspend, revoke, or censure a licensee for cause, including "(2) Dishonesty, fraud, or gross negligence in the practice of public accountancy" and "(4) Violation of a rule of professional conduct adopted and promulgated by the board under the authority granted by the act." The complaint asserted that Zwygart violated the Board's rules and regulations which prohibit, inter alia, committing an act that

reflects adversely on a licensee's fitness to engage in the practice of public advocacy. 288 Neb. Admin. Code, ch. 5, § 007.01 (1999).

An amended complaint filed on May 16, 2003, alleged that two lawsuits were filed against Zwygart and that Zwygart was found to have perpetuated a fraud on a former shareholder and violated his fiduciary duty to another shareholder. The complaint further alleged:

> The facts related to the conduct of [Zwygart] with respect to [the shareholders] and other business entities are set forth in detail in the opinion of the District Court of Madison County, Nebraska and in the opinion of the Supreme Court . . . and are incorporated herein by reference. Additionally, [Zwygart] was engaged in business relationships with [the shareholders] and related business entities and [Zwygart] performed professional services for both of those individuals and for each of the related business entities. In his capacity as a CPA, [Zwygart] performed professional services for those individuals and the various business entities required and included the use of his accounting or auditing skills including, but not limited to, the preparation of financial statements and one or more kinds of management advisory or consulting services, the preparation of tax returns, and the furnishing of advice on tax matters. [Zwygart] also kept the corporate and business records for said business entities and prepared the necessary documents for filing with regulatory authorities which included the Nebraska Secretary of State and the Nebraska Liquor Control Commission. The conduct of [Zwygart] was not limited to [Zwygart's] activities as a shareholder in one or more of the business entities. [Zwygart] utilized his knowledge gained as the CPA for said individuals and business entities to further his interests as a stockholder in the business entities and [Zwygart] utilized information gained from income tax returns prepared for [one shareholder] to further [Zwygart's] interests as a shareholder. Furthermore, [Zwygart] disclosed confidential tax and financial information of [one shareholder] obtained in the course of performing professional services without the consent of [the shareholder].

On July 16, 2003, a formal hearing was held on the Board's complaint against Zwygart, and on September 5, the hearing officer issued his findings of fact and conclusions of law. The hearing officer found that the record contained sufficient evidence to support a finding that the acts committed by Zwygart reflected adversely on his fitness to engage in the practice of public accountancy and that Zwygart had violated § 1-137(2) and (4) and the Board's rules and regulations. On September 15, the Board adopted the hearing officer's findings, and entered an order revoking Zwygart's C.P.A. certificate and permit to practice and assessed to Zwygart the costs of the proceedings, which included the fees and expenses of the Board's prosecutor and hearing officer.

On September 16, 2003, the Board vacated its September 15 order and scheduled an additional hearing for November 5 on the matter of attorney fees and other expenses. On November 6, the Board issued a second order. In this order, the Board again adopted the hearing officer's findings, and found that pursuant to Neb. Rev. Stat. § 1-148(8) (Reissue 1997), it was authorized to assess to Zwygart the costs of the proceedings. The Board also ordered the revocation of Zwygart's C.P.A. certificate and permit to practice and ordered Zwygart to pay the costs of the proceedings, including the fees and expenses of the Board's prosecutor and hearing officer.

Zwygart petitioned for review of the Board's decision in the district court for Lancaster County. In an order dated May 4, 2004, the district court stated:

> [Zwygart] has failed to establish that substantial rights of [Zwygart] were prejudiced by the Board as required by NEB. REV. STAT. §84-917. There is no showing that the decision violates constitutional provisions, exceeds statutory authority or agency jurisdiction, was made upon unlawful procedure, was affected by other error of law, was unsupported by competent material and substantial evidence, or was arbitrary or capricious.

The language employed by the district court is nearly identical to Neb. Rev. Stat. § 84-917(6)(a) (Reissue 1999), which sets forth the standard of review for petitions filed in the district before July 1, 1989. For appeals after that date, the district court's standard

of review is de novo on the record, and the term "substantial rights" is no longer utilized as a basis of determining if the petition may have been prejudicial because of the agency decision. § 84-917(6)(b).

Following the district court's decision, Zwygart perfected this timely appeal, which we moved to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1105(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Zwygart assigns that the district court erred (1) in affirming the finding of the Board and (2) in finding that Zwygart failed to establish that his substantial rights were prejudiced by the Board.

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. *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005).

[2,3] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling. See *In re Grand Jury of Lancaster Cty.*, 269 Neb. 436, 693 N.W.2d 285 (2005).

[4,5] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003). Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

ANALYSIS

In order to dispose of this appeal, we need not address the specific facts of the case. See *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997). In *Law Offices of Ronald J. Palagi*, the district court reviewed the decision of the Nebraska Appeal Tribunal under the standard set forth in § 84-917(6)(a), which limits the district court's review for a review proceeding commenced before July 1, 1989. For review proceedings commenced after July 1, 1989, § 84-917(5)(a) specifies that the district court shall conduct a de novo review on the record. After noting that the district court was obliged to make an independent determination of the facts without reference to those made by the Nebraska Appeal Tribunal, we held that because the review committee proceeding was commenced after the due date upon which a new standard for review proceedings was established, the district court's use of a limited standard of review on appeal without reference to the determination of facts made by tribunal was plain error requiring remand for a de novo review of the record.

This case is identical in all relevant respects to *Law Offices of Ronald J. Palagi v. Dolan, supra.* The district court erroneously limited its review, even though it was required to conduct a de novo review of the record pursuant to § 84-917(5)(a). This constitutes plain error and requires that the cause be remanded to the district court for a de novo review of the record.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GERRARD, J., not participating.

STEVEN M. ONDRAK, APPELLANT AND CROSS-APPELLEE, V. LIZABETH L. MATIS, APPELLEE AND CROSS-APPELLANT.

699 N.W.2d 367

Filed June 24, 2005. No. S-04-764.

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. **Property: Sales: Title: Liens: Notice.** The purpose of a lis pendens is to notify prospective purchasers that the real property at issue is directly involved in a pending suit over title or of an interest such as a lien which affects title to the property.
3. **Property: Notice.** Generally, property that is removable at an owner's pleasure is not the type of property that affects title to real property under lis pendens statutes.
4. **Property: Title: Parties: Intent.** The purpose and nature of the property and the intent of the parties determines whether buildings or other items located on leased land affect the title to real property.
5. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Thomas J. Watson, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Timothy P. Brouillette, of Elliott & Brouillette, L.L.P., for appellee.

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

CONNOLLY, J.

The appellant, Steven M. Ondrak, sought specific performance on a contract for the sale of property. After Ondrak filed a notice of lis pendens—but before service was perfected—the appellee, Lizabeth L. Matis, sold the property to a third party, Jim and Doris Wilson. Ondrak did not join the Wilsons as parties to the suit. The district court determined that the property at issue was personal property and that the lis pendens did not apply to allow for specific performance. The court granted Matis' motion for summary judgment. We determine that the lis pendens would allow for specific performance if the property is real property. Because a question of fact exists whether the property is real property or personal property, we reverse, and remand for further proceedings.

BACKGROUND

Ondrak filed a complaint against Matis and her agent, Coldwell Banker-Preferred Group PC, seeking specific performance on a real estate contract. The contract in the record is a blurry, faxed, printed, Realtor's purchase agreement; it is illegible even using a

magnifying glass. The record is unclear whether the contract was for the sale of the land or for the sale of buildings, fixtures, or improvements. Although some exhibits indicate that it was a contract for the sale of "real estate," other exhibits indicate that it was for buildings, fixtures, or improvements. At oral argument, attorneys for the parties stated that the contract was for the sale of a cabin on leased land; however, this is not clear from the record.

Ondrak alleged that he entered a contract to purchase the property, that Matis breached the contract, and that she informed him the property would be sold to another party. Ondrak filed a notice of lis pendens with the register of deeds and mailed a copy to Matis. After the notice was filed, but before she was served with summons, Matis sold the property to the Wilsons. Coldwell Banker-Preferred Group PC was dismissed from the action, and Matis filed a cross-claim, alleging that the complaint was frivolous, and moved for summary judgment. Matis' Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) motion to dismiss, alleging that there was no valid contract, was overruled. Both parties moved for summary judgment.

The court found that the property was personal property. Although the court noted that an action for damages could be brought against Matis and a specific performance action could be brought against the Wilsons, it determined that an action for specific performance could not be brought against Matis because she no longer owned the property. Thus, the court granted Matis' motion for summary judgment. The court granted Ondrak's motion for summary judgment on the cross-claim. Ondrak appeals, and Matis cross-appeals.

ASSIGNMENTS OF ERROR

Ondrak assigns, rephrased and consolidated, that the district court erred when it granted Matis' motion for summary judgment. On cross-appeal, Matis contends that the court erred by overruling her rule 12(b)(6) motion to dismiss and her motion for summary judgment on the cross-claim.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that

may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005).

ANALYSIS

Ondrak contends that because he filed notice of lis pendens, the Wilsons are bound by any judgment against Matis affecting the property even if they are not joined as a party to the lawsuit. Thus, he argues that specific performance is an available remedy. Matis argues, however, that because the suit involves personal property, the lis pendens was not effective. Therefore, she contends that specific performance is not available because she no longer owns the property and that the Wilsons would not be bound by an award of specific performance.

[2] Neb. Rev. Stat. § 25-531 (Cum. Supp. 2004) provides:

> When the summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency. While the action is pending no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title. In all actions brought to affect the title to real property, the plaintiff may either at the time of filing his or her complaint or afterwards, file . . . with the clerk or register of deeds of each county in which the real estate thus to be affected, or any part thereof, is situated, a notice of the pendency of such action. The notice shall contain the names of the parties, the object of the action, and a description of the property in such county sought to be affected thereby. . . . From the time of filing such notice the pendency of such action shall be constructive notice to any purchaser or encumbrancer to be affected thereby. Every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser or encumbrancer and shall be bound by all proceedings taken in the action after the filing of such notice to the same extent as if he or she were made a party to the action.

Section 25-531 differentiates between real and personal property. In an action that affects personal property, notice of the pendency of an action is effective upon the service of summons or publication. But in actions that "affect the title to real property," notice

may be filed with the register of deeds. Once notice is filed, any subsequent purchaser is bound by any proceedings in the action, whether joined as a party or not. The purpose of a lis pendens is to notify prospective purchasers that the real property at issue is directly involved in a pending suit over title or of an interest which affects title to the property. See *Hutson v. Young*, 255 Ga. App. 169, 564 S.E.2d 780 (2002).

[3] We have not addressed whether under § 25-531, an action concerning the sale of buildings or fixtures on leased land is an action that "affect[s] the title to real property." Other courts, however, have held that an action for specific performance for the purchase of buildings or fixtures situated on leased land is not an action that affects the title to real property under lis pendens statutes. *Hutson v. Young, supra*; *Hubbard v. Hardeman County Bank*, 868 S.W.2d 656 (Tenn. App. 1993); *Garrison General Tire Service, Inc. v. Montgomery*, 75 N.M. 321, 404 P.2d 143 (1965). As a general rule, courts hold that whether property placed on land is personal or real property depends on the intention of the parties and the purpose of the property. See, *Hubbard v. Hardeman County Bank, supra*; *Garrison General Tire Service, Inc. v. Montgomery, supra*. Generally, property that is removable at an owner's pleasure is not the type of property that affects title to real property under lis pendens statutes. *Hubbard v. Hardeman County Bank, supra*.

In *Hubbard*, a lis pendens was ineffective against the purchaser of two one-story bank buildings located on leased land. Evidence showed that the buildings were intended to be movable and could be moved relatively inexpensively. The ground leases also expressly provided that the buildings were not to become fixtures and that if the land was sold, the owner of the land would not own the buildings. The Tennessee Court of Appeals concluded that the bank buildings were personal property.

Likewise, in *Garrison General Tire Service, Inc. v. Montgomery, supra*, the New Mexico Supreme Court determined that a cabin on leased land was personal property. The land lease provided that upon expiration, if all rents were paid, the cabin could be moved. Because the parties intended the cabin to be treated as personal movable property, the court found

that it was not real estate or a fixture, and that thus, a lis pendens did not bind a subsequent purchaser of the cabin.

[4] We agree with the rationale of the Tennessee and New Mexico courts. Accordingly, we hold that the purpose and nature of the property and the intent of the parties determines whether buildings or other items located on leased land affect the title to real property. The answer could differ depending on the facts.

Here, although the district court determined that the property was personal property, the record does not provide sufficient details to reach a determination. The contract is illegible. In some instances, the record refers to the property as real estate. In other instances, the record reflects that the contract was for the sale of buildings, fixtures, or improvements. At argument, attorneys for the parties stated that it concerned a cabin on leased land. If the property affects the title to real estate, the lis pendens was effective to bind the Wilsons, should specific performance be awarded. But if the property is personal, the lis pendens was filed before service of process and is ineffective against the Wilsons. In that case, an action for specific performance may not be brought against Matis, because performance would be impossible.

Because the property might be property that affects the title to real estate, we determine that there is an issue of material fact about whether the property is personal or affects title to real estate. Thus the district court erred when it granted summary judgment. Accordingly, we reverse, and remand for further proceedings.

CROSS-APPEAL

[5] On cross-appeal, Matis contends that the district court erred by failing to determine that there was no valid contract between the parties and by overruling her motion for summary judgment on her cross-claim. The contract is illegible. It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed. *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002). Because we cannot read the contract, we cannot determine its validity, nor can we determine that the action was frivolous. Accordingly, we affirm

the overruling of the motions to dismiss and for summary judgment on the cross-claim.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JEANELLE S. KLEVELAND, RESPONDENT.

703 N.W.2d 244

Filed June 24, 2005. No. S-04-1111.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

On October 1, 2004, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against Jeanelle S. Kleveland, respondent. The formal charges set forth two counts that included allegations that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); DR 1-102(A)(6) (engaging in conduct adversely reflecting on fitness to practice law); and Canon 6, DR 6-101(A)(3) (neglecting legal matter), as well as her oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent's answer disputed the allegations.

A referee was appointed and heard evidence. The referee filed a report on May 2, 2005. With respect to the two counts in the charges, the referee concluded that respondent's conduct had violated DR 1-102(A)(5) and (6), DR 6-101(A)(3), and her oath as an attorney. The referee recommended that respondent receive a public reprimand and be placed on probation for a period of 18 months, during which probationary period, respondent would engage and work with a practicing attorney to monitor respondent's practice. On May 4, respondent and relator filed a joint motion

for judgment, requesting that this court accept the referee's recommendation and enter judgment thereon. We grant the joint motion for judgment and impose discipline as indicated below.

FACTS

The substance of the referee's findings may be summarized as follows: Respondent was admitted to the practice of law in the State of Nebraska in 1984. She has practiced in Lancaster County, Nebraska.

With regard to count I of the formal charges, the referee found that in October 2002, respondent was retained by a client to represent her in a dissolution of marriage action in the district court for Lancaster County. The dissolution action was filed on January 29, 2003, and thereafter, respondent and the client met to prepare a draft settlement agreement, a copy of which respondent sent to the client in April 2003. The referee further found that thereafter, from May to late July, the client repeatedly attempted to contact respondent but was unsuccessful. In September, the client terminated her attorney-client relationship with respondent.

With regard to count II of the formal charges, the referee found that in December 2003, the client wrote to relator complaining that respondent had neglected the client's case. On December 10, relator forwarded a copy of the client's correspondence to respondent and asked for a written response within 15 days. Thereafter, on January 16 and 28, and on February 2, 2004, relator sent letters to respondent, again seeking respondent's response to the client's concerns. Respondent did not file her response until March 4.

The referee found that respondent's actions constituted a violation of respondent's oath of office as an attorney and the following provisions of the Code of Professional Responsibility: DR 1-102(A)(5) and (6) and DR 6-101(A)(3). With respect to the discipline to be imposed, the referee recommended that respondent receive a public reprimand and be placed on probation for a period of 18 months, during which probationary period respondent would engage and work with a practicing attorney to monitor respondent's practice.

On May 4, 2005, respondent and relator filed a joint motion for judgment, in which the parties moved this court to enter judgment in conformance with the referee's report and recommendation.

ANALYSIS

As noted above, neither party filed written exceptions to the referee's report. Pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2003), relator and respondent filed a joint motion for judgment. When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence, and the joint motion for judgment is granted.

A proceeding to discipline an attorney is a trial de novo on the record. *Id.* To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. Counsel for Dis. v. Villarreal*, 267 Neb. 353, 673 N.W.2d 889 (2004).

Based upon the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based upon the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated the following provisions of the Code of Professional Responsibility: DR 1-102(A)(5) and (6) and DR 6-101(A)(3). The record also supports a finding by clear and convincing evidence that respondent violated her oath of office as an attorney, and we find that respondent has violated said oath.

We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. at 293, 691 N.W.2d at 535. Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for
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> (1) Disbarment by the Court; or
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> (2) Suspension by the Court; or
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> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or

(4) Censure and reprimand by the Court; or

(5) Temporary suspension by the Court; or

(6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.

(B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, rule 10(N).

With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach attorney discipline case must be evaluated individually in light of its particular facts and circumstances." *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. at 293, 691 N.W.2d at 535. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.*

We have considered the referee's report and recommendation, the findings of which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that respondent should be and hereby is publicly reprimanded. We further order that respondent be on probation for a period of 18 months, effective immediately, during which period, respondent shall be monitored by an attorney approved by relator. We further order that respondent shall (1) submit to such monitoring attorney monthly reports of respondent's pending cases, (2) meet on a monthly basis with such monitoring attorney to discuss respondent's pending cases, and (3) work with such monitoring attorney to develop and implement appropriate office procedures to ensure that client matters are handled in a timely manner.

CONCLUSION

The joint motion for judgment is granted. We find by clear and convincing evidence that respondent violated DR 1-102(A)(5) and (6), DR 6-101(A)(3), and her oath of office as an attorney. It is the judgment of this court that respondent should be and is hereby publicly reprimanded. We further order that respondent be on probation for a period of 18 months, effective immediately, during which period, respondent shall be monitored by an attorney approved by relator, subject to the terms set forth above.

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

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROBERT WILLIAM CHAPIN, JR., RESPONDENT.

699 N.W.2d 359

Filed June 24, 2005. No. S-04-1264.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

On November 9, 2004, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against Robert William Chapin, Jr., respondent. On December 13, amended formal charges were filed against respondent. The amended formal charges set forth two counts; however, count II of the amended formal charges was later dismissed by relator. Count I of the amended formal charges included allegations that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); Canon 6, DR 6-101(A)(3) (neglecting legal matter); and Canon 9, DR 9-102(B)(4) (failing to return property of client), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent's answer disputed the allegations.

A referee was appointed and heard evidence. The referee filed a report on May 10, 2005. With respect to the single remaining count in the amended formal charges, the referee concluded that respondent's conduct had breached DR 1-102(A)(1),

DR 6-101(A)(3), and DR 9-102(B)(4). The referee made no finding regarding the allegation that respondent had violated his oath of office as an attorney. The referee recommended that respondent receive a public reprimand. On May 13, respondent and relator filed a joint motion for judgment, requesting that this court accept the referee's findings and recommendation and enter judgment thereon. We grant the joint motion for judgment and impose discipline as indicated below.

FACTS

The substance of the referee's findings may be summarized as follows: Respondent was admitted to the practice of law in the State of Nebraska on September 18, 1981. He has practiced in Lancaster County, Nebraska.

With regard to count I of the amended formal charges, the referee found that in October 2002, respondent was retained by an individual to represent him in a civil rights action against the Lancaster County Corrections Department and certain named defendants. The referee further found that from December 2002 through June 2003, respondent neglected his client's case by failing to file amended pleadings and failing to verify that all defendants were served. The referee further found that respondent failed to respond to his client's inquiries and failed to return his client's file when requested to do so. The referee found that respondent's actions constituted a violation of the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(B)(4). With respect to the discipline to be imposed, the referee recommended that respondent receive a public reprimand.

On May 13, 2005, respondent and relator filed a joint motion for judgment, in which the parties concurred with the referee's findings and moved this court to accept the referee's recommendation.

ANALYSIS

As noted above, neither party filed written exceptions to the referee's report. Pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2003), relator and respondent filed a joint motion for judgment. When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel.*

Counsel for Dis. v. Widtfeldt, 269 Neb. 289, 691 N.W.2d 531 (2005). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the amended formal charges are supported by clear and convincing evidence, and the joint motion for judgment is granted.

A proceeding to discipline an attorney is a trial de novo on the record. *Id.* To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. Counsel for Dis. v. Villarreal*, 267 Neb. 353, 673 N.W.2d 889 (2004).

Based upon the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based upon the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(B)(4). The record also supports a finding by clear and convincing evidence that respondent violated his oath of office as an attorney, and we find that respondent has violated said oath.

We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. at 293, 691 N.W.2d at 535. Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for
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> (5) Temporary suspension by the Court; or
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> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
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> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, rule 10(N).

With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach attorney discipline case must be evaluated individually in light of its particular facts and circumstances." *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. at 293, 691 N.W.2d at 535. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.*

We have considered the referee's report and recommendation, the findings of which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that respondent should be and hereby is publicly reprimanded.

CONCLUSION

The joint motion for judgment is granted. We find by clear and convincing evidence that respondent violated DR 1-102(A)(1), DR 6-101(A)(3), DR 9-102(B)(4), and his oath of office as an attorney. It is the judgment of this court that respondent should be and is hereby publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001) and rule 10(P) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

HENDRY, C.J., not participating.

CAROL LOUISE IODENCE AND BRIAN IODENCE, WIFE AND HUSBAND, APPELLANTS, V. CITY OF ALLIANCE, A NEBRASKA MUNICIPAL CORPORATION, APPELLEE.

700 N.W.2d 562

Filed July 1, 2005. No. S-03-528.

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. **Words and Phrases.** Under the ejusdem generis rule, specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Reversed and remanded for further proceedings.

James L. Zimmerman, of Sorensen, Zimmerman & Mickey, P.C., for appellants.

Steven W. Olsen, of Simmons Olsen Law Firm, P.C., for appellee.

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

PER CURIAM.

NATURE OF CASE

Carol Louise Iodence (Iodence) was injured when the vehicle she was driving struck a tree stump on property owned by the City of Alliance, Nebraska. The issue presented in this case is whether the city is immune from liability under the Recreation Liability Act (RLA), Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 2004). We hold that it was not immune because Iodence did not enter or use the city's land for "recreational purposes," as that term is defined by § 37-729(3).

BACKGROUND

On October 14, 1999, Iodence traveled to the Alliance softball complex to watch her son play a YMCA junior football league game. The softball complex is located on land owned by the city and is furnished to the public for sporting and recreational use. Adjacent to the softball fields is an open field. When she arrived at the softball complex, Iodence drove behind several other vehicles along a well-worn, severely rutted dirt path in the open field to park her car. While attempting to avoid the deepest ruts, Iodence struck a tree stump that was hidden in tall grass. Iodence was injured by the sudden stop of her vehicle.

Iodence and her husband, Brian Iodence, filed a negligence action against the city under the Political Subdivisions Tort Claims

Act (Tort Claims Act). The city filed a motion for summary judgment, asserting that it was immune from liability under the RLA. At the summary judgment hearing, the city offered affidavits from two individuals who worked for the Alliance parks department and whose duties included mowing and maintenance for the open field where Iodence was injured. Both generally averred that they did not remember ever seeing the tree stump that caused the accident. They further stated that they did not remember ever receiving complaints of tree stumps in that area that might cause a hazard. The Iodences offered the affidavits of two Alliance residents who generally averred that during the 1990's, the city had planted trees in the open field and had later cut them down, leaving the stumps in place. Both Alliance residents also averred that when they attended events at the softball complex, they had to be careful navigating the open field in order to avoid hitting the tree stumps.

The district court found that "the activity involved, i.e., youth football comes within the [RLA]" and that Iodence "was on the protected premises when the accident occurred and was a recreational user." The court also found no evidence to support imposing liability on the city for willful or malicious conduct under § 37-734(1). Based on those findings, the court found that the city was immune from liability under the RLA and granted the city's motion for summary judgment. The Iodences appealed, and we moved the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

The Iodences' four assignments of error can be more succinctly restated as two: (1) The district court erred in finding that Iodence entered or used the city's land for recreational purposes and (2) the district court erred in finding that the city did not willfully or maliciously fail to guard or warn against a dangerous condition on its land.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005).

ANALYSIS

Pursuant to the RLA, an owner of land generally owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. § 37-731. But see § 37-734 (exceptions).

The Iodences argue that the city is not immune for two reasons. First, they contend that the RLA does not apply because Iodence did not enter or use the city's land for "recreational purposes" under § 37-729(3). Second, they argue that the city is liable because of its willful and malicious failure to guard or warn against a dangerous condition on its land. See § 37-734.

At issue in the Iodences' first argument is whether Iodence entered or used the city's land for recreational purposes when she entered the softball complex to watch her son play a youth football game. Recreational purposes is defined in § 37-729(3), which states:

> Recreational purposes includes, but is not limited to, any one or any combination of the following: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, waterskiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, or otherwise using land for purposes of the user[.]

We have interpreted § 37-729(3) to be broad enough to include "the normal activities afforded by public parks." *Watson v. City of Omaha*, 209 Neb. 835, 842, 312 N.W.2d 256, 259 (1981). Activities that fall within the definition of recreational purposes include using a playground slide, see *id.*; sledding, *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); and playing softball, *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984).

Our prior "broad" interpretations of § 37-729(3) do not extend to *all* activities. Thus, in *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000), we held that the viewing of livestock exhibits at a county fair was not a recreational purpose.

> [T]he viewing of livestock at a county fair is not substantially similar to the enumerated activities in § 37-729(3). Generally speaking, the activities listed in § 37-729(3) are

> more physical than not, generally require the outdoors, and are not "spectator sports." . . . The listed recreational purposes tend to involve activities in which the individual using the land is actively involved.

(Citations omitted.) 260 Neb. at 382-83, 617 N.W.2d at 823.

The city urges us to interpret recreational purpose to include spectating at a youth football game. In support, it cites to several cases from other jurisdictions, namely *Rankey v. Arlington Bd. of Edn.*, 78 Ohio App. 3d 112, 603 N.E.2d 1151 (1992). In that case, a spectator at a track meet was struck by a shotput. The court considered whether the spectator was engaged in a "recreational pursuit," which the court gave "the most liberal of interpretations." *Id.* at 116, 603 N.E.2d at 1154. It concluded that rather than focusing on the specific activity pursued by the plaintiff at the time of the accident, the relevant inquiry should focus on the nature and scope of activities for which the premises are held open to the public. Thus, the *Rankey* court concluded that the spectator, although she was merely an observer and not an active participant, was engaged in a recreational pursuit. Other Ohio cases are in agreement. See, *LiCause v. Canton*, 42 Ohio St. 3d 109, 537 N.E.2d 1298 (1989) (walking through park to reach or leave softball field and watching softball game); *Fetherolf v. State*, 7 Ohio App. 3d 110, 454 N.E.2d 564 (1982) (watching others swim).

[2] We decline to follow the Ohio line of cases. Consistent with the doctrine of ejusdem generis, we have construed § 37-729(3) such that the specific terms listed in the statute restrict the general term of "recreational purposes." *Dykes v. Scotts Bluff Cty. Ag. Socy., supra.* Ohio's liberal interpretation of its recreational use statute and its de-emphasis of the specific activity pursued by the plaintiff are incompatible with our existing precedent. *Dykes* compels us to hold that spectating at a youth football game is not a recreational purpose under the RLA. Iodence's spectating is not substantially similar to the enumerated activities in § 37-729(3), as it is not a physical activity and requires no "active involvement" on the part of Iodence.

Because Iodence did not enter or use the city's land for a recreational purpose, the city is not immune from liability under the RLA. The district court erred in granting summary judgment in

favor of the city on that basis. Having so concluded, we need not consider the Iodences' other assignment of error.

CONCLUSION

The district court erred in granting summary judgment in favor of the city under the RLA. The judgment of the court is reversed, and the cause is remanded for further proceedings under the Tort Claims Act.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., concurring.

I concur with the result reached by the majority. I write separately, however, to express my reservations with the continued application of *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), to provide governmental entities with immunity from liability for ordinary negligence on public land used for recreational purposes. In my view, this court incorrectly construed the Recreation Liability Act (RLA), Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 2004), in *Watson* to include governmental entities within its ambit of protection.

The RLA provides owners of land with limited immunity from negligence liability when they make their property available to others for recreational purposes. See §§ 37-730 to 37-734. Section 37-729(2) defines "owner" as a "tenant, lessee, occupant, or person in control of the premises."

The Legislature has not explicitly stated whether an owner of land includes governmental entities as well as private parties, but this court has addressed that issue. On four occasions, we have expressly held that the RLA applies to government and private landowners alike. *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987); *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Watson, supra*. In several other cases, we have tacitly accepted that governmental entities could be owners under this line of cases while deciding whether they were entitled to immunity on some other ground. See, *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998) (concluding city street could not be temporarily converted to recreational area for purposes of limiting city's liability

under RLA for plaintiff's injury sustained at automobile show); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996) (concluding school district was not immune under RLA from liability for football player's injury because football clinic was not open to public without charge), *abrogated on other grounds, Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51; *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984) (concluding city was protected under RLA when plaintiffs did not pay charge to enter park and city was not guilty of willful or wanton negligence). See, also, *Teters v. Scottsbluff Public Schools*, 5 Neb. App. 867, 884, 567 N.W.2d 314, 327 (1997) (holding that school district was "owner" of land under RLA as "an occupant or a person in control of" recreational camp for weekend but was not immune from liability because it did not hold land open to public), *affirmed in part and in part reversed on other grounds* 256 Neb. 645, 592 N.W.2d 155 (1999) (reversing on separate issue but affirming Nebraska Court of Appeals' holding as to school district without discussion). Compare *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000) (concluding that viewing of livestock exhibits at county fair was not recreational purpose but not being asked nor reaching issue whether agricultural society is governmental entity).

This court first considered whether the RLA applied to governmental entities in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981). In *Watson*, the plaintiffs sued the city of Omaha for its negligent operation of a city park. The city defended on the ground that it was immune under the RLA. The district court, in determining that the city was liable for negligence, further concluded that the immunity provided by the RLA did not apply to political subdivisions. We reversed.

Although conceding "for the sake of argument" that "the original purpose of the [RLA] was to encourage *private* landowners to offer their lands for use by the public" (emphasis supplied), *Watson*, 209 Neb. at 840, 312 N.W.2d at 258, citing 24 Council of State Governments, Suggested State Legislation 150 (1965), we nonetheless concluded: "Whatever the Legislature's intent was at the time of the enactment of the [RLA], we believe that the definition of owner . . . is sufficiently broad to cover a public entity." 209 Neb. at 841, 312 N.W.2d at 259.

In so doing, we acknowledged that some courts had determined such an interpretation amounted to a grant of " 'redundant immunity' " where a governmental entity already enjoyed sovereign immunity. *Id.* at 840, 312 N.W.2d at 259. We distinguished these cases, however, on the ground that the Legislature had waived sovereign immunity for political subdivisions with the passage of the Political Subdivisions Tort Claims Act (Tort Claims Act). See Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997 & Cum. Supp. 2004). We then concluded that the Legislature, in enacting the Tort Claims Act subsequently to the RLA, was presumed to have knowledge of the RLA. Because it had not placed any limitation on the definition of "owner," we concluded that the Legislature had intended in both acts "to grant the same rights and privileges to governmental and private landowners alike." 209 Neb. at 841, 312 N.W.2d at 259.

The majority's rationale was challenged in *Watson* and on three other occasions, but the rule has not been questioned since 1987. See, *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987) (White, J., dissenting); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984) (Grant, J., dissenting; White and Shanahan, JJ., join); *Garreans v. City Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984) (Shanahan, J., dissenting; White and Grant, JJ., join); *Watson, supra* (White, J., dissenting; McCown, J., joins). In *Watson*, the dissent noted:

> The [RLA] was passed in 1965, at which time political subdivisions were immune from liability. It is clear from the legislative history that the act was passed to encourage private landowners to make their land and water areas available for recreational purposes such as fishing and hunting. There was no need to pass such an act to limit the liability of political subdivisions since they were already immune.

209 Neb. at 842, 312 N.W.2d at 259-60.

The dissent further criticized the majority's conclusion that despite the general waiver of immunity in the Legislature's enactment of the Tort Claims Act in 1969, the Legislature was presumed to have knowledge that governmental entities nonetheless had immunity as "owners of land" under the RLA. The dissent argued that this was an implausible construction because the Legislature had no reason to believe a grant of

immunity to public entities would have been necessary when it enacted the RLA. I agree with the dissent's rationale.

In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005). In my view, the majority in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), failed to properly construe the RLA for a number of reasons.

First, since its enactment in 1965, the statutorily stated purpose of the RLA has been to "encourage owners of land *to make available to the public* land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon." § 37-730 (Reissue 2004). See, also, Neb. Rev. Stat. §§ 37-1001 to 37-1008 (Cum. Supp. 1965) (recodified at Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 1998)); *Garreans*, 216 Neb. at 497-98, 345 N.W.2d at 316 (Shanahan, J., dissenting; White and Grant, JJ., join) (noting that through RLA, "the state avoids expensive acquisition of considerable land for public recreational use, that is, state-owned or -leased areas, and in return grants restricted or limited liability to private landowners providing areas for public recreation"). However, "[a] governmental body . . . needs no such motivation" because its principal purpose in owning public recreational land is to make the land available for public use. *City of Pensacola v. Stamm*, 448 So. 2d 39, 41 (Fla. App. 1984). As a result, the legislative purpose of the RLA is meaningless when applied to governmental entities.

Second, the RLA provisions cannot be read consistently to mean that "owner of land" includes governmental entities. Section 37-733 provides that a landowner does not owe a duty of care to keep the land safe or warn others of hazards when the landowner "leases land to the state for recreational purposes." See, also, § 37-1004 (Reissue 1978) (identical language employed at time *Watson* was decided). This provision is nonsensical when it is read to mean that a governmental entity can avoid

liability for ordinary negligence by leasing land to itself. See *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 652, 592 N.W.2d 155, 160 (1999) (construing § 37-733 to mean that "[i]f the landowner charges for the use of the land, then the landowner is not protected by the [RLA] unless the land is leased to the state *or a subdivision thereof*" (emphasis supplied)). See, also, *Soto v. State*, 269 Neb. at 343-44, 693 N.W.2d at 497 ("[s]tatutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision"); *Rauscher v. City of Lincoln*, 269 Neb. 267, 279, 691 N.W.2d 844, 854 (2005) ("it is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language"). I agree with the Connecticut Supreme Court that "[b]y carving out different rules for lands leased to the state . . . the statutes suggest that the legislature did not intend public and private 'owners' to be treated identically under the statute." *Conway v. Town of Wilton*, 238 Conn. 653, 665, 680 A.2d 242, 249 (1996).

Third, I concur with the *Watson* dissent that the Legislature had no reason to believe that when the RLA was enacted in 1965, the RLA should have any application to governmental entities which were already immune from liability. See, e.g., *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002) (stating that under Neb. Const. art. V, § 22, state may sue and be sued, but provision is not self-executing, and that legislative action is necessary to waive state's sovereign immunity). In *Watson*, the majority recognized that interpreting "owner" to include governmental entities arguably resulted in a legislative grant of superfluous immunity. The majority, however, relied on the passage of the Tort Claims Act to implicitly conclude that because immunity had since been waived, immunity under the RLA was not redundant. That reliance was unfounded, however, because as noted by the *Watson* dissent, the State did not waive its sovereign immunity under the Tort Claims Act until 1969, 4 years after the RLA was enacted. The State's waiver of sovereign immunity in 1969 fails to negate the argument that a legislative grant of statutory immunity for governmental entities under the RLA in 1965 would have been redundant.

Fourth, interpreting the RLA to include governmental entities as owners allows those entities "to treat two classes of persons injured on public lands differently: it forbids recovery for personal injuries incurred during recreational activities, but permits recovery for personal injuries incurred during non-recreational activities." *Hovland v. City of Grand Forks*, 563 N.W.2d 384, 388 (N.D. 1997) (comparing outcome under this interpretation for plaintiff who was injured while skating on bike path to outcome for hypothetical plaintiff who was injured while riding bike to work on same path). See, also, *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998) (reasoning that allowing public street to be used for recreational purpose would permit parties injured while crossing street to maintain action against city if they were going to restaurant, but not if they were attending automobile show on street). The North Dakota Supreme Court noted that while this disparate outcome was rational in the context of encouraging private owners to permit public access, "[i]n the context of public access to public lands, the disparate treatment is much harder to understand." *Hovland*, 563 N.W.2d at 388.

Fifth, I disagree with the majority's conclusion in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), that the Legislature was presumed to have knowledge a governmental entity could have immunity as an owner under the RLA when enacting the Tort Claims Act. Logically, the Legislature should not have been presumed to have knowledge of our 1981 judicial interpretation of "owner" in *Watson, supra*, when the Tort Claims Act was enacted in 1969. Further, § 13-908 of the Tort Claims Act sets forth a general waiver of immunity subject to certain limited exceptions stated in § 13-910. *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002). None of those exceptions are related to a governmental entity's negligent operation of publicly owned recreational facilities. Thus, interpreting the Tort Claims Act as incorporating immunity under the RLA is essentially a revocation of the State's waiver of immunity in these circumstances. See *Watson*, 209 Neb. at 843, 312 N.W.2d at 260 (White, J., dissenting; McGown, J., joins) ("[w]e have today gutted the [Tort Claims Act]").

Finally, the legislative history of the RLA, as noted by the dissent in *Watson*, fails to support the construction of the act articulated by the *Watson* majority. In enacting the RLA, the Legislature adopted a model act presented by the Council of State Governments in its annual publication, Suggested State Legislation. *Teters v. Scottsbluff Public Schools*, 256 Neb. 645, 592 N.W.2d 155 (1999); 24 Council of State Governments, Suggested State Legislation 150 (1965). This legislative bill was titled "Model Liability Relief Law," and specified that it was "AN ACT to adopt the Model Liability Relief Law . . . ." 1965 Neb. Laws, L.B. 280, ch. 193, p. 589. Like many other state legislatures, the Nebraska Legislature adopted the model law with only minor changes, which are not relevant to this issue. See, *Teters, supra* (noting that RLA closely followed model act but determining that Legislature's slight modifications rendered section dealing with rental-paid exception to RLA's immunity unconstitutionally vague); *Rivera v. Philadelphia Theological Seminary*, 510 Pa. 1, 17 n.18, 507 A.2d 1, 8 n.18 (1986) (resolving unrelated issue but listing 16 states, including Nebraska, that had adopted model act "virtually *verbatim*").

Although "owner" is defined to include a "tenant, lessee, occupant, or person in control of the premises," it does not clarify whether governmental entities were intended to be included when considered in the context of the RLA's origin and purpose. See §§ 37-729 (Reissue 2004) and 37-1008 (Cum. Supp. 1965). Compare 24 Council of State Governments, *supra*, at 151 ("[o]wner means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises"). See, also, *Redinger v. Clapper's Tree Service Inc.*, 419 Pa. Super. 487, 493, 615 A.2d 743, 746 (1992) (deciding separate issue but noting that "[i]n spite of its conciseness and apparent simplicity, the [model act] has managed to weave a tortured tapestry of decisional law in a multitude of jurisdictions in which it as been enacted"). Courts in other jurisdictions, reviewing legislation which included this definition of owner, have nonetheless determined that the act was intended to apply only to private landowners. See, *Conway v. Town of Wilton*, 238 Conn. 653, 680 A.2d 242 (1996) (overruling prior decision holding that "owner" included municipalities and concluding that definition of "owner," which was identical to

model act, was ambiguous when court considered legislative history and public policy underlying statute); *Monteville v. Terrebonne Parish Con. Gov't*, 567 So. 2d 1097 (La. 1990) (noting that state legislature had adopted model act almost without change, including definition of owner; concluding that act applied only to private owners); *Stamper v. Kanawha County Bd. of Educ.*, 191 W. Va. 297, 298 n.4, 445 S.E.2d 238, 239 n.4 (1994) (concluding that state legislation fashioned after model act was intended to benefit private landowners despite legislature's slight modification to specify that owner "shall include, *but not be limited to*, tenant, lessee, occupant or person in control of the premises" (emphasis supplied)). See, also, *Hovland v. City of Grand Forks*, 563 N.W.2d 384 (N.D. 1997).

Section 1 of the model act and § 37-730 of the RLA both provide that their purpose is to encourage "owners of land" to make land and water areas available to the public for recreational purposes by limiting their liability. Although neither the model act nor the Nebraska legislation based on the model act explicitly specified that "owners of land" referred only to private owners, the introductory commentary to the model act leaves no question as to that intent:

> Recent years have seen a growing awareness of the need for additional recreational areas to serve the general public. The acquisition and operation of outdoor recreational facilities by governmental units is on the increase. However, large acreages of *private land* could add to the outdoor recreation resources available. Where the owners of private land suitable for recreational use make it available on a business basis, there may be little reason to treat such owners and the facilities they provide in any way different from that customary for operators of private enterprises. However, in those instances where private owners are willing to make their land available to members of the general public without charge, it is possible to argue that every reasonable encouragement should be given to them.
>
> In something less than one-third of the states, legislation has been enacted limiting the liability of private owners who make their premises available for one or more public recreational uses. This is done on the theory that it is not

> reasonable to expect such owners to undergo the risks of liability for injury to persons and property attendant upon the use of their land by strangers from whom the accommodating owner receives no compensation or other favor in return.
>
> The suggested act which follows is designed to encourage availability of *private* lands by limiting the liability of owners to situations in which they are compensated for the use of their property and to those in which injury results from malicious or willful acts of the owner. In the case of lands leased to states or their political subdivisions for recreational purposes, the legislation expressly provides that the owner will have no remaining liability to recreationists, except as such liability may be incorporated in an agreement, or unless the owner is compensated for the use of the land in addition to consideration for the lease.

(Emphasis supplied.) 24 Council of State Governments, Suggested State Legislation 150 (1965). Compare, e.g., *In re Estate of Sutherlin*, 261 Neb. 297, 622 N.W.2d 657 (2001) (relying on commentary to Uniform Probate Code to elucidate section Nebraska Legislature had adopted).

I recognize that this court, in four decisions, has expressly held that a governmental entity was immune from liability for ordinary negligence under the RLA. The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. *Holm v. Holm*, 267 Neb. 867, 678 N.W.2d 499 (2004). But while the doctrine of stare decisis forms the bedrock of our common-law jurisprudence, it does not require us to blindly perpetuate a prior interpretation of the law if we conclude that it was clearly incorrect. *Id.* As Seneca the Elder noted nearly 2,000 years ago, we can often go astray on a well-trodden and much-frequented road. Given that appellants have not asked this court to reconsider its jurisprudence, I feel constrained to do nothing more than to express my reservations that the road we continue to travel is manifestly wrong.

GERRARD and MCCORMACK, JJ., join in this concurrence.

STEPHAN, J., dissenting.

I respectfully dissent. Although *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), may rest upon questionable reasoning, as suggested by Chief Justice Hendry in his concurring opinion, it is still the law. A governmental owner of land used for recreational purposes is entitled to the tort immunity conferred by the Recreation Liability Act (RLA), Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 2004). *Watson, supra.*

Applying this principle, this court has held that a city had immunity against the claim of a person who stepped in a hole and injured his knee while playing softball in a city park. *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984). Presumably, a public entity would enjoy the same immunity with respect to the claim of a person who is injured while playing football on its land. However, under the majority opinion in this case, there is no immunity with respect to the claim of a person who is injured on public land en route to the bleachers to watch the same football game. Under the reasoning of the majority, the football player is engaged in a recreational activity, but the spectator is not.

This illogical conclusion flows from the decision in *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000), in which the majority applied what in my view is an artificial and overly restrictive interpretation of the phrase "recreational purposes" as used in the RLA. In holding that viewing livestock at a county fair was not substantially similar to the recreational activities specifically enumerated in the RLA at § 37-729(3), the majority reasoned that such activities "are more physical than not, generally require the outdoors, and are not 'spectator sports.' " *Dykes*, 260 Neb. at 382-83, 617 N.W.2d at 823.

I continue to disagree with this analysis, and particularly with the notion that a recreational purpose under the RLA requires some particular degree of physical exertion. For example, fishing is one of the activities specifically enumerated in § 37-729(3) as a recreational purpose, but as one thoughtful fisherman has observed, "God never did make a more calm, quiet, innocent recreation than angling." Izaak Walton, The Compleat Angler 100 (Everyman's Library 1906). Thus, while some may spend their

leisure seated beside a pond waiting for a line to go taut, others enjoy watching an athletic contest from the stands of a municipal ballfield. Neither activity is "more physical than not," but both are pursued for a clearly recreational purpose.

It may be time to reexamine the holding in *Watson, supra*, particularly if it necessitates the strained reasoning and illogical distinctions employed by the majority in this case and *Dykes, supra*. However, as long as we continue to construe the RLA to grant immunity to governmental landowners, it is my view that such immunity extends to claims arising from *all* uses of public lands which can fairly be characterized as recreational in purpose, whether strenuous or sedentary, competitive or contemplative.

I agree with the determination of the district court that Carol Louise Iodence was on public lands for a recreational purpose at the time of her injury and that therefore, the city is immune from liability under the RLA. For the reasons set forth above and in my dissent in *Dykes*, I would affirm the judgment of the district court.

MILLER-LERMAN, J., joins in this dissent.

PAULETTE GENTHON, SPECIAL ADMINISTRATOR OF THE ESTATE OF VICTORIA MULDREW, DECEASED, APPELLEE, V. MICHAEL B. KRATVILLE, INDIVIDUALLY AND DOING BUSINESS AS TERRY & KRATVILLE, APPELLANT.

701 N.W.2d 334

Filed July 1, 2005. No. S-04-350.

1. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
2. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Motions for Mistrial: Appeal and Error.** A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion.
4. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
5. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, and the trial court's decision will be upheld unless it

is based upon reasons that are untenable or if its action is clearly against justice or conscience, reason, and evidence.

6. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.
7. **Pleadings.** Although the decision whether to allow an amendment to any pleading is within the discretion of the court, Neb. Rev. Stat. § 25-852 (Reissue 1995) is to be liberally construed so as to permit amendments when proposed at opportune times in furtherance of justice.
8. **Actions: Parties.** The propriety of substituting parties depends on whether the cause of action otherwise remains the same. Where such substitution will introduce a new cause of action into the case, the substitution will not be allowed.
9. ____: ____. The test for determining whether a new cause of action results from the substitution of parties is whether an attempt is made to state facts giving rise to a wholly distinct and different legal obligation against the defendant, or to change the liability sought to be enforced. In addition, in order to substitute one party for another, the party substituted must bear some relation to the original party or possess an interest in the controversy sufficient to enable that party to maintain the proceeding.
10. **Limitations of Actions: Pleadings.** The main purpose of a statute of limitations is to notify the defendant of a complaint against it within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against it long after the time it could have prepared a defense against the claim. Where the amendment does not introduce a new cause of action, but, rather, relies upon the same set of facts as the original pleading and the defendant is not prejudiced by the amendment, the right to a statute of limitations defense has not been violated.
11. **Motions for Mistrial.** A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial.
12. ____. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters provide examples of events which may require the granting of a mistrial.
13. **Motions for Mistrial: Waiver.** A motion for mistrial should be made at the first reasonable opportunity. If not timely made, it is waived.
14. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
15. **Motions for Mistrial.** In addition to being timely, a motion for mistrial must be premised upon actual prejudice, not the mere possibility of prejudice.
16. **Trial: Insurance: Motions for Mistrial.** It is not every casual or inadvertent reference to an insurance company in the course of trial that will necessitate a mistrial. Whether the disclosure is such as to constitute error depends essentially upon the facts and circumstances peculiar to the case under consideration.
17. **Trial: Evidence: Insurance.** Where the fact of insurance is relevant to some issue in the case, it cannot properly be excluded, but where not relevant to any such issue, evidence of the existence of insurance coverage is inadmissible.
18. **Trial: Evidence: Appeal and Error.** One may not, on appeal, assert a different ground for excluding evidence than was urged in the objection to the trial court.

19. **Appeal and Error.** It is not the function of an appellate court to scour the record looking for unidentified evidentiary errors.
20. **Damages: Appeal and Error.** An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
21. ____: ____. On appeal, the fact finder's determination of damages is given great deference.

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

Jerry W. Katskee, of Katskee, Henatsch & Suing, for appellant.

Jerry Alexander, Sara Larson, and Henry C. Rosenthal, Jr., of Alexander & Associates, P.C., L.L.O., for appellee.

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

GERRARD, J.

Donald Muldrew's mother, Victoria Muldrew (Victoria), was admitted to a nursing home and died shortly thereafter. Muldrew retained Michael B. Kratville to represent his family in a wrongful death action against the nursing home based on medical negligence. After Kratville withdrew from the case, Muldrew filed a defective pro se wrongful death petition. The wrongful death petition was eventually dismissed for failure of service within the statutory period. Ultimately, the special administrator of Victoria's estate brought a legal malpractice claim against Kratville, claiming that his negligence resulted in the loss of the estate's wrongful death claim against the nursing home. A jury found in favor of the estate, and Kratville appeals.

FACTUAL AND PROCEDURAL BACKGROUND

Victoria was admitted to Northview Villa Nursing Home (Northview) on April 18, 1994, following a period of hospitalization. She died on May 26. Muldrew retained Kratville and his firm, Terry & Kratville, to represent the Muldrew family in a wrongful death action against Northview.

On April 6, 1996, Kratville informed Muldrew that he was discontinuing his representation of the Muldrew family in the claim against Northview. Muldrew then filed a pro se wrongful

death petition against Northview on April 18, which required service by October 18. See Neb. Rev. Stat. § 25-217 (Reissue 1995). However, the wrongful death petition was brought in Muldrew's name, individually, instead of in the name of a personal representative for the benefit of the next of kin, as required by Neb. Rev. Stat. § 30-810 (Reissue 1995).

On October 14, 1996, Kratville sent a letter to Muldrew, advising him that a representative of Northview's insurance adjuster had contacted him and expressed an interest in settling the case and that Kratville would be willing to pursue such a settlement on Muldrew's behalf. Paulette Genthon, Muldrew's girl friend, testified that she and Muldrew met with Kratville on the morning of October 16 and provided him a copy of the pro se petition they had filed in April. Genthon stated that Kratville agreed during that meeting to resume representation of the matter and to take care of the service deadline approaching on October 18.

In contrast, Kratville testified that he merely spoke with Genthon via telephone on the afternoon of October 16, 1996, at which time Genthon informed him of the pro se petition, indicating that it had been filed on April 17 rather than the true filing date of April 18. Kratville further testified that he did not see the petition—and therefore was not aware of its defects—until the end of October or early November. Finally, Kratville testified that during his October 16 conversation with Genthon, he agreed to look at the court file but had not yet agreed to go forward with the matter, expressing a desire to speak with Muldrew before doing so. Kratville negotiated with Northview's insurance adjuster and, at trial, claimed he had an agreement with the adjuster that service on the wrongful death petition could be postponed as long as the parties were involved in negotiations. In March 1997, Kratville again withdrew from representation in Muldrew's wrongful death suit against Northview.

Around August 20, 1997, Muldrew retained the services of George Achola, and subsequently, service was made on Northview. On December 1, the wrongful death case was formally dismissed for failure of service within 6 months of the original filing, as required under § 25-217.

On October 13, 1998, Muldrew, as special administrator of Victoria's estate, filed a legal malpractice action against Kratville

and Lee R. Terry, individually and doing business as Terry & Kratville, alleging negligence in the representation of the Muldrew family in the wrongful death action. Genthon was later substituted for Muldrew as special administrator of the estate, and Terry was dismissed as a party prior to trial. Kratville filed a demurrer, alleging that a cause of action against him based on legal malpractice in withdrawing from representation of the Muldrew family on April 6, 1996, was barred by the 2-year statute of limitations for professional malpractice.

The district court found that because the alleged negligence occurred on April 6, 1996, the Muldrew estate was entitled to bring a legal malpractice action against Kratville until April 6, 1998. The court acknowledged that the legal malpractice petition was not filed until October 13, 1998, and, therefore, sustained Kratville's demurrer.

The special administrator ultimately filed additional amended legal malpractice petitions, presumably relying on the second period of representation by Kratville, not yet barred by the statute of limitations. Kratville filed a "Motion to Dismiss" the operative third amended petition, claiming that the allegations in the petition were insufficient to confer subject matter jurisdiction and that the petition failed to state a claim upon which relief could be granted. Kratville argued that the 2-year statute of limitations for malpractice actions barred any claims of legal malpractice with respect to Kratville's conduct prior to October 13, 1996, and that Kratville's failure to take action on the wrongful death petition within the 2 days before that petition's service deadline was not negligent, because the defective pro se wrongful death petition rendered the action a nullity.

In its order of January 8, 2004, the district court overruled the "Motion to Dismiss," finding that under the relation-back doctrine, Kratville *could* have preserved the estate's cause of action by taking steps to amend and serve the wrongful death petition that Muldrew filed against Northview.

Following a jury trial, Genthon, as special administrator of Victoria's estate, was awarded $275,000 in damages for the wrongful death and $25,000 for Victoria's predeath pain and suffering due to the medical negligence of Northview. Kratville's subsequent motions for judgment notwithstanding the verdict,

new trial, and remittitur were overruled. Kratville filed a timely appeal.

ASSIGNMENTS OF ERROR

Kratville assigns several errors on appeal, which can be condensed and restated as follows: The district court erred in (1) finding relation back to be applicable to correct a defective wrongful death action and override an expired statute of limitations, (2) permitting references to Kratville's malpractice insurance to be placed before the jury and failing to declare a mistrial, (3) allowing evidence of a report of the Department of Health and Human Services regarding revocation of the Northview license to be placed before the jury, and (4) finding sufficient evidence to support the award of damages.

[1] Kratville also assigns but does not argue that the district court erred in allowing matters that arose prior to October 13, 1996, to be placed before the jury. Errors that are assigned but not argued will not be addressed by an appellate court. *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005).

STANDARD OF REVIEW

[2] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005).

[3] A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001).

[4] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

[5] A motion for new trial is addressed to the discretion of the trial court, and the trial court's decision will be upheld unless it is based upon reasons that are untenable or if its action is clearly

against justice or conscience, reason, and evidence. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

[6] The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved. *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998).

ANALYSIS

RELATION BACK

Kratville argues that under Nebraska law, an amendment to a wrongful death petition to cure a defect does not relate back to the original filing date. Therefore, Kratville asserts that even if he had learned of and cured the defects in the pro se wrongful death petition before expiration of the service period on October 18, 1996, the action would have been barred by the wrongful death statute of limitations (which expired May 26, 1996) and the doctrine of relation back would not have been available to permit the amendments to the pro se petition to relate back to the original filing date of April 18, 1996. In other words, Kratville argues that the statutory requirements for bringing a wrongful death action—including the requirement that it be brought within 2 years of the death and in the name of the decedent's personal representative—are conditions precedent to establishing such an action and that because Muldrew's pro se wrongful death petition did not do so, the action was a nullity. Consequently, Kratville argues that the court erred in failing to sustain his "Motion to Dismiss" and motions for judgment notwithstanding the verdict and for new trial.

Kratville's argument presents a two-part question: whether Muldrew would have been permitted to substitute the proper plaintiff in his wrongful death action and, if so, whether such an amendment would have related back to the original filing date of the pro se wrongful death petition.

[7,8] In *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994), and again in *New Light Co. v. Wells Fargo Alarm Servs.*, 252 Neb. 958, 567 N.W.2d 777 (1997), we stated that, although the decision whether to allow an amendment to any pleading is within the discretion of the court, Neb. Rev. Stat.

§ 25-852 (Reissue 1995) is to be liberally construed so as to permit amendments when proposed at opportune times in furtherance of justice. Section 25-852 stated:

> The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, permit a party upon motion to amend any pleading, process, or proceeding by adding or striking out the name of any party or by correcting a mistake in the name of the party or a mistake in any other respect or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of Chapter 25, the court may permit the same to be made conformable thereto by amendment.

(While this section has since been repealed and replaced, it was still in effect at the time of the events underlying this case.) In *New Light Co., supra*, and *Hoiengs, supra*, we stated that the propriety of substituting parties depends on whether the cause of action otherwise remains the same. Where such substitution will introduce a new cause of action into the case, the substitution will not be allowed. *New Light Co., supra*; *Hoiengs, supra.*

[9] The test for determining whether a new cause of action results from the substitution of parties is whether an attempt is made to state facts giving rise to a wholly distinct and different legal obligation against the defendant, or to change the liability sought to be enforced. In addition, in order to substitute one party for another, the party substituted must bear some relation to the original party or possess an interest in the controversy sufficient to enable that party to maintain the proceeding. *Id.*

In this case, the contents of the pro se wrongful death petition and the relief sought by the allegations within it would not have been altered by the substitution of the estate's special administrator as plaintiff. The facts alleged and the damages requested in the pro se petition are framed in the context of Victoria's wrongful death and the predeath pain and suffering she allegedly experienced as a result of the negligence of Northview's personnel. Thus, we conclude that substituting the estate's special

administrator as the plaintiff in Muldrew's wrongful death action would not introduce a new cause of action or, in other words, result in an attempt to state facts giving rise to a wholly distinct and different legal obligation against the defendant or change the liability sought to be enforced.

Further, Muldrew is the son of Victoria, and Muldrew ultimately served as the special administrator of Victoria's estate prior to the appointment of Genthon in his place. In addition, the special administrator of Victoria's estate has an interest in collecting for the alleged wrongful death and pain and suffering of Victoria for the benefit of her next of kin. Thus, the substitute party in this case—the special administrator of Victoria's estate —both is related to the original plaintiff *and* has an interest in the controversy sufficient to maintain the action. Because the substitution considered in this case would not have introduced a new cause of action and the substitute party has a sufficient interest in the action, the substitution would be permitted.

Next, we must determine whether the amended petition would have related back to the original filing date, so as to avoid bar by the statute of limitations. Section 30-810 provides that a wrongful death action "shall be commenced within two years after the death of such person. It shall be brought by and in the name of the person's personal representative for the exclusive benefit of the widow or widower and next of kin."

Relying on case law from other jurisdictions, Kratville argues that wrongful death actions are distinguishable from common-law actions because they fail to exist without strict compliance with the statutory conditions under which such actions may be brought. Kratville contends that a petition does not properly establish a cause of action for wrongful death if it is not brought in a representative capacity within the applicable statute of limitations and that thus, any amendment to such a petition would constitute a new cause of action and—if made after the limitations period—be barred.

[10] The main purpose of a statute of limitations is to notify the defendant of a complaint against it within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against it long after the time it could have prepared a defense against the claim. *New Light Co. v. Wells Fargo*

Alarm Servs., 252 Neb. 958, 567 N.W.2d 777 (1997). Where the amendment does not introduce a new cause of action, but, rather, relies upon the same set of facts as the original pleading and the defendant is not prejudiced by the amendment, the right to a statute of limitations defense has not been violated. *Id.*

Although we have yet to specifically address amendments to wrongful death petitions and the applicability of the relation-back doctrine in such circumstances, we have considered amendments to pleadings made after the limitations period in other causes of action and have consistently concluded that such amendments relate back to the original filing dates. See *id.* (district court abused its discretion in failing to allow corporation to substitute related corporation and real party in interest as plaintiff after expiration of limitations period); *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988) (analysis of federal and Nebraska case law, general policy considerations, and provisions of Political Subdivisions Tort Claims Act led to conclusion that amended pleading under act should relate back to date of original pleading); *Kennedy v. Potts*, 128 Neb. 213, 258 N.W. 471 (1935) (amended petition not barred by statute of limitations where amendment elaborated upon same cause of action alleged in original petition); *State Bank of Gothenburg v. Carroll*, 81 Neb. 484, 116 N.W. 276 (1908) (substitution of one party plaintiff for another in pending action is continuation of original action rather than commencement of new action).

Furthermore, in *Russell v. New Amsterdam Casualty Company*, 303 F.2d 674 (8th Cir. 1962), the U.S. Court of Appeals for the Eighth Circuit considered Nebraska case law regarding amendments to pleadings and opined as to whether, if faced with the issue, Nebraska courts would permit relation back of amendments in wrongful death actions. In *Russell*, the district court dismissed a wrongful death action filed by the deceased's widow, finding that the cause of action was vested in the personal representative of the deceased and that, therefore, the deceased's widow had no right to maintain the action. Because the action had not been commenced by the party having legal capacity to do so, the court concluded that the cause of action was barred by the statute of limitations.

On appeal, the Eighth Circuit reversed the judgment of the district court. After evaluating several cases in which this court considered amendments to pleadings, the Eighth Circuit determined that the issue turns on whether the amended petition presents a new cause of action. *Id.* The court cited *State Bank of Gothenburg, supra*, in which we stated:

> " 'The plea of the statute of limitations was based upon the theory and assumption that the filing by the substituted plaintiff of an amended and substituted petition was the commencement of a new action, and that, more than five years having elapsed prior to the filing of such petition, the action was barred. It is conceded that the original action was begun previous to the running of the statute. We think the rule is generally well settled that the substitution of one party plaintiff for another in a pending action is a continuation of the original rather than the commencement of a new action. It is the same cause of action. Only another party has succeeded to the rights of one of the litigants, and in our practice such party may be substituted as the real party in interest in lieu of the one who commenced the action. Since the statute of limitations had not run at the commencement of the original action, it follows that it can be no defense in this action.' "

Russell, 303 F.2d at 680. The Eighth Circuit recognized Nebraska's liberal practice of permitting amendments to original petitions and concluded that the district court's dismissal of the deceased's widow's complaint was based upon an erroneous concept of Nebraska law. Further, the court stated that an amendment to the complaint would not have introduced a new and different cause of action and, thus, should have been permitted. *Id.*

The Eighth Circuit's analysis of our precedent was correct. We see no reason to distinguish between relation back of amendments to pleadings in actions for wrongful death and relation back of similar amendments in other causes of action. Thus, having already determined that the amendment to Muldrew's wrongful death petition would have been permitted, we also conclude that the amendment would relate back to the original filing date of the petition and, thereby, avoid the bar of the statute of limitations.

Although Kratville had a short time in which to accomplish the task of curing the defective pro se petition and serving the appropriate defendant, testimony at trial suggested that it was feasible. An attorney testified at trial, as an expert witness, that the tasks necessary to cure Muldrew's pro se wrongful death petition could have been completed in the time remaining before expiration of the service period on October 18, 1996. In fact, the attorney testified that in his practice, he had previously established an estate, had a personal representative appointed, and filed a petition in district court, all in a period of 8 or 9 hours. Although Kratville testified that he was unaware of the defects in the petition prior to the expiration of the service period, there was testimony to the contrary sufficient to sustain the jury's findings. Consequently, the district court did not err in overruling Kratville's "Motion to Dismiss" and his motions for judgment notwithstanding the verdict and for new trial, finding that Muldrew's pro se wrongful death petition could have been amended to include the proper parties and avoid bar by the statute of limitations through the doctrine of relation back.

Insurance References

Kratville next argues that the district court erred in failing to order a mistrial and in overruling his motions for judgment notwithstanding the verdict and for new trial due to the allegedly prejudicial effect of trial testimony referencing Kratville's malpractice insurance coverage and insurance held by Northview. The trial testimony upon which Kratville relies most in support of his argument was given by Achola on direct examination during the following exchange:

> [Plaintiff's counsel:] And did . . . Muldrew ask you to take the malpractice case against . . . Kratville?
>
> [Achola:] No — yes, he did. He initially did. And as a matter of fact, you could probably find some correspondence somewhere in this file where I advised . . . Kratville of the fact that I thought there might have been malpractice and he probably should notify his carrier. And [Kratville], if I remember correctly, asked me to think twice about that and to talk to him before I did anything further on that issue.

Kratville asserts that Achola's reference to "carrier" warrants a mistrial.

[11-15] A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001). A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial. See *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters provide examples of events which may require the granting of a mistrial. See *id.* A motion for mistrial should be made at the first reasonable opportunity. If not timely made, it is waived. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). Failure to make a timely objection waives the right to assert prejudicial error on appeal. *Id.* In addition to being timely, a motion for mistrial must be premised upon actual prejudice, not the mere possibility of prejudice. See *Groves, supra.*

In this case, Kratville argues that the reference to his insurance carrier made by Achola during his testimony was highly prejudicial. However, Kratville did not object to the question or move to strike the answer at the time of the testimony. He also failed to make any such motion at the conclusion of Achola's testimony, after the subsequent testimony of Muldrew, or at the end of trial proceedings that day, at which time several matters were dealt with outside the presence of the jury. Kratville made his first objection to the testimony in a motion for mistrial the following day, which arguably was beyond the first reasonable opportunity and, therefore, untimely.

However, even assuming that Kratville's objection to Achola's testimony was timely, the district court did not abuse its discretion by overruling the motion for mistrial. The only reference to Kratville's insurance made in the presence of the jury over approximately 6 days of testimony was Achola's mention of Kratville's "carrier." In addition, the question preceding Achola's reference to Kratville's "carrier" did not call for an

answer relating to or including information about Kratville's insurance carrier and, therefore, was not made at the prompting of Muldrew's attorney, but, rather, as an inclusion by Achola in answering a question on direct examination.

[16] It is not every casual or inadvertent reference to an insurance company in the course of trial that will necessitate a mistrial. Whether the disclosure is such as to constitute error depends essentially upon the facts and circumstances peculiar to the case under consideration. *Stumpf v. Nintendo of America*, 257 Neb. 920, 601 N.W.2d 735 (1999). Instead of making a timely objection and seeking to have any prejudice cured by a motion to strike or an admonishment to the jury, Kratville made a belated motion for the most extreme remedy. Based on our review of the record, any prejudice from Achola's testimony was not sufficient to warrant the remedy of a mistrial and the district court did not abuse its discretion in overruling Kratville's motions based on prejudicial trial references to insurance.

[17] Although Kratville's assignment of error focuses primarily on the purported prejudice of Achola's reference to Kratville's "carrier," he also asserts that references to Northview's insurance adjuster made throughout the trial were prejudicial and grounds for mistrial. However, the estate's prima facie case for malpractice against Kratville required proof that the underlying wrongful death case would have been successful but for Kratville's negligence, and evidence of Northview's insurance was relevant to show that a monetary judgment in such a case against Northview would have been recoverable. It is the established law of this jurisdiction that where the fact of insurance is relevant to some issue in the case, it cannot properly be excluded, but where not relevant to any such issue, evidence of the existence of insurance coverage is inadmissible. *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984). Although the parties stipulated to the fact that any monetary judgment or settlement recovered against Northview would have been collectible in full, based on the record, there exists no reversible error due to references to Northview's insurance carrier during trial. Therefore, we conclude that the court did not abuse its discretion in overruling Kratville's motion for mistrial.

REFERENCE TO NORTHVIEW'S LICENSE REVOCATION

Kratville next assigns that the district court erred in allowing evidence of the report of the Department of Health and Human Services regarding revocation of Northview's license to be placed before the jury. However, the only reference to the license revocation within Kratville's brief on appeal is the following: "The sole purpose of [Genthon] in introducing into evidence revocation of Northview's license by Nebraska's Department of Health and Human Services, when that evidence was irrelevant and immaterial to [Victoria's] death, was to inflame the passion of the jury. Its effect was highly prejudicial." Brief for appellant at 36-37. Kratville does not specify which evidence or testimony is the subject of his challenge and, further, does not indicate how it was prejudicial to his defense. Kratville's "argument" merely consists of a reformulation of the assigned error and, therefore, does not constitute the required argument in support of the assigned error. See, *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *State ex rel. Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

[18] Furthermore, the only basis for exclusion of the evidence mentioned in Kratville's appellate brief, as quoted above, is that the evidence was irrelevant. But our review of the record reveals that the only objection made to the report at trial was that the evidence was cumulative. One may not, on appeal, assert a different ground for excluding evidence than was urged in the objection to the trial court. *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003). A later reference made to the revocation of Northview's license was received without objection. A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *Parker v. Parker*, 268 Neb. 187, 681 N.W.2d 735 (2004).

[19] Kratville's failure to argue in support of this assignment of error means that he has failed to direct this court to any instance in the record at which a timely relevance objection was made. It is not the function of an appellate court to scour the record looking for unidentified evidentiary errors. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). In the absence of any reference to a point in the proceedings when evidence was erroneously admitted over a timely relevance

objection, we fail to find merit in Kratville's assignment that the district court erred in allowing evidence of Northview's license revocation to be admitted into evidence.

Sufficiency of Evidence

Finally, Kratville assigns that the district court erred in overruling his motion for remittitur. Kratville argues that the award of damages, consisting of $275,000 for wrongful death and $25,000 for predeath pain and suffering, was excessive and unsubstantiated by the evidence.

[20] An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Smith v. Colorado Organ Recovery Sys., supra*. In this case, the evidence is sufficient to support the award of damages. The estate introduced evidence to prove the underlying claim of wrongful death, ultimately found to have been lost as a result of legal malpractice on the part of Kratville.

The physician who was on duty when Victoria was brought to the emergency room shortly before her death performed numerous tests on Victoria, a diabetic, during her treatment at the emergency room. He found her blood glucose level to have significantly elevated from 172 on May 23, 1994, to approximately 1,150 when she arrived at the emergency room on May 26. In addition, the physician found Victoria to be severely dehydrated. He referred to the nursing home records in testifying that Victoria was nonresponsive for a number of hours before she was ultimately brought to the emergency room. The physician opined that the nursing home's negligence in leaving her in such a state for an extended period of time and allowing her blood glucose to rise to such a high level resulted in her death. As a result of the physician's discoveries as well as other observations of allegedly neglected patients from Northview, he contacted the Department of Health and Human Services Adult Protective Services.

Finally, there was substantial evidence adduced regarding the loss of Victoria's society, comfort, and companionship sustained by her children as a result of her death. Genthon testified about numerous examples of the mutual love and devotion exercised between Victoria and her children, including large family gatherings that took place on Sundays, during which Victoria's children and grandchildren would meet for the entire day to cook and visit with one another. Muldrew also testified in detail about his close relationship with Victoria and explained that he often went to her for advice and comfort while raising his own children.

[21] In sum, based on our review of the record, we conclude that the evidence presented at trial was sufficient to support the verdict for the loss of Victoria's society, comfort, and companionship sustained by her next of kin and for her predeath pain and suffering due to the negligence of Northview. On appeal, the fact finder's determination of damages is given great deference. *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004); *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002). The amount of damages awarded by the jury is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. See *Williams v. Monarch Transp.*, 238 Neb. 354, 470 N.W.2d 751 (1991). Accordingly, the district court did not err in overruling Kratville's motion for remittitur.

CONCLUSION

Having found Kratville's assignments of error to be without merit, we affirm the judgment of the district court.

AFFIRMED.

MILLER-LERMAN, J., not participating.

IN RE ESTATE OF LILLIAN M. BAUER, DECEASED. MARVIN E. BAUER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LILLIAN M. BAUER, DECEASED, APPELLANT, V. BETTY M. BEDIENT AND KATHRYN E. WARD, APPELLEES.

700 N.W.2d 572

Filed July 1, 2005. No. S-04-429.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.
3. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
4. **Decedents' Estates: Wills: Gifts: Words and Phrases.** The term "ademption" refers to the destruction or extinction of a testamentary gift by reason of a bequeathed asset's ceasing to be part of the estate at the time of the testator's death.
5. ____: ____: ____: ____. There are generally two types of ademption, one involving satisfaction of a devise and the other involving an implied revocation thereof.
6. **Decedents' Estates: Wills: Gifts.** An ademption by satisfaction occurs when a testator, prior to death, conveys to the beneficiary the property that was specifically devised to that beneficiary. Ademption by implied revocation results from an act by which a devise of specific property becomes inoperative by the sale or extinction of the property during the testator's lifetime.
7. **Decedents' Estates: Wills: Gifts: Intent: Presumptions.** The doctrine of ademption by implied revocation is based upon a presumed alteration of intention arising from the changed condition and circumstances of the testator, or on the presumption that the will would have been different had it been executed under the altered circumstances.
8. **Decedents' Estates: Wills: Gifts: Property.** The common-law doctrine that ademption results where there has been a sale of the specific property by the testator before the will becomes operative applies except as it has been modified by statute.
9. **Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good

faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.

Appeal from the County Court for Box Butte County: JAMES T. HANSEN, Judge. Affirmed.

Dennis D. King, of Smith, King & Freudenberg, P.C., for appellant.

Howard P. Olsen, Jr., and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellees.

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

STEPHAN, J.

The issue presented in this appeal is whether an ademption occurs when specifically devised real property is sold pursuant to a durable power of attorney prior to the death of the testator. We agree with the county court for Box Butte County that on the facts presented in the record, the sale resulted in an ademption, and that the proceeds of the sale remaining at the time of the testator's death were properly included in the residuary estate.

BACKGROUND

Lillian M. Bauer and Earl O. Bauer, husband and wife, executed wills on December 18, 1991, in which each left all of their property to the surviving spouse. Each will further provided:

> If my [spouse] does not survive me, I give and devise all real estate owned by me in Sheridan County, Nebraska to my son, **Marvin E. Bauer**.
>
> If my [spouse] does not survive me, I give and devise all my residuary estate, being all property, wherever situated, not otherwise effectively disposed of, to my daughters, **Betty M. Bedient and Kathy E. Ward**, in equal shares, share and share alike.

The real property referred to in the wills consisted of ranchland which Marvin E. Bauer had leased from his parents, Earl and Lillian, beginning in 1980.

On March 17, 1999, Earl and Lillian each executed a durable power of attorney appointing Marvin as attorney in fact and

authorizing him, inter alia, "[t]o acquire or dispose of real estate or personal property (tangible and intangible), for cash or on credit, at public or private sale . . . ." On August 18, Earl and Lillian sold to Marvin and his wife, by installment contract, a portion of the ranch property for a purchase price of $170,171 at 6 percent interest per annum. The contract also called for forgiveness of any unpaid portion of the remaining debt upon the deaths of Earl and Lillian. Earl signed the contract himself, and Marvin signed as attorney in fact for Lillian. Marvin made two payments under the contract totaling $29,672.56. Earl returned one-half of one payment as a gift to Marvin.

On approximately May 4, 2001, Marvin filed a petition in the county court for Box Butte County requesting appointment of a guardian and conservator for Lillian. In this petition, Marvin alleged that other assets of Earl and Lillian had been depleted and that it was necessary to sell the remaining ranchland in order to provide necessary care for both Earl and Lillian. He further alleged that an offer to purchase the ranchland was received, but that due to Lillian's "diminished mental capacity and dementia," it was necessary to have a guardian and conservator appointed for Lillian in order to complete the transaction. Earl and Lillian's daughters, Betty M. Bedient and Kathryn E. Ward, opposed the appointment of a guardian and conservator for Lillian. The parties eventually reached a compromise whereby the guardianship-conservatorship proceedings were dismissed and the entire ranch property, including that portion which Marvin and his wife had been purchasing on contract, was sold to a third party, with Marvin executing the deed as attorney in fact for both Earl and Lillian. This compromise was reflected in a written stipulation and agreement executed by Marvin (individually and as attorney in fact for Earl and Lillian), Bedient, and Ward. Marvin and his wife received a net amount of $109,238.37 from the sale proceeds for their interest in the portion of the ranch which they had been purchasing on contract. At the time of the execution of the agreement and stipulation, both Earl and Lillian resided in a nursing facility and had depleted their liquid assets except for the ranch property.

Earl died on December 9, 2001, and Lillian died on June 26, 2002, survived by Marvin, Bedient, and Ward. Lillian's will was

admitted to probate, and Marvin was appointed personal representative. He initiated this declaratory judgment action in which he alleged that approximately $194,768.82 remained from the sale of the ranch and that he was entitled to such proceeds by reason of the specific devise of the ranch property to him. He further alleged that Bedient and Ward were

> estopped from denying or claiming that such sale and the proceeds from such sale are not subject to the "nonademption" as set forth in NEB. REV. STAT. §30-2346 [(Reissue 1995)] for the reason that they joined in the procedure and process by which such real estate was sold by a power of attorney rather than through a regularly appointed guardian/conservator.

Bedient and Ward filed an answer in which they specifically alleged that Neb. Rev. Stat. § 30-2346 (Reissue 1995) was inapplicable. All parties filed motions for summary judgment. The county court granted summary judgment in favor of Bedient and Ward, determining that the specific devise of real estate was adeemed by the sale of the property and that Bedient and Ward were not estopped from claiming ademption.

Marvin perfected this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Marvin assigns, restated, that the county court erred in entering summary judgment in favor of Bedient and Ward based upon the court's determination that the specific devise of the ranch property was adeemed by its sale during Earl and Lillian's lifetimes and its finding that Bedient and Ward were not estopped from asserting the ademption.

STANDARD OF REVIEW

[1,2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Spring Valley IV Joint Venture v. Nebraska State Bank*, 269 Neb. 82, 690 N.W.2d 778 (2005); *Richards v. Meeske*, 268 Neb. 901,

689 N.W.2d 337 (2004). 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. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

[3] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001); *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

ANALYSIS

ADEMPTION

[4-6] The term "ademption" refers to "[t]he destruction or extinction of a testamentary gift by reason of a bequeathed asset's ceasing to be part of the estate at the time of the testator's death . . . ." Black's Law Dictionary 42 (8th ed. 2004). There are generally two types of ademption, one involving satisfaction of a devise and the other involving an implied revocation thereof. *In re Estate of Poach*, 257 Neb. 663, 600 N.W.2d 172 (1999); *Reed v. McClow*, 205 Neb. 739, 290 N.W.2d 186 (1980). An ademption by satisfaction occurs when a testator, prior to death, conveys to the beneficiary the property that was specifically devised to that beneficiary. *Id.*; Neb. Rev. Stat. § 30-2350 (Reissue 1995). Ademption by implied revocation results from an " 'act by which a devise . . . of specific property becomes inoperative by the sale or extinction of the property *during the testator's lifetime.*' " *In re Estate of Poach*, 257 Neb. at 668-69, 600 N.W.2d at 177, quoting *Reed v. McClow, supra*. In this case, we are presented with the question of whether an ademption by implied revocation occurred when the real property specifically devised to Marvin by his mother was sold to a third party during her lifetime.

[7] The doctrine of ademption by implied revocation is " 'based upon a presumed alteration of intention arising from the changed condition and circumstances of the testator, or on the presumption

that the will would have been different had it been executed under the altered circumstances.' " *In re Estate of Poach*, 257 Neb. at 669, 600 N.W.2d at 177, quoting *Baacke v. Baacke*, 50 Neb. 18, 69 N.W. 303 (1896). To illustrate this principle, this court wrote in *Baacke* that a "sale of the entire estate devised" will have the effect of revocation because "the will cannot thereafter take effect on it." 50 Neb. at 21, 69 N.W. at 304. We held in *In re Estate of Kulp*, 122 Neb. 157, 239 N.W. 636 (1931), that specific legacies which were to be paid from the sale of certain real property after the death of the testatrix were adeemed and rendered inoperative by the sale of such property by the testatrix during her lifetime. Rejecting an argument that the legacies should be satisfied from the proceeds of such sale, we stated that such distribution "would be, in effect, making a new will." *Id.* at 163, 239 N.W. at 638.

[8] The common-law doctrine that ademption results where there has been a sale of the specific property by the testator before the will becomes operative applies except as it has been modified by statute. *Reed v. McClow, supra*; *Baacke v. Baacke, supra.* Certain rules of construction codified by the adoption of the Nebraska Probate Code in 1974 modified the common-law doctrine of ademption by implied revocation under certain circumstances. *Reed v. McClow, supra.* Specifically, § 30-2346 provides in relevant part:

> (a) If specifically devised property is sold by a conservator or guardian . . . the specific devisee has the right to a general pecuniary devise equal to the net sale price . . . . This subsection does not apply if, subsequent to the sale . . . it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (b).
>
> (b) A specific devisee has the right to the remaining specifically devised property and:
>
> (1) any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property.

This statute creates an exception to the common-law rule of ademption by implied revocation when property is sold by a conservator or guardian. Although the statute does not create a

similar exception with respect to sales by an attorney in fact under a durable power of attorney, Marvin urges that we should follow the Supreme Court of Kansas and judicially formulate such an exception. In *In re Estate of Graham*, 216 Kan. 770, 777-78, 533 P.2d 1318, 1323-24 (1975), the court held that

> where following execution of his will a testator becomes incompetent and his conservator *or attorney-in-fact* acting under a power of attorney sells the property which is the subject matter of a specific devise and a portion of the proceeds from the sale of the property remains in the hands of the conservator *or attorney-in-fact* at the time of the testator's death, an ademption ordinarily does not take place. The unexpended proceeds of the sale are impressed with a trust in the hands of the executor and on distribution of the estate should be paid to the devisee in accordance with the specific devise contained in the will.

(Emphasis supplied.) The Kansas Supreme Court had previously held that a voluntary sale by a competent testator of ranch property which had been specifically devised to his nephews resulted in an ademption and that the nephews were not therefore entitled to the proceeds of the sale remaining at the death of the testator. *In re Estate of Snyder*, 199 Kan. 487, 430 P.2d 212 (1967). In *In re Estate of Graham*, the court reasoned that while ademption of a specific devise normally occurs when a competent testator voluntarily conveys the devised property during his lifetime, as in *In re Estate of Snyder*, the intent of the testator to effect an ademption cannot be presumed from a sale by a person acting in a representative capacity at a time when the testator "had no capacity or understanding relative to the sale of his real estate." *In re Estate of Graham*, 216 Kan. at 774, 533 P.2d at 1321.

The *In re Estate of Graham* opinion makes no reference to any Kansas statute which modifies the common-law doctrine of ademption by implied revocation. If we were to adopt the reasoning of *In re Estate of Graham*, we would be extending Nebraska's current statutory rule of nonademption with respect to a sale by a conservator, as set forth in § 30-2346(a), to a sale by an attorney in fact under a durable power of attorney. In *In re Estate of Hegel*, 76 Ohio St. 3d 476, 668 N.E.2d 474 (1996), the Supreme Court of Ohio addressed this precise issue. An

Ohio statute modeled after the Uniform Probate Code provided that ademption would not result from a sale of specifically bequeathed property by a guardian and that the specific devisee or legatee had a right to a general pecuniary bequest or devise equal to the net proceeds of such sale. The court noted that the Ohio General Assembly had not adopted subsequent amendments to the Uniform Probate Code which established a similar rule of nonademption with respect to specifically devised property sold " 'by an agent acting within the authority of a *durable power of attorney* for an incapacitated principal.' " *In re Estate of Hegel*, 76 Ohio St. 3d at 477, 668 N.W.2d at 476, quoting Unif. Probate Code § 2-606(b), 8 U.L.A. 171 (Supp. 1996). The court indicated its unwillingness "to read into the statute language that the [Ohio] General Assembly has decided not to specifically include." *In re Estate of Hegel*, 76 Ohio St. 3d at 478, 668 N.E.2d at 476. It further noted a distinction between a guardian appointed by and subject to the control of a probate court and an attorney in fact who is permitted to act without court approval as the alter ego of the principal.

We conclude that the county court was correct in applying the reasoning of *In re Estate of Hegel* to this case. The Nebraska Legislature has not adopted the amendments to the Uniform Probate Code which establish a rule of nonademption in the event of the sale of specifically bequeathed property by an attorney in fact, and we deem it inappropriate for this court to do so by judicial fiat. Although Marvin contends that Lillian was incompetent at the time of the sale, and therefore could not have intended that the sale would operate as an ademption of the specific bequest of the ranch to Marvin, there is no allegation or showing that she lacked the capacity to execute the durable power of attorney in 1999. Neb. Rev. Stat. § 30-2666 (Reissue 1995) provides:

> All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal were competent and not disabled.

Thus, as a matter of law, the sale of the ranch by the attorney in fact must be treated as the act of a competent principal who, by

such act, impliedly revoked the specific bequest of such property. Under the common law, ademption by implied revocation necessarily resulted from this transfer.

ESTOPPEL

In rejecting Marvin's claim that Bedient and Ward were estopped from taking the position that the sale of the ranch and the resulting proceeds were not subject to the nonademption rule of § 30-2346, the county court found:

> Betty Bedient and Kathryn Ward were solicitous of their father's feelings and did not wish for him to be declared incapacitated in a guardianship hearing. Evidently, Lillian M. Bauer was considered incapacitated by all the children at the time of the proposed guardianship hearing. There is no evidence that Betty Bedient and Kathryn Ward requested a durable power of attorney in an effort to mislead Marvin Bauer to their benefit.

[9] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Id.* The record reflects that Marvin was represented by an attorney during the negotiations which preceded the sale, as were Bedient and Ward. The agreement reached by the parties is set forth in writing and is signed by each party. The document recites that Earl and Lillian had "depleted their assets" except for the ranch property, and further identifies that portion of the net sale proceeds to which Marvin and his wife were entitled in exchange

for their interest in the property. The document makes no reference to the disposition of any proceeds of the sale remaining after the death of Earl and Lillian, or as to the treatment of such proceeds under their wills. There is no allegation or showing that either Bedient or Ward made any representations, promises, or statements to Marvin as to this issue, or that they concealed any material information from him. From our review of the record, we conclude that there is no genuine issue of material fact regarding Marvin's allegation of estoppel.

CONCLUSION

For the reasons set forth, we conclude that the specific devise of the ranch property in the last will and testament of Lillian was adeemed by its sale during her lifetime and that Bedient and Ward, as devisees of Lillian's residuary estate, were not estopped from asserting the ademption by implied revocation resulting from the sale. Because the record reflects no dispute as to any facts material to these issues, the county court did not err in overruling the motion for summary judgment filed by Marvin, or in granting summary judgment in favor of Bedient and Ward pursuant to their motion. The judgment of the county court is therefore affirmed.

AFFIRMED.

JAMES MALOLEPSZY AND LYNN MALOLEPSZY, APPELLANTS, V. STATE OF NEBRASKA, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND CHAS. VRANA & SON CONSTRUCTION CO., THIRD-PARTY DEFENDANT, APPELLEE.

699 N.W.2d 387

Filed July 1, 2005. No. S-04-667.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
3. **Actions: Parties: Judgments: Appeal and Error.** Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004) requires, in cases with multiple claims or parties, an explicit adjudication with respect to all claims or parties or, failing such explicit adjudication of

all claims or parties, an express determination that there is no just reason for delay of an appeal of an order disposing of less than all claims or parties and an express direction for the entry of judgment as to those adjudicated claims or parties.

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

James E. Schaefer and Jill A. Daley, Senior Certified Law Student, of Gallup & Schaefer, for appellants.

Jon Bruning, Attorney General, and Matthew F. Gaffey for appellee State of Nebraska.

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

MILLER-LERMAN, J.

NATURE OF CASE

James Malolepszy was injured in a motor vehicle accident which occurred in a highway construction zone. James and his wife, Lynn Malolepszy, appellants, sued the State of Nebraska, an appellee, in the district court for Douglas County. The State filed a third-party complaint against Chas. Vrana & Son Construction Co. (Vrana), the company contracted by the State to carry out the highway construction, and Charles Atkins, the driver of the other vehicle involved in the accident, who was subsequently dismissed as a party. The State filed a motion for summary judgment. On May 13, 2004, the district court granted the State's motion for summary judgment and dismissed the Malolepszys' petition against the State. The third-party action filed by the State against Vrana was not resolved in the May 13 order, and the district court did not direct the entry of a final judgment under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004) as between the Malolepszys and the State. The Malolepszys appeal. Because there was no express adjudication of the State's third-party action against Vrana and the district court did not make an express determination and express direction to enter judgment on the Malolepszys' claim against the State as required by § 25-1315(1), this court is without jurisdiction, and we dismiss the appeal.

STATEMENT OF FACTS

At approximately 12:30 p.m. on May 23, 2001, James was driving his black Jeep Cherokee in an easterly direction within a highway construction zone on West Dodge Road in Omaha, Nebraska. Lynn was driving another vehicle following him. At the time, the State, through the Department of Roads, was undertaking a highway construction project on West Dodge Road from approximately 155th to 170th Streets in Omaha; however, the roadway remained open for public travel, with one lane of traffic in each direction. As James traveled east, he approached the area where a bridge for 168th Street was being constructed over West Dodge Road. A pickup truck operated by Atkins was stopped along the south shoulder of the eastbound lane of West Dodge Road at 168th Street. Atkins' truck was facing in a northwesterly direction. When James was approximately one-half to one car length from where Atkins' truck was stopped, Atkins suddenly pulled out in front of James' Jeep, and the vehicles immediately collided. James was seriously injured in the collision.

On July 15, 2002, James filed an action against the State pursuant to the State Tort Claims Act. On March 18, 2003, an amended petition was filed which also named Lynn as a plaintiff. The Malolepszys asserted three causes of action: negligence, negligent infliction of emotional distress, and loss of consortium. They alleged, inter alia, that (1) the State had a duty to warn of the dangerous and hazardous conditions existing on the roadway and to utilize fundamental safety principles when routing traffic through construction and maintenance sites, (2) the State breached its duty when it failed in certain respects to provide adequate warnings and safe roadway conditions, and (3) the injuries which resulted from the collision were directly and proximately caused by the negligence of the State.

On August 13, 2003, the State filed a third-party complaint against Vrana and Atkins. In its third-party complaint, the State prayed that in the event of a judgment in favor of the Malolepszys against the State, the court award judgment in favor of the State against Vrana and Atkins in an amount proportional to the relative negligence of each third-party defendant. On March 17, 2004, Atkins was dismissed from the action on the State's motion. The State's action against Vrana remained pending.

On April 6, 2004, the State moved for summary judgment against the Malolepszys. A hearing on the motion was held on May 6. On May 13, the court entered an order sustaining the motion. In summary, the court concluded as a matter of law that Atkins was negligent and that his negligence was the sole proximate cause of the collision. In this regard, the court determined that the Department of Roads' design and construction choices were not relevant to examining the causes of the collision because the State was not bound to have anticipated or to have contemplated that a driver in Atkins' position would negligently enter an oncoming lane of traffic without yielding to traffic in that lane. The court determined that there were no factual issues regarding the proximate cause of the accident for a finder of fact to resolve, and it therefore sustained the State's motion for summary judgment and dismissed the Malolepszys' petition against the State. In the May 13 order, the court made no findings or orders regarding the State's pending third-party complaint against Vrana.

The Malolepszys filed a notice of appeal on May 27, 2004. On June 30, the Nebraska Court of Appeals issued an order for the Malolepszys to show cause why, in light of the fact that the May 13 order was silent with respect to the third-party action brought by the State against Vrana, the appeal should not be dismissed for lack of jurisdiction because there was no final, appealable order. In response, the Malolepszys filed an affidavit stating that they had not joined Vrana as a defendant and asserting that the May 13 order was final because it disposed of the claims set forth in their petition. The Court of Appeals ordered the appeal to proceed and ordered the parties to address in their briefs the jurisdictional issue regarding the applicability of § 25-1315(1) with respect to the third-party action brought by the State against Vrana. The appeal was subsequently moved to this court's docket.

ASSIGNMENT OF ERROR

The Malolepszys assert that the district court erred in granting the State's motion for summary judgment.

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. *In*

re Guardianship & Conservatorship of Woltemath, 268 Neb. 33, 680 N.W.2d 142 (2004).

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004). We find it necessary to examine jurisdiction in this case. Section 25-1315(1) controls our analysis. Section 25-1315(1) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Although the district court in its May 13, 2004, order dismissed the Malolepszys' petition against the State, the court did not explicitly adjudicate the State's pending third-party claim against Vrana, and the court did not make the express determination and the express direction required by § 25-1315(1) in cases involving multiple claims or parties. Therefore, as explained below, we conclude that this court lacks jurisdiction over this case and that the appeal must be dismissed.

We noted in *Keef v. State*, 262 Neb. 622, 628, 634 N.W.2d 751, 758 (2001), that "[p]rior to the enactment of § 25-1315, an order that effected a dismissal with respect to one of multiple parties was a final, appealable order, and the complete dismissal with prejudice of one of multiple causes of action was a final,

appealable order" but that after the enactment of § 25-1315, the statute "permits a judgment to become final only under the limited circumstances set forth in the statute." We also noted that "by its terms, § 25-1315(1) is implicated only where multiple causes of action are presented or multiple parties are involved, and a final judgment is entered as to one of the parties or causes of action." 262 Neb. at 627-28, 634 N.W.2d at 757.

The Malolepszys contend that the requirements of § 25-1315(1) do not apply to their appeal because they did not join Vrana as a party and that instead, the State, by virtue of its third-party complaint, joined Vrana as a third party. The Malolepszys argue, in effect, that their action does not include a claim against Vrana. We reject the Malolepszys' argument. By its terms, § 25-1315(1) encompasses actions in which "more than one claim for relief is presented . . . whether as a claim, counterclaim, crossclaim, or third-party claim." Because the present case undeniably involves a "third-party claim" and is an action where "more than one claim for relief is presented," it is therefore an action implicating § 25-1315(1).

The May 13, 2004, order from which the Malolepszys attempt to appeal adjudicates their claim against the State, but the order does not expressly adjudicate the State's third-party claim against Vrana nor has the third-party claim against Vrana been adjudicated in another order. The district court in the May 13 order did not make "an express determination that there [was] no just reason for delay," nor did it make "an express direction for the entry of judgment" as to the Malolepszys' claim against the State as required under § 25-1315(1). Therefore, under § 25-1315(1), the order did not terminate the action as to "any of the claims or parties."

To be appealable, an order must satisfy the final order requirements of Neb. Rev. Stat. § 25-1902 (Reissue 1995), and additionally, where implicated, § 25-1315(1). *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004), *affirmed* 269 Neb. 595, 694 N.W.2d 208 (2005). Although the grant of summary judgment is a final order, see *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996), § 25-1315(1) is implicated in this case, and the May 13, 2004, order failed to satisfy § 25-1315(1). The May 13 order was not

an appealable order. Therefore, this court does not have jurisdiction over this appeal.

Both parties in this case argue that the order was appealable because although the order did not explicitly rule on the third-party action, the third-party claim was dependent on the Malolepszys' claim against the State, and dismissal of the Malolepszys' claim against the State effectively disposes of the State's claim against Vrana. The issue therefore is whether § 25-1315(1) prohibits an immediate appeal from an order which does not explicitly adjudicate all claims but which may have obviated the need to resolve the unadjudicated claims.

Because § 25-1315(1) is substantially similar to Fed. R. Civ. P. 54(b), we look to federal cases construing rule 54(b) for guidance in construing § 25-1315(1). See *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003). In *Federal Sav. & Loan Ins. Corp. v. Huff*, 851 F.2d 316 (10th Cir. 1988), the Court of Appeals for the 10th Circuit determined that an order dismissing a claim was not appealable without a rule 54(b) certification when counterclaims and cross-claims remained pending, even though it was undisputed that the counterclaims and cross-claims were substantively dependent upon the dismissed claim. The counterclaims and cross-claims were not referred to in the order dismissing the claim, and the appellate court stated that rule 54(b)'s

> salutary goal of certainty with respect to jurisdiction of appeals is unsatisfied by appeal from an order dismissing an action or a complaint, leaving dependent claims expressly unadjudicated. In such circumstances the appellate court, and the parties themselves, must investigate the nature of the order from which the appeal was taken, the action itself, and the claims which were not addressed by the district court.

851 F.2d at 319-20. The appellate court further noted that "for notice of appeal purposes, there remains a technical difference between the practical collapse of dependent claims and an explicit dismissal of those claims." *Id.* at 319.

The Maryland Court of Appeals, construing a Maryland statute similar to rule 54(b) and to § 25-1315(1) and relying on federal cases, determined that "no matter how groundless an outstanding claim might be, unless it is somehow disposed of through the

entry of a judgment, that outstanding claim will be sufficient to deprive an appellate court of jurisdiction over the case under federal rule 54(b)." *Estep v. Georgetown Leather*, 320 Md. 277, 286, 577 A.2d 78, 82 (1990). The court in *Estep* concluded that under the Maryland rule, the appellate court lacked jurisdiction "until the judgment on the third-party claim was entered on the docket." 320 Md. at 287, 577 A.2d at 83. Based on the clear language of the Maryland rule, the Maryland court declined "to adopt a new test based on the mootness or viability of third-party claims to determine when a judgment is to be considered as final and appealable." 320 Md. at 287, 577 A.2d at 82. The Maryland court explained its rationale for declining to adopt such a test:

> We do not believe that either the public or the appellate courts of this state will be well served by a test which requires an examination of the legal relationships of all of the claims at trial and a conclusion through deductive reasoning that a judgment on one claim has obviated the need for a judgment to be entered on the remaining claims. Such a test would only make the legal system more mysterious to the general public. The value of a simple docket entry which would make clear to everyone the disposition of each and every claim in a case cannot be overemphasized.

320 Md. at 287, 577 A.2d at 82.

We are aware that other courts have taken a different approach to this issue. See *American Nat. Bank and Trust v. Secretary of HUD*, 946 F.2d 1286, 1291 n.6 (7th Cir. 1991) (stating that "technical requirements of [rule] 54(b) need not be met when claims cannot 'logically survive a judgment' "). However, we are persuaded that the reasoning in *Federal Sav. & Loan Ins. Corp. v. Huff, supra*, and *Estep v. Georgetown Leather, supra*, is more harmonious with the provisions of § 25-1315(1).

[3] The clear purpose of § 25-1315(1) is to provide certainty as to when an order disposing of fewer than all claims or parties in a case involving multiple claims or parties is appealable. As the joinder rules in Nebraska have been recently liberalized, thus permitting more numerous combinations of parties and claims, the necessity for such certainty is even more important. Rather than leave an assessment of the status of the trial proceedings to appellate conjecture, we read § 25-1315(1) to require, in cases

with multiple claims or parties, an explicit adjudication with respect to all claims or parties or, failing such explicit adjudication of all claims or parties, an express determination that there is no just reason for delay of an appeal of an order disposing of less than all claims or parties and an express direction for the entry of judgment as to those adjudicated claims or parties. Lacking both an adjudication of all claims and an order under § 25-1315(1), we do not have jurisdiction of this case and we must dismiss this appeal.

CONCLUSION

We conclude that we lack jurisdiction over this appeal because there was no adjudication of the State's third-party claim against Vrana and the district court did not make the express determination and express direction as required under § 25-1315(1) to enter judgment on the Malolepszys' claim against the State. When an appellate court is without jurisdiction to act, the appeal must be dismissed. *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004). We therefore dismiss this appeal.

APPEAL DISMISSED.

IN RE COMPLAINT OF CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT.
CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT (CNPPID), APPELLANT, V. THE PERSONS IDENTIFIED AS REGISTERED IRRIGATION WELL OWNERS LOCATED IN THE PLATTE RIVER WATERSHED AS LISTED IN THE DEPARTMENT OF NATURAL RESOURCES' DATABASE UPSTREAM OF CNPPID'S DIVERSION DAM AND NEBRASKA DEPARTMENT OF NATURAL RESOURCES, APPELLEES.

699 N.W.2d 372

Filed July 1, 2005. No. S-04-836.

1. **Administrative Law: Appeal and Error.** On questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director of the Department of Natural Resources.

2. **Irrigation.** The system of irrigation in Nebraska has its foundation in statutory enactments and constitutional provisions.
3. ____. Rights of irrigation in Nebraska exist only as they have been created and defined by the law and are therefore limited in their scope by the language of their creation.
4. **Waters: Legislature.** In Nebraska, the Legislature has not developed an appropriation system that addresses direct conflicts between users of surface water and ground water that is hydrologically connected.
5. **Administrative Law: Waters: Natural Resources Districts.** Nebraska has two separate systems for the distribution of its water resources: One allocates surface water, and the other allocates ground water. The Department of Natural Resources regulates surface water appropriators, see Neb. Rev. Stat. § 61-201 et seq. (Reissue 2003 & Cum. Supp. 2004), and ground water users are statutorily regulated by the natural resources districts through the Nebraska Ground Water Management and Protection Act, see Neb. Rev. Stat. § 46-701 et seq. (Reissue 2004).

Appeal from the Nebraska Department of Natural Resources. Affirmed.

Michael C. Klein, of Anderson, Klein, Swan & Brewster, for appellant.

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

Steven C. Smith, of Pahlke, Smith, Snyder, Petitt & Eubanks, a general partnership, for amici curiae Pathfinder Irrigation District et al.

Robert J. McCormick for amicus curiae The Tri-County Water Users Association.

Donald G. Blankenau and Jaron J. Bromm, of Fennemore Craig, P.C., for amicus curiae Nebraska Groundwater Management Coalition.

LeRoy W. Sievers, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for amici curiae Nebraska Water Users, Inc., and Nebraska State Irrigation Association.

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

WRIGHT, J.

NATURE OF CASE

The Central Nebraska Public Power and Irrigation District (Central) filed an amended complaint with the Nebraska Department of Natural Resources (Department) alleging that "registered irrigation well owners located in the Platte River watershed" were diverting waters of the Platte River without having first obtained appropriations from the Department. Central requested that the irrigation well owners be ordered to cease such "unpermitted diversions." The Department issued an order summarily dismissing Central's amended complaint for lack of jurisdiction to grant the relief requested. Central appealed.

SCOPE OF REVIEW

[1] On questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director of the Department. See *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004).

FACTS

Central is a political subdivision of the State of Nebraska organized pursuant to Neb. Rev. Stat. § 70-601 et seq. (Reissue 2003 & Cum. Supp. 2004). It owns and operates a system of reservoirs, canals, and laterals utilized for the purpose of hydropower production, delivery of irrigation water, recreation, and environmental enhancement. One of the principal features of this system is Lake McConaughy.

Central's amended complaint alleged that persons identified as registered irrigation well owners located in the Platte River watershed were diverting waters of the Platte River and its tributaries without first obtaining appropriations from the Department. Central asserted that these unpermitted diversions caused an average annual depletion of approximately 100,000 acre feet which would otherwise be available for Central's use pursuant to its appropriations. The complaint alleged that the ground water users were subject to the prior appropriations doctrine set forth in Neb. Const. art. XV, § 6.

In its prayer for relief, Central requested that the Department order the well owners to cease the unpermitted diversions,

declare Central's appropriations prior and superior to such diversions, take all necessary and appropriate actions to protect Central's appropriations, and enforce the regulation of unpermitted diversions.

On July 1, 2004, the director of the Department issued an order dismissing the amended complaint for lack of jurisdiction to grant the relief requested. The director concluded as to the issue presented that the Department's legal authority was limited to working cooperatively with the natural resources districts to address conflicts between surface water appropriators and ground water users by jointly developing and implementing integrated management plans. The order stated: "The Legislature has not given the Department . . . any independent authority to regulate or administer ground water users for the benefit of surface water appropriators." Central timely perfected an appeal.

ASSIGNMENTS OF ERROR

Central's assignments of error may be summarized and restated as follows: The Department erred in finding that it was without jurisdiction to "regulate or administer" ground water users for the benefit of surface water appropriators.

ANALYSIS

ISSUE PRESENTED

The issue presented is whether the Department has jurisdiction to adjudicate disputes between surface water appropriators and ground water users. On questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director of the Department. See *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004).

BACKGROUND OF IRRIGATION LAW IN NEBRASKA

[2,3] The system of irrigation in Nebraska has its foundation in statutory enactments and constitutional provisions. See *Drainage District No. 1 v. Suburban Irrigation District*, 139 Neb. 460, 298 N.W. 131 (1941). Rights of irrigation in the state exist only as they have been created and defined by the law and are therefore limited in their scope by the language of their creation. *Id.* The first enactment relating to irrigation was 1889 Neb. Laws,

ch. 68, p. 503, entitled " 'An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes.' " 139 Neb. at 468, 298 N.W. at 135. This act provided: " 'The right of the use of running water, flowing in a river or stream or down a canyon, or ravine, may be acquired by appropriation by any person or persons, company or corporation organized under the laws of the state of Nebraska . . . .' " *Id.*

Subsequently, 1895 Neb. Laws, ch. 69, §§ 42-43, p. 260, provided:

> " 'Sec. 42. The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as heretofore provided.
>
> " 'Sec. 43. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purposes . . . .' "

Drainage District No. 1 v. Suburban Irrigation District, 139 Neb. at 468, 298 N.W. at 135.

In 1920, the Nebraska Constitutional Convention amended Neb. Const. art. XV, §§ 4 through 6, to mimic the previously enacted legislation:

> " 'Sec. 4. *Water a Public Necessity.* The necessity of water for domestic use and for irrigation purposes in the state of Nebraska is hereby declared to be a natural want.
>
> " 'Sec. 5. *Use of Water Dedicated to People.* The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section.
>
> " 'Sec. 6. *Right to Divert Unappropriated Waters.* The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose . . . .' "

(Emphasis in original.) *Drainage District No. 1 v. Suburban Irrigation District*, 139 Neb. at 469, 298 N.W. at 136.

In *Drainage District No. 1*, we first acknowledged that certain kinds of water were not subject to appropriation. There, the defendant irrigation district sought the right by eminent domain to place obstructions or dams in the plaintiff's drainage ditches. One of the controlling questions was from what source and how did the irrigation district become vested with power to use and appropriate the water out of such drainage ditches. From the history of our irrigation laws and constitutional provisions, the court concluded that the right of appropriation for irrigation was limited to the waters of the " 'natural streams' of the state." *Id.* at 470, 298 N.W. at 136. The source of the waters contained in the drainage ditches was low-lying land which was too wet to farm, over which surface waters were diffused, and through which subterranean waters percolated. The court concluded that the drainage ditches were not natural streams or natural watercourses and that their inherent nature excluded them from the class or kind of waters to which state laws of appropriation were applicable. Because such waters were not subject to appropriation for irrigation purposes, the attempt to secure them for the irrigation district by exercising the right of eminent domain was unauthorized. *Id.*

Subsequent to *Drainage Dist. No. 1*, we recognized the potential conflicts between ground water users and surface water appropriators in *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966). In that case, an order by the director of Water Resources authorized Omaha's Metropolitan Utilities District to supplement its water supply with ground water. Pursuant to Neb. Rev. Stat. § 46-638 (Cum. Supp. 1963), the director was authorized to grant permits to cities to develop ground water supplies in the area served by the city. The use of ground water pursuant to a permit was governed by Neb. Rev. Stat. § 46-613 (Cum. Supp. 1963).

In discussing the history of irrigation law, the court noted that it was not until 1957 that the Legislature undertook any form of ground water regulation. Such legislation provided for registration of irrigation wells, spacing of such wells, and preferences in the use of ground water. *Metropolitan Utilities Dist. v. Merritt Beach Co., supra.* In 1959, the Legislature provided for the creation of ground water conservation districts. *Id.* In 1963, the

Legislature defined ground water and required that a permit be obtained to pump underground water within 50 feet of the bank of a natural stream. *Id.* At that time, ground water was defined by Neb. Rev. Stat. § 46-635 (Cum. Supp. 1963) as that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land.

In recognizing the beginning of conflicts between ground water and surface water rights, we stated:

> [A]cts of the Legislature were mere beginnings in the exercise of possible control and regulation of ground water. While the rights of appropriators to the use of water from rivers and streams have been protected over the years, rights in the use of ground water have not been determined nor protected, nor the public policy with reference to the use of such underground waters legislatively declared. The difficulties in administering dual conflicting principles, and fixing the rights of users thereunder, are readily apparent.

Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. at 799, 140 N.W.2d at 636.

Recently, in *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005), we addressed whether a surface water appropriator had a claim against a ground water user for interference with a surface water appropriation. Spear T Ranch (Spear T) had filed a complaint in the district court, alleging that it had surface water appropriations on Pumpkin Creek and that certain ground water users who had irrigation wells within the boundaries of the Pumpkin Creek basin were converting Spear T's surface water rights to their own use without compensating Spear T. Spear T alleged it would be irreparably harmed if the ground water users continued to use their irrigation wells. It sought compensation for the value of the surface water appropriations allegedly taken by such ground water users and, in the alternative, special damages for the value of the water rights and injunctive relief.

Spear T argued that because the water in question was hydrologically connected and because Spear T had a prior surface water appropriation, it had priority to the water in the Pumpkin Creek basin. It asked this court to apply legislatively created surface water priorities to ground water use without considering existing common-law rules. We declined to apply the statutory

surface water appropriation rules to conflicts between surface water appropriators and ground water users. While we accepted as true that the water in question was hydrologically connected, we pointed out that water rarely runs in a true underground stream. *Id.*

[4] We found no statutory authority or case law that supported applying surface water appropriations to ground water. While we recognized that most legislatures in western states had developed comprehensive appropriation systems which were overseen by administrative agencies, we pointed out that in Nebraska, the Legislature has not developed an appropriation system that addresses direct conflicts between users of surface water and ground water that is hydrologically connected. *Id.*

We recognized that the prior appropriation rule which Spear T advocated would give first-in-time surface water appropriators the right to use whatever water they wanted to the exclusion of later-in-time ground water users. We pointed out that this rule could have the effect of shutting down all the wells in any area where surface water appropriations were hydrologically connected to ground water. *Id.*

CENTRAL'S ARGUMENT

Central claims that the Nebraska Constitution charges the Department with regulating all waters of the state based upon the doctrine of prior appropriation. It relies upon Neb. Const. art. XV, § 6, and also argues that the Department is charged with administering all water of the state through a number of statutory provisions. Specifically, Central notes Neb. Rev. Stat. § 61-206(1) (Cum. Supp. 2004), which provides: "The Department . . . is given jurisdiction over all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute." In addition, Neb. Rev. Stat. § 46-226 (Reissue 2004) states: "The department shall make proper arrangements for the determination of priorities of right to use the public waters of the state and determine the same. The method of determining the priority and amount of appropriation shall be fixed by the department."

Central asserts that Neb. Rev. Stat. § 61-201 et seq. (Reissue 2003 & Cum. Supp. 2004) grants authority to the Department and

that these statutes contain no limitation upon the Department's jurisdiction over matters concerning water rights.

Department's Argument

The Department argues that it does not have authority to regulate ground water users for the benefit of surface water appropriators. It emphasizes that the jurisdiction delegated by § 61-206(1) is limited by the phrase "except as such jurisdiction is specifically limited by statute." Brief for appellee Department at 7. It argues that Neb. Const. art. XV, § 6, refers only to "natural stream[s]" and that this is a reference to surface water only. Brief for appellee Department at 6.

The Department also relies upon Neb. Rev. Stat. § 46-703(5) (Reissue 2004), which provides: "The Department . . . is responsible for regulation of surface water resources . . . ." The Department does not claim that it lacks statutory authority to regulate surface water, but, rather, that the regulation of ground water users is beyond its authority. It cites § 46-703(3), which provides:

> Natural resources districts . . . are the preferred entities to regulate, through ground water management areas, ground water related activities which are contributing to or are, in the reasonably foreseeable future, likely to contribute to conflicts between ground water users and surface water appropriators or to water supply shortages in fully appropriated or overappropriated river basins, subbasins, or reaches.

Based upon the above statutes, the Department asserts that the regulation of ground water has been statutorily delegated to the natural resources districts.

Resolution

In *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005), we addressed whether a surface water appropriator had a claim against a ground water user for interference with a surface water appropriation. The issue of the Department's jurisdiction to hear disputes between surface water appropriators and ground water users was not presented; however, the issue is now squarely before us.

[5] Nebraska has two separate systems for the distribution of its water resources: One allocates surface water, and the other

allocates ground water. *Id.* The Department regulates surface water appropriators, see § 61-201 et seq., and ground water users are statutorily regulated by the natural resources districts through the Nebraska Ground Water Management and Protection Act, see Neb. Rev. Stat. § 46-701 et seq. (Reissue 2004).

The Nebraska Constitution does not address the use of ground water, and historically, the regulation of ground water has been governed by the rule of reasonable use. In *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 800, 140 N.W.2d 626, 636-37 (1966), we stated: "Without any declaration of public policy as to the use of underground waters other than the constitutional declaration that they are a natural want, we adhere to the rule that such waters must be reasonably used for a beneficial purpose without waste." *Metropolitan Utilities Dist.* impliedly recognized that ground water was included in article XV, § 4 ("water . . . declared to be a natural want"), but was not included in article XV, § 5 ("the water of every natural stream").

After the constitutional amendments in 1920, the Legislature did not address any form of ground water regulation until 1957. By then, the difficulties in administering dual conflicting principles between the rights of appropriators and the rights in the use of ground water and in fixing the rights of users had become readily apparent. See *Metropolitan Utilities Dist. v. Merritt Beach Co., supra.*

In this case, we are presented with a question of law, and we are obligated to reach a conclusion independent of the legal determinations made by the director of the Department. See *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004). We conclude that the Department has no independent authority to regulate ground water users or administer ground water rights for the benefit of surface water appropriators. We do not address what relief, if any, Central might obtain under § 46-701 et seq.

This conclusion is clearly supported by our decision in *Spear T Ranch v. Knaub, supra*, in which we declined to apply legislatively created surface water priorities to ground water use for the reason that no statutory authority or case law supported the rationale of applying the rules relating to surface water appropriations to ground water use. We recognized that the Legislature has not

developed an appropriation system that addresses direct conflicts between users of surface water and ground water that is hydrologically connected. We noted that the lack of an integrated system was reinforced by the fact that different agencies regulate ground water and surface water.

CONCLUSION

For the reasons set forth herein, the decision of the Department's director, which dismissed Central's amended complaint for lack of jurisdiction to grant the relief requested, is affirmed.

AFFIRMED.

FRATERNAL ORDER OF POLICE, LODGE NO. 8, AND ROSS STEBBINS, APPELLANTS, V. COUNTY OF DOUGLAS, STATE OF NEBRASKA, APPELLEE.

699 N.W.2d 820

Filed July 8, 2005. No. S-04-611.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Constitutional Law.** The core value of the Free Speech Clause of the First Amendment is the public interest in having free and unhindered debate on matters of public importance.
4. **Constitutional Law: Public Officers and Employees.** A State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.
5. ____: ____. The consideration of a claim by a public employee that the employee's rights have been violated by an adverse employment decision involves a three-step analysis.
6. ____: ____. The identification of protected conduct is a two-step process. As a threshold matter, the speech must have addressed a matter of public concern. Then, the interest of the employee in so speaking must be balanced against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

7. **Constitutional Law.** The inquiry into the protected status of speech is one of law, not fact.
8. **Constitutional Law: Public Officers and Employees.** The content, form, and context of a given statement must be considered in determining whether an employee's speech addresses a matter of public concern.
9. ____: ____. To fall within the realm of public concern, an employee's speech must relate to a matter of political, social, or other concern to the community.
10. ____: ____. The public concern test functions to prevent every employee's grievance from becoming a constitutional case and to protect a public employee's right as a citizen to speak on issues of concern to the community.
11. ____: ____. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
12. **Actions: Constitutional Law: Labor and Labor Relations: Proof.** To establish a prima facie case of unlawful retaliation, an employee must show that he or she participated in a protected activity, that the employer took an adverse employment action against him or her, and that a causal connection existed between the protected activity and the adverse employment action. Once a prima facie case has been made, the burden shifts to the employer to articulate a nondiscriminatory reason for the adverse employment action. The employee then has an opportunity to prove that the reason given is pretextual.
13. **Constitutional Law.** The Freedom of Association Clause of the First Amendment is not absolute.
14. **Constitutional Law: Public Officers and Employees.** When the government deals with its employees in its role as employer, it has broader latitude in First Amendment matters than when it deals with its citizens in its role as a sovereign.
15. **Constitutional Law: Labor and Labor Relations.** Participation in union meetings is a protected activity under the First Amendment's guarantee of freedom of association.
16. **Constitutional Law: Public Officers and Employees.** The right of association is similar to the right to free speech in that it must also be balanced against, and may be overridden by, the government's interest as an employer in efficiency.
17. **Labor and Labor Relations: Proof.** To establish a prima facie case of retaliation, a plaintiff must show, among other things, that the plaintiff suffered an adverse employment action at the hands of the employer.
18. **Employer and Employee: Words and Phrases.** An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage.
19. ____: ____. Termination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects are adverse employment actions, but minor changes in working conditions that merely inconvenience an employee or alter an employee's work responsibilities are not.
20. **Constitutional Law.** The First Amendment protects the right of all persons to associate together in groups to further their lawful interests.
21. **Constitutional Law: Labor and Labor Relations: Public Officers and Employees.** The First Amendment is violated by state action whose purpose is either to intimidate public employees from joining a union or from taking an active part in its affairs or to retaliate against those who do.

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

John E. Corrigan and Andrew M. Steinbaugh, of Fahey & Corrigan, P.C., for appellants.

Stuart J. Dornan, Douglas County Attorney, and James R. Thibodeau for appellee.

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

WRIGHT, J.

NATURE OF CASE

The Fraternal Order of Police, Lodge No. 8 (Union), represents employees of the Douglas County Department of Corrections (Department). The Union and its president, Ross Stebbins, brought this action against Douglas County (County) seeking declaratory and injunctive relief after management of the Department directed that employees must use vacation time to meet with members of the Douglas County Board of Commissioners (Board). The district court granted the County's motion for summary judgment, and the Union and Stebbins appeal.

SCOPE OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

FACTS

The County operates and maintains the Douglas County Correctional Center through the Department. The Union is a labor organization existing under the laws of the State of Nebraska and

is recognized as the exclusive collective bargaining representative for certain employees of the Department. All employees holding the position of "Corrections Officer" are covered by the collective bargaining agreement between the Union and the County. At all times relevant to this case, Stebbins was employed as a Corrections Officer III, commonly referred to as a "Sergeant."

The agreement at issue here encompassed wages, hours, and terms and conditions of employment. It covered the term of July 1, 2001, to June 30, 2003, and had been in effect without material changes to the relevant language for at least 10 years. Article VII, § 4, of the agreement provided in part:

> The president and two of his appointed union members may be excused to attend regular and emergency meetings, as well as State and National [Fraternal Order of Police] meetings, and suffer no loss of pay provided that they are excused only for the actual time of the meeting, and that no overtime hours will be incurred by the necessity of someone needing to cover the respective officer's shift and/or absence for said meeting.

In the Union and Stebbins' petition, they alleged that pursuant to the longstanding practice of the parties and their common usage of the agreement's language, the president of the Union and other Union officers had been excused from work without loss of pay to attend meetings of the Board (the governing body of Douglas County) or to meet with individual county commissioners. This practice had generally been referred to as "taking F.O.P. time." The Union president and other Union officers were required to fill out a form which indicated that the requested time off was to be used for Union purposes. Based on the language of the agreement, the request was either approved or denied.

On January 28, 2003, the Union held an emergency meeting for the purpose of directing the Union's executive board to seek relief from the Board for alleged repeated contractual violations by the Department's administration. The next day, a member of the Department's administrative management issued a memorandum stating: "**Effective immediately:** No union employee will be allowed to have any time off to meet with any County Commissioner during work time unless there is an available vacation slot and the employee use[s his or her] vacation time.

If you have any question[s,] please feel free to contact me." Stebbins submitted a request for leave to attend a Board meeting scheduled for February 4, and the request was denied.

On January 31, 2003, the Union and Stebbins filed a petition for declaratory and injunctive relief. They asserted that issuance of the memorandum violated the collective bargaining agreement; the Union president's right to freedom of speech, in violation of article I, § 5, of the Nebraska Constitution; the right of the Union to freedom of association, in violation of article I, § 19, of the Nebraska Constitution; and the right of the Union to freedom of speech and association, as guaranteed by the 1st and 14th Amendments to the U.S. Constitution, in violation of 42 U.S.C. § 1983 (2000). The Union and Stebbins sought temporary and permanent injunctions, compensatory and punitive damages, and attorney fees.

The County denied the Union and Stebbins' allegations and asserted that the district court lacked subject matter jurisdiction. It claimed that the Douglas County Civil Service Commission had original jurisdiction over any action requiring interpretation of the collective bargaining agreement and that the district court had only appellate jurisdiction.

The district court granted the County's motion for summary judgment regarding the freedom of speech and freedom of association claims. The court concluded that it lacked jurisdiction over the collective bargaining agreement because a matter was pending before the Douglas County Civil Service Commission based on the same set of facts.

As to the claims related to freedom of speech, the district court concluded that the alleged basis for the change in policy —the Union's emergency meeting and other disputes within the facility—was not a matter of public concern that was protected speech. The court found that the policy complained of was a workplace personnel policy implemented by the Department's management and was intended to increase the security of the facility and reduce the amount of unnecessary overtime expense for the County. The policy did not prohibit employees from communicating with county commissioners in writing, using their vacation time to meet with commissioners, or meeting with commissioners at a time that was not the employee's scheduled worktime.

The district court found that the policy was not made in retaliation for actions by the Union. The County had articulated nondiscriminatory reasons for the adverse employment action—to increase the security of the facility and reduce the amount of unnecessary overtime expense.

ASSIGNMENTS OF ERROR

The Union and Stebbins assign the following errors: The district court erred (1) in sustaining the County's motion for summary judgment and dismissing their petition; (2) in concluding that the Union and Stebbins failed to demonstrate that they had engaged in conduct protected by the First Amendment Free Speech Clause; and (3) in concluding that the County's conduct in issuing the January 29, 2003, memorandum was not sufficient to state a claim for retaliation on the basis of freedom of association.

ANALYSIS

FREEDOM OF SPEECH

The Union and Stebbins assert that the district court erred in concluding that the Union and Stebbins had failed to demonstrate that they had engaged in conduct protected by the First Amendment Free Speech Clause. The court concluded that the Department's policy was not a matter of public concern that was protected speech, and it granted the County's motion for summary judgment as to this issue.

[3,4] The U.S. Supreme Court has noted that the core value of the Free Speech Clause of the First Amendment is the public interest in having free and unhindered debate on matters of public importance. See *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). It has been settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). See, also, *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000).

[5] The consideration of a claim by a public employee that the employee's rights have been violated by an adverse employment

decision involves a three-step analysis. *Roberts v. Van Buren Public Schools*, 773 F.2d 949 (8th Cir. 1985).

> First, plaintiffs must demonstrate that their conduct was protected; second, plaintiffs must demonstrate that such protected conduct was a substantial or motivating factor in the adverse employment decision; and third, the employer may show that the employment action would have been taken even in the absence of the protected conduct.

Id. at 953-54, citing *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

[6,7] Under *Connick v. Myers, supra*, the identification of protected conduct is a two-step process. *Roberts v. Van Buren Public Schools, supra*. "As a threshold matter, the speech must have addressed a 'matter of public concern' . . . then, the interest of the employee in so speaking must be balanced against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " (Citations omitted.) *Id.* at 954. "The inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. at 148 n.7.

[8-11] The content, form, and context of a given statement must be considered in determining whether an employee's speech addresses a matter of public concern. *Id.* " 'To fall within the realm of "public concern," an employee's speech must relate to a "matter of political, social, or other concern to the community." ' " *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. at 1025, 614 N.W.2d at 284, quoting *Morris v. Crow*, 117 F.3d 449 (11th Cir. 1997). "The public concern test functions to prevent every employee's grievance from becoming a constitutional case and to protect a public employee's right as a citizen to speak on issues of concern to the community." *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. at 1025-26, 614 N.W.2d at 284, citing *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997). "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers*, 461 U.S. at 146.

In addressing a First Amendment issue, the court must first determine whether the activity in question is a matter of public concern. See *Cox v. Civil Serv. Comm. of Douglas Cty., supra.* If the activity does not involve a matter of public concern, then the First Amendment is not implicated and the inquiry as to this issue is therefore at an end. *Id.*

In the case at bar, the district court concluded that internal grievances, the expression of personal grievances, or job-related grievances were not generally considered to be matters of public concern and that if an employee's statement did not involve a matter of public concern, the inquiry into whether the Free Speech Clause had been violated was ended. See *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

We agree with the district court that the matters raised in the petition—the Union's emergency meeting and other disputes within the facility—did not rise to the level of a matter of public concern that was protected speech. A matter of public concern must relate to a political or social issue in the community. A court is not the appropriate forum to review decisions made by a public agency when an employee speaks about personal matters, rather than as a citizen addressing public matters. *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000).

The district court correctly determined as a matter of law that the policy was not a matter of public concern, but, instead, addressed internal job-related grievances. The Union wanted to discuss with the county commissioners alleged violations of the collective bargaining agreement. Remedies for violations of such provisions were found in the agreement's grievance procedures. This topic was not a matter of public concern.

Here, the policy did not limit all communications with the county commissioners, but merely provided that any time spent during a work shift for such communication must be recorded as vacation leave. The policy did not limit the right of Union officers and members to contact county commissioners outside of work hours. The policy was a personnel rule that was designed to increase security at the correctional facility and to reduce overtime costs for the County. Employees remained able to contact county commissioners at times other than during a work shift.

The Union and Stebbins contend that there were material issues of fact concerning the intention of management in issuing the policy. We do not reach this issue because the Union and Stebbins have not demonstrated that their conduct was protected. Whether the Department would pay a Union member for time spent meeting with a county commissioner was not a matter of political, social, or other concern to the public. This was an issue of contractual interpretation of what rights had been bargained for under the agreement between the Union and the County. We cannot say that the policy suppressed the Union's right to participate in public affairs. When the activity does not involve a matter of public concern, the inquiry is ended. See *Cox v. Civil Serv. Comm. of Douglas Cty., supra.*

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. *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005). Viewing the evidence in the light most favorable to the Union, we find no genuine issue as to any material fact. See *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005). The County is entitled to judgment as a matter of law on the freedom of speech claim.

Freedom of Association

The Union and Stebbins contend that the district court erred in concluding that issuance of the January 29, 2003, memorandum was not an adverse employment action sufficient to state a claim for retaliation on the basis of freedom of association.

[12] In *Hudson v. Norris*, 227 F.3d 1047 (8th Cir. 2000), the U.S. Court of Appeals for the Eighth Circuit addressed a claim that state officials had retaliated against an employee for testifying in a lawsuit between a former coworker and the state department of correction.

> To establish a *prima facie* case of unlawful retaliation, an employee must show that he or she participated in a protected activity, that the employer took an adverse employment action against him or her, and that a causal connection existed between the protected activity and the adverse

> employment action. . . . Once a *prima facie* case has been made, the burden shifts to the employer to articulate a nondiscriminatory reason for the adverse employment action. . . . The employee then has an opportunity to prove that the reason given is pretextual.

(Citations omitted.) *Id.* at 1050-51.

[13,14] The Freedom of Association Clause of the First Amendment is not absolute. *International Ass'n v. City of Kansas City*, 220 F.3d 969 (8th Cir. 2000). When the government deals with its employees in its role as employer, it has broader latitude in First Amendment matters than when it deals with its citizens in its role as a sovereign. *Id.* Therefore, an intermediate level of scrutiny is applicable because we are dealing with the government's role as an employer. See *id.*

[15,16] Participation in union meetings is a protected activity under the First Amendment's guarantee of freedom of association. See *Roberts v. Van Buren Public Schools*, 773 F.2d 949 (8th Cir. 1985), and cases cited therein. The right of association is similar to the right to free speech in that it must also be "balanced against, and may be overridden by, the government's interest as an employer in efficiency." *Id.* at 957.

The Union and Stebbins allege that the Department's policy was put into place in retaliation for the Union's action in directing its executive board to contact the county commissioners regarding alleged contractual violations by the Department's administration. The district court concluded that the policy in question was not an adverse employment action that produced a material employment disadvantage. Union employees were not prohibited from contacting the county commissioners on their own time or in writing, and the Department had articulated nondiscriminatory reasons for the adverse employment action, i.e., to increase the security of the facility and reduce the expense for unnecessary overtime.

The County is entitled to summary judgment on this issue if there is no genuine dispute of material fact and the undisputed facts establish that it is entitled to judgment as a matter of law. 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. *Allied Mut. Ins. Co. v. City of Lincoln, supra.*

In *Spears v. Mo. Dept. of Corr. & Human Resources*, 210 F.3d 850 (8th Cir. 2000), the plaintiff brought a retaliation claim against the department of corrections. The district court granted summary judgment in favor of the department, concluding that the plaintiff had failed to establish any adverse employment action and, thus, had not presented a prima facie case of retaliation. The court of appeals affirmed.

[17-19] To establish a prima facie case of retaliation, a plaintiff must show, among other things, that the plaintiff suffered an adverse employment action at the hands of the employer. See *id.* "An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." *Id.* at 853. "Termination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects meet this standard . . . but minor changes in working conditions that merely inconvenience an employee or alter an employee's work responsibilities do not." (Citation omitted.) *Id.*

The policy implementation herein cannot be considered an adverse employment action. It did not produce a material employment disadvantage. The Union's officers were still free to contact the county commissioners while using vacation time. It was not shown that the change in policy significantly affected the Union officers' future career prospects.

The Department's policy did not limit the Union officers' right to associate in order to form or join a union. It merely provided that they could not use worktime to contact county commissioners for Union-related matters. The policy served a sufficiently important government interest. It provided that there would be an ample number of employees on duty in the correctional facility at any one time. It was also an attempt by the Department to establish that its budget would be maintained without excessive overtime costs.

[20,21] "The first amendment protects the right of all persons to associate together in groups to further their lawful interests." *Pro. Ass'n of Col. Educ. v. El Paso Cty. Com. Col.*, 730 F.2d 258, 262 (5th Cir. 1984), *cert. denied* 469 U.S. 881, 105 S. Ct. 248, 83

L. Ed. 2d 186. This right includes the right of public employees to join unions and

> the right of their unions to engage in advocacy and to petition government in their behalf. Thus, the first amendment is violated by state action whose purpose is either to intimidate public employees from joining a union or from taking an active part in its affairs or to retaliate against those who do.

Pro. Ass'n of Col. Educ. v. El Paso Cty. Com. Col., 730 F.2d at 262. The rights apply to unions, their members, and their organizers. *Id.*

The Union and Stebbins claimed that the policy limited their right to engage in advocacy because a Union member would not be paid by the Department during the time that the member met with a county commissioner. We disagree. The policy provided that Union employees could not take time during work hours to meet with county commissioners unless the employees used vacation time. This did not limit the Union members' right to advocate for the Union.

Viewing the evidence in the light most favorable to the Union and giving it the benefit of all reasonable inferences deducible from the evidence, we conclude that the Union did not establish a claim for the violation of the right of association as guaranteed by the First Amendment. The policy did not restrict the employees' exercise of their right to associate with other Union members or county commissioners. The district court did not err in granting the County's motion for summary judgment on this claim, and the County was entitled to judgment as a matter of law.

CONCLUSION

For the reasons set forth above, the judgment of the district court is affirmed.

AFFIRMED.

SPEAR T RANCH, INC., APPELLANT AND CROSS-APPELLEE, V. NEBRASKA DEPARTMENT OF NATURAL RESOURCES, APPELLEE AND CROSS-APPELLANT.

699 N.W.2d 379

Filed July 8, 2005. No. S-04-639.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the trial court.
3. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.
4. ____. The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
5. **Irrigation.** The system of irrigation in Nebraska has its foundation in statutory enactments and constitutional provisions.
6. **Negligence.** One cannot be negligent in failing to perform an act which it did not in the first instance have a duty or obligation to perform.
7. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.

Appeal from the District Court for Morrill County: PAUL D. EMPSON, Judge. Affirmed.

Thomas D. Oliver for appellant.

Jon Bruning, Attorney General, and Justin D. Lavene for appellee.

Steven C. Smith, of Pahlke, Smith, Snyder, Petitt & Eubanks, G.P., for amici curiae Pathfinder Irrigation District et al.

Michael C. Klein, of Anderson, Klein, Swan & Brewster, for amicus curiae Central Nebraska Public Power and Irrigation District.

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

WRIGHT, J.

I. NATURE OF CASE

Spear T Ranch, Inc. (Spear T), filed a claim for damages with the State Claims Board under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2003). The board denied the claim, and Spear T subsequently brought an action against the Nebraska Department of Natural Resources (Department). Spear T alleged that the Department was negligent in failing to protect Spear T's surface water appropriations and that the Department had permitted the diversion of water from Spear T's land, which greatly reduced the value of the land and resulted in an unauthorized taking of its property without compensation. Spear T appeals from the order of the Morrill County District Court which granted the Department's motion for summary judgment and dismissed its amended petition with prejudice.

II. SCOPE OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005).

[2] Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the trial court. *McGinn v. State Farm Mut. Auto. Ins. Co.*, 268 Neb. 843, 689 N.W.2d 802 (2004).

III. FACTS

Spear T is a Nebraska corporation that owns land in Morrill County. Pumpkin Creek flows through Spear T's land, and it has two surface water appropriations on Pumpkin Creek. Water appropriation A-6811 is a permit dated November 16, 1954, to divert 2.57 cubic feet per second of water. Water appropriation A-9051 is dated December 21, 1956, and permits a diversion of 1.6 cubic feet per second.

Spear T initially filed a claim for damages with the State Claims Board pursuant to the State Tort Claims Act. The board

denied the claim, and Spear T subsequently brought this suit against the Department.

In its first cause of action, Spear T claimed that the Department had negligently failed to protect its appropriations by controlling the amount of ground water taken from the Pumpkin Creek basin by hydrologically connected ground water users. It claimed that this negligence arose from a common-law duty of the Department to protect surface water appropriations. Spear T claimed that as a result of the Department's negligence, Pumpkin Creek had become brackish and unsuitable for raising crops or watering livestock. Spear T claimed damages for the loss of crops and a reduction in property and aesthetic value.

Spear T also alleged that Neb. Rev. Stat. § 46-226 (Reissue 2004) imposed a duty upon the Department to make proper arrangements for the determination of priorities of the right to use the public waters of the state and to determine the same. It alleged that the Department's failure to determine priorities between surface water appropriators and ground water users had directly resulted in damages to Spear T.

As to its cause of action for inverse condemnation, Spear T claimed that Neb. Rev. Stat. § 46-159 (Reissue 2004) prohibited the diverting of water from the creek to the detriment of a party unless previous compensation is ascertained. Spear T asserted that the Department's inaction had resulted in the inverse condemnation of its vested property rights without just compensation, in violation of the Fifth Amendment to the U.S. Constitution and Neb. Const. art. I, § 21. It also claimed that the Department's actions deprived it of its constitutional rights under color of law, thereby violating 42 U.S.C. § 1983 (2000).

Spear T sought general damages for the reduction in value of its property caused by the Department's alleged negligence and for the resulting loss of hay and reduced pasture rental. It requested special damages for the loss of aesthetic value of the property and other damages allowed by law. It also sought an injunction requiring the Department to cease issuance of well permits in the Pumpkin Creek basin and to restrict the amount of water pumped from upstream wells.

The Department demurred, claiming that the petition was insufficient to state a cause of action sounding in either negligence

or inverse condemnation. The district court sustained the demurrer as to Spear T's action for inverse condemnation, and Spear T was allowed to amend. Its amended petition was identical to the original petition in nearly all respects, the main exception being that Spear T eliminated all references to a violation of 42 U.S.C. § 1983.

The Department moved for summary judgment, claiming that Spear T's action was barred by applicable statutes of limitation and that it had no duty to regulate ground water use to protect Spear T's surface water rights. The Department also asserted other affirmative defenses.

Following a hearing, the district court sustained the Department's motion for summary judgment. It found that the Department had no legal duty to protect surface water appropriators from the activities of ground water users. The court also granted the Department's motion for an order dismissing Spear T's claim for inverse condemnation. Spear T timely perfected an appeal, and the Department has cross-appealed.

IV. ASSIGNMENTS OF ERROR

Spear T assigns the following restated errors to the order of the district court: The court erred (1) in finding that the Department had no duty to protect surface water appropriators from the effects of ground water use and (2) in finding that Spear T had no cause of action for inverse condemnation against the Department.

The Department assigns the following restated errors on cross-appeal: The district court erred (1) in failing to find that Spear T's claim was barred by the statute of limitations; (2) in failing to find that even if the Department had a duty to protect surface water appropriators from the effects of ground water irrigation, such claims were not appropriate under the State Tort Claims Act; and (3) in failing to find that Spear T had not exhausted all available administrative remedies prior to seeking judicial review.

V. ANALYSIS

1. Spear T's Argument

Spear T asserts that the Department had both a common-law duty and a statutory duty to protect the rights of surface water appropriators. As to the statutory duty, it relies upon § 46-226,

which provides: "The department shall make proper arrangements for the determination of priorities of right to use the public waters of the state and determine the same. The method of determining the priority and amount of appropriation shall be fixed by the department." Spear T claims this language placed a duty upon the Department to regulate all of the waters of the state through a system of priorities. It claims that the Department had a statutory duty to establish a method for determining priority between the surface water appropriators and the ground water users, and to fix the amount of water that hydrologically connected ground water users could extract from Pumpkin Creek. Spear T also relies upon Neb. Rev. Stat. § 61-206(1) (Cum. Supp. 2004), which states: "The Department of Natural Resources is given jurisdiction over all matters pertaining to water rights for irrigation . . . except as such jurisdiction is specifically limited by statute." Spear T concludes this means that the Department has exclusive jurisdiction to hear and adjudicate all matters pertaining to water rights.

2. Department's Argument

The Department claims that it had no duty to protect appropriators of surface water from the activities of ground water users. It argues that because it had no duty, it cannot be held actionable in a claim for negligence or inverse condemnation.

The Department asserts that the Legislature is the body with authority to implement the state's water policy and that the Legislature has delegated the authority to regulate surface water to the Department and has delegated the authority to regulate ground water, including hydrologically connected ground water, to the natural resources districts. It argues that pursuant to law, the Legislature has authorized the Department to regulate surface water appropriations and to protect the rights of surface water appropriators from encroachment by other surface water appropriators.

3. Resolution

[3,4] The legal issue presented is whether the actions or inactions of the Department constituted negligence. The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. *Fu v. State*, 263 Neb. 848, 643 N.W.2d

659 (2002). The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994). Regarding questions of law, an appellate court is obligated to reach a conclusion independent of the determination made by the court below. *Trimble v. Wescom*, 267 Neb. 224, 673 N.W.2d 864 (2004).

(a) Common-Law Duty

Spear T relies upon *State, ex rel. Sorensen, v. Mitchell Irrigation District*, 129 Neb. 586, 262 N.W. 543 (1935), and *State v. Birdwood Irrigation District*, 154 Neb. 52, 46 N.W.2d 884 (1951), to support its position that the Department had a common-law duty to protect surface water appropriators from hydrologically connected ground water users. We conclude that neither case supports Spear T's position.

In *State, ex rel. Sorensen, v. Mitchell Irrigation District, supra*, the Attorney General of Nebraska instituted an action to compel Mitchell Irrigation District to comply with state law applicable to irrigation districts and to enjoin the irrigation district until it complied with such laws. We held that the State had the right to enforce compliance with laws that would protect the rights of all users of water for irrigation purposes. Contrary to Spear T's argument, *State, ex rel. Sorensen, v. Mitchell Irrigation District* did not create a common-law duty in the Department to resolve conflicts between surface water appropriators and ground water users. Instead, the authority of the State via the Attorney General to compel the irrigation district to comply with the law was created by statute.

In *State v. Birdwood Irrigation District, supra*, the Department of Roads and Irrigation commenced an action to cancel part of the water appropriation of the Birdwood Irrigation District. The law existing at the time, Neb. Rev. Stat. § 46-229.02 (Supp. 1949), expressly authorized the Department of Roads and Irrigation to cancel a water right that had not been used for some beneficial purpose for more than 3 years. The irrigation district contended that the department was without authority to cancel the water right on certain lands. We held that the department was expressly authorized by statute to forfeit a water right where it appeared that

the water appropriation had not been used for some beneficial or useful purpose.

In an effort to establish a common-law duty to protect surface water appropriators, Spear T attempts to give our decisions in *State, ex rel. Sorensen, v. Mitchell Irrigation District, supra*, and *State v. Birdwood Irrigation District, supra*, an overly broad application. Neither of these cases contains language creating a duty which would require the Department to resolve conflicts between surface water appropriators and ground water users. In fact, the issue of resolving a conflict between surface water appropriators and ground water users was never presented. Both cases were decided before the Legislature first addressed ground water regulation in 1957. See *In re Complaint of Central Neb. Pub. Power, ante* p. 108, 699 N.W.2d 372 (2005). While we stated in *State, ex rel. Sorensen, v. Mitchell Irrigation District*, 129 Neb. at 593, 262 N.W. at 547, that "the state has the right . . . to enforce compliance with laws that will protect the rights of all users of water for irrigation purposes within the state," this language did not establish a common-law duty in the Department to resolve conflicts between surface water appropriators and ground water users.

[5] The system of irrigation in Nebraska has its foundation in statutory enactments and constitutional provisions. *In re Complaint of Central Neb. Pub. Power, supra.* Rights of irrigation in this state exist only as they have been created and defined by the law, and are necessarily limited in their scope by the language of their creation. *Id.*

(b) Statutory Duty

The issue of whether the Department has a statutory duty to resolve conflicts between surface water appropriators and ground water users has been resolved by our decisions in *In re Complaint of Central Neb. Pub. Power, supra*, and *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

In *In re Complaint of Central Neb. Pub. Power, supra*, we affirmed the Department's order, which dismissed the complaint for lack of jurisdiction to grant the relief requested. Central Nebraska Public Power and Irrigation District (Central) had filed suit with the Department to stop certain ground water users from diverting water from the Platte River without first obtaining a

permit from the Department. Central claimed the Department was charged with administering all waters of the state through a number of statutory provisions, specifically §§ 46-226 and 61-206(1) and Neb. Const. art. XV, § 6. The Department dismissed the complaint for lack of jurisdiction, concluding that its legal authority was limited to working cooperatively with the natural resources districts to address conflicts between surface water appropriators and ground water users by jointly developing and implementing integrated management plans. The Department's order stated that the Legislature had not given it independent authority to regulate ground water users or administer ground water rights for the benefit of surface water appropriators.

In resolving the issue in favor of the Department, we stated: "Nebraska has two separate systems for the distribution of its water resources . . . . The Department regulates surface water appropriators, see § 61-201 et seq., and ground water users are statutorily regulated by the natural resources districts through the Nebraska Ground Water Management and Protection Act . . . ." See *In re Complaint of Central Neb. Pub. Power, ante* p. 108, 116-17, 699 N.W.2d 372, 378 (2005). We concluded that the Department had no independent authority to regulate ground water users or administer ground water rights for the benefit of surface water appropriators.

In *In re Complaint of Central Neb. Pub. Power, supra*, we relied upon our decision in *Spear T Ranch v. Knaub, supra.* In that case, the plaintiff argued that it had a prior surface water appropriation and that because the water was hydrologically connected, it had priority over the ground water users to the water in the Pumpkin Creek basin. Spear T asked this court to apply legislatively created surface water priorities to conflicts between surface water appropriators and ground water users. We declined to adopt that approach, finding no statutory authority or case law that supported applying surface water appropriations to ground water.

In the case at bar, all of Spear T's causes of action are based upon the assumption that the Department has a duty to resolve conflicts between surface water appropriators and ground water users. It is well established that the Department has only that authority which the Legislature has specifically conferred upon it

by statute or by construction necessary to achieve the purpose of the relevant act. See *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

[6] We conclude that the Department has no common-law or statutory duty to regulate the use of ground water in order to protect Spear T's surface water appropriations. See *In re Complaint of Central Neb. Pub. Power, supra* (holding that Department had no independent authority to regulate ground water users or administer ground water rights for benefit of surface water appropriators). In the absence of independent authority to regulate the use of ground water, the Department has no legal duty to resolve conflicts between surface water appropriators and ground water users. If there is no legal duty, there is no actionable negligence. *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003). One cannot be negligent in failing to perform an act which it did not in the first instance have a duty or obligation to perform. *Travelers Indemnity Co. v. Center Bank*, 202 Neb. 294, 275 N.W.2d 73 (1979).

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. *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005). Viewing the evidence in the light most favorable to Spear T and giving it the benefit of all reasonable inferences deducible from the evidence, we conclude that the Department was entitled to judgment as a matter of law. The district court was correct in its determination that the Department had no duty to protect surface water appropriators from the activities of ground water users. The district court did not err in granting summary judgment on this issue.

4. Remaining Assignment of Error

Spear T also assigns as error the district court's determination that Spear T had no cause of action for inverse condemnation. After sustaining the Department's demurrer, the court gave Spear T an opportunity to file an amended petition. Its amended petition was identical to the original petition in nearly all respects, the main exception being that it omitted all references to a violation of 42 U.S.C. § 1983.

[7] In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *McGinn v. State Farm Mut. Auto. Ins. Co.*, 268 Neb. 843, 689 N.W.2d 802 (2004). Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the trial court. *Id.*

Neb. Const. art. I, § 21, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The question is, What property was taken or damaged by the Department? The Department did not have authority to regulate ground water users or administer ground water rights for the benefit of surface water appropriators. Accordingly, its action or inaction did not amount to a taking or damages as alleged by Spear T. Because Spear T had no property that was damaged or taken by the Department, Spear T could not assert a cause of action for inverse condemnation. It was not error for the district court to dismiss Spear T's cause of action for inverse condemnation.

5. Cross-Appeal

On cross-appeal, the Department argues that the district court erred in failing to grant it summary judgment based upon each of the reasons set forth in its motion. The court granted the motion only with respect to the Department's argument that it had no duty to protect the rights of surface water appropriators from ground water users. Because we find that summary judgment was proper based upon the Department's lack of duty, it is unnecessary to determine whether summary judgment should have been granted as to each of the reasons the Department raised in its motion.

VI. CONCLUSION

For the reasons set forth herein, the judgment of the district court, which granted the Department's motion for summary judgment and dismissed Spear T's cause of action for inverse condemnation, is affirmed.

Affirmed.

FRANCES LOUISE NICHOLSON, APPELLANT, V. RED WILLOW COUNTY SCHOOL DISTRICT NO. 0170, ALSO KNOWN AS TWIN VALLEY PUBLIC SCHOOLS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

699 N.W.2d 25

Filed July 15, 2005. No. S-03-1296.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
3. **Administrative Law: Appeal and Error.** It is only when the inferior board or tribunal acts judicially that a review by error proceedings is allowed.
4. ____: ____. Where an inferior board or tribunal decides no question of adjudicative fact and no statute requires the board or tribunal to act in a judicial manner, such orders are not reviewable by error proceedings.
5. **Schools and School Districts: Appeal and Error.** Any person adversely affected by the changes made by the State Committee for the Reorganization of School Districts, pursuant to Neb. Rev. Stat. §§ 79-413 to 79-422 (Reissue 2003), may proceed by appeal or by petition in error.
6. **Declaratory Judgments.** An action for declaratory judgment does not lie where another equally serviceable remedy is available.
7. ____. One who has failed to pursue a full, adequate, and exclusive statutory remedy is not afforded an additional remedy under the Uniform Declaratory Judgments Act.

Appeal from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. Appeal dismissed.

Steve Williams and John F. Recknor, of Recknor, Williams & Wertz, for appellant.

Kelley Baker, Karen A. Haase, and Neal Stenberg, of Harding, Shultz & Downs, for appellees Red Willow County School Districts Nos. 0170 and 0109.

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

PER CURIAM.

NATURE OF CASE

Frances Louise Nicholson challenges the constitutionality of bond issues passed by the voters of two Nebraska school districts as part of the school districts' reorganization. She argues that the

school districts' combination of the two bond issues violated Neb. Const. art. VIII, § 4.

BACKGROUND

This case was tried on the following stipulated facts: Nicholson resides and owns property in Red Willow County School District No. 0170 (Twin Valley), a Class II school district. She does not own property in the adjacent Red Willow County School District No. 0109 (Republican Valley), a Class III school district.

On January 29, 2003, the boards of education of Twin Valley and Republican Valley each voted to approve a petition to reorganize the districts with each other. The reorganization petition sought to dissolve both Twin Valley and Republican Valley, effective August 1, and create a single new Class III school district in their place (the reorganized district). The reorganization petition was contingent upon the approval of separate bond issues in both Twin Valley and Republican Valley.

Separate bond elections were held in both school districts on March 25, 2003. The voters of Twin Valley approved, by a vote of 296 to 266, the issuance of bonds by Twin Valley in the amount of $3,495,000 for the purpose of paying the costs of land acquisition, constructing a school building, and providing for necessary furniture and apparatus for such a building. Nicholson voted in the Twin Valley bond election. Republican Valley voters approved, by a vote of 296 to 272, the issuance of bonds by Republican Valley in the amount of $3,495,000 for the same purposes as the Twin Valley bond issue. The eventual issuance of the bonds in each school district was not only contingent upon a successful election in the other school district, but also upon the approval of the reorganization petition as required by law. On May 9, the State Committee for the Reorganization of School Districts (State Committee) approved the reorganization petition.

The aggregate assessed value of all taxable property in Twin Valley was, as last reported by the Red Willow County assessor, $129,187,800. The most recently reported aggregate assessed value of all taxable property in Republican Valley was $86,684,569. In the absence of the reorganization petition, an amount of approximately 21 to 22 cents per $100 of taxable valuation would have been levied on Twin Valley property owners to redeem that school district's bond issue of $3,495,000, while

Republican Valley property owners would have been levied 35 to 36 cents per $100 of taxable valuation to redeem the $3,495,000 bond issue in their school district. However, under the terms of the reorganization petition, the two separate bond issues would be combined for a total bond issue of $6,990,000 and repaid by the property owners of the reorganized district over approximately 22 years. Thus, all property owners in the reorganized district will pay a bond levy in the amount of 26.3 cents per $100 of taxable valuation. The reorganized district's authority to combine the bond issues of Twin Valley and Republican Valley stems from section II(E) of the reorganization petition, which provides in full:

> **E. Bonded Indebtedness and Authority To Issue Bonds.** Neither the Twin Valley Public School District nor the Republican Valley Public School District has any bonded indebtedness existing on the date of the signing of this Petition. However, if the voters of both the existing Twin Valley Public School District and the existing Republican Valley Public School District vote to authorize the issuance of bonds in elections in both school districts, any authority to issue bonds, and any bonded indebtedness created pursuant to such authority which exists on the effective date of the dissolution and reorganization of the existing Twin Valley Public School District and the existing Republican Valley Public School District shall become the authority and/or obligation of the New School District.

Nicholson initiated this action on May 2, 2003. Her complaint sought injunctive relief preventing issuance of the bonds and implementation of the reorganization petition. She also sought a declaration that the reorganization petition and Neb. Rev. Stat. § 79-422(1) (Reissue 2003) are unconstitutional under Neb. Const. art. VIII, § 4.

On October 16, 2003, the district court denied Nicholson's request for declaratory and injunctive relief and dismissed her complaint. Upon Nicholson's motion, the court entered an order nunc pro tunc on November 10, repeating its earlier findings that § 79-422(1) and the merger and bond issues were constitutional and that the bond issues and reorganization petition were "lawful in all respects." Nicholson filed her notice of appeal on November 13, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

Nicholson assigns that the district court erred in finding that (1) the bond issues and reorganization petition were lawful in all respects, (2) § 79-422(1) is constitutional, and (3) the merger and bond issues of the school districts are constitutional.

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. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004).

ANALYSIS

[2] In this appeal, Nicholson challenges the constitutionality of bond issues passed by the voters of Twin Valley and Republican Valley as a part of the school districts' reorganization. However, before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues. *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005). After this case was initially argued, we ordered additional briefing and argument on the issue of whether Nicholson's remedy was to appeal the May 9, 2003, decision of the State Committee pursuant to Neb. Rev. Stat. § 79-413(4) (Reissue 2003) or whether Twin Valley's and Republican Valley's reorganization plan is subject to collateral attack. We begin with a review of current Nebraska law governing school reorganizations.

School District Reorganization Methods

There are two methods available to accomplish a school district reorganization: the petition method and the election method.

> [I]t is critical that one recognize the distinction between effecting a school reorganization by what is commonly referred to as the "petition method" as opposed to effecting a reorganization by the "election method." The differences are important. While in both instances the electors of the affected districts have a voice, their manner of exercising that voice is significantly different. While the ultimate authority for changing the boundaries by either the petition method or the election method rests with the electors of the several districts involved, the effect of their action is quite

> different. Under the petition method, once a sufficient number of legal voters of each district have signed a petition, the superintendent [now the State Committee for the Reorganization of School Districts] must then act in accordance with the statute. See Neb. Rev. Stat. § 79-402 (Reissue 1976) [now codified at § 79-413]. Under the petition form of reorganization, the provisions of the statutes are mandatory and jurisdictional and the failure to comply with the requirements set out in the statutes generally causes the action taken by the county superintendent to be void. See *State ex rel. Larson v. Morrison*, 155 Neb. 309, 51 N.W.2d 626 (1952). Likewise, where proper petitions are filed, it is the mandatory duty of the superintendent to hold a hearing and, if the petitions are sufficient, to change the boundaries as requested. See *School Dist. No. 49 v. Kreidler*, 165 Neb. 761, 87 N.W.2d 429 (1958).
>
> On the other hand, under the election method, a plan of reorganization is not effected until it is submitted at a special election to all the electors of the districts within the county whose boundaries are in any manner changed by the plan of reorganization and approved by a majority of all electors voting within each voting unit included in the proposed plan. § 79-426.15 [now codified at § 79-447]. It is this final special election which causes the reorganization to take place, and requirements regarding the giving of notice and the holding of preliminary hearings prior to the special election, while important, are not jurisdictional.

Eriksen v. Ray, 212 Neb. 8, 12-13, 321 N.W.2d 59, 62 (1982).

The election method is governed by the Reorganization of School Districts Act, Neb. Rev. Stat. §§ 79-432 to 79-451 (Reissue 2003). That is *not* the method used by Twin Valley and Republican Valley to create the reorganized district in this case. Instead, our case arose from a reorganization accomplished by the petition method. The statutes governing the petition method are found at Neb. Rev. Stat. §§ 79-413 to 79-422 (Reissue 2003).

Petition Method: Procedures

A reorganization utilizing the petition method may be initiated in one of two ways: by a petition signed by voters or by the actions of the districts' school boards.

Section 79-413(1) allows for the creation of a new school district from other districts by a petition signed by voters. It provides that the State Committee may create a new district if it receives a petition signed by 60 percent of legal voters of each district affected. If the petition is signed by at least 65 percent of legal voters, the State Committee shall approve the petitions.

The reorganized district in this case was created using the second type of procedure authorized by law. That is, the creation of a new school district from other districts may also be initiated and accepted by the school board of any district rather than petitions signed by voters. § 79-415(1). We recognized the distinction between these two procedures in *Leibbrandt v. Lomax*, 228 Neb. 552, 557, 423 N.W.2d 453, 456-57 (1988), where we stated:

> Sections 79-402 [now codified at § 79-413] and 79-402.03 [now codified at § 79-415] provide alternative methods for creation of a new school district from existing school districts. By § [79-413], a school district's legal voters may petition for a change of the district's boundaries. By § [79-415], a school district's board of education may initiate or accept a proposed change of a district's boundaries or the creation of a new district by merger of existing districts. Action under § [79-415] may be characterized as a board-to-board petition for a change of a school district's boundaries or merger of existing school districts. The board-to-board petition is as efficacious as a petition by a school district's legal voters to effect a school district's boundary change or merger involving another district.

Although § 79-413 expressly addresses only petitions for reorganization initiated by voters, a number of its provisions apply equally to petitions initiated by school boards. See § 79-418. Thus, a petition to create a new school district, initiated by a school board, must be submitted to the State Committee, § 79-413(3)(a); must satisfy the requirements of § 79-419 for content; and must be subject to a public hearing before the State Committee, § 79-413(3)(a). A petition submitted to and reviewed by the State Committee "shall not become effective unless it is approved by a vote of a majority of the members of the State Committee." § 79-418.

SCHOOL DISTRICT REORGANIZATION: APPEAL PROCEDURES

One other provision of law that applies to petitions initiated by both voters and school boards is the right of appeal under § 79-413(4). That section provides, "Any person adversely affected by the changes made by the state committee may appeal to the district court of any county in which the real estate or any part thereof involved in the dispute is located."

In her supplemental brief, Nicholson contends that her collateral attack is a permissible means of challenging the constitutionality of the school districts' combination of the bond issues. Nicholson argues that § 79-413(4) is inapplicable because she is not disputing any "changes" made by the State Committee. She claims that the only "changes" made by the State Committee are to the boundaries of the school districts and the appointment of new school board members, neither of which she disputes, and that the State Committee does not authorize the issuance of bonds or the reallocation of indebtedness. In a related argument, she contends that if the State Committee authorized a transfer of debt from Twin Valley and Republican Valley to the reorganized district, her collateral attack is the proper remedy because the State Committee acted beyond its authority, rendering such action by the State Committee void. See *School Dist. of Gering v. Stannard*, 193 Neb. 624, 228 N.W.2d 600 (1975) (county superintendent proceedings may be attacked collaterally when such proceedings are void and county superintendent lacks jurisdiction).

We reject Nicholson's arguments. Section 79-422(1) provides that bonded indebtedness approved prior to the change in school district boundaries "shall remain the obligation of the school district voting such bonds *unless otherwise specified in the petitions*." (Emphasis supplied.) The reorganization petition in this case did "otherwise specify" under § 79-422(1). Nicholson's objection to the reallocation of debt to the reorganized district was an objection to the terms of the petition. The State Committee's required approval of that petition, containing those terms, was a "change" within the State Committee's jurisdiction and subject to appeal pursuant to § 79-413(4).

Nicholson next argues that she could not have appealed under § 79-413(4) because of our statements in *Kosmicki v. Kowalski*, 184 Neb. 639, 171 N.W.2d 172 (1969). She argues that the only

function of the State Committee is to determine if the petition has been properly executed and that this is a ministerial and not a quasi-judicial function. Thus, citing *Kosmicki*, Nicholson concludes that the State Committee's exercise of a nonjudicial function is not appealable under § 79-413(4) and that her remedy is by collateral attack. See *Kosmicki v. Kowalski, supra* (when county superintendent does not act in judicial manner, then collateral attack offers adequate remedy).

Prior to the enactment of the predecessor to § 79-413(4), the authority currently exercised by the State Committee was exercised by county superintendents. See 1999 Neb. Laws, L.B. 272 (transferring duties from county superintendents to State Committee). No specific provision for appeal of county superintendents' decisions existed until 1963. See 1963 Neb. Laws, ch. 473, § 1, p. 1519. Prior to 1963, judicial review of county superintendents' decisions was solely by petition in error. *School Dist. of Wilbur v. Pracheil*, 180 Neb. 121, 141 N.W.2d 768 (1966).

[3,4] Allowing judicial review of county superintendents' decisions by petition in error clearly implied that county superintendents acted in a judicial manner. We have held that it is only when the inferior board or tribunal acts judicially that a review by error proceedings is allowed. *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001). Where an inferior board or tribunal decides no question of adjudicative fact and no statute requires the board or tribunal to act in a judicial manner, such orders are not reviewable by error proceedings. *Id.* Our cases from that earlier era also *expressly* held that county superintendents acted in a judicial manner. See, *Longe v. County of Wayne*, 175 Neb. 245, 121 N.W.2d 196 (1963) (under petition method, county superintendent acts judicially to certain extent in determining sufficiency of petition); *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 102 N.W.2d 599 (1960) (hearing before county superintendent is quasi-judicial in character); *Dovel v. School Dist. No. 23*, 166 Neb. 548, 552, 90 N.W.2d 58, 62 (1958) ("[t]he hearing before the county superintendent of schools is a quasi-judicial hearing"); *School Dist. No. 49 v. Kreidler*, 165 Neb. 761, 87 N.W.2d 429 (1958).

We departed from that line of authority in *Kosmicki v. Kowalski, supra*. In *Kosmicki*, petitions were submitted to the

county superintendent by the members of the boards of education of the respective school districts. The county superintendent held a hearing to consider the petitions and then approved the petitions. This court stated:

> The appellants contend that the district court for Sherman County has jurisdiction to review by proceedings in error the order of the county superintendent of schools. The issue raised by this contention is whether section 79-402, R. S. Supp., 1967 [codified today at § 79-413(4)], which provides that "any person adversely affected by the changes made by the county superintendent may appeal to the district court of any county in which the real estate is located," requires the district court to review an administrative order which does not rest on any adjudicative fact. We hold that this provision for direct appeal is limited to an order which required the superintendent to act in a judicial manner.
>
> In School Dist. No. 23 v. School Dist. No. 11, 181 Neb. 30[5], 148 N. W. 2d 301 (1967), this court reversed a district court's review of the superintendent's order in an error proceeding. The county superintendent had dissolved and attached one school district to another under section 79-408.01, R. R. S. 1943. This court found that: "In the present case the superintendent decided no dispute of adjudicative fact, and no statute required him to act in a judicial manner. Such orders are not reviewable by error proceedings, which are limited to orders made in the exercise of judicial functions. §§ 25-1901 and 25-1903, R. R. S. 1943; Longe v. County of Wayne, 175 Neb. 245, 121 N. W. 2d 196 [(1963)]. In such circumstances collateral attack offers an adequate remedy. . . ." The county superintendent of Sherman County was required to determine only whether the signatures on the petition were valid under section 79-402, R. R. S. 1943, and accordingly had no dispute of adjudicative fact before her.

(Citations omitted.) *Kosmicki v. Kowalski*, 184 Neb. 639, 642-43, 171 N.W.2d 172, 174 (1969).

Without citing *Kosmicki*, we returned to our pre-*Kosmicki* line of authority in *School Dist. of Gering v. Stannard*, 193 Neb. 624, 228 N.W.2d 600 (1975). There, a petition in error was brought

against the determination by the county superintendent transferring real property from one district to another. We stated that this court had

> considered such proceedings on many occasions. It has held that the hearing by the county superintendent to determine the sufficiency of the petitions is judicial in nature . . . ; that if the petitions are legally sufficient, the county superintendent has the jurisdiction and the mandatory duty to order the requested change in boundaries . . . ; that judicial review of the county superintendent's action is by petition in error and that such proceedings may be attacked collaterally when such proceedings are void and the county superintendent lacks jurisdiction . . . .

Id. at 628-29, 228 N.W.2d at 605.

Obviously, *Kosmicki* is an anomaly in our school reorganization jurisprudence. Nicholson has cited to no other case but *Kosmicki* for the authority that the State Committee, in determining the sufficiency of a petition, does not act in a quasi-judicial manner. *Kosmicki v. Kowalski, supra*, is hereby disapproved.

[5] Our review of the statutes currently in effect supports our conclusion that the State Committee may consider the substance of a petition initiated by school boards, therefore acting in a quasi-judicial manner. Section 79-418 specifically subjects petitions initiated by school boards to approval by the State Committee. As we have noted, determining the sufficiency of signatures on a voter-initiated petition is a quasi-judicial function. *Dovel v. School Dist. No. 23*, 166 Neb. 548, 90 N.W.2d 58 (1958). In addition to determining the sufficiency of signatures, the State Committee must also evaluate a petition against the requirements of § 79-419. That statute prescribes the content of a petition, including, among other things, a "summary of the terms on which reorganization is to be made between the reorganized districts." § 79-419(1)(b). With the present case in mind, such terms would include any reallocation of debt pursuant to the authority granted by § 79-422. Thus, the State Committee's evaluation of the reorganization petition presented the first opportunity for Nicholson to object to the school districts' reallocation of indebtedness. The State Committee's subsequent approval of the petition, including the terms Nicholson took exception to, "adversely affected"

Nicholson within the meaning of § 79-413(4). She was thus required to challenge the State Committee's approval of the petition by an appeal pursuant to § 79-413(4), or, alternatively, a petition in error. See *Moser v. Turner*, 180 Neb. 635, 144 N.W.2d 192 (1966) (review of county superintendent's decision could be sought by appeal or petition in error).

[6,7] An action for declaratory judgment does not lie where another equally serviceable remedy is available. *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). One who has failed to pursue a full, adequate, and exclusive statutory remedy is not afforded an additional remedy under the Uniform Declaratory Judgments Act. *Id.* Rather than seeking review by appeal or by petition in error, Nicholson filed this improper collateral attack, seeking injunctive and declaratory relief, on May 2, 2003—1 week before the reorganization petition was approved by the State Committee. Because Nicholson filed an impermissible collateral action, we conclude that we do not have jurisdiction over Nicholson's appeal.

APPEAL DISMISSED.

IN RE INTEREST OF SHELBY L.,
A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,
V. SHAWNA L., APPELLANT, ROBERT Z., APPELLEE AND
CROSS-APPELLANT, AND DONALD L. AND JUDY L.,
INTERVENORS-APPELLEES AND CROSS-APPELLANTS.

699 N.W.2d 392

Filed July 15, 2005. No. S-04-028.

1. **Parental Rights: Evidence: Proof.** For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Reissue 2004), it must find that termination is in the child's best interests and that one or more of the statutory grounds listed in this section have been satisfied. The State must prove these facts by clear and convincing evidence.
2. **Evidence: 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.
3. **Parental Rights: Evidence: Proof.** In a juvenile proceeding to terminate parental rights, the evidence adduced to prove termination on any statutory ground other than

Neb. Rev. Stat. § 43-292(7) (Reissue 2004) is highly relevant to the best interests of the juvenile, as it would show abandonment, neglect, unfitness, or abuse.

4. **Parental Rights.** When a court adjudicates a juvenile under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998), a termination under Neb. Rev. Stat. § 43-292(6) (Reissue 2004) requires a finding that reasonable efforts to preserve and unify the family under the direction of the court have failed to correct the conditions leading to the determination.
5. ____. When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the children require termination of the parental rights.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and CARLSON, Judges, on appeal thereto from the County Court for Dodge County, GERALD E. ROUSE, Judge. Judgment of Court of Appeals reversed.

James Walter Crampton for appellant.

Jon Bruning, Attorney General, B. Gail Steen, Special Assistant Attorney General, and Jeri Grachek for appellee State of Nebraska.

Leta F. Fornoff, of Fornoff & Schutt, P.C., for appellee Robert Z.

Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., for intervenors-appellees.

Pamela Lynn Hopkins, guardian ad litem.

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

CONNOLLY, J.

I. NATURE OF CASE

The juvenile court terminated the parental rights of Shelby L.'s mother, Shawna L., based on Neb. Rev. Stat. § 43-292(6) and (7) (Reissue 2004). The Nebraska Court of Appeals affirmed. See *In re Interest of Shelby L.*, No. A-04-028, 2004 WL 2935857 (Neb. App. Dec. 21, 2004) (not designated for permanent publication) (*In re Interest of Shelby L. II*). We granted Shawna's petition for further review. We now reverse, because the State has failed to prove by clear and convincing evidence that termination of Shawna's parental rights was in Shelby's best interests.

We also granted the petition for further review of the maternal grandparents, Donald L. and Judy L. However, because of our disposition of Shawna's petition, it is unnecessary to address the Court of Appeals' determination that it lacked jurisdiction to consider Donald and Judy's appeal from the juvenile court's denial of their petition to intervene.

II. BACKGROUND

Shortly after Shelby's birth, she suffered from several serious health problems which included a congenital heart disease requiring surgery at 10 weeks, respiratory syncytial virus (RSV) and pneumonia at 6 weeks, gastric reflux, and asthma. She was also diagnosed with a tear duct problem and required ear tubes.

In May 1999, when Shelby was 16 months old, Shawna took Shelby to the emergency room with a second- and third-degree burn on her hand. Shortly after this incident, the Nebraska Department of Health and Human Services (DHHS) received a call from a person alleging that Shawna had "medically" and physically abused Shelby. On June 24, DHHS removed Shelby from Shawna's home and placed her in protective custody.

From the start, DHHS suspected abuse related to "Munchausen's Syndrome by Proxy" (MSBP), which is the name given to factitious disorders in children produced by their parents or caregivers. See 2 Gale Encyclopedia of Medicine 1147 (Donna Olendorf et al. eds., 1999). The American Psychiatric Association defines factitious disorder by proxy as "the deliberate production or feigning of physical or psychological signs or symptoms in another person who is under the individual's care," motivated by the perpetrator's need to assume the sick role by proxy. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 781 (4th rev. ed. 2000).

Later, in November 1999, the Dodge County Court, sitting as a juvenile court, determined that Shelby was a child in need of special supervision under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998). Shelby remained in foster care for almost 2 years, including 1 year with Shawna's sister and her husband. Around June 1, 2001, DHHS returned Shelby to Shawna. One of the conditions of reunification required Shawna to take Shelby to only one doctor, a new pediatrician, Madeleine MacDonald.

In March 2002, however, DHHS removed Shelby again and placed her back with Shawna's sister because Stephanie Clark, Shelby's caseworker, believed Shawna continued to seek unnecessary medical care. In May, the permanency objective was changed from reunification with Shawna to a guardianship with a concurrent goal of adoption. In July, the juvenile court adopted the case plan. DHHS, however, still allowed Shawna visitation because it believed it was in Shelby's best interests to continue her relationship with Shawna.

Shawna appealed the juvenile court's order changing the permanency objective from reunification to guardianship and adoption. The Court of Appeals affirmed, based upon Clark's opinion that Shawna inaccurately reported Shelby's symptoms to medical providers and failed to provide a safe environment for Shelby. See *In re Interest of Shelby L.*, No. A-02-900, 2003 WL 1962921 (Neb. App. Apr. 29, 2003) (not designated for permanent publication) (*In re Interest of Shelby L. I*).

On June 24, 2003, 1 month after the Court of Appeals affirmed, the State moved to terminate the parental rights of Shawna and Robert Z., the biological father. The amended petition alleged grounds for termination under both § 43-292(7) (15 of most recent 22 months in out-of-home placement) and (6) (reasonable efforts to preserve and reunify family have failed to correct conditions leading to adjudication). Before the termination petition was filed, DHHS removed Shelby from Shawna's sister's home because of her sister's marital and family problems. At that time, Clark determined that it was in Shelby's best interests to terminate Robert and Shawna's parental rights and placed Shelby in a "fos-adopt" home.

After the State filed termination proceedings, the juvenile court granted Donald and Judy's petition to intervene. On October 2, the first day of trial, however, the juvenile court entered an order declining to adjudicate their request until after Shawna's rights were determined.

At the termination hearing, Clark testified that DHHS considered only Shawna's sister for a guardianship. If the guardianship failed, Shelby would be placed for adoption because DHHS believed it had exhausted the services it could provide to Shawna. She testified that during the 2 years Shelby lived in foster care,

Shelby was treated by doctors for illnesses approximately eight times and did not require ongoing medications. In contrast, she testified that during Shelby's 9 months with Shawna, Shelby had 25 doctor visits and 4 emergency room visits. She also stated Shelby had been to a doctor only four times in the 6 months that she had been placed in the "fos-adopt" home. Clark further testified that one of the conditions of placement with Shawna required that Shawna contact her each time Shelby was to see a doctor. She stated, however, that Shawna had contacted her before seeking medical treatment only three-fourths of the time. She did, however, testify that Shawna contacted DHHS after every appointment to report symptoms if she could not reach Clark or the family support worker beforehand. At the termination hearing, Clark conceded that Shawna loved Shelby, that Shelby had a positive relationship and interacted well with Shawna, and that mother and daughter had bonded.

After the trial, the court terminated both parents' rights. The court determined that the State had shown grounds for terminating Shawna's parental rights under both § 43-292(6) and (7). The court also denied Donald and Judy's intervention petition because it concluded that they no longer had standing to intervene.

All three parties, Shawna, Robert, and Donald and Judy, appealed. The Court of Appeals affirmed. See *In re Interest of Shelby L. II.* The court stated that although neither the guardian ad litem nor the State had argued why it was in Shelby's best interests to terminate Shawna's parental rights, it nonetheless found clear and convincing evidence to terminate. The court relied on Clark's testimony that when Shelby was in foster care, she was not ill. See *id.*

The Court of Appeals also concluded that it lacked jurisdiction to consider Donald and Judy's appeal because they failed to appeal from the juvenile court's October 2, 2003, "final order." In that order, the juvenile court declined to consider "their 'motion for placement' until after the issue of termination . . . was determined." *Id.* at *8.

Shawna and Donald and Judy petitioned for further review. Robert and Shawna are divorced, and he has not sought further review.

III. ASSIGNMENTS OF ERROR

Shawna assigns that the Court of Appeals erred in determining that the State had proved by clear and convincing evidence termination was in Shelby's best interests and that the State had made reasonable efforts toward reunification.

Donald and Judy assign that the Court of Appeals erred in (1) concluding that the October 2, 2003, ruling was a final, appealable order and (2) affirming the juvenile court's December 29 order, determining that the termination of Shawna's parental rights extinguished their request for placement despite their successful intervention.

IV. STANDARD OF REVIEW

In an appeal from a judgment or order terminating parental rights, an appellate court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

V. ANALYSIS

1. Termination of Shawna's Parental Rights

The juvenile court found clear and convincing evidence to terminate Shawna's parental rights under both § 43-292(6) and (7). The State contends that neither parent contested that Shelby was in out-of-home placement for over 15 of the most recent 22 months when the petition was filed and that Shawna was unable to rehabilitate herself in that time. Although the State does not argue in its brief why it is in Shelby's best interests to terminate Shawna's parental rights, at oral argument, the State asserted that Shawna had continued to place Shelby at risk by seeking unnecessary medical treatment.

Shawna, however, contends that the Court of Appeals erred in determining that the State proved by clear and convincing evidence that termination was in Shelby's best interests. She argues that (1) Clark's opinion that she placed Shelby at risk by seeking unnecessary medical treatment was not credible because MacDonald's testimony showed Shawna had not harmed Shelby

through medical contacts or treatment and (2) the State admitted that Shawna and Shelby are bonded.

[1,2] For a juvenile court to terminate parental rights under § 43-292, it must find that termination is in the child's best interests and that one or more of the statutory grounds listed in this section have been satisfied. The State must prove these facts by clear and convincing evidence. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Aaron D., supra.*

[3] Here, the State satisfied the statutory ground for termination under subsection (7). See § 43-292(7) (allowing termination if juvenile has been in out-of-home placement for 15 or more of most recent 22 months). The State removed Shelby the second time on March 12, 2002, and she had been in continuous out-of-home placement for 15 months and 12 days when the termination petition was filed on June 24, 2003. If this were the only ground for termination, the only question would be whether termination was in Shelby's best interests. See *In re Interest of Aaron D., supra.* But the juvenile court also found grounds for termination under subsection (6). In *In re Interest of Aaron D.*, we stated that the evidence adduced to prove termination on any statutory ground other than subsection (7) is "highly relevant to the best interests of the juvenile, as it would show abandonment, neglect, unfitness, or abuse." 269 Neb. at 260, 691 N.W.2d at 173. Thus, whether the State proved by clear and convincing evidence grounds for termination under subsection (6) is highly relevant to a determination of Shelby's best interests.

[4,5] When a court adjudicates a juvenile under § 43-247(3)(a), a termination under § 43-292(6) requires a finding that reasonable efforts to preserve and unify the family under the direction of the court have failed to correct the conditions leading to the determination. *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). And when a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the children require termination of the parental rights. *In re Interest of Mainor T. & Estela T., supra.*

At the termination hearing, Clark again contended that Shawna's inaccurate reporting of Shelby's symptoms put Shelby at risk because it was harmful to place a child on unnecessary medications. Implicit in her testimony is the assumption that Shawna had subjected Shelby to unnecessary medical treatment. Thus, we look to the only relevant allegation from the adjudication: Shawna "has subjected Shelby to excessive and unnecessary medical treatment to the detriment of the child."

2. Juvenile Court's Findings Regarding Termination of Shawna's Parental Rights

The juvenile court found clear and convincing evidence that Shawna had failed to comply with her goals and objectives and had placed Shelby at risk. The court specifically found that Shawna's "indifference to a time when Shelby appeared to be ill as she was playing cards with a friend and waited till the next day to then take her to an emergency room is indication [sic] to the court that she is still unable to care for Shelby's needs." The court apparently made this finding based on Shawna's testimony regarding her medical contacts over a 3-day period in July 2001 when Shelby had an earache.

Yet, the record shows that during this 3-day period, Shawna took Shelby to MacDonald's office on Friday, July 13, 2001, for an earache that had started on Thursday. The rest of Friday and Saturday, Shelby was not feeling well. Saturday evening, Shawna had a friend over to play cards and held Shelby the entire time because Shelby would not sleep otherwise. The record reveals that around midnight, Shawna called a nursing service provided by MacDonald's office and then took Shelby to the emergency room, as she had been instructed. On Sunday morning, the emergency room physician called to advise Shawna to watch Shelby to make sure she was urinating. Later that day, after consulting the family support worker, Shawna called the nursing service again about Shelby's temperature and infrequent urination. The nursing service advised her to take Shelby to Children's Hospital in Omaha. The hospital physicians saw no sign of dehydration, but they did diagnose Shelby with tonsillitis and viral syndrome.

The juvenile court's finding that Shawna failed to immediately seek emergency medical treatment obviously does not support

termination based on the relevant allegation from the adjudication petition, i.e., that Shawna had subjected Shelby to unnecessary medical treatment to her detriment. The court not only ignored the relevant allegation, its finding demonstrates Shawna's dilemma. On the one hand, the juvenile court viewed Shawna's attempts to comfort Shelby before seeking emergency medical care as an indication that she did not recognize when Shelby required emergency medical care. On the other hand, Clark testified that there was no reason for Shawna to seek emergency medical care over this 3-day period and even emphasized the emergency room visits to bolster her opinion that Shawna was seeking unnecessary medical care.

3. Court of Appeals' Determination

The Court of Appeals affirmed the termination order based on Clark's testimony. It noted that Clark testified Shawna failed to demonstrate she would seek only necessary medical care for Shelby, failed to follow the safety plan, failed to report Shelby's doctor appointments 25 percent of the time, and reported symptoms to Clark that were inconsistent with what she had reported to the medical care provider. The court quoted Clark as stating: " 'When Shelby's been with Shawna, [Shelby] appears to be quite ill. When Shelby is not with Shawna, [Shelby] is very healthy, and I think that is the concern.' " *In re Interest of Shelby L. II*, 2004 WL 2935857 at *4.

(a) Seeking Unnecessary Medical Treatment

We recognize that at the adjudication hearing, Shawna admitted to seeking unnecessary medical care to Shawna's detriment. At the termination hearing, however, Clark testified to specific facts about Shelby's health and medical contacts in her first 17 months. The State introduced these facts as circumstantial evidence that Shelby was at risk whenever Shawna was responsible for her medical decisions. As the Court of Appeals' opinion demonstrates, the State's proof that Shelby was at risk with Shawna depended heavily upon contrasting Shelby's health and medical contacts while in Shawna's care to her health and medical contacts while in foster care. Keeping in mind the State's standard of clear and convincing burden of proof, we review the sufficiency of this circumstantial evidence.

The State's conclusion that Shawna placed Shelby at risk hangs on two premises: (1) Shelby was seen by a doctor less frequently in foster care and (2) Shelby's health substantially improved in foster care. But the State's argument and conclusion collapse under the weight of the evidence. First, the State failed to prove its premise that Shelby was substantially healthier in foster care. More important, the State's premises do not necessarily support its conclusion.

(i) Shawna's Medical Contacts

Clark testified that before Shelby's first removal in June 1999, Shawna had made 195 medical contacts with 11 different doctors, whereas in foster care, Shelby was seen by a doctor for illnesses approximately 8 times. But the significance of Shawna's medical contacts during Shelby's first 17 months of life cannot be reviewed in a vacuum. This record shows both that Shelby had significant health problems from birth and that many of DHHS' reported "contacts" are of no consequence.

Clark's conclusion relied on a summary of Shawna's calls to and appointments with medical providers during Shelby's first 17 months; the summary was compiled by Clark's predecessor through a Medicaid tracking service. The summary includes an examination at birth, "well-baby" checkups, followup appointments, and telephone calls to make appointments or to get dosages for over-the-counter medicines. The record also shows that most of the doctors Shawna contacted were emergency room physicians or physicians to whom Shelby was referred by her primary physician.

In the context of Shelby's medical history, these contacts fail to establish that Shawna placed Shelby at risk by seeking unnecessary medical care. As noted, the record shows that Shelby endured serious medical problems before her first removal. The State adduced no evidence to show that Shawna was responsible for these conditions.

(ii) Shelby's Health Improvements During Foster Care

Clark also testified that after Shelby's first removal from Shawna, she gained weight during her first 11 months in foster care, she did not require ongoing medications, and the symptoms Shawna had reported were no longer observed. This indicated to

Clark that the medical treatment Shelby had received was unnecessary. DHHS had earlier concluded Shelby's low weight gain and gastric reflux before her first removal were consistent with MSBP because she gained weight in foster care and her symptoms of gastric reflux reportedly diminished considerably after her removal.

Although, before Shelby's first removal, Shawna frequently reported gastric reflux symptoms, Shelby's gastric reflux was evident during a 3-day hospitalized observation. Thus, the State has failed to prove that Shelby's gastric reflux condition did not exist. Regarding Shelby's weight, in May 1999, Shelby's first primary physician noted in response to Shawna's concerns that Shelby's "recent illnesses could account for her poor weight gain but I also think she is just small." Shortly after Shelby's 3-day hospitalization, the record shows Shelby began to gain some weight before her removal in June.

Although Shelby's weight and gastric reflux symptoms did improve in foster care, MacDonald testified that children often outgrow protein intolerance and gastric reflux by the time they are 2 years old. She concluded that Shelby's lack of gastric reflux symptoms after her first removal could indicate inaccurate reporting, or it could indicate that Shelby was outgrowing the problem. MacDonald also addressed Clark's testimony that Shelby required no ongoing medications and was not taken to a doctor as often in foster care. MacDonald testified that this pattern could be attributed to the fact that children's immunities improve and their air passages get larger as they get older.

Moreover, the State did not prove that Shelby was not ill in foster care. This record shows that while in foster care, Shelby was treated for many of the same medical problems Shawna had reported before Shelby's first removal. These included viral respiratory infections, reactive airway disease, asthma, bronchitis, RSV, pneumonia, croup, allergies, and conjunctivitis. Because MacDonald testified that many of Shelby's symptoms could have abated simply by her getting older, and because many of Shelby's same medical problems continued in foster care, the State failed to establish that Shelby's health substantially improved in foster care beyond what would have occurred naturally. Thus, neither MacDonald's testimony nor the State's evidence

supports a conclusion that Shelby's conditions before her first removal were such that they would not have existed except for the acts or omissions of Shawna.

(iii) Shelby's Medical Contacts During Reunification

Shawna admitted that she had taken Shelby to the doctor more during the reunification period than had the foster care providers. But MacDonald's testimony directly contradicted Clark's testimony that Shawna had sought unnecessary emergency medical treatment and had placed Shelby at risk through her medical contacts while she was reunited with Shelby. MacDonald testified that she had reviewed the hospital reports regarding Shelby's two emergency room visits in July 2001 and was unconcerned with either of the treatments. She said that Shawna had not acted inappropriately by following the directions of the nursing service.

MacDonald believed that Shawna needed extra reassurance and education because "there may be some extent of a vulnerable child syndrome," which she described as a spectrum of parents with a heightened awareness of their child's health due to the child's real medical problems. But MacDonald testified that if she had suspected MSBP or believed that there was an issue with vulnerable child syndrome to the point of causing harm to Shelby, she would have made a referral for a diagnosis. She specifically testified, however, that she had never diagnosed either disorder and that she did not believe it was necessary to make a referral.

Finally, Clark admitted that during reunification, many of Shawna's medical contacts for Shelby were necessary and that no doctor had ever reported to her that an office visit or emergency room treatment was unnecessary. In fact, Clark could not point to any of Shelby's medical appointments that were unnecessary or point to any harm Shelby had suffered because of a medical contact during reunification.

In sum, the State produced no evidence that Shawna intentionally induced or falsified Shelby's symptoms or was even suspected of this behavior. Furthermore, the State failed to adduce expert testimony that Shawna was diagnosed with MSBP disorder. In the absence of proving medical abuse, the State has shown that Shawna is overprotective, excessively worries, and sometimes takes Shelby to the doctor for minor problems. But

MacDonald did not believe Shelby had been harmed by any of Shawna's medical contacts, and Clark could not point to any harm because of these contacts.

(b) Failure to Contact Clark

Clark also contended that Shawna failed to follow the rehabilitation plan during reunification by not calling Clark before every doctor appointment. The juvenile court additionally found that Shawna had continued to take Shelby to other doctors without seeking Clark's permission. The case plan and court order for reunification are not part of this record. Clark testified that during reunification, Shawna was required to take Shelby to a new pediatrician, MacDonald, and no other doctor, and to contact Clark before and after appointments. Shawna was to allow only her sister to provide daycare.

Nothing in the record suggests that during reunification, Shawna took Shelby to any other clinic besides MacDonald's office. Clark testified that Shawna sought emergency room treatment on four occasions. But the record shows that Shawna paged the family support worker on three of these occasions and that Shawna had been advised to take Shelby to the hospital by MacDonald's nursing service on the one occasion that she did not page the family support worker first.

Although Shawna did not call Clark or the family support worker before every office visit with MacDonald, Clark did testify that Shawna had always called to report Shelby's symptoms after every visit, if not before. Clark testified that the purpose for this requirement was not to obtain Clark's permission to seek medical care, but to allow Clark to compare the symptoms Shawna reported to her to those Shawna reported to a doctor. So, Shawna substantially complied with the reporting requirement by usually contacting Clark or the family support worker before appointments and calling afterward if she could not reach either of them beforehand.

(c) Shawna's Inaccurate Reporting of Symptoms

Finally, our review of the record indicates that Shawna's alleged inconsistent reporting of symptoms did not rise to the level of intentionally falsifying symptoms and that the inconsistencies are often overstated or misstated. For example, Clark and

the family support worker testified that in separate instances, Shawna had reported a higher temperature to DHHS than was recorded by a medical provider. Yet, in one of those instances, the doctor noted Shawna reported Shelby had a higher temperature *the day before* Shelby was seen. In our de novo review, we conclude that Shawna's alleged inconsistencies simply do not reflect the type of inaccurate reporting that supports the termination of a parent's rights.

We determine that the State has failed to prove by clear and convincing evidence grounds for termination of Shawna's parental rights under subsection (6). Nor has the State proved that it is otherwise in Shelby's best interests to terminate Shawna's parental rights. The record shows that during the time Shelby was in foster care, Shawna, on her own initiative, paid to take three parenting courses to improve her parenting skills. Clark admitted that Shawna had followed through with the therapy required by DHHS and had been released from treatment. Both Clark's testimony and the record support Shawna's contention that during reunification, she was more likely to try to comfort Shelby before seeking medical treatment and greatly reduced the times she took Shelby to the doctor. Further, the evidence is uncontroverted that Shelby and Shawna are bonded and have positive interactions, and DHHS has stated on two occasions that it was in Shelby's best interests to maintain her relationship with Shawna because of their positive relationship and their family network.

We conclude that the State has failed to prove by clear and convincing evidence that the termination of Shawna's parental rights was in Shelby's best interests.

4. Donald and Judy's Standing to Appeal

In their petition for further review, Donald and Judy assign the Court of Appeals erred in concluding that the October 2, 2003, order was a final, appealable order from which they failed to appeal. Thus, the court affirmed the juvenile court's December 29 order that terminated Shawna's parental rights and extinguished their request for placement despite their successful intervention. Because we determine that the State failed to prove by clear and convincing evidence that it is in Shelby's best interests to terminate Shawna's parental rights, it is unnecessary to address the

Court of Appeals' determination that it lacked jurisdiction to consider Donald and Judy's appeal.

VI. CONCLUSION

The Court of Appeals erred in affirming the juvenile court's termination order. Although Shelby was in out-of-home placement for 15 months and 12 days of the most recent 22 months, we conclude that the State failed to prove by clear and convincing evidence that termination of Shawna's parental rights is in Shelby's best interests.

REVERSED.

EDWARD A. HAHN, APPELLEE, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

699 N.W.2d 32

Filed July 15, 2005. No. S-04-560.

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. **Administrative Law.** As a general rule, administrative agencies have no general judicial powers, even though they may perform some quasi-judicial duties.
4. ____. An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.
5. **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 Cheyenne County: KRISTINE R. CECAVA, Judge. Affirmed.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellant.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

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

STEPHAN, J.

In this appeal brought pursuant to the Administrative Procedure Act, the director of the Nebraska Department of Motor Vehicles appeals from a decision of the district court for Cheyenne County holding that the director lacked the authority to revoke the driver's license of Edward A. Hahn because of deficiencies in the arresting officer's sworn report. We affirm.

FACTS

On August 5, 2003, at approximately 11:30 p.m., Sgt. Dale Miller of the Sidney Police Department observed a speeding vehicle driven by Hahn and initiated a traffic stop. Upon approaching the vehicle, Miller detected the odor of alcohol. Hahn admitted he had been drinking and showed impairment on field sobriety tests. After Hahn failed a preliminary breath test, Miller placed him under arrest and informed him that he would be transported to the police station for a chemical breath test.

Hahn failed the chemical test. Pursuant to Neb. Rev. Stat. § 60-6,205(3) (Cum. Supp. 2002), Miller verbally notified Hahn that his license would be automatically revoked 30 days after the date of the arrest unless a petition for hearing was filed within 10 days of the arrest. Also pursuant to § 60-6,205(3), Miller forwarded his sworn report to the director within 10 days of the arrest.

Hahn filed a timely petition for an administrative hearing to contest the revocation of his license. Miller testified at the hearing, and his sworn report was received as evidence. Thereafter, the director of the Department of Motor Vehicles revoked Hahn's license for 90 days. Hahn filed a timely appeal with the district court pursuant to the Administrative Procedure Act. In an order entered on April 7, 2004, the district court vacated the revocation, reasoning that the director lacked the authority to revoke Hahn's license because Miller's sworn report did not meet the requirements of § 60-6,205. We moved this case to our

docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

In the director's sole assignment of error, she assigns, restated, that the district court erred in finding that she lacked the authority to revoke Hahn's license.

STANDARD OF REVIEW

[1,2] 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. *Hauser v. Nebraska Police Stds. Adv. Council*, 269 Neb. 541, 694 N.W.2d 171 (2005); *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Hauser v. Nebraska Police Stds. Adv. Council, supra*; *Lein v. Nesbitt*, 269 Neb. 109, 690 N.W.2d 799 (2005).

ANALYSIS

The issue in this appeal is whether the sworn report submitted by Miller was sufficient to confer authority upon the director to revoke Hahn's license. Resolution of this issue requires an examination of the relevant statutory and case law.

At the time of Hahn's arrest, the relevant statute provided that when an arrested individual 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 validly arrested pursuant to section 60-6,197 [driving under the influence] 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].

§ 60-6,205(3). In *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995), we held that the department makes a prima facie case for license revocation once it establishes that the officer provided a sworn report containing the recitations required by the statute. See § 60-6,205(7). Upon such showing, the director is not required to prove the recitations are true. *Id.* Rather, it becomes the motorist's burden to prove that one or more of the recitations in the sworn report are false. *Id.*

Miller's sworn report was received at the administrative hearing. The report was properly notarized and sworn prior to its timely submission to the department. In his report, Miller checked the box stating that Hahn was validly arrested and gave supporting reasons. Although Miller checked a box noting that Hahn "submitted to a chemical test which indicated an alcohol concentration of **0.08** or more," he failed to check the box stating that Hahn "was requested to submit to the required test." Miller filled out a portion of the form noting that the test results were "0.148" and that the "Instrument Type" was "5000," but neglected to indicate whether the chemical test was of Hahn's blood or breath. On its face, therefore, the report does not fully comply with the requirements of § 60-6,205(3).

The director argues that Miller's report sufficiently complied with the requirements of the statute to give her the authority to revoke Hahn's license. Relying on *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002), the director asserts that the information in the sworn report and the testimony offered by Miller at the administrative hearing established a prima facie case.

In *Morrissey*, the director sought to revoke a motorist's license based on the motorist's refusal to submit to a chemical test. After being arrested at the scene and transported to the police station for a chemical test, the motorist blew a small sample of breath into an Intoxilyzer 5000 machine. The test record card indicated that the motorist had an alcohol content of .203 grams of alcohol per 210 liters of breath. However, the test record card also indicated that the sample of breath obtained from the motorist was deficient. Although requested to do so, the motorist refused

to submit to any further chemical tests. The arresting officer completed a sworn report which met all of the statutory requirements and specifically stated that the motorist refused to submit to a chemical test.

The motorist petitioned for a hearing to contest the revocation of his license. At the hearing, testimony was received from the arresting officer. In addition, the sworn report, the test record card, and a chemical test checklist completed by the test administrator at the time of the test were received into evidence. The chemical test checklist recited that the digital reading on the Intoxilyzer showed "0.203" of a gram of alcohol per 210 liters of breath. This court also took judicial notice of the Nebraska Department of Health and Human Services Regulation and Licensure rules and regulations, 177 Neb. Admin. Code, ch. 1 (1998).

According to the applicable rules and regulations, see 177 Neb. Admin. Code, ch. 1, § 002.01A, no digital result should have been reported on the checklist when the test record card indicated an insufficient sample of breath had been given. *Morrissey v. Department of Motor Vehicles, supra. Morrissey* examined the effect of this error and concluded that the department's failure to follow its own promulgated rules and regulations was significant. In such a situation, we concluded that the rule announced in *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995), i.e., the rule that the recitations in the sworn report are presumptively true, is inapplicable. We explained that the *McPherrin* rule

> frees the department of independently investigating the circumstances of each arrest. The department is also free from establishing the foundational elements necessary for the admission of a breath test in a driving under the influence prosecution. . . . Thus, *McPherrin* conveys a substantial procedural benefit upon the department in an administrative license revocation proceeding. However, given this benefit, the department is expected to strictly comply with the applicable rules and regulations. Where, as in this case, the department violates one of those rules, we believe that concerns are properly raised about whether other aspects of the chemical testing conformed to the rules and regulations. Therefore, we conclude that when the applicable rules and

> regulations are not strictly complied with, the department cannot obtain the benefit of a presumption that all facts recited in the sworn report are true.

(Citation omitted.) *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 461, 647 N.W.2d 644, 650 (2000). *Morrissey* further reasoned that although the statement in the sworn report reciting that the motorist failed to submit to the chemical test could not be presumed to be true, the director nevertheless offered sufficient evidence of the motorist's refusal, in the form of live testimony from the arresting officer, to support the license revocation.

The director contends that *Morrissey* controls the instant case. She argues that although the sworn report failed to comply with all the requirements of § 60-6,205(3), the failure only caused the department to lose the presumption that the recitations in the report were true. She contends that Miller's testimony at the administrative hearing is admissible under *Morrissey* to fill in the gaps created by the missing information in the sworn report.

In this respect, the director misinterprets *Morrissey*. In that case, the sworn report strictly complied with all of the *statutory* requirements and thus the director had the authority pursuant to statute to revoke the motorist's license. The question of the validity of the allegations in the sworn report arose due to other evidence offered by the motorist at the revocation hearing. Because this evidence cast doubt upon the report, we held that the department lost the presumption that the report was true, but that the department was free to supplement the report with additional evidence at trial.

In § 60-6,205(3), the Legislature specified the information which must be set forth in an arresting officer's sworn report in order for the director to administratively revoke an operator's license. The arresting officer's sworn report triggers the administrative revocation process by establishing a prima facie basis for revocation. See, § 60-6,205(6) and (7); *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). 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. See, § 60-6,205(4),(6), and (7); *McPherrin v.*

Conrad, supra. Under similar statutory schemes, other courts have held that the existence of the sworn report is a jurisdictional requirement in an administrative revocation proceeding. In *Wilcox v. Billings*, 200 Kan. 654, 438 P.2d 108 (1968), the court held that where revocation was automatic upon receipt of a sworn report if the licensee did not request a hearing, the requirement that the report be "sworn" was essential to the legislative purpose of providing a reliable basis for administrative action and was therefore mandatory. The court concluded that an administrative revocation proceeding initiated by an unsworn report was void. See, also, *Wulfkuhle v. Kansas Dept. of Revenue*, 234 Kan. 241, 245, 671 P.2d 547, 551 (1983) (noting requirement that arresting officer's report be sworn is "jurisdictional"). The court in *Dawson v Secretary of State*, 44 Mich. App. 390, 205 N.W.2d 299 (1973), adopted the reasoning of *Wilcox* in holding that the failure of the arresting officer to swear to the report as required by statute invalidated the subsequent administrative revocation proceeding. Citing *Wilcox* and *Dawson*, the court in *Metcalf v. Dept of Motor Vehicles*, 11 Wash. App. 819, 525 P.2d 819 (1974), concluded that the statutory requirement of a "sworn" report was jurisdictional. Following the same reasoning, the Missouri Court of Appeals in *Allen v. Director of Revenue*, 59 S.W.3d 636, 637 (Mo. App. 2001), held:

> The director's receiving this sworn report is what activates the director's authority to revoke a driving license. He has no power to act before then. By requiring a sworn report, the General Assembly affords some measure of reliability and protection to a licensee, and the director's ignoring this mandate thwarts this protection. The sworn report, therefore, is essential to the validity of the director's subsequent actions. If the director does not receive a sworn report, his subsequent actions are void.

If a complete but unsworn report defeats jurisdiction in an administrative license revocation proceeding, is the same true of a sworn but incomplete report? Even in jurisdictions where a sworn statement is held to be a jurisdictional prerequisite to an agency's power to revoke an operator's license, technical deficiencies in the sworn report do not defeat administrative jurisdiction. For example, in *Veranth v. Department of Licensing*, 91

Wash. App. 339, 959 P.2d 128 (1998), the officer's use of abbreviations to designate locations was held not to be a jurisdictional defect where the sworn report did not vary or omit information required by the implied consent law. In *Broom v. Dept of Licensing*, 72 Wash. App. 498, 865 P.2d 28 (1994), the officer's use of summary language did not defeat jurisdiction where the language accurately conveyed the information required by the applicable statute. However, the court qualified its holding, stating that "we do not suggest that a report containing a significant variation from or an omission of the information required under [the statute] would be adequate to confer jurisdiction." 72 Wash. App. at 504, 865 P.2d at 31. See, also, *Cessor v. Director of Revenue*, 71 S.W.3d 217 (Mo. App. 2002) (holding incorrect notary signature date on sworn report did not defeat jurisdiction).

[3-5] The obvious difficulty is in defining the point at which an omission on a sworn report becomes a jurisdictional defect, as opposed to a technical one. We conclude that the test should be whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute. As a general rule, administrative agencies have no general judicial powers, even though they may perform some quasi-judicial duties. See, *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994). An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act. *Id.* Thus, the authority of the director of the Department of Motor Vehicles to administratively revoke an operator's license is only that which is specifically conferred by the administrative license revocation statutes. Given the substantial role which the sworn report plays in an administrative license revocation proceeding, we conclude that the report must, at a minimum, contain the information specified in the applicable statute, in this case § 60-6,205(3), in order to confer jurisdiction. The statutory requirements are not onerous; an arresting officer need only complete a form designed to convey the required information and swear to the information thus conveyed. In this case, Miller did not complete those portions of the sworn report form which would indicate that Hahn "was requested" to submit to the required test or "the type of test" to

which he submitted. Because of the omission of this information which is required by § 60-6,205(3), we agree with the district court that the director did not acquire jurisdiction or authority to administratively revoke Hahn's operator's license. To the extent language in *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002), and *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995), suggests that a sworn report which does not include information required by statute may be supplemented by evidence offered at a subsequent hearing, it is disapproved.

CONCLUSION

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

AFFIRMED.

THOMAS J. ARNDT, APPELLEE, V.
DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

699 N.W.2d 39

Filed July 15, 2005. No. S-04-584.

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. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Proof.** As a general rule, the offer by the Department of Motor Vehicles at a license revocation hearing of a sworn report establishes the department's prima facie case, and the burden shifts to the driver to refute such evidence. However, the rule presupposes a proper report—that is, a sworn report which comports with statutes and the relevant administrative rules and regulations sufficient to confer authority upon the director to revoke an operator's license.

5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs.** Because revocation of an operator's license is automatic upon receipt of a sworn report if the licensee does not request a hearing, the requirement that the triggering report be "sworn" and be submitted by an "arresting peace officer" is essential to the legislative purpose of providing a reliable basis for administrative action.
6. ____: ____: ____: ____: ____. The authority of the director of the Department of Motor Vehicles to administratively revoke an operator's license is only that which is specifically conferred by the administrative license revocation statutes, and absent receipt of a properly sworn report submitted by an arresting peace officer, the director does not acquire the authority to administratively revoke the operator's license.

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

Jon Bruning, Attorney General, Milissa Johnson-Wiles, and, on brief, Charlotte Koranda for appellant.

Michael L. Munch for appellee.

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

GERRARD, J.

After failing field sobriety tests during a traffic stop, Thomas J. Arndt, the appellee, was arrested and his motor vehicle operator's license was revoked. Arndt appealed the revocation, arguing that the "sworn report" that initiated the revocation procedure was not completed by the arresting officer, as required by Neb. Rev. Stat. § 60-498.01 (Supp. 2003), and was therefore invalid. The district court reversed the order of revocation on that basis, and the Department of Motor Vehicles (the Department) appeals.

FACTUAL AND PROCEDURAL BACKGROUND

While traveling on Cornhusker Road in Sarpy County, Officer Joseph Milos noticed the vehicle in front of him straddling the centerline of two travel lanes. Milos conducted a traffic stop and, upon making contact with the driver, Arndt, conducted various field sobriety tests, which Arndt either failed or was unable to complete. After receiving a preliminary breath test sample of .150 grams of alcohol per 210 liters of breath, Milos placed Arndt under arrest. Because Milos had a dog in his vehicle, a sergeant on the scene contacted an Officer Reed to transport

Arndt to the Sarpy County jail. Milos gave Reed the completed citation and updated Reed on what had happened during the traffic stop. Reed subsequently transported Arndt to the jail, after which Arndt was read the postarrest chemical test advisement form. Arndt signed the form, an Intoxilyzer test was administered, and Reed completed a "sworn report" and submitted the report to the Department. The report indicated that Arndt had been arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Supp. 2003) and that, according to a chemical test, he had an alcohol concentration of more than .08 grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. See § 60-498.01 and Neb. Rev. Stat. § 60-6,196 (Supp. 2003). Arndt filed a petition for a hearing before the Department pursuant to § 60-498.01.

The report completed by Reed was offered at the hearing, and Arndt objected to its admission on the basis that it was not completed by the arresting officer as required by statute. See § 60-498.01. The hearing officer overruled the objection and received the report into evidence. Thereafter, the director of the Department adopted the hearing officer's recommended order that Arndt was operating a vehicle while having an alcohol concentration in violation of § 60-6,196(1) and, consequently, ordered that Arndt's operator's license be revoked for 90 days.

On appeal, the district court reversed the order of revocation, concluding that the report was not completed by the arresting officer as required by § 60-498.01 and that, therefore, the director's order of revocation was not supported by the evidence.

ASSIGNMENTS OF ERROR

The Department assigns that the district court erred in concluding that Reed was not an arresting officer for the purpose of filling out the sworn report required by § 60-498.01.

STANDARD OF REVIEW

[1,2] 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. *Hahn v. Neth, ante* p. 164, 699 N.W.2d 32 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on

the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.*

[3] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004).

ANALYSIS

[4] Section 60-498.01 provides the procedure for administratively revoking the license of a person who, after submitting to a chemical breath or blood test, is found to be operating a vehicle under the influence of alcohol in a concentration equal to or more than .08 grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. See § 60-6,196. Section 60-498.01(3) states, in part:

> The arresting peace officer shall within ten days forward to the director a sworn report stating (a) that the person was arrested pursuant to section 60-6,197 [driving under the influence] 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 [equal to or more than .08].

As a general rule, the offer by the Department of the sworn report at the hearing establishes the Department's prima facie case, and the burden shifts to the driver to refute such evidence. See, *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002); § 60-498.01(7). However, the rule presupposes a proper report—that is, a sworn report which comports with statutes and the relevant administrative rules and regulations sufficient to confer authority upon the director to revoke an operator's license. See *id.* See, also, *Hahn, supra.*

In its order reversing the revocation of Arndt's license, the district court stated: "Due to the fact that the sworn report was not completed by the arresting officer pursuant to the requirements of § 60-498.01, this Court finds the final decision of the Director was

not supported by the evidence and the revocation is reversed." The Department argues that the district court erred in determining that Reed was not an arresting officer.

In *Connelly v. Department of Motor Vehicles*, 9 Neb. App. 708, 713-14, 618 N.W.2d 715, 720 (2000), the Nebraska Court of Appeals considered the characteristics of an arresting officer and correctly determined that

> "[a]n officer, who is present at the scene of the arrest for purposes of assisting in it, if necessary, is an 'arresting officer' within the meaning of the statute even though a different officer actually places his hand upon the defendant and informs him that he is under arrest."

(Quoting *State v. Stauffer*, 266 N.C. 358, 145 S.E.2d 917 (1966).) Accord *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

In this case, however, Reed was not present when Arndt was taken into custody, and we decline to extend *Connelly* and *Roberts* to such circumstances. We conclude that the district court's determination that Reed was not an arresting officer under the circumstances of this case is supported by competent evidence. The record establishes that Milos conducted the traffic stop and observed Arndt's intoxication. In addition, Milos performed the field sobriety tests, including a preliminary breath test, and placed Arndt under arrest. Reed arrived after the arrest in order to transport Arndt to the county jail and observed a Sarpy County sheriff's deputy administer an Intoxilyzer test at the jail. Reed's limited participation does not establish that he was "present at the scene of the arrest for purposes of assisting in it." See *Connelly, supra*. Rather, Reed was summoned to the scene, after the arrest, for the purposes of transporting Arndt to the county jail. Such facts do not support Reed's classification as an arresting officer, and therefore, the district court did not err in so concluding.

[5] In this case, Reed completed and submitted the report that initiated Arndt's license revocation proceedings. However, § 60-498.01 specifies that the sworn report required by that section is to be submitted by the arresting peace officer. Because revocation of an operator's license is automatic upon receipt of a sworn report if the licensee does not request a hearing, the requirement that the triggering report be "sworn" and be submitted

by an "arresting peace officer" is essential to the legislative purpose of providing a reliable basis for administrative action. *Hahn v. Neth, ante* p. 164, 699 N.W.2d 32 (2005), citing *Wilcox v. Billings*, 200 Kan. 654, 438 P.2d 108 (1968). The director's receipt of this properly submitted sworn report is what activates the director's authority to revoke an operator's license. In the instant case, the report filed did not contain the affirmation of an "arresting peace officer" that the facts recited in the report were true, and was thus not a proper "sworn report" as required by § 60-498.01. Because Reed was not an arresting officer, the report submitted at the hearing in this case did not comport with the requirements of the statute, and therefore, the director did not acquire the authority to administratively revoke Arndt's operator's license. See *Hahn, supra*.

[6] The Department's sole argument is that the district court incorrectly concluded that Reed was not an arresting officer. The Department does not contest the court's conclusion that if Reed was not an arresting officer, the report filed was insufficient to support the director's order of revocation. But more to the point, the authority of the director of the Department to administratively revoke an operator's license is only that which is specifically conferred by the administrative license revocation statutes, see *id.*, and absent receipt of a properly sworn report submitted by an arresting peace officer, the director does not acquire the authority to administratively revoke the operator's license. Because the report submitted by Reed was not sufficient to confer authority upon the director of the Department to revoke Arndt's operator's license, the district court properly reversed the order of revocation.

CONCLUSION

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

AFFIRMED.

DALLAS L. SHEARER, APPELLANT, V. LYNNE R. SHEARER, APPELLEE.

700 N.W.2d 580

Filed July 22, 2005. No. S-03-680.

1. **Property Division: Appeal and Error.** The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
4. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
5. **Divorce: Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding.
6. **Actions: Stipulations.** Parties are bound by stipulations that are voluntarily made, and relief from such stipulations is warranted only under exceptional circumstances.
7. **Property Division: Stipulations.** A court should not order a distribution of property inconsistent with a voluntary stipulation.
8. **Divorce: Property Division.** A court may order division of property as is reasonable, considering factors such as the parties' circumstances, the duration of their marriage, and the contributions of each party to the marriage.
9. ____: ____. Courts may consider earning abilities of the parties in making a division of property in a divorce case and, further, may consider all facts pertinent in reaching an equitable property division.

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

Susan C. Williams for appellant.

R. Bradley Dawson, of Dawson & Piccolo, for appellee.

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

GERRARD, J.

NATURE OF CASE

Dallas L. Shearer filed a petition to dissolve the marriage between Dallas and his wife, Lynne R. Shearer. The parties entered into a stipulation and agreement, disposing of their property but

reserving the division of a portion of Dallas' railroad disability benefits for the district court. At trial, Dallas argued that the benefits should be awarded solely to him, since the marital estate benefited considerably from proceeds he received during the marriage from a settlement with Union Pacific Railroad Company (Union Pacific) for an injury he sustained while working for Union Pacific. The district court disagreed and divided the benefits at issue equally between the parties. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Dallas and Lynne were married in April 1971. Dallas began working for Union Pacific in late 1975 and continued that employment until he was injured on the job in 1992. Dallas' injury left him occupationally disabled; in other words, he was unable to return to the work he had been trained to do for Union Pacific. Dallas filed a claim against Union Pacific under the Federal Employers' Liability Act and reached a settlement in which he was awarded $525,000 and an additional $50,000 for use in establishing a leatherworking business.

In addition, Dallas continues to receive disability benefits under the Railroad Retirement Act. Annuities under the Railroad Retirement Act consist of independent tiers. Tier I is calculated using Social Security benefit formulas and includes earnings both in the railroad industry and in employment covered by the Social Security Act. Tier II is based on railroad retirement earnings alone. Dallas receives benefits of $1,361 per month under tier I and $398 per month under tier II. Upon reaching retirement age, Dallas' benefits will convert to those provided for railroad retirees. Dallas also receives health insurance through Union Pacific at a monthly cost to him of $275.

Lynne worked at Simon Construction from 1983 through 1996. When the company was sold in 1994, the employees of the company received a share of the profits; Lynne received $134,000 from the sale. When Dallas' injury prevented him from returning to work at Union Pacific, he and Lynne established a leatherworking business called Mill Iron "S" Company.

In 2002, Dallas filed a petition for dissolution of marriage. Dallas and Lynne subsequently entered into a stipulation and agreement prior to trial. In the stipulation, the parties agreed to

waive alimony, arranged for the division of marital property, and divided responsibilities with respect to insurance, debts, and attorney fees. The stipulation specifically reserved the disposition of Dallas' tier II annuity benefits for the district court.

A trial was held, and the court entered a decree of dissolution. The court approved the parties' stipulation and agreement and ordered the tier II benefits to be divided equally. The court discussed several factors in support of its decision: Dallas failed to sustain his burden of proof to show that the tier II benefits are nonmarital and should be awarded solely to him; this was a marriage of long duration; Dallas' tier I benefits were roughly equivalent to Lynne's monthly income; during the marriage, Lynne left two jobs at Dallas' request; Dallas is still capable of working and could earn up to $400 per month without affecting his railroad benefits; and both parties experienced "windfalls" as a result of Dallas' Union Pacific settlement and Lynne's employment bonus.

Dallas filed a motion for new trial, which the court overruled. Dallas appeals.

ASSIGNMENTS OF ERROR

Dallas assigns, restated, that the district court erred in (1) equally dividing his tier II benefits, (2) considering Lynne's bonus in its justification for equally dividing his tier II benefits, and (3) considering the respective earning capacities of Dallas and Lynne in dividing Dallas' tier II benefits.

STANDARD OF REVIEW

[1,2] The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

[3,4] 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. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly

untenable, unfairly depriving a litigant of a substantial right and a just result. *In re Guardianship of Robert D.*, 269 Neb. 820, 696 N.W.2d 461 (2005).

ANALYSIS

Neb. Rev. Stat. § 42-365 (Reissue 1998) provides for the equitable division of marital property, based upon

> the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

The parties may enter into a written agreement providing for the disposition of their property. Neb. Rev. Stat. § 42-366(1) (Reissue 2004). Such an agreement is binding on the court unless the agreement is found to be unconscionable. § 42-366(2).

In the present case, the parties entered into a stipulation and agreement for the disposition of their property but reserved the allocation of Dallas' tier II benefits for the court. In its decree, the court approved the stipulation and ordered disposition of the parties' property as called for within the stipulation. The court was then left with the question whether Dallas' tier II benefits should be divided between the parties and, if so, how they should be divided.

In the past, courts were prohibited from awarding one spouse an interest in benefits to which the other spouse became entitled under the Railroad Retirement Act. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979). The act has since been amended, and the Railroad Retirement Board has published regulations that require the board to honor a decree of divorce characterizing tier II benefits as property subject to distribution. 45 U.S.C. § 231m(b)(2) (2000); 20 C.F.R. § 295.1 (2005).

[5] Dallas assigns that the district court erred in dividing his tier II benefits, thereby depriving him of a fair and equitable property division. He argues that he is entitled to the entire amount of his tier II benefits in order to "make up" for the windfall realized by the marital estate when he collected settlement funds from Union Pacific, some of which Dallas claims could

have been excluded from the marital assets as compensation for pain and suffering. We note that Dallas did not present evidence to the district court to establish upon what basis his tier II benefits were calculated and that he did not argue in his appellate brief that his tier II benefits should not have been included in the marital estate because they were awarded for disability. As we stated in *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999), the burden of proof to show that property is nonmarital remains with the person making the claim. Thus, our analysis is confined to Dallas' argument with respect to his settlement funds.

Stipulation and Waiver

Dallas testified that he received $575,000 in his settlement with Union Pacific. Of that amount, he testified that $182,000 went to satisfy legal fees; $41,000 and an additional $5,225 were apportioned for "time lost" and "extra years" needed to qualify for disability benefits from Union Pacific; and $50,000 was used to start Mill Iron "S" Company. Dallas argues that the balance of approximately $296,000 was for pain and suffering and, thus, could have been excluded from the marital assets and reserved for Dallas. He cites *Parde v. Parde*, 258 Neb. at 109, 602 N.W.2d at 663, in support of his argument: "[C]ompensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate." In his brief, Dallas argues that $293,792 of the $296,000 for pain and suffering can be traced to marital assets, including real estate, personal items, money markets, and expenses related to Mill Iron "S" Company. As a result, Dallas argues, the marital estate received a windfall through his settlement moneys.

In contrast, Lynne argues, inter alia, that by entering into the stipulation and agreement before trial in which the parties disposed of all marital property except for the tier II benefits, Dallas waived issues with respect to the nonmarital nature of his settlement proceeds, and that if Dallas wished to have certain assets designated as nonmarital, he should have litigated those issues before the court.

[6] Pursuant to § 42-366, upon marital separation, parties may enter into a written agreement for the disposition of their property,

and the terms of such an agreement are binding on the court unless found to be unconscionable. Parties are bound by stipulations that are voluntarily made, and relief from such stipulations is warranted only under exceptional circumstances. *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991).

In this case, the parties entered into the stipulation and agreement, in which they agreed upon the disposition of all of their property except Dallas' tier II benefits. In its decree, the court specifically found that the terms of the agreement were not unconscionable, approved the agreement, and ordered disposition of the parties' property as called for within the agreement. However, as the basis of his argument that the district court erred in dividing his tier II benefits between the parties, Dallas relies on the classification and disposition of his settlement proceeds. In other words, Dallas' argument as to the disposition of his tier II benefits is based upon the allegedly unbalanced distribution of other property, the division of which he stipulated to as fair and equitable and of which the court approved.

In *Laude v. Laude*, 600 N.W.2d 848 (N.D. 1999), the Supreme Court of North Dakota dealt with a similar issue. In *Laude*, the parties agreed to a marital property division in which the wife waived all right, title, interest, and claim to the husband's pension. In addition, the parties expressly stipulated to submit the issue of spousal support to the trial court. The trial court entered a judgment, incorporating the parties' stipulation and concluding that the wife was entitled to permanent spousal support of $800 per month, to be reduced to $300 per month upon the husband's retirement. The husband appealed the judgment, arguing that the spousal support award was an improper claim against his pension, to which the wife had waived any right. *Id.*

The North Dakota Supreme Court discussed the importance of equitable property agreements and peaceful resolutions of divorce disputes and further stated: " '[T]o the extent that competent parties have voluntarily stipulated to a particular disposition of their marital property, a court ordinarily should not decree a distribution of property that is inconsistent with the parties' contract.' " *Id.* at 850. Although the wife waived any right to the husband's pension, the court stated that the parties also agreed to submit the issue of spousal support to the trial

court, including the amount to be paid and the required duration of such payments. The court concluded that although evidence at trial suggested that the husband's pension could be his sole source of income during retirement, the trial court had not awarded the wife a portion of those proceeds. Rather, the support payments could be satisfied with other income or property. *Id.* The court explained that the parties could have stipulated to postretirement spousal support or agreed that the husband's pension income could not be used in determining the support award; however, having left the issue of all spousal support to the trial court, the court concluded that the trial court had not erred in awarding postretirement spousal support. *Id.*

[7] The same principles are applicable to the circumstances in the present case. Specifically, the stipulation and agreement entered into by Dallas and Lynne provided for the disposition of all of their marital property and reserved the sole issue of Dallas' tier II benefits for the district court. Therefore, the disposition of Dallas' settlement proceeds in the form of marital property was determined in the stipulation, and a court should not order a distribution of property inconsistent with that voluntary stipulation. Consideration of the classification of Dallas' settlement proceeds and whether or not those moneys were properly included in the marital estate, as justification for concluding that the tier II benefits would not be divided, is inconsistent with the stipulation settling the division of such assets. Dallas is bound by that stipulation and waived the issue of his settlement proceeds; consequently, his first assignment of error is without merit.

Consideration of Lynne's Bonus

Dallas also assigns that the district court erred in considering Lynne's bonus in the disposition of the tier II benefits. Although it is somewhat difficult to decipher Dallas' argument with respect to this assignment, he appears to argue that there was no evidence that Lynne's bonus was nonmarital property, providing a windfall to the marital estate. Thus, Dallas argues that the court erred in comparing marital property (Lynne's bonus) to nonmarital property (Dallas' settlement proceeds), finding that the windfall provided by the bonus effectively canceled out that of the settlement proceeds. However, we have already determined that

Dallas effectively stipulated to the division of property acquired with his settlement proceeds as part of the marital estate. Specifically, the court did not compare marital property and nonmarital property, as both Lynne's bonus and Dallas' settlement proceeds were divided as marital property in the stipulation signed by the parties and approved by the court. Thus, Dallas' second assignment of error is without merit.

CONSIDERATION OF EARNINGS

Dallas' assignment with respect to the court's consideration of the parties' earning capacities is equally without merit. He argues that the court's consideration of earnings operated as a "back-door" alimony award, contrary to the stipulation of both parties to waive alimony.

[8,9] Section 42-365 provides that a court may order division of property as is reasonable, considering factors such as the parties' circumstances, the duration of their marriage, and the contributions of each party to the marriage. This court has specifically stated that courts may consider earning abilities of the parties in making a division of property in a divorce case and, further, has indicated that courts may consider all facts pertinent in reaching an equitable property division. *Sees v. Sees*, 188 Neb. 769, 199 N.W.2d 496 (1972); *Foltyn v. Foltyn*, 180 Neb. 42, 141 N.W.2d 433 (1966).

A trial court may consider the earnings of the parties in determining a fair and equitable division of property. Such consideration, as permitted by law, does not render the resulting property division a back-door alimony award. Therefore, the district court did not err in considering the parties' earnings in its decision to divide the tier II benefits equally.

CONCLUSION

Upon our de novo review of the record, we conclude that the district court did not abuse its discretion in dividing Dallas' tier II benefits equally between the parties or in overruling Dallas' motion for new trial. The judgment of the court is affirmed.

AFFIRMED.

DOUGLAS L. BRUNK, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA STATE RACING COMMISSION AND DENNIS OELSCHLAGER, EXECUTIVE SECRETARY OF NEBRASKA STATE RACING COMMISSION, APPELLANTS AND CROSS-APPELLEES.

STACY LANE VAN HORN, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA STATE RACING COMMISSION AND DENNIS OELSCHLAGER, EXECUTIVE SECRETARY OF NEBRASKA STATE RACING COMMISSION, APPELLANTS AND CROSS-APPELLEES.

700 N.W.2d 594

Filed July 22, 2005. Nos. S-03-698, S-03-699.

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 the district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
4. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling.
5. **Administrative Law.** An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.
6. **Administrative Law: Statutes.** An administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.

Appeals from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Judgment in No. S-03-698 affirmed as modified. Judgment in No. S-03-699 affirmed.

Patrick T. O'Brien, of Butler, Galter, O'Brien & Boehm, and Timothy R. Engler and Christopher R. Heinrich, of Harding, Shultz & Downs, for appellants.

David T. Schroeder for appellee Douglas L. Brunk.

O. William VonSeggern for appellee Stacy Lane Van Horn.

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

STEPHAN, J.

These consolidated appeals involve disciplinary actions brought by the Nebraska State Racing Commission (Commission) against equine veterinarians Douglas L. Brunk and Stacy Lane Van Horn. Following a hearing, the Commission made findings that Brunk and Van Horn had violated Commission rules pertaining to the administration of medications to racehorses and assessed disciplinary penalties. Brunk and Van Horn filed a petition for review in the district court for Lancaster County against the Commission and its executive secretary, Dennis Oelschlager. The district court determined that the evidence did not support some of the Commission's findings and accordingly modified the penalties assessed by the Commission. The Commission and Oelschlager appealed, and Brunk and Van Horn cross-appealed. We consolidated the appeals and now affirm the judgments of the district court, with one modification.

I. BACKGROUND

Neb. Rev. Stat. § 2-1201.01 (Reissue 1997) requires the Commission "to provide statewide regulation of horseracing in order to prevent and eliminate corrupt practices and fraudulent behavior, and thereby maintain a high level of integrity and honesty in the horseracing industry of Nebraska." The Commission served separate complaints on Brunk and Van Horn, alleging that each violated the rules and regulations of the Commission while licensed and serving as veterinarians during 2001 race meets held at Fonner Park in Grand Island, Nebraska. In January 2002, Brunk and Van Horn each filed objections and motions to dismiss the complaints, alleging that the Commission lacked jurisdiction to proceed because neither Brunk nor Van Horn were at that time licensed "racing industry participants" within the meaning of Neb. Rev. Stat. § 2-1203 (Reissue 1997). The Commission deferred ruling on these objections and motions until the hearing scheduled on the complaints.

The Commission conducted the combined evidentiary hearing on both complaints on September 23 and 24, October 22, and November 25, 2002. Evidence adduced at the hearing disclosed that during the 2001 Fonner Park meets, the Commission utilized Industrial Laboratories Company, Inc. (Industrial Laboratories), of Denver, Colorado, to conduct drug testing on the blood and urine of racehorses. Gas chromatography mass spectrometry tests performed by Industrial Laboratories revealed the presence of "Clonidine," a human blood pressure medication, in 10 horses, 1 of which tested positive for Clonidine on two occasions. The tests conducted by Industrial Laboratories did not include a quantitative analysis of the Clonidine present in the tested blood and urine samples. Veterinarians are permitted to prescribe Clonidine for administration to horses on an "off-label" basis to reduce high blood pressure, as a bronchial dilator to open a horse's airway, or as a medication for nervousness and bleeding in the lungs. Although veterinarians are permitted to prescribe Clonidine for racehorses, it is classified as a "Class 3" drug by the Association of Racing Commissioners International, Inc., and as such, may not be administered to or present in a horse on a day when it races.

The horses that tested positive for Clonidine at Fonner Park were all treated by either Brunk or Van Horn, both of Equine Veterinary Associates, P.C. (Clinic), a veterinary clinic located near the racetrack. Brunk prescribed Clonidine for eight of the horses, including Rust Ridge Range, Coronary Clare, Personal Trick, Trinity River, Pago, Jana's Fantasy, Cure the Devil, and High Dice. Van Horn prescribed the drug for the other two horses, Hesaluckycat and Vengeful Vicky.

The Commission's investigation revealed that the Clinic ordered 400 Clonidine pills on September 25, 2000, and 500 pills on March 29, 2001. The second order took place after the positive test results were reported. Between August 23 and September 29, 2000, the Clinic ordered 3,000 milliliters of liquid Clonidine at a .2 milligram concentration, and between October 2, 2000, and March 12, 2001, it ordered 2,800 milliliters of liquid Clonidine at a .8 milligram concentration.

Commission investigators found Clonidine pills in the possession of the trainers of 6 of the 10 horses. Two other trainers had

also received Clonidine pills from one of the veterinarians. Four trainers were granted immunity in exchange for their truthfulness during interviews regarding the investigation. All but one of the trainers whose horses were prescribed Clonidine testified that Brunk or Van Horn told them that they could not administer the drug within 48 hours of a race. The other trainer testified that he had not received Clonidine and had no knowledge of its use. Some trainers testified that the veterinarians had given nonprohibited injections of "Bute" or "Lasix" within 24 hours of a race, but no trainer ever indicated that the veterinarians had administered injectible doses of Clonidine. All of the trainers whose horses tested positive for Clonidine were disciplined pursuant to 294 Neb. Admin. Code, ch. 18, § 18.011 (2001).

Van Horn's treatment records indicated that in 59 of 60 cases, he had given Clonidine for treatment of a horse the day after it had raced. However, in several instances, the treatment time reported was at a time that the horse had already left the park. Brunk's medication reports also contained irregularities when compared with the bills provided by the Clinic, and some prescriptions that trainers had reportedly received from Brunk or Van Horn did not appear on the medication reports of either veterinarian.

Following the hearing, the Commission entered orders finding that Brunk and Van Horn had violated various rules of the Commission and assessed discipline. The Commission determined that Brunk had violated 294 Neb. Admin. Code, ch. 14, § 14.005.06 (2001), by causing Clonidine to be administered to eight horses on race days on nine occasions and that he was responsible for the presence of Clonidine in those horses in violation of § 18.011.01. It further determined that Van Horn caused Clonidine to be administered to two horses on a race day and was responsible for the presence of the drug in those horses. The Commission also determined that Van Horn had violated Commission rules by administering "Dex" and estrogen to horses on race days without permission and that Brunk had violated a rule requiring persons licensed by the Commission to cooperate in its investigation of alleged rule violations. In addition, the Commission found that each veterinarian had violated the Commission's rules regarding drug handling, packaging, and

reporting. It determined that each veterinarian would be ineligible for licensing by the Commission, be denied access to all areas under its jurisdiction until January 1, 2006, and be assessed fines in the amount of $2,000.

Brunk and Van Horn appealed to the district court pursuant to the Administrative Procedure Act. The court rejected their contention that the Commission lacked jurisdiction to assess discipline after their licenses had expired at the end of 2001. Based upon a de novo review, the district court affirmed the findings of the Commission that Brunk failed to properly handle, package, and report medications given to horses and that he failed to file reports in a timely fashion. However, it determined that there was insufficient evidence to support the Commission's determination that Brunk had failed to cooperate with the Commission during its investigation. The court also determined that there was insufficient evidence to establish that Brunk caused Clonidine to be administered to any horses on race days or that he was responsible for such administration. With respect to Van Horn, the district court affirmed the Commission's finding that he had violated rules regarding drug handling, packaging, and reporting, but found the evidence insufficient to establish other charges, including those pertaining to unlawful administration of Clonidine and two other drugs. The district court also found the evidence insufficient to support the Commission's findings that Van Horn had administered Dex and estrogen in violation of Commission rules. On the basis of these findings, the court did not modify the fines assessed by the Commission but did modify the penalties assessed by shortening Brunk's period of disqualification from licensure to July 1, 2004, and Van Horn's to July 1, 2003. The Commission and Oelschlager perfected these timely appeals and moved for consolidation, which was granted. On our own motion, we moved the consolidated appeals to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. ASSIGNMENTS OF ERROR

The Commission and Oelschlager assign, regrouped and restated, that the district court erred (1) in finding the evidence

insufficient to establish that Brunk and Van Horn were responsible for the presence of Clonidine in horses on race days; (2) in finding the evidence insufficient to establish that Brunk and Van Horn had administered a prohibited drug or medication on race days; (3) in finding the evidence insufficient to establish that Brunk failed to cooperate in the investigation; (4) in modifying the penalties imposed by the Commission; and (5) in making several incorrect factual determinations which cumulatively resulted in "erroneous failure to credit the Commission's observation of the witnesses and the conclusions the Commission reached."

In their cross-appeals, Brunk and Van Horn assign, restated and renumbered, that the district court erred (1) in finding that the Commission had jurisdiction and (2) in imposing penalties that are not authorized by the Nebraska statutes governing horseracing in Nebraska. Additionally, Van Horn assigns that the district court erred in finding that he violated the Commission's recording and reporting rules.

III. STANDARD OF REVIEW

[1-4] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Zwygart v. State, ante* p. 41, 699 N.W.2d 362 (2005); *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005). When reviewing an order of the district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings. *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm., supra*; *DLH, Inc. v. Nebraska Liquor Control Comm.*, 266 Neb. 361, 665 N.W.2d 629 (2003). When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling. *Zwygart v. State, supra*; *In re Grand Jury of Lancaster Cty.*, 269 Neb. 436, 693 N.W.2d 285 (2005).

IV. ANALYSIS

1. Jurisdiction of Commission

The Commission is authorized to issue licenses to "racing industry participants" and "other persons as deemed necessary by the commission." Neb. Rev. Stat. § 2-1203.01(2) (Reissue 1997). "If the commission is satisfied that its rules and regulations and all provisions of sections 2-1201 to 2-1218 have been and will be complied with, it may issue a license for a period of not more than one year." Neb. Rev. Stat. § 2-1205 (Reissue 1997). Pursuant to this statutory authority, the Commission has promulgated the following rule:

> The Commission may refuse to issue or renew a license, or may suspend or revoke a license issued pursuant to the rule, if it shall find that the applicant, or any person who is a partner, agent, employee or associate of the applicant, has been convicted of a crime in any jurisdiction, or is or has been associating or consorting with bookmakers, touts, or persons of similar pursuits, or has personally engaged in similar pursuits, or is financially irresponsible, or has been guilty of or attempted any fraud . . . *or has violated or attempted to violate* any law with respect to racing in any jurisdiction *or any rule, regulation or order of the Commission*, or adopted by the Commission, or has been guilty of or engaging in similar, related or like practices.

(Emphasis supplied.) 294 Neb. Admin. Code, ch. 10, § 10.004 (2001). "Every license shall be for not more than one year, and shall expire on December 31st of each year." 294 Neb. Admin. Code, ch. 10, § 10.013 (2001).

The Commission has statutory authority to "revoke or suspend licenses issued to racing industry participants" and may also impose a fine of up to $1,000 "upon a finding that a rule or regulation has been violated by a licensed racing industry participant." § 2-1203. Neb. Rev. Stat. § 2-1244 (Reissue 1997) defines "horseracing industry participant," for purposes of Neb. Rev. Stat. §§ 2-1243 to 2-1246 (Reissue 1997), as "an individual who currently holds a valid license from the State Racing Commission and who owns, trains, cares for, or rides horses stabled at a Nebraska-licensed racetrack for the purpose of horseracing at the live race meeting at such racetrack." The Commission has incorporated

this definition for purposes of its general rulemaking and jurisdictional authority in 294 Neb. Admin. Code, ch. 2, § 2.001.06(2)A and B (2001). The Commission's rules provide: "Each license is granted upon the condition that the licensee shall accept the jurisdiction of the Racing Commission or its authorized designee to conduct hearings and impose sanctions pursuant to Rule 7.002 and each licensee in accepting a license does thereby consent thereto." § 2.001.06(2)B(2). Pursuant to its licensing authority, the Commission requires that "[e]very veterinarian who examines or treats a horse registered for racing at the Racing Secretary's office, at a licensed meeting then in progress, must be licensed by the Nebraska State Racing Commission." 294 Neb. Admin. Code, ch. 14, § 14.005.01 (2001). Licensure by the Commission is in addition to state licensing requirements for veterinarians. See Neb. Rev. Stat. § 71-1,152.01 et seq. (Reissue 2003).

Brunk and Van Horn were licensed by the Commission at all relevant times during 2001, but were not licensed by the Commission in 2002. In their cross-appeals, they contend that the Commission had no jurisdiction to conduct disciplinary proceedings against them in 2002 for rule violations alleged to have occurred in 2001. They argue that because they were not licensed in 2002, they were not "racing industry participants" subject to the Commission's disciplinary authority during that year. They further contend that the Commission has no statutory authority to declare them ineligible for licensure for any specific period.

[5,6] An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act. *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994). An administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002); *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997); *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994). The Commission is charged by statute with providing "statewide regulation of horseracing in order to prevent and eliminate corrupt practices and fraudulent behavior, and thereby maintain a high level of integrity and hon-

esty in the horseracing industry of Nebraska." § 2-1201.01. Clearly, the Commission's rules governing the administration of drugs and medicines to racehorses are in furtherance of this statutory purpose. The question presented is whether the procedure utilized by the Commission to enforce such rules is within its statutory authority.

We conclude that it is. The statutory requirement that licenses be issued for a period of no longer than 1 year requires the Commission to reevaluate the qualifications of veterinarians and other persons involved in Nebraska horseracing on a regular and recurring basis. Before issuing a license, the Commission must be satisfied that its rules and regulations as well as applicable statutes "have been and will be complied with." § 2-1205. There is no statutory limitation on the right of a person to apply for relicensure after a license has expired. Because a relicensure decision would involve a consideration of any rule violations during prior periods of licensure, it is reasonable and consistent with the Commission's statutory purpose to promptly investigate and resolve alleged rule violations committed during a period of licensure, even if the process of doing so extends into a period when the subject is not licensed. See *Wang v. Board of Registration in Medicine*, 405 Mass. 15, 537 N.E.2d 1216 (1989). Likewise, because relicensure involves a consideration of prior rule violations, the Commission has authority to determine that a person who has violated its rules will not be eligible for relicensure for a specified period. We agree with the district court that the Commission had jurisdiction in this matter.

2. "Causing" Drugs to Be Administered

(a) Brunk

The Commission found that as the veterinarian in charge of the care of the eight racehorses listed above, Brunk caused Clonidine to be administered to those horses on race days "when no emergency existed and without first getting the permission of the official track veterinarian within 24 hours of first post time during a race meet held at Fonner Park in violation of Rule 14.005.06 of the Nebraska Rules of Racing." Section 14.005.06 provides:

> Except in cases of extreme emergency, all practicing veterinarians must get permission from the official track veterinarian before medicating a horse within 24 hours of first post time on a day it is entered to race. In cases of medication of a horse in extreme emergency, the official track veterinarian and the stewards shall be immediately advised of the circumstances necessitating such treatment and of the medication administered. The permission requirement is waived for the authorized administration of furosemide.

Based upon its de novo review, the district court found the evidence insufficient to support this finding. The Commission assigns that this was error.

It is undisputed that horses for which Brunk had prescribed Clonidine tested positive for that substance on race days. The dispute, with respect to the alleged violation of § 14.005.06, is whether Clonidine was in fact administered to the horses on race days and, if so, whether Brunk administered it. No one testified that he or she observed Brunk or anyone else administer Clonidine to any horse on a day that it raced. All but one of the trainers whose horses tested positive for Clonidine acknowledged receiving the drug in pill form and administering it no closer in time than 48 hours before a race; the remaining trainer disclaimed any knowledge regarding Clonidine.

There was conflicting and inconclusive evidence as to whether the positive test results could have been due to residual Clonidine in a horse's system from a prescribed administration more than 48 hours prior to a race. After obtaining the initial positive results, Industrial Laboratories contacted its scientific consultant, Dr. Richard Sams, a professor of veterinary medicine at Ohio State University and director of the official testing laboratory of the Ohio State Racing Commission. At Industrial Laboratories' request, Sams conducted tests on urine samples taken from the horses running at Fonner Park which produced the positive test results. At the time of Sams' initial testing, there were no standard operating procedures utilized in testing for Clonidine in racehorses. Sams testified that he detected the presence of Clonidine in nearly all of the samples sent from Industrial Laboratories. However, he was not asked to render an opinion regarding the

time, method, or amount of Clonidine administered to the horses in question.

Sams testified that after conducting these initial tests, he asked a colleague at the University of California at Davis (UC-Davis) to do a study on orally administered Clonidine in test horses. She reportedly administered Clonidine as Sams instructed and sent him back, for testing, urine samples taken from five stabled research horses ages 5 to 16 years. One UC-Davis sample yielded no result for measurable Clonidine. Of the other four, two showed measurable amounts of Clonidine only at 1- and 2-hour intervals after oral administration of the drug. Sams concluded that in these horses, Clonidine could not be detected past the 4-hour interval. However, he acknowledged that there can be dramatic differences in excretion rates of drugs into urine over time between horses and that the more similar the characteristics of the test horses, the less chance of uncertainty as to the variables affecting excretion. Sams further acknowledged that acidification of urine due to exercise could affect excretion of certain drugs but that the research he referred to did not involve any horses exercised extraneously.

Dr. Steven Barker, an employee of Louisiana State University and a chemist for the Louisiana State Racing Commission, testified on behalf of Brunk. Barker served as an advisor to the Association of Racing Commissioners International and participated in the development of its drug classification system for racehorses. Barker testified, based upon his familiarity with the evidence in this case, that it was impossible to draw any conclusion about when, where, and how much Clonidine was administered to the Fonner Park horses. He testified that the information derived from the UC-Davis tests, conducted on "horses standing in stalls," had "no relevance to what might have been found in racing fit horses [sic] that had just completed a race." Baker stated an opinion that the positive test results at issue could have been due to the administration of Clonidine by trainers more than 48 hours prior to a race, in accordance with Brunk's instructions. We find no error in the district court's de novo determination that the evidence was insufficient to establish that Brunk caused Clonidine to be administered to any racehorse on any race day.

(b) Van Horn

(i) Clonidine

The Commission found that as the veterinarian in charge of the care of the two racehorses listed above, Van Horn caused Clonidine to be administered to those horses on a race day "when no emergency existed and without getting the permission of the official track veterinarian within 24 hours of the first post time during a race meet held at Fonner park in violation of Rule 14.005.06 of the Nebraska Rules of Racing." The district court determined, on the basis of its de novo review, that the evidence was insufficient to support this finding. For the same reasons discussed in connection with the district court's similar finding with respect to Brunk, we find no error in this determination.

(ii) Dex and Estrogen

The Commission found that Van Horn had injected one horse running at Fonner Park with Dex and another with estrogen prior to their scheduled races, in violation of § 14.005.06. Based upon its de novo review, the district court determined that the evidence was insufficient to support these findings. Although the Commission's second assignment of error is broad enough to refer to this determination, it is not argued in the Commission's brief, and we therefore do not consider it. 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. *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004).

3. "Responsibility" for Administration of Drugs

The Commission determined that Brunk and Van Horn were responsible for the presence of Clonidine in horses on race days, in violation of § 18.011.01. The applicable rules provide:

> **18.011** The trainer is the absolute insurer of the condition of horses entered in an official workout or race and is responsible for the presence of any prohibited drug or medication, or other prohibited substance in such horses. A positive test for a prohibited substance, or the presence of permitted medication in excess of maximum allowable levels, as reported by an official laboratory approved by the

> commission shall be prima facie evidence of a violation of this rule.
>
> **18.011.01** Owners, assistant trainers, grooms, practicing veterinarians, or any other persons who cared for, or attended the horse may also be held responsible for any violation of this rule and be subject to the same penalties as the trainer.

The district court determined that the evidence was insufficient to support this finding. The Commission and Oelschlager argue on appeal that because of the uncontroverted evidence that Brunk and Van Horn prescribed Clonidine for the horses in question, they are necessarily responsible for the horses' testing positive for Clonidine on race days.

Section 18.011.01 treats the trainer as the "absolute insurer" of the condition of a horse on race day and states that the trainer "is responsible" for the presence of any prohibited substance in the horse. Others, including veterinarians, "may also be held responsible" under § 18.011.01. The differentiation between trainers and others with respect to responsibility for the presence of a prohibited substance in a horse is significant. Trainers are held to the equivalent of a strict liability standard, making them responsible for the presence of a prohibited substance, regardless of their personal knowledge or conduct with respect to the substance. Because the rule does not impose this strict standard on others, including veterinarians, we interpret the rule as requiring proof that such persons engaged in specific conduct which resulted in the positive test result in order to be held "responsible."

As noted, we find no error in the district court's finding that the evidence is insufficient to establish that either Brunk or Van Horn personally administered Clonidine to the horses in question on race days. Although the record establishes that both veterinarians prescribed the drug for racehorses with instructions that it not be given within 48 hours of a race, there was inconclusive evidence as to when, how, and by whom the drug was administered prior to each horse's race. Sams testified that the UC-Davis study which he requested found detectable levels of Clonidine in the urine of the test horses 2 hours after oral administration, but no detectable level of Clonidine was found in tests performed more than 4 hours after administration. Sams did not express any opinion regarding the administration time or elimination rate of

the Clonidine detected in the horses at Fonner Park. Barker testified that it would be impossible to draw any conclusion about when, where, how, and how much Clonidine was administered to those horses. Based on this record, we conclude that the district court did not err in finding the evidence insufficient to establish that Brunk and Van Horn were responsible for the positive test results in the Fonner Park horses.

4. COOPERATION WITH COMMISSION INVESTIGATION

The Commission found that Brunk failed to cooperate with its investigation because he did not provide investigators complete and accurate reports as well as "all purchased, administration and dispensing records for the drug Clonidine," thus requiring the Commission to issue subpoenas in order to secure the records. The Commission found Brunk's conduct in this regard to be in violation of 294 Neb. Admin. Code, ch. 2, § 2.001.07A(1) (2001), which states in relevant part:

> Each license granted by the Racing Commission, including licenses to . . . veterinarians, is granted upon the condition that the licensee shall cooperate with the stewards and Racing Commission investigators or enforcement officers in rules investigations conducted by them; and each licensee in accepting a license does thereby consent thereto.

The district court determined that the evidence was insufficient to conclude that Brunk refused to provide records requested for those horses within the jurisdiction of the Commission. The court found that Brunk had "provided the Commission with records of horses that tested positive and records of Clonidine purchased during the period the Commission requested."

The record reflects that by letter dated November 6, 2001, Dan Sweetwood, the Commission's director of investigations and security, requested Brunk to produce various records maintained by the Clinic pertaining to Clonidine purchased or prescribed between January 1, 2000, and November 12, 2001. A subsequent letter from Oelschlager included more details regarding the information sought and requested that it be submitted by December 14, 2001. In a letter addressed to Sweetwood dated December 13, 2001, Brunk stated: "This is to inform you that, as of yet, I have been unable to get my records together for you. I will give it my

immediate attention as soon as I possibly can." Sweetwood testified that he was attempting to secure from Brunk as much information as he could regarding his use and distribution of Clonidine at Fonner Park in 2001 but that Brunk never provided the information requested. The Commission issued a subpoena directed to Brunk and the Clinic on February 14, 2002, in which it requested various records pertaining to Clonidine purchased and prescribed between January 1, 2000, and April 1, 2001. Brunk moved to quash the subpoena on various grounds. On May 10, 2002, the Commission overruled the motion to quash and directed Brunk to comply with the subpoena. Without specific citation to the record, the Commission states in its brief that Brunk refused to comply with the subpoena. In his brief, Brunk states that the "Commission had all the records of [the Clinic] for Clonidine billed that was dispensed for horses that tested positive." Brief for appellee Brunk at 24. However, he does not state that he provided these documents, and the record reflects that Commission investigators obtained the documents from trainers.

Brunk did not testify at the hearing or offer any evidence that he provided *any* of the documents requested by the Commission during its investigation. Based on the uncontroverted testimony of Sweetwood that Brunk failed to cooperate with the requests to produce records relating to Clonidine, we conclude that there was no competent evidence to support the district court's finding that Brunk cooperated with the Commission's investigation in compliance with § 2.001.07A(1).

5. Drug Handling, Packaging, and Reporting: Van Horn

The Commission found that both Brunk and Van Horn violated its rules pertaining to the handling, packaging, and reporting of drugs prescribed for racehorses. Based upon its de novo review, the district court found these findings were supported by the evidence. With respect to Van Horn, the district court stated:

> Van Horn failed to make certain entries on his daily medication reports, he did not provide all of the required information, he failed to report drugs prescribed, he did not properly report the prescription of Guenabenz, and he gave Clonidine to trainer Dale Brecheisen in a plastic bag.

In his cross-appeal, Van Horn assigns that this finding was erroneous. Brunk has not cross-appealed on this issue.

The Commission found that Van Horn violated 294 Neb. Admin. Code, ch. 14, §§ 14.005.02 to 14.005.02C and 14.005.03 (2001), which provide:

> **14.005.02** All veterinarians shall make reports to the Commission concerning each horse examined or treated; each prescription written; and drugs, medicines, or vitamins provided for administration by trainers or owners. Reports shall be made to the Commission no later than 2 p.m. the following race day. A signed copy of the veterinarian's own record may serve as the veterinarian's official report, or the report may be submitted on forms provided by the Commission.
>
> **14.005.02A** The veterinarian's report shall include the:
>
> (1) name of each horse examined or treated;
>
> (2) owner and/or trainer of the horse;
>
> (3) name and amount of all drugs, medicines, or vitamins administered;
>
> (4) time and method of administration.
>
> **14.005.02B** If drugs, medicines, or vitamins are prescribed, or provided by the veterinarian, to be administered by the owner or trainer the report shall specify the:
>
> (1) name of the owner or trainer;
>
> (2) name of the horse(s) for which the prescription is provided;
>
> (3) name of the drug, medication, or vitamin; and time(s) for and other instructions concerning administration.
>
> **14.005.02C** Veterinarian reports shall be provided beginning not later than the first day that entries are taken. Reports must also include horses that are entered and draw into a race that were treated or administered drugs, medications, or vitamins or for which drugs, medications, or vitamins have been provided or prescribed for use by the trainer, during the fourteen day period prior to the race, if the treatment or administration occurred prior to the date that [sic] for which daily submission of veterinarian reports is required.
>
> . . . .

> **14.005.03** Any drugs, medications, or vitamins provided by a veterinarian for use by a trainer on any horses that are on the grounds of the association, or that are registered to race, shall be in containers clearly labeled to identify the substance provided, the horse or horses for which it is provided, and instructions concerning administration.

Trainer Dale Brecheisen testified that Van Horn gave him five or six Clonidine tablets in a plastic bag, not a pill bottle, for administration to one of his horses running at Fonner Park in 2001. Van Horn's report shows that this occurred at 4 p.m. on March 26, 2001. Brecheisen testified that it occurred on the previous day, just before he left town with the horse. There were other instances where Van Horn reported treatments administered in Grand Island to horses which were not there on the dates indicated. In his reports, Van Horn utilized a "treatment code 263" to indicate a prescription of "blood pressure pills." From this designation, it could not be determined whether the prescription was for Clonidine or "Guanabenz." Van Horn admitted that he prescribed medication for a horse named "Gifted Guy" at a time when the horse was in Oklahoma but registered to race in Nebraska and that he did not report the prescription. From our review of the record, we conclude that there was competent evidence upon which the district court could conclude that Van Horn violated §§ 14.005.02 to 14.005.02C and 14.005.03, as initially determined by the Commission.

6. Cumulative Error

The Commission and Oelschlager assign that the district court "erred in several factual determinations set forth in the Court's opinion, the cumulation [sic] of which resulted in erroneous failure to credit the Commission's observation of the witnesses and the conclusions the Commission reached." We have considered this assignment and the accompanying argument set forth in the Commission and Oelschlager's brief and find them to be without merit.

7. Penalties

After making its de novo findings, the district court concluded, with respect to the penalties to be assessed:

> The integrity of racing is dependent upon veterinarians who properly and carefully maintain accurate records of drugs administered to race horses. Dr. Brunk's records are terrible. They reflect a gross disregard for Commission rules. More importantly, they reflect an unwillingness to recognize that such shoddy record keeping calls into question the integrity of horse racing in Nebraska, not to mention Dr. Brunk's own veracity. The Commission has the authority and responsibility to insist upon compliance – even meticulous compliance – with its reporting requirements. . . .
>
> Dr. Van Horn's records are not nearly as abysmal as Dr. Brunk's. The improper and incomplete records are not insignificant, though.
>
> The court finds that the Commission does have the authority to extend certain discipline to periods of time that are beyond the duration of the license issued. Therefore, the court finds that the Commission's penalty should be modified by reducing the time that the plaintiff's [sic] are banned from any area under the jurisdiction of the Nebraska State Racing Commission. The fine for each shall remain in effect.

Based upon this reasoning, the district court determined that Brunk would be ineligible for licensing by the Commission and would be denied access to all areas under the jurisdiction of the Commission until July 1, 2004, and that Van Horn would be similarly ineligible for licensing and denied access until July 1, 2003. As noted, the district court did not modify the fines assessed by the Commission.

The Commission and Oelschlager assign error with respect to the penalty modification, arguing that the court acted arbitrarily and capriciously in reducing the penalties. Brunk and Van Horn assign error in the cross-appeals, arguing that the penalties as determined by the district court were disproportionate to the seriousness of the offenses, the economic consequences of disqualification from licensure, and the penalties which the Commission assessed against the trainers whose horses tested positive for Clonidine. We conclude that the penalties assessed by the district court are proportionate to the seriousness of the offenses committed by Brunk and Van Horn, with one exception. Because we have determined that the district court erred in setting aside the

Commission's finding that Brunk failed to comply with its rule requiring cooperation in a rules investigation, we conclude that the period of his disqualification for licensure should be extended by 6 months, to January 1, 2005.

V. CONCLUSION

The district court correctly determined that the Commission acted within its jurisdiction and authority in pursuing disciplinary actions against Brunk and Van Horn for rule violations alleged to have occurred during 2001, notwithstanding the fact that they were not licensed by the Commission when the disciplinary actions were concluded in 2002. In conducting its review de novo on the record, the district court did not err in determining there was insufficient evidence to establish that Brunk and Van Horn caused Clonidine to be administered to racehorses on race days or that they were responsible for positive test results. Likewise, the district court did not err in finding that there was sufficient evidence to establish that both Brunk and Van Horn violated the Commission's rules pertaining to the handling, packaging, and reporting of drugs prescribed for racehorses. We conclude that the district court did err in finding the evidence insufficient to support the Commission's determination that Brunk violated its rule requiring a licensee to cooperate with an investigation conducted by the Commission. Based upon this determination, we extend the period during which Brunk is ineligible for licensing by the Commission and denied access to all areas under the jurisdiction of the Commission to January 1, 2005. Accordingly, the judgment in case No. S-03-698 is affirmed as modified, and the judgment in case No. S-03-699 is affirmed.

JUDGMENT IN NO. S-03-698 AFFIRMED AS MODIFIED.
JUDGMENT IN NO. S-03-699 AFFIRMED.

CASPERS CONSTRUCTION COMPANY, APPELLANT, v. NEBRASKA STATE PATROL, APPELLEE.

700 N.W.2d 587

Filed July 22, 2005. No. S-03-1277.

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. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
6. **Statutes: Legislature: Intent: Appeal and Error.** In construing a statute, an appellate court should consider the statute's plain meaning in pari materia and from its language as a whole to determine the intent of the Legislature.

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

Bradford E. Kistler, of Kinsey, Ridenour, Becker & Kistler, L.L.P., for appellant.

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

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

GERRARD, J.

NATURE OF CASE

Caspers Construction Company (Caspers) was the subject of a compliance review conducted by the Nebraska State Patrol's carrier enforcement division to evaluate Caspers' highway safety performance. As a result of the review, Caspers was charged with multiple violations of federal motor carrier safety regulations adopted in Nebraska. Caspers was ultimately assessed a civil

penalty for the violations. On appeal, the district court affirmed the penalty. Caspers appeals.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2002, Caspers received a letter from the U.S. Department of Transportation Federal Motor Carrier Safety Administration (FMCSA), stating that Caspers' highway safety performance was unacceptable. The letter requested immediate action by Caspers to correct the safety deficiencies and notified Caspers that an onsite compliance review would be conducted within the following 6 months. Further, the letter stated that any violations discovered during the review would subject Caspers to civil or criminal penalties.

In November 2002, a representative of the FMCSA visited Caspers. During the visit, the representative did not conduct a compliance review but instead determined that Caspers' business was intrastate and should be addressed by the Nebraska State Patrol. The FMCSA contacted the State Patrol, advising it to conduct a review of Caspers' compliance with federal safety regulations adopted in Nebraska. See Neb. Rev. Stat. § 75-363 (Cum. Supp. 2002). A sergeant with the State Patrol's carrier enforcement division arranged for Barb Aude, a trooper with the division, to conduct a compliance review of Caspers.

Trooper Aude completed the compliance review, finding Caspers to be in violation of several motor carrier safety regulations, including use of a driver without a valid motor vehicle operator's license or permit, failure to require a driver to make a record of duty status, failure to require a driver to prepare a driver vehicle inspection report, and use of a commercial motor vehicle not periodically inspected. As a result, a civil penalty was imposed against Caspers pursuant to an administrative order charging Caspers with 23 violations. Caspers requested a hearing to contest the penalty.

At the conclusion of the hearing, three violations involving interstate travel—one count each of failing to require a driver to make a record of duty status, failing to require a driver to prepare a driver vehicle inspection report, and using a commercial motor vehicle not periodically inspected—were withdrawn. Thereafter, the hearing officer recommended that the Superintendent of Law

Enforcement and Public Safety of the Nebraska State Patrol reduce the penalty to reflect the withdrawn violations and order a penalty of $8,575 to be assessed against Caspers for the remaining 20 violations. The superintendent adopted the hearing officer's recommendation and entered a decision and order accordingly. Caspers appealed, and the district court affirmed the order of the superintendent.

Caspers appeals the judgment of the district court.

ASSIGNMENTS OF ERROR

Caspers presents four assignments of error, which may be condensed and restated as follows: The district court erred in finding that (1) sufficient evidence was adduced to show that the alleged violations occurred in Nebraska intrastate commerce and (2) the State Patrol had presented a prima facie case for the 17 violations contested by Caspers.

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Hahn v. Neth, ante* p. 164, 699 N.W.2d 32 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.* In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings. *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005).

[4,5] Statutory interpretation presents a question of law. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005). When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005).

ANALYSIS

On appeal, Caspers assigns that the district court erred in finding that the State Patrol presented a prima facie case with respect to 17 of the 20 violations for which Caspers was sanctioned. Caspers does not dispute the two violations it was found to have committed under 49 C.F.R. § 391.11 (2004), i.e., using a driver without a valid vehicle operator's license. Caspers' appellate brief challenges the 18 remaining violations. However, during oral argument before this court, Caspers conceded to a third violation dealing with the use of a commercial motor vehicle not periodically inspected, limiting its challenge to 17 of the 20 violations it was found to have committed.

Caspers argues that proof of a violation under § 75-363 requires that the conduct allegedly constituting the violation be shown to have occurred in Nebraska intrastate commerce. Caspers argues that no such evidence was provided in support of the 17 contested violations. But before considering the specific evidence at issue in this case, we must determine the applicable legal standard that the evidence was required to meet. To do so, we must examine the statutory scheme pursuant to which the relevant regulations were adopted.

Section 75-363 stated, in part:

> The parts of the federal Motor Carrier Safety Regulations, 49 C.F.R., as modified in this section and any other parts referred to by such parts, in existence and effective as of January 1, 2002, are adopted as Nebraska law. Except as otherwise provided in this section, the regulations shall be applicable to all carriers, drivers, and vehicles to which the federal regulations apply, to all vehicles of *intrastate motor carriers* with a gross vehicle weight rating, gross combination weight rating, gross vehicle weight, or gross combination weight over ten thousand pounds . . . to all *intrastate motor carriers* in the operation of vehicles with a gross vehicle weight rating, gross combination weight rating, gross vehicle weight, or gross combination weight over ten thousand pounds . . . and to all drivers of such vehicles if the drivers are operating a commercial motor vehicle as defined in section 60-465 which requires a commercial driver's license.

(Emphasis supplied.) Further, Neb. Rev. Stat. § 75-369.03 (Reissue 2003) states: "The Superintendent of Law Enforcement and Public Safety may issue an order imposing a civil penalty against . . . an *intrastate motor carrier* for violation of section 75-363 . . . ." (Emphasis supplied.)

Although the statutes make clear that intrastate motor carriers in violation of federal motor carrier safety regulations adopted by § 75-363 are subject to civil penalties, they do not explicitly define the term "intrastate motor carriers." However, Neb. Rev. Stat. § 75-302(11) (Reissue 2003) defines "intrastate commerce" as "commerce between any place in this state and any other place in this state and not in part through any other state." "Motor carrier" is defined as "any person other than a regulated motor carrier who or which owns, controls, manages, operates, or causes to be operated any motor vehicle used to transport passengers or property over any public highway in this state." § 75-302(12).

[6] In construing a statute, an appellate court should consider the statute's plain meaning in pari materia and from its language as a whole to determine the intent of the Legislature. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004). Reading § 75-369.03 in its statutory context, we conclude that the purpose of the statutory scheme is to provide for the regulation of motor carriers that are not subject to federal regulation. Section 75-369.03 states that the superintendent

> may issue an order imposing a civil penalty . . . against an intrastate motor carrier for violation of section 75-363 or 75-364 based upon an inspection conducted pursuant to section 75-366 . . . . Upon the discovery of any violation by an interstate motor carrier of section 75-307, 75-352, 75-363, or 75-364 based upon an inspection conducted pursuant to section 75-366, the superintendent shall immediately refer such violation to the appropriate federal agency for disposition . . . .

In this case, Caspers was charged with violating the following parts of title 49 of the Code of Federal Regulations, all of which are adopted as Nebraska law under § 75-363: 49 C.F.R. §§ 391.11(b)(5), 395.8(a), 396.11(a), and 396.17(a) (2004). Accordingly, the superintendent has authority to impose penalties on Caspers for the above violations only if Caspers is an "intrastate

motor carrier." If Caspers is an "interstate motor carrier," such violations must be referred to the appropriate federal agency.

Under federal law, interstate motor carriers must register to provide transportation or service. See 49 U.S.C.A. §§ 13901 and 13501 et seq. (1997 & Cum. Supp. 2005). See, generally, *Mid-Con Freight Sys. v. Mich. Public Service*, 545 U.S. 440, 125 S. Ct. 2427, 162 L. Ed. 2d 418 (2005). Section 13501 specifies that the Secretary of Transportation and the Surface Transportation Board have jurisdiction

> over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier—
>
> (1) between a place in—
>
> (A) a State and a place in another State;
>
> (B) a State and another place in the same State through another State.

As we previously stated, the purpose of the Nebraska statutes at issue in this case is to ensure that motor carriers not falling under federal jurisdiction are nonetheless subject to regulation under state law. To effectuate that purpose, we must look to the parameters of jurisdiction granted to the secretary and board in order to define the jurisdiction of the state to impose penalties under § 75-369.03. The clear import of the legislative scheme is to subject a carrier to motor carrier safety regulations under *either* federal jurisdiction *or* state jurisdiction, but not both at the same time. In other words, an "interstate motor carrier" within the meaning of § 75-369.03 is a carrier subject to federal jurisdiction pursuant to the federal motor carrier safety regulations, as delimited by 49 U.S.C.A. § 13501 et seq., and an "intrastate motor carrier" is a carrier not subject to that federal jurisdiction.

It is also apparent that whether a particular violation of motor vehicle safety regulations is within federal or state jurisdiction is determined by the nature of the activity in which the violation took place. Obviously, as in this case, a motor carrier may be in the business of conducting both intrastate and interstate operations. Thus, whether such a carrier's violation of safety regulations is subject to federal or state authority depends on whether the transaction during which the violation occurred was "interstate" or "intrastate" as explained above.

In the instant case, then, the question is whether the violations found to exist by the superintendent were committed during an interstate or intrastate transaction, as that delineation is drawn from the relevant federal statutes. Caspers argues that the district court erred in concluding that the charged violations occurred in Nebraska intrastate commerce.

The court based its conclusion on a document signed by Elsie Caspers, co-owner and secretary-treasurer of Caspers, that states: "Caspers Construction Company employed the following as drivers of the company vehicles with excess of 10,000 lbs. [gross vehicle weight rating] and used the drivers in Intrastate commerce." Following the statement, the document goes on to list the dates of the alleged violations and the drivers and vehicles involved. The district court concluded that although the document's reference to intrastate commerce does not specifically refer to *Nebraska* intrastate commerce, such meaning was clearly intended based on reasonable inferences from the evidence. The court based such inferences on evidence that a compliance review of Caspers was in fact conducted by the Nebraska State Patrol and upon proof that Caspers is a Nebraska corporation.

Caspers argues that the court incorrectly inferred that the reference to intrastate commerce implicated *Nebraska* intrastate commerce because a compliance review of Caspers was conducted by the Nebraska State Patrol. As set forth by the district court in its order, the State Patrol has the initial burden of presenting evidence to support the violations charged against Caspers. Caspers argues that the court failed to hold the State Patrol to its obligation and, instead, that the court assumed, because the State Patrol was shown to have conducted the compliance review, it must have had jurisdiction to do so.

Caspers also argues that the district court improperly inferred that the reference to intrastate commerce in the document signed by Elsie Caspers referred to Nebraska intrastate commerce based on evidence that Caspers is a Nebraska corporation. Specifically, Caspers argues that the state in which a business is incorporated need not have any connection with the location in which that company conducts the majority of its business. Further, Caspers correctly asserts that the appropriate question is whether the 17 disputed violations occurred in Nebraska intrastate commerce,

not whether the majority of Caspers' business is conducted in Nebraska.

Caspers' arguments are without merit. Although the statement signed by Elsie Caspers did not refer specifically to *Nebraska* intrastate commerce, the other evidence relied upon by the district court and otherwise present in the record supports a reasonable inference that the document was referring to intrastate commerce in the State of Nebraska. Specifically, the FMCSA visited Caspers, and after determining that the company was an intrastate operation, contacted the Nebraska State Patrol to conduct a compliance review. Trooper Aude, of the Nebraska State Patrol, performed the compliance review, working closely with Elsie Caspers and a Caspers secretary during the process. Trooper Aude testified that the document presented to and eventually signed by Elsie Caspers was presented as per standard procedure for compliance reviews. In addition, Trooper Aude testified that she advised Elsie Caspers to ensure the accuracy of the document before signing it. Among the documents submitted during the State Patrol hearing in support of the alleged violations were Nebraska certificates of title and Nebraska registration information for Caspers' vehicles. Evidence of Caspers' incorporation in Nebraska was also presented at the State Patrol hearing, along with a letter from Caspers' state senator, requesting leniency for Caspers stating: "This company has been in my legislative district and conducted business for over 25 years."

The document's reference to "intrastate" commerce must have been intended to mean commerce in *some* state—the question is, which state? Given the circumstantial evidence of Nebraska's relationship to the corporation, its business, and the investigation during which the document was created, it is reasonable to infer that Nebraska was the state in question. Furthermore, the document specifically states that Caspers "employed the following as drivers of the company vehicles . . . and used the drivers in Intrastate commerce" and follows that statement with a detailed list of the dates on which the alleged violations occurred, identifying the driver and vehicle associated with each violation. Read as a whole, the document is fairly read as an admission that each of the listed violations occurred in Nebraska intrastate commerce.

We are required to decide whether the district court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. In conducting that review, we do not substitute our factual findings for those of the district court where competent evidence supports those findings. In this case, the district court's conclusion that Elsie Casper's statement refers to Nebraska intrastate commerce was reasonable based on competent evidence presented at the State Patrol hearing. The inference implicating Nebraska intrastate commerce is not only reasonable but, indeed, the most rational conclusion under the circumstances. Furthermore, Elsie Casper's statement may be fairly read as an admission that each violation occurred in Nebraska intrastate commerce.

CONCLUSION

The district court did not err in finding that the State Patrol presented a prima facie case with respect to the 17 violations contested by Caspers because competent evidence was adduced to prove that each of the alleged violations occurred in Nebraska intrastate commerce. The judgment of the court conforms to the law and is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

FERNANDO LECUONA III, COMMISSIONER OF LABOR, APPELLEE, v. PENNY A. McCORD, APPELLANT.

699 N.W.2d 403

Filed July 22, 2005. No. S-03-1464.

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. **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 not arbitrary, capricious, or 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. **Employment Security: Words and Phrases.** In-kind benefits received in return for services provided may constitute wages for purposes of determining eligibility for unemployment compensation benefits.

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

Chris A. Johnson, of Conway, Pauley & Johnson, P.C., for appellant.

John H. Albin and Thomas A. Ukinski for appellee.

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

GERRARD, J.

NATURE OF CASE

Penny A. McCord began receiving unemployment benefits in early 2003. She then began providing business consulting services through a corporation she formed for that purpose. She did not receive a salary for her services. After a random benefits accuracy investigation, the Nebraska Department of Labor (the Department) concluded that McCord had failed to accurately report earnings she received through the corporation and was obligated to repay the unemployment benefits overpayment. The question before this court is whether McCord was "unemployed" for purposes of eligibility for unemployment compensation. See Neb. Rev. Stat. §§ 48-602(27) and 48-625(1) (Reissue 2004).

FACTUAL AND PROCEDURAL BACKGROUND

McCord, the appellant, filed a claim for unemployment benefits at the end of 2002 and began collecting benefits in January 2003. In February, McCord incorporated Strategic Assessments, Inc. (Strategic), of which she was the president and sole shareholder. On behalf of Strategic, McCord provided consulting services to various companies on an hourly basis.

In March 2003, McCord's unemployment benefits claim was randomly selected by the Department for a "benefits accuracy measurement investigation," through which the Department verifies claims and confirms eligibility for benefits. The review of McCord's claim revealed that she had failed to report earnings to the Department for the weeks ending January 25 through

March 8, 2003. When a Department field representative for quality control contacted McCord, McCord explained that she had been providing services on behalf of her corporation, Strategic, but had not received wages while claiming unemployment benefits, since the corporation was not yet profitable. A notice of determination was issued to McCord, notifying her of the Department's review and ordering her to repay the amount of the alleged benefit overpayment.

McCord filed a request for a hearing with the Nebraska Appeal Tribunal (the Appeal Tribunal), arguing that she had not earned wages in 2003 and, therefore, was not liable for an overpayment of benefits. After a hearing during which the Department's field representative and McCord testified, the Appeal Tribunal agreed, concluding that during the weeks claimed, McCord had received no remuneration for her services on behalf of Strategic. Rather, the Appeal Tribunal determined that Strategic had yet to show a profit and was therefore not able to compensate McCord for her services. The Appeal Tribunal concluded: "[McCord] has no wages payable with respect to weeks claimed and consequently is entitled to benefits for such weeks." Upon a request by the Department to reconsider the decision, the Appeal Tribunal again concluded:

> [McCord] received no remuneration of any kind whether in the form of a salary or dividends. The corporation had not shown a profit in 2003. Since the claimant was not compensated for services performed to Strategic, she did not receive disqualifying wages within the meaning of the Nebraska Employment Security Law.

Fernando Lecuona III, the Commissioner of Labor, petitioned the district court for review of the Appeal Tribunal's decision. The district court concluded that the Appeal Tribunal erred in finding that McCord did not receive wages. The court opined that McCord clearly benefited from her work for Strategic because her living expenses were paid by the corporation and the value of Strategic stock had increased. The court concluded that the administrative judge should have focused on whether McCord's work for Strategic resulted in in-kind benefits sufficient to constitute wages and, if so, the amount of those benefits. The court remanded the matter to the Department for such a determination.

The district court did not discuss the significance of McCord's admission that she had been providing services on behalf of Strategic, nor did the district court discuss whether McCord had been providing services part time or full time during the weeks in question.

McCord now appeals the decision of the district court.

ASSIGNMENT OF ERROR

McCord claims that the district court erred in concluding that McCord received wages disqualifying her from unemployment benefits and leaving her potentially liable for the overpayment of benefits.

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Arndt v. Department of Motor Vehicles, ante* p. 172, 699 N.W.2d 39 (2005). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.* 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. *In re Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W.2d 117 (2004).

ANALYSIS

Before turning to the specific facts of this case, we review the general principles governing eligibility for unemployment benefits. In order to be eligible to receive unemployment compensation benefits, a claimant must be unemployed, as defined in § 48-602(27). See § 48-625(1). Section 48-602(27) provides two definitions of "unemployed" for purposes of determining eligibility for unemployment benefits. An individual is unemployed during any week in which the individual performs no service and with respect to which no wages are payable to the individual (first definition), or, alternatively, an individual is unemployed during any week of less than full-time work if the wages payable with respect to such week are less than the individual's weekly

unemployment benefit amount (second definition). § 48-602(27). In *Board of Regents v. Pinzon*, 254 Neb. 145, 575 N.W.2d 365 (1998), we considered the first definition and held that based upon the plain and ordinary meaning of the statute, two elements must be satisfied to demonstrate unemployment under that definition. 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.

In this case, the parties focused on whether McCord received wages during the weeks in question, but neither party discussed the element of performing services. Further, the record does not show any previous resolution of that element in prior proceedings. The record before us establishes beyond dispute that based on McCord's own admissions and the findings of fact of the Appeal Tribunal and the district court, McCord performed services for Strategic during the weeks in question. The parties appear to have acted on the mistaken assumption that if McCord was not receiving wages, she was "unemployed" for purposes of eligibility for unemployment benefits. However, based on the plain language of the first definition and our consideration of that language in *Pinzon, supra*, McCord does not satisfy the requirements to be considered unemployed under the first definition, regardless of whether or not she was receiving wages, because she was providing services on behalf of Strategic during the weeks at issue.

Due to this misunderstanding of the statutory requirements, the parties, the Appeal Tribunal, and the district court did not consider whether McCord qualified as "unemployed" under the second definition of § 48-602(27) for any of the relevant weeks. With respect to the second definition, the record in this case suggests that McCord may have provided services full time for some of the weeks in question, but not others. The record does not, however, allow us to determine with specificity whether any nonmonetary benefits McCord received while performing services for Strategic constituted wages and, if so, the amount of any such benefits.

[4] "Wages" are defined in § 48-602(29) as "all remuneration for personal services, including commissions and bonuses, remuneration for personal services paid under a contract of hire, and

the cash value of all remunerations in any medium other than cash." Further, "remuneration" is defined as payment or compensation. Black's Law Dictionary 1322 (8th ed. 2004). From these definitions, it is clear that wages may include noncash benefits under certain circumstances. Thus, we generally agree with the district court's observation that in-kind benefits received in return for services provided may constitute wages for purposes of determining eligibility for unemployment compensation benefits. We have recognized this proposition in other contexts, such as child support cases, in which we have held that the provision of "in-kind" benefits, from an employer or other third party, may be included in a party's income for child support purposes. See, *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001).

Although our reasoning differs from that of the district court, we agree with the court's ultimate determination that the case should be remanded for a determination of whether McCord received "in-kind" benefits constituting wages within the meaning of § 48-602(29) and, if so, the amount of those benefits. The reasonable cash value of noncash remuneration is to be determined under rules and regulations prescribed by the Commissioner of Labor. § 48-602(29). If the value of McCord's noncash benefits, payable for any given week during which McCord worked less than full time, is exceeded by her weekly unemployment benefit amount, she may be entitled to keep those unemployment benefits.

CONCLUSION

For the reasons stated, we affirm the order of the district court.

AFFIRMED.

ROSA MOLINA, IN HER CAPACITY AS GUARDIAN OF MANUEL SALAZAR, AN INCAPACITATED PERSON, APPELLANT, V. AMERICAN ALTERNATIVE INSURANCE CORPORATION, A DELAWARE CORPORATION, APPELLEE.

699 N.W.2d 415

Filed July 22, 2005. No. S-04-389.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb.

Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.

2. **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.
3. **Insurance: Contracts.** An insurance policy is a contract.
4. **Insurance: Tort-feasors: Liability: Actions: Negligence.** As a general rule, there is no privity between an injured person and the tort-feasor's liability insurer. For this reason, direct actions against liability insurance carriers based on the negligence of the insured are not permitted in Nebraska.
5. **Contracts: Intent.** As a matter of general contract law, in order for those not named as parties to a contract to recover thereunder as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and that provision was being made for them.

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

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellee.

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

STEPHAN, J.

On April 1, 2000, Manuel Salazar sustained serious personal injuries resulting from a motor vehicle accident caused by the negligence of a deputy sheriff employed by Scotts Bluff County. In *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003), this court held that despite a determination that Salazar's damages attributable to the negligence of the deputy sheriff amounted to $4,484,018, the county's legal liability to Salazar was limited to $1 million under Neb. Rev. Stat. § 13-926(1) (Reissue 1997), which provides that "[t]he total amount recoverable under the Political Subdivisions Tort Claims Act for claims arising out of an occurrence after November 16, 1985, shall be limited to [o]ne million dollars for any person for any number of claims arising out of a single occurrence."

In this action, Rosa Molina, as Salazar's legal guardian, seeks recovery from American Alternative Insurance Corporation (AAIC) of that portion of Salazar's damages which exceeded the statutory cap. AAIC issued a commercial umbrella insurance policy to Scotts Bluff County which was in effect at the time of the accident. After the district court for Scotts Bluff County sustained a motion to dismiss filed under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) and dismissed the action, Molina perfected this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). We affirm the judgment of the district court based upon our determination that Salazar has no contractual right of recovery under the AAIC policy.

BACKGROUND

A copy of the AAIC policy insuring Scotts Bluff County is attached to Molina's complaint and is thereby considered a part of the complaint pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 10(c) (rev. 2003). The insuring agreement within the policy states in relevant part:

> We will pay, on behalf of the insured, sums in excess of the amount payable under the terms of any Underlying Insurance as stated in the Schedule of Underlying Insurance, that the insured becomes legally obligated to pay as damages because of injury or damage to which this insurance applies.

The policy declarations reflect a limit of insurance of $4 million for "Each Occurrence." The schedule of underlying insurance included in the policy lists automobile liability coverage of $700,000 for "Each Occurrence." The policy defines "occurrence" as "an accident, including continuous and repeated exposure to substantially the same general harmful conditions which results in bodily injury or property damage which is neither expected nor intended from the standpoint of the insured."

In Salazar's prior action, he contended that the county had waived the benefits of the Political Subdivisions Tort Claims Act by procuring insurance in excess of the statutory limits set forth in § 13-926(1). In rejecting this claim, we held that the maximum liability of a political subdivision was set by the act, "and not by

the limit of any liability policy purchased by the political subdivision." *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 450, 665 N.W.2d 659, 665 (2003).

In this action, Molina alleges that the county and its underlying insurance carrier have paid the $1 million judgment affirmed in *Salazar*, but that AAIC had denied liability under its policy. She further alleges that Salazar is entitled to recover that portion of his damages attributable to the county which exceeded the statutory cap, namely $3,484,018, from AAIC under its commercial umbrella policy. Molina alleges that Salazar is a third-party beneficiary of the policy; that AAIC "falsely and fraudulently represented that it would provide excess coverage for the benefit of third parties such as SALAZAR who were injured as a result of negligence on the part of the insured"; and that AAIC has been "unjustly enriched by charging, accepting, and keeping premium [sic] paid by Scotts Bluff County for the purpose of obtaining excess insurance coverage for third parties catastrophically injured by negligence attributable to Scotts Bluff County, when in fact AAIC had no intention of paying such excess coverage."

In its order sustaining the county's motion to dismiss, the district court determined that the dispositive issue of law was the meaning of the phrase "legally obligated to pay" in the policy's insuring agreement. Noting the absence of case law recognizing "an insurer's duty of indemnification in excess and independent of the legal obligations of its underlying insured," the district court held that "[t]he liability of an indemnification insurer is dependent upon and limited to recovery against the insured." Applying this principle, the court concluded:

> AAIC's duty of indemnification is defined by its insured's "legal obligation to pay" which is synonymous with "required to pay". AAIC's insured, Scotts Bluff County, was "legally obligated" to pay one million dollars as damages to Salazar. In the complaint filed herein Molina acknowledges that that sum has been paid. Accordingly, the complaint does not state facts that would entitle Molina to relief, nor could it be amended to do so.

ASSIGNMENTS OF ERROR

Molina assigns that the district court erred in (1) finding that she did not state a claim upon which relief could be granted and

(2) dismissing her complaint when a motion to compel discovery was pending and noticed for hearing.

STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005); *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

[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. *Chief Indus. v. Great Northern Ins. Co.*, 268 Neb. 450, 683 N.W.2d 374 (2004).

ANALYSIS

[3,4] An insurance policy is a contract. *McGinn v. State Farm Mut. Auto. Ins. Co.*, 268 Neb. 843, 689 N.W.2d 802 (2004); *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003). As a general rule, there is no privity between an injured person and the tort-feasor's liability insurer. For this reason, direct actions against liability insurance carriers based on the negligence of the insured are not permitted in Nebraska. *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998); *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991). Molina contends that this is not a direct action based upon the negligence of the insured, but, rather, a "direct action against an insurance carrier based on breach of its contract with its insured." Reply brief for appellant at 8. Molina does not challenge the district court's interpretation of the phrase "legally obligated to pay" as used in the insuring agreement. However, she contends that AAIC waived or is estopped from relying upon the policy language to limit its liability because it charged a premium for coverage in excess of the $1 million statutory cap and because it made a settlement offer in the prior action which exceeded the cap. Molina argues that she has standing to assert these contractual claims because Salazar is a third-party beneficiary of the AAIC policy.

This court has never held that an injured person is a third-party beneficiary of a liability insurance policy insuring the tort-feasor. Molina relies upon *Shafer v. Berger, Kahn, Shafton, Moss*, 107 Cal. App. 4th 54, 131 Cal. Rptr. 2d 777 (2003), to support her argument that Salazar is a third-party beneficiary of the AAIC policy. *Shafer* was an action brought by the judgment creditors of an insured against the liability insurer's attorney to recover for fraudulent misrepresentation of coverage and civil conspiracy. The action was brought in part pursuant to a California statute which required liability insurance policies issued in that state to include a provision stating that a party who obtains a judgment against an insured based upon bodily injury, death, or property damage may bring a direct action against the insurer on the policy. That statute has been construed by California courts to make " 'the judgment creditor a third party beneficiary of the insurance contract between the insurer and the insured.' " *Id.* at 68, 131 Cal. Rptr. 2d at 788, quoting *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 553 P.2d 584, 132 Cal. Rptr. 424 (1976). Nebraska has no similar statute. Our much narrower direct action statute, Neb. Rev. Stat. § 44-508 (Reissue 2004), permits an injured party to bring a direct action against an automobile liability insurer in the event that the insured is insolvent or bankrupt. See *German Mut. Ins. Co. v. Federated Mut. Ins. Co.*, 8 Neb. App. 1062, 606 N.W.2d 856 (2000). That circumstance is not presented here, and we find no statutory basis for the claim that Salazar is a third-party beneficiary of the AAIC policy.

[5] As a matter of general contract law, in order for those not named as parties to a contract to recover thereunder as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and that provision was being made for them. *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993); *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992). We do not read the AAIC policy as creating any rights enforceable by Salazar or any other injured parties as third-party beneficiaries. As we stated in the prior case, the county was liable to Salazar, whether or not it purchased insurance, because its sovereign immunity was waived by the Political Subdivisions Tort Claims Act. *Salazar v.*

Scotts Bluff Cty., 266 Neb. 444, 665 N.W.2d 659 (2003). We held that the same act limited the amount of the county's liability to Salazar, as an individual claimant, to $1 million. *Salazar v. Scotts Bluff Cty., supra.* See § 13-926(1). However, the act also provides that a political subdivision may have liability of up to "[f]ive million dollars for all claims arising out of a single occurrence." § 13-926(2). On its face, the AAIC policy was clearly intended to indemnify the county for its potential tort liability exceeding $1 million per occurrence, up to the $5 million statutory cap. The required underlying insurance of $1 million plus the excess coverage of $4 million covered the full amount of the county's potential liability arising from a single occurrence. This coverage was not illusory, as Molina claims, as it is quite possible that claims asserted by multiple claimants arising from a single occurrence could result in potential liability up to the $5 million cap set forth in § 13-926(2). The fact that AAIC provided liability insurance coverage for that portion of the county's potential liability for a single occurrence which exceeded its legal liability to a single claimant cannot be viewed as creating any rights on the part of injured persons such as Salazar to recover more from the insurer than its insured was legally obligated to pay.

In her brief, Molina argues that during the prior litigation, AAIC authorized a settlement offer which exceeded the statutory limit applicable to Salazar's claim by $50,000, and that although he rejected the offer, Salazar now has standing as a third-party beneficiary to claim that the offer constituted a waiver of AAIC's right to rely on the language of its insuring agreement, as construed by the district court. We note that the complaint makes no reference to such offer, and the exhibit to which Molina cites in her brief was not offered as evidence with respect to the motion to dismiss. We assume that the complaint could be amended to allege these facts, but conclude that so amended, it would still not state a cause of action. The settlement offer of $1,050,000 was made during litigation in which Salazar claimed that the limit of his recovery against the county was the amount of its insurance, not the statutory cap. This would not give Salazar standing as a third-party beneficiary to assert that AAIC waived its right to rely on its insuring agreement now that the prior action has been resolved against Salazar.

Molina's complaint admits that Salazar was paid $1 million by the county and its underlying insurer. Thus, the county's "legal obligation to pay" has been fully satisfied under § 13-926(1) and our holding in *Salazar v. Scotts Bluff Cty., supra*. Assuming the truth of all facts alleged in the complaint, considered in light of the insurance policy at issue, we conclude as a matter of law that AAIC could have no contractual liability to Salazar for that portion of his proven damages which exceeded $1 million. For this reason, we agree with the district court that the complaint did not state a cause of action and could not be amended to do so.

Molina also assigns error in the dismissal of her action while her motion to compel discovery was pending. AAIC argues that this issue was not preserved in the district court, in that Molina's counsel indicated a readiness to proceed at the hearing on the motion to dismiss. Because we conclude as a matter of law that AAIC has no contractual liability to Salazar under its policy, we do not reach this assignment of error.

CONCLUSION

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

AFFIRMED.

CLIFTON McCRAY, APPELLANT, V.
NEBRASKA STATE PATROL, APPELLEE.

701 N.W.2d 349

Filed July 22, 2005. No. S-04-395.

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. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
5. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
6. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
7. **Probation and Parole: Civil Rights: Convictions.** Pursuant to Neb. Rev. Stat. § 29-2264(4) (Reissue 1995), if a court sets aside a conviction, the court is required to nullify the conviction and remove all civil disabilities imposed as a result of the conviction, except as otherwise provided by § 29-2264(5).
8. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
9. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

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

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellant.

Jon Bruning, Attorney General, Mark D. Starr, and Jeffrey J. Lux for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Clifton McCray challenges his classification as a Level 3 sex offender under the Sex Offender Registration Act (SORA), Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2004). The district court for Lancaster County affirmed the order of the superintendent of the Nebraska State Patrol (NSP), upholding McCray's classification.

BACKGROUND

In 1998, McCray was convicted of three counts of third degree sexual assault, which brought him within the purview of SORA. A risk assessment was performed on McCray, pursuant to SORA, to determine his risk of reoffending. At the time McCray's risk assessment was completed, McCray's criminal history reflected

a number of charges and convictions, which were used to score his assessment. These included convictions for the violation of a restraining order, operation of a motor vehicle without an operator's license, and the injury or destruction of another's property, as well as charges for failing to appear in court and the injury or destruction of another's property. McCray's criminal record also included eight sexual assault charges. Of those, three resulted in convictions, three were dismissed, and two were filed with other citations.

Based upon answers to the 14 factors, or "items," composing the risk assessment instrument, McCray received a score of 195 and was classified as a Level 3, or high risk, sex offender. In October 2002, McCray filed a request for a hearing to contest his classification. On October 2, 2003, a hearing was held before a hearing officer regarding McCray's classification.

At the hearing, McCray made two primary challenges to the scoring of his risk assessment instrument. McCray argued that his non-sex-related convictions should not have been used to score items 2 and 14 because those convictions had been set aside in May 2003, pursuant to Neb. Rev. Stat. § 29-2264 (Cum. Supp. 2002). McCray was assessed 30 points for item 2 for having three or more convictions for non-sex-related offenses other than traffic infractions. He was assessed 20 points for item 14 for having 24 months or less time between his most recent arrest for a felony and/or Class I or II misdemeanor conviction and his prior release from court-ordered confinement or supervision.

McCray also contested his point assessment under item 9. Sex offenders are assessed points for item 9 based upon the nature of their sexual assault. McCray was assigned 30 points for item 9, which included 5 points for conduct falling within the "Fondling/Manipulate/Seduce/Coerce/Authority" category, and 25 points for conduct falling within the "Physical Force or Violence/Restrained Victim/Threatened with Weapon or Dangerous Object" category. These points were assessed based upon exhibits 6, 7, and 8, which are unsworn victim statements taken by the Lincoln Police Department on January 14 and 15, 1997. McCray argued that it was improper to assess points for item 9 based on the victim statements because it was not clear from the record whether they related to a conviction or a dismissed or withdrawn charge.

On October 17, 2003, the hearing officer recommended that McCray's classification as a Level 3 sex offender be upheld. In her order, the hearing officer found that "because an order setting aside a conviction does not completely negate the conviction, proceedings such as sex offender risk assessment . . . may properly consider convictions which have been set aside." The hearing officer further found with respect to item 9 that the risk assessment manual does not require that an offender be convicted or even charged for the offense. Rather, there must merely be evidence of physical force or restraint in official documentation.

The NSP, on September 3, 2002, adopted the hearing officer's recommendation in full. On November 13, 2003, pursuant to the Administrative Procedure Act, see Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Supp. 2003), McCray filed a petition in the district court appealing his classification as a Level 3 sex offender. The district court affirmed McCray's classification and McCray filed this appeal.

ASSIGNMENT OF ERROR

McCray assigns, restated and consolidated, that the district court erred in finding that competent evidence supported the scoring of items 2, 9, and 14 on the risk assessment instrument.

STANDARD OF REVIEW

[1-4] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Lein v. Nesbitt*, 269 Neb. 109, 690 N.W.2d 799 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.* 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. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

[5,6] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Pathod*, 269 Neb. 155, 690 N.W.2d 784 (2005). Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.*

ANALYSIS

We have recently considered several challenges to SORA. See, *State v. Pathod, supra*; *Lein v. Nesbitt, supra*; *Welvaert v. Nebraska State Patrol*, 268 Neb. 400, 683 N.W.2d 357 (2004); *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). The pertinent features of SORA and the rules and regulations that implement SORA were discussed in detail in *Slansky* and *Worm*. In *Slansky*, we also discussed the risk assessment instrument that was developed to classify sex offenders under SORA. As we have done previously, we direct the reader to *Slansky* and *Worm* for background information regarding SORA.

Under the broad assignment of error, McCray makes two arguments: (1) The use of convictions previously set aside to score items 2 and 14 was improper and (2) the use of victim statements containing allegations of physical force or restraint by McCray was improper because it is not clear from the record whether that conduct formed the basis of a conviction, a dismissed charge, or a withdrawn charge.

Use of Convictions Set Aside Under § 29-2264 to Score Convicted Sex Offender's Risk Assessment Instrument

[7] McCray argues that it was improper for the NSP to assess him points on his risk assessment instrument for convictions which were set aside pursuant to § 29-2264. Under § 29-2264(4), if a court sets aside a conviction, it is required to nullify the conviction and remove all civil disabilities imposed as a result of that conviction, except as otherwise provided by § 29-2264(5). The record reflects that McCray's three non-sex-related convictions were set aside pursuant to § 29-2264 in May 2003. However,

McCray's risk assessment instrument was completed in September 2002. Thus, at the time McCray's risk assessment was completed, McCray's convictions had not yet been set aside. The question presented, therefore, is whether civil disabilities are restored under § 29-2264 as of the date a conviction is set aside or whether they can be restored retroactively.

[8] Statutory interpretation presents a question of law, and an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002).

Section 29-2264(2) provides:

> Whenever any person is convicted of a misdemeanor or felony and is placed on probation by the court or is sentenced to a fine only, he or she may, after satisfactory fulfillment of the conditions of probation for the entire period or after discharge from probation prior to the termination of the period of probation and after payment of any fine, petition the sentencing court to set aside the conviction.

When the sentencing court believes that setting aside the conviction will be in the best interest of the offender and consistent with the public welfare, the court may grant the petition and issue an order setting aside the conviction. § 29-2264(4).

We believe the plain language of § 29-2264 indicates the Legislature's intent that the removal of civil disabilities operate prospectively from the date of the order setting aside a defendant's conviction. While a defendant is entitled to petition the court to have a conviction set aside upon the completion or discharge from probation, a sentencing court is not required to grant the defendant's petition at that time. Rather, § 29-2264(4) provides that a defendant's petition should not be granted until the sentencing court believes that setting aside the conviction "will be in the best interest of the offender and consistent with the public welfare."

In the instant case, McCray's convictions were not set aside until after his risk assessment instrument was completed. Because

McCray's record at the time the risk assessment was completed reflected three non-sex-related convictions when the risk assessment instrument was completed, we conclude that the convictions were properly considered. We express no opinion, however, on what effect the convictions that were set aside would have had on McCray's SORA assessment if the assessment had occurred after the convictions were set aside.

Use of Conduct for Which Sex Offender Was Not Convicted to Score Item 9

[9] Having determined that items 2 and 14 were properly scored, we need not address whether item 9 was properly scored. Assuming, arguendo, that item 9 was improperly scored, the hearing officer was still presented with evidence that established that McCray had a risk assessment score of 165, or 35 points more than needed to classify him as a Level 3 offender. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

CONCLUSION

For the reasons discussed, we conclude that McCray was properly classified as a Level 3 offender. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

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

NANA NELL CHANNER AND CARROLL CHANNER, WIFE AND HUSBAND, APPELLANTS, V. JANET E. CUMMING AND LONNIE R. CUMMING AND PHYLLIS CUMMING, HUSBAND AND WIFE, APPELLEES.

699 N.W.2d 831

Filed July 22, 2005. Nos. S-04-478, S-04-489.

1. **Partition: Equity: Appeal and Error.** A partition action is an action in equity and is reviewable by an appellate court de novo on the record.

2. **Equity: Appeal and Error.** 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.
3. **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.
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. **Partition: Estates.** The purpose of a partition action is to divide a jointly owned interest in real property so that each owner may enjoy and possess in severalty.
6. **Partition: Wills.** Ordinarily, the right to partition property is one of right and not a matter of grace. The right to partition may be restricted by the terms of a testator's will where the restriction is reasonable.
7. **Wills: Trusts.** The interpretation of the words in a will or trust is a question of law.
8. **Partition.** Under Nebraska's partition statutes, the partition of the subject property may take one of two forms: (1) partition in kind, where the property is physically divided, or (2) partition by sale, where the property is sold and the sale proceeds are divided.
9. **Partition: Words and Phrases.** The language "first opportunity to buy" creates a first right to buy, the effect of which is to limit the right of the owner to freely dispose of his or her property by compelling such owner to offer it first to the party who has the first right to buy.

Appeals from the District Courts for Platte and Boone Counties: ROBERT R. STEINKE and MICHAEL OWENS, Judges. Reversed and remanded for further proceedings.

Brian F. Beckner for appellants.

Jason D. Mielak, of Milbourn, Fehringer, Kessler & Mielak, P.C., L.L.O., for appellees Lonnie R. Cumming and Phyllis Cumming.

Stephen C. Hansen, of Sipple, Hansen, Emerson & Schumacher, P.C., for appellee Janet E. Cumming.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellants Nana Nell Channer and Carroll Channer filed two separate partition actions. Case No. S-04-478 was filed in the district court for Platte County, Nebraska. Case No. S-04-489 was filed in the district court for Boone County, Nebraska. The named defendants in both cases are appellees Janet E. Cumming and husband and wife, Lonnie R. Cumming and Phyllis Cumming. Appellants filed an appeal from adverse judgments in both cases. The two cases were consolidated on appeal for purposes of oral argument. Given the similarity of the facts and issues in these cases, this court, on its own motion, hereby consolidates these cases for purposes of opinion and disposition.

Nana Nell, Janet, and Lonnie are the adult children of Roy and Esther Cumming, both of whom are deceased. In their various estate-related documents (estate documents), Roy and Esther, inter alia, gave Nana Nell and Janet each an undivided one-half interest in 320 acres of farmland, consisting of 160 acres in Platte County and 160 acres in Boone County (collectively subject property). The estate documents provided, however, that Lonnie had a first right to buy the subject property in the event the land was to be sold. After a dispute arose between Nana Nell and Janet over leasing the subject property to a tenant farmer, appellants filed the instant partition actions, seeking court orders dividing the subject property or, alternatively, ordering the property to be sold in the event an equitable division could not be made. On cross-motions for summary judgment, each district court sustained appellees' respective motion and dismissed appellants' complaint as premature. Both district courts ruled that before appellants could maintain their partition action, Lonnie had to first be afforded an opportunity to buy the subject property.

Contrary to the district courts' rulings, as explained more fully below, it is the law in Nebraska that a joint owner of real property generally has a right to seek partition and that if the real property cannot be partitioned in kind, then thereafter, a partition by sale may be directed, at which a holder of a first opportunity to buy may exercise his or her rights. Thus, the district courts' determinations, that Lonnie's first right to buy the land restricted appellants' ability to maintain a partition action and that such

first right to buy had to be exercised before appellants could bring their partition action, were error. Accordingly, we reverse the judgments of the district courts and remand the causes for further proceedings consistent with this opinion.

STATEMENT OF FACTS

The following facts are essentially undisputed: Nana Nell and Janet each own an undivided one-half interest in the subject property, described as follows: 160 acres, consisting of the Northeast Quarter (NE¼) of Section Thirty-three (33), Township Nineteen (19) North, Range Four (4) West of the 6th P.M., Platte County; and 160 acres, consisting of the Southeast Quarter (SE¼) of Section Twelve (12), Township Eighteen (18) North, Range Six (6), West of the 6th P.M., Boone County. Nana Nell and Janet received their respective interests from their mother Esther's will and their father Roy's trust. Under the terms of the "Last Will and Testament of Esther M. Cumming," Esther conveyed an undivided one-half interest in the subject property to Nana Nell and Janet, "subject, however, to the restriction that if my daughters . . . desire to sell this land, they must give my son, Lonnie R. Cumming, first opportunity to buy it." Under the terms of the Roy G. Cumming Trust, Roy conveyed an undivided one-half interest in the subject property to Nana Nell and Janet, "subject, however, to the restriction that if my daughters . . . desire to sell this land, they must give my son, Lonnie R. Cumming, first opportunity to buy it." Thus, both of these estate documents contained identical language granting Lonnie a "first opportunity to buy" the subject property in the event the land is sold.

In May 2003, after Nana Nell and Janet were unable to agree on a tenant to lease the subject property, appellants filed the instant partition actions, filing essentially the same complaint in both actions. Although not controlling, we note that the parties agree that Nana Nell did not offer to sell the subject property to Lonnie prior to filing the partition actions. In paragraph 6 of the complaint, appellants alleged as follows: "Plaintiff Nana Nell Channer is entitled to partition of the real estate and to its sale if an actual division of the real estate cannot be equitably made." This allegation filed by Nana Nell is consistent with the partition

procedure pursuant to which an in-kind partition is explored before a sale.

In each of the partition actions, the parties filed cross-motions for summary judgment, which came on for evidentiary hearings. The evidence offered in support of the motions was essentially the same in both district courts and consisted primarily of several affidavits. In separate orders filed March 22, 2004, both district courts sustained appellees' motions for summary judgment, overruled appellants' motions for summary judgment, and dismissed the actions.

In its order, the district court for Platte County determined that the "first opportunity to buy" language contained in the estate documents "serve[d] as a temporary suspension of the right to partition the subject [property] until Lonnie is afforded a reasonable first opportunity to buy the same." The Platte County district court further stated that the order "is not intended to bar a subsequent partition action if . . . good faith compliance with the restrictive language [with regard to the 'first opportunity to buy'] is accomplished." Similarly, the district court for Boone County determined that the "first opportunity to buy" language served as a "temporary suspension" on appellants' right to partition and that as a result, appellants' partition action was "premature as a matter of law."

Appellants filed appeals from the district courts' separate orders.

ASSIGNMENTS OF ERROR

Appellants assign two errors, essentially claiming that the "first opportunity to buy" language is unenforceable or, in the alternative, that if such language is enforceable, it can ultimately be satisfied in a sale of the subject property.

STANDARDS OF REVIEW

[1,2] A partition action is an action in equity and is reviewable by an appellate court de novo on the record. *Gustafson v. Gustafson*, 239 Neb. 448, 476 N.W.2d 819 (1991). 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. *Detter v. Miracle Hills Animal Hosp.*, 269 Neb. 164, 691 N.W.2d 107 (2005).

[3,4] 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. *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005). When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just. *Id.*

ANALYSIS

Appellants Have a Right to Bring Their Partition Actions.

In the instant cases, appellants filed appeals from the district courts' rulings that sustained appellees' motions for summary judgment and dismissed their partition actions. The district courts determined that as a result of the "first opportunity to buy" language in the estate documents, appellants' partition actions were premature. Appellants challenge those rulings. For reasons other than those articulated by appellants in their briefs, we conclude that appellants had a right to bring their partition actions and that the district courts erred in dismissing appellants' partition actions. Accordingly, we reverse the district courts' orders sustaining appellees' motions for summary judgment and dismissing appellants' complaints and remand the causes for further proceedings consistent herewith.

[5] Initially, we note that the purpose of a partition action is to divide a jointly owned interest in real property so that each owner may enjoy and possess in severalty. *Dixon v. Dixon*, 189 Neb. 212, 202 N.W.2d 180 (1972); *Hartman v. Drake*, 166 Neb. 87, 87 N.W.2d 895 (1958). This court has long recognized that when " 'a case is fairly brought within the law authorizing a partition, the right to partition is imperative and absolutely binding upon courts of equity. . . . To invoke this equitable remedy is a matter

of right, and not of mere grace.' " *Oliver v. Lansing*, 50 Neb. 828, 836-37, 70 N.W. 369, 371 (1897) (quoting *Hill v. Reno et al.*, 112 Ill. 154 (1883)). Accord *Yunghans v. O'Toole*, 199 Neb. 317, 321, 258 N.W.2d 810, 813 (1977) (stating that "[o]nce joint title in real estate has been established, partition may be had as a matter of law").

[6] In ruling that appellants' partition actions were premature, both district courts relied upon *Peterson v. Damoude*, 98 Neb. 370, 152 N.W. 786 (1915), in which this court affirmed a lower court's ruling dismissing a partition action as premature when, under the terms of a will devising property, the testator provided that the " 'real estate . . . not be disposed or divided . . . prior to' " a specific date. Similarly, in *Wenzel v. Wenzel*, 174 Neb. 61, 69, 115 N.W.2d 788, 793 (1962), we affirmed the trial court's dismissal of a partition action when the will devising the property contained a provision which essentially prohibited the disposal or the division of the real property for 5 years, stating that while "[o]rdinarily, the right to partition property is one of right and not a matter of grace[, t]he right to partition . . . may be restricted by the terms of a testator's will where the restriction is reasonable." See, also, *Freeland v. Andersen*, 114 Neb. 822, 211 N.W. 167 (1926) (enforcing on appeal testamentary restriction on partition which restriction lasted for life of testator's widow). In each of these cases, the estate document devising the property contained a restriction that effectively prohibited the disposal or the division of the real property for a reasonable quantifiable time period, and thus, a partition action brought before the expiration of that time period was deemed premature.

In contrast to these decisions, however, the estate documents under which title of the subject property was conveyed to Nana Nell and Janet do not contain a temporal restriction on the division or disposal of the subject property. Instead, the controlling estate documents convey the subject property to Nana Nell and Janet while also recognizing the potentiality of a sale. Both estate documents contain the following language: "[I]f my daughters . . . desire to sell this land, they must give my son, Lonnie R. Cumming, first opportunity to buy it." Thus, unlike the defined restrictions on the disposal or the division of real property contained in *Peterson* and *Wenzel*, the estate documents in the instant

cases do not preclude a sale at Nana Nell's or Janet's insistence. Rather, as we discuss in greater detail below, the estate documents grant to Lonnie a first right to buy the subject property in the event the property is sold.

[7] The interpretation of the words in a will or trust is a question of law. See, *In re Estate of Johnson*, 260 Neb. 91, 615 N.W.2d 98 (2000); *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994). A partition action is an action in equity and is reviewable by an appellate court de novo on the record. *Gustafson v. Gustafson*, 239 Neb. 448, 476 N.W.2d 819 (1991). On appeal from an equity action, an appellate court, as to questions of law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Detter v. Miracle Hills Animal Hosp.*, 269 Neb. 164, 691 N.W.2d 107 (2005).

With the foregoing principles in mind, we conclude that nothing in the language of the estate documents at issue in these cases restricts Nana Nell's or Janet's right to partition the subject property. We conclude that both district courts erred as a matter of law in interpreting the "first opportunity to buy" language contained in the estate documents as a restriction on appellants' right to bring an action to partition the subject property. Because the estate documents contain no restriction on appellants' right to bring a partition action, the district courts erred in sustaining appellees' motions for summary judgment and dismissing the respective complaints.

Lonnie's First Right to Buy the Subject Property May Be Exercised if a Partition Sale Is Ordered.

Despite our determination that the "first opportunity to buy" language does not preclude appellants from filing their partition actions, we are mindful that under Nebraska law, the proceedings in these partition actions could lead to an eventual sale of the subject property. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal when those issues are likely to recur during further proceedings. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004). Accordingly, we consider the effect of the expression "first opportunity to buy" in the estate documents, and we conclude that in the event the district courts order a partition sale of the subject property and not a partition in kind, Lonnie must first be

given, in accordance with the terms of the estate documents, a right to buy the subject property. This conclusion is indicated by Nebraska statutes and case law.

In summary, Nebraska's partition procedure is set forth in Neb. Rev. Stat. § 25-2170 et seq. (Reissue 1995 & Cum. Supp. 2004). Under § 25-2170.01, a joint owner of any real estate may compel a partition of the real estate. The statute authorizes the district court to appoint a referee or referees, "to make partition into the requisite number of shares." § 25-2180. Section 25-2181 provides that if the referee so appointed determines that the property cannot be partitioned in kind, he or she shall make a report to that effect to the district court. Section 25-2183 provides that if, after appointment of a referee, it is determined that partition in kind cannot be made without great prejudice, the district court may order the property sold.

[8] Thus, under Nebraska's partition statutes, the partition of the subject property may take one of two forms: (1) partition in kind, where the property is physically divided, or (2) partition in sale, where the property is sold and the sale proceeds are divided. See, also, 59A Am. Jur. 2d *Partition* § 2 (2003). We note that consistent with the above-discussed statutory scheme, this court has long expressed a preference for partition in kind. We have stated:

> "As between a partition in kind or sale of land for division, the courts will favor a partition in kind, since this does not disturb the existing form of inheritance or compel a person to sell his property against his will, which, it has been said, should not be done except in cases of imperious necessity."

Trowbridge v. Donner, 152 Neb. 206, 213, 40 N.W.2d 655, 660 (1950) (quoting 47 C.J. *Partition* § 436 (1929)). See, also, *Nordhausen v. Christner*, 215 Neb. 367, 372, 338 N.W.2d 754, 757 (1983) (stating that "the presumption in favor of partition in kind does still prevail in this jurisdiction").

In accordance with the statutes and case law, in paragraph 6 of their complaint, appellants first sought a partition in kind and sought to have the subject property sold only in the event the subject property could not be equitably divided. In view of the foregoing, on remand, each district court will appoint a referee or referees to review the portion of the subject property within its authority and report to the respective district court regarding

the proposed division of the same. If the referee or referees so appointed determine that the subject property cannot be divided and should be sold, then, as provided under Nebraska's partition statutes, a partition sale can be ordered by the district courts. Under the terms of the estate documents, however, Lonnie has been given a "first opportunity to buy" the subject property in the event of a sale. We now consider the effect of those terms in the event of a partition sale.

[9] In *Winberg v. Cimfel*, 248 Neb. 71, 76-77, 532 N.W.2d 35, 39 (1995) (quoting 11 Samuel Williston, A Treatise on the Law of Contracts § 1441A (3d ed. 1968)), we stated that language such as "first rights to purchase" created a first right to buy, the effect of which was to limit the right of the owner to freely dispose of his or her property " 'by compelling [such owner] to offer it first to the party who has the first right to buy.' " We conclude that the expression "first opportunity to buy" in the estate documents in the instant cases creates a similar first right to buy, running in favor of Lonnie. Accordingly, the estate documents grant to Lonnie a first right to buy the subject property in the event of a sale.

We recognize that the district courts may ultimately order the sale of the subject property in these partition actions. Such sale would trigger Lonnie's first right to buy the subject property, and therefore, upon the happening of a partition by sale, Lonnie must be given the first right to buy the subject property.

CONCLUSION

On this court's own motion, we have consolidated these cases for disposition. We conclude that both district courts erred as a matter of law in determining that the "first opportunity to buy" language contained in the estate documents restricted appellants' right to maintain a partition action. In accordance with Nebraska law, each district court shall appoint a referee or referees to report on the feasibility of partition in kind. If partition in kind is not viable, then we further conclude that as a result of the "first opportunity to buy" language in the estate documents, in the event the district courts order a partition sale, Lonnie must be given the first right to buy the subject property. Accordingly, we reverse the district courts' orders sustaining appellees' motions for summary

judgment and dismissing appellants' partition actions and remand the causes for further proceedings consistent herewith.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JOSEPH MOGLIA AND AMY MOGLIA, HUSBAND AND WIFE, APPELLANTS, V. MCNEIL COMPANY, INC., ET AL., APPELLEES.

700 N.W.2d 608

Filed July 22, 2005. No. S-04-554.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Contracts: Contractors and Subcontractors.** In the absence of an otherwise binding agreement, express or implied, there is no privity of contract between a subcontractor and the property owner who negotiated the original agreement with the general contractor.
3. **Contracts: Contractors and Subcontractors: Liability.** In the absence of privity, no liability on the part of subcontractors in favor of subsequent owners will be implied.
4. **Contractors and Subcontractors: Warranty.** As a general rule, a contractor constructing a building impliedly warrants that the building will be erected in a workmanlike manner.
5. ____: ____. The implied warranty of workmanlike performance provides the owner with an action against the contractor if the contractor's work is not of good quality and free from defects.
6. **Contractors and Subcontractors: Warranty: Liability.** Liability under the implied warranty of workmanlike performance is further implied and extended to subsequent home purchasers as against general contractors.
7. **Limitations of Actions: Real Estate: Warranty.** The extension of the implied warranty of workmanlike performance to subsequent home purchasers is limited to latent defects which manifest themselves after the subsequent purchase, are not discoverable by a subsequent purchaser's reasonably prudent inspection at the time of the subsequent purchase, and are subject to the statute of limitations found at Neb. Rev. Stat. § 25-223 (Reissue 1995).
8. **Real Estate: Warranty.** The basic elements of the implied warranty of habitability are that it applies to purchasers of residences against builders and ensures that there are no defects in materials or workmanship that make a dwelling unfit for habitation.
9. **Actions: Warranty.** Nebraska has not adopted a cause of action based on implied warranty of habitability.
10. **Negligence.** Whether a legal duty in negligence exists is a question of law.

11. ____. In negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk.
12. ____. In determining whether a duty exists, 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.
13. **Negligence: Complaints: Contracts: Torts.** In order to decide the form of redress, whether contract or tort, it is necessary to know the source or origin of the duty or the nature of the grievance, and the character of the action must be determined from what is asserted concerning it in the complaint.
14. **Negligence: Contracts: Contractors and Subcontractors.** No legal duty in negligence runs from contractors or subcontractors in favor of subsequent homeowners stemming from the contract between the original homeowners and the contractor.
15. **Negligence: Real Estate.** Building codes create a legal duty, thus giving rise to a potential negligence claim.
16. **Negligence: Contracts: Contractors and Subcontractors: Damages: Liability.** The general rule is that a construction contractor is not liable for injuries or damage to a third person with whom he or she is not in a contractual relation resulting from the negligent performance of his or her duty under the contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner.
17. **Negligence: Contractors and Subcontractors.** An exception to the accepted work doctrine is recognized in situations where the parties dealt with inherently dangerous elements or the defect at issue was latent and could not have been discovered by the owners or employer.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

W. Patrick Betterman, Dave J. Skalka, and Jennifer M. Betterman, of Law Offices of W. Patrick Betterman, for appellants.

Donald G. Furlow and Jason C. Demman, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellee Landgraphics, Inc.

Michael G. Mullin and Michaela A. Messenger, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees K D Roofing, Inc., and Keith M. Duggan.

Michael T. Gibbons and Aimee C. Bataillon, of Woodke & Gibbons, P.C., L.L.O., for appellees McNeil Company, Inc., and Patrick McNeil.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellants, Joseph Moglia and Amy Moglia, sued various subcontractors and the contractor, claiming that their home was defectively constructed. Appellants were the second owners of the home. The amended complaint filed January 15, 2004, alleged three causes of action as follows: count I, "Breach of Implied Duty to Perform in a Workmanlike Manner"; count II, "Breach of Implied Warranty of Habitability"; and count III, "Negligence." All appellees filed motions to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). The district court granted the motions and dismissed the complaint. With the exception of the dismissal of count I, breach of implied duty to perform in a workmanlike manner alleged against the contractor, the McNeil Company, Inc., the district court did not err. We affirm in part, and in part reverse and remand for further proceedings.

STATEMENT OF FACTS

According to the complaint, in October 1994, the McNeil Company contracted with Michael and Kathleen Fahey to design and build a house in Omaha, Nebraska. The construction concluded, and the Faheys took possession of the house on January 17, 1997. On August 1, 2001, appellants purchased the house from the Faheys. The Faheys are not parties to the instant litigation.

Appellants allege that beginning in December 2002 and continuing through October 2003, they discovered numerous defects in the design and construction of the house. Appellants specifically allege they first learned of roofing defects in December 2002 when they engaged a home inspector to inspect the premises for insurance purposes. They thereafter learned of drainage problems. Appellants allege that some or all defects violate the Omaha building codes.

On September 5, 2003, appellants filed suit against the contractor and several subcontractors who worked on the house. On January 15, 2004, appellants filed an amended complaint

(complaint), naming as defendants the contractor, the McNeil Company, and Patrick McNeil, an employee of McNeil Company; the roofing subcontractor, K D Roofing, Inc., and Keith M. Duggan, an employee of K D Roofing; and the drainage subcontractor, Landgraphics, Inc. All defendants are appellees on appeal. The complaint contains three counts, asserted against various defendants, as follows: count I, "Breach of Implied Duty to Perform in a Workmanlike Manner," alleged against the McNeil Company, K D Roofing, Duggan, and Landgraphics; count II, "Breach of Implied Warranty of Habitability," alleged against the McNeil Company; and count III, "Negligence," alleged against all defendants. Appellants alleged they had sustained various damages and sought relief therefor.

In response to the allegations in appellants' complaint, each defendant filed a motion to dismiss under rule 12(b)(6), claiming that the complaint failed to state a claim upon which relief could be granted. The motions came on for hearing on April 6, 2004. In dismissing the complaint, the district court concluded that Nebraska did not recognize a cause of action for breach of an implied warranty of habitability. Thereafter, the district court concluded that all of appellants' claims sounded in contract and not in negligence. Finally, the district court determined that appellants lacked privity of contract with all of the defendant-appellees and that as such, the complaint failed to state a cause of action. The district court granted all appellees' motions and dismissed appellants' complaint with prejudice. Appellants filed this appeal.

ASSIGNMENT OF ERROR

Appellants claim that the district court erred in sustaining each appellee's motion to dismiss.

STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005).

ANALYSIS

Count I, Breach of Implied Duty to Perform in Workmanlike Manner, Was Properly Dismissed as to K D Roofing, Duggan, and Landgraphics but Was Improperly Dismissed as to McNeil Company.

Appellants allege in count I of the complaint that K D Roofing, Duggan, Landgraphics, and the McNeil Company breached an implied duty to perform in a workmanlike manner. On appeal, appellants claim that the district court erred when it dismissed count I for failure to state a cause of action. As to K D Roofing, Duggan, and Landgraphics, we conclude the district court did not err in dismissing count I. However, we conclude that the district court erred in dismissing count I as to the McNeil Company.

[2,3] With respect to K D Roofing, Duggan, and Landgraphics, we agree with the district court that in the absence of an allegation of privity, count I, styled "Breach of Implied Duty to Perform in a Workmanlike Manner," fails to state a cause of action against these subcontractors. We have long held that in the absence of an otherwise binding agreement, express or implied, there is no privity of contract between a subcontractor and the property owner who negotiated the original agreement with the general contractor. *Boyd v. Benkelman Public Housing Authority*, 188 Neb. 69, 195 N.W.2d 230 (1972). We have thus previously concluded that there is no liability on the part of subcontractors in favor of original owners, and given the more attenuated relationship with subcontractors, it logically follows that in the absence of privity, no liability on the part of subcontractors in favor of subsequent owners will be implied. See, *Cox v. Curnutt*, 271 P.2d 342 (Okla. 1954); *B & C Construction Co. v. Grain Handling Corp.*, 521 S.W.2d 98 (Tex. Civ. App. 1975).

In urging this court to extend the warranty of workmanlike performance in favor of subsequent owners despite the absence of privity, appellants refer us to several Nebraska cases, including *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984), and *Herman v. Bonanza Blds., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986). *Peterson* involved extending an implied warranty of merchantability to a subsequent purchaser of seed corn under the Uniform Commercial Code. *Herman* involved an action in which a steel building owner sued

the manufacturer of a component part where the manufacturer had made express warranties upon which the owner relied. These cases are distinguishable from the case at bar. In the instant case, there are no Uniform Commercial Code imperatives and no alleged express warranties which would lead us to impose liability on the subcontractors in favor of the subsequent owners of the home based on the implied warranty to perform in a workmanlike manner. Given the absence of an allegation of privity, the district court did not err in dismissing count I as to K D Roofing, Duggan, and Landgraphics, and we affirm this portion of the district court's order.

[4,5] Unlike subcontractors, as to contractors, we have long recognized that "[a]s a general rule a contractor constructing a building impliedly warrants that the building will be erected in a workmanlike manner . . . ." *Henggeler v. Jindra*, 191 Neb. 317, 318, 214 N.W.2d 925, 926 (1974). We note that the law implies the warranty, and we have applied this warranty between an original homeowner and a contractor. *Id.* This implied warranty "provides the owner with an action against the contractor if the contractor's work is not of good quality [and] free from defects." 3 C. Allen Foster et al., Construction and Design Law § 20.3a at 27 (1998). Appellants note that the ultimate objective encompassed by the warranty of workmanlike construction is the construction of a home of good quality and urge this court to extend the warranty such that it impliedly favors subsequent owners. We find merit in appellants' argument.

Although we have not previously extended the warranty, we are aware that elsewhere, the warranty of workmanlike performance has explicitly been extended to subsequent purchasers. E.g., *Aronsohn v. Mandara*, 98 N.J. 92, 484 A.2d 675 (1984). Although using the language of the warranty of workmanlike construction and the warranty of habitability somewhat interchangeably, we are aware that both warranties have been extended in favor of subsequent purchasers by additional courts. E.g., *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 678 P.2d 427 (1984); *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670 (Miss. 1983). But see, contra, *Butler v. Caldwell & Cook*, 122 A.D.2d 559, 505 N.Y.S.2d 288 (1986).

Various public policy rationale have been offered in extending the implied warranty of workmanlike performance in favor of subsequent purchasers. In explaining why the privity requirement should be abandoned between a subsequent purchaser and a contractor in connection with an implied warranty of workmanlike performance, the court in *Aronsohn, supra*, stated that to require privity

> in such a situation would defeat the purpose of the implied warranty of good workmanship and could leave innocent homeowners without a remedy for negligently built structures in their home. The contractor should not be relieved of liability for unworkmanlike construction simply because of the fortuity that the property on which he did the construction has changed hands.

98 N.J. at 102, 484 A.2d at 680. As to the breadth of the warranty, we note that in *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983), *overruled in relevant part in Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644 (Tex. 1996), *as recognized in PPG Industries v. JMB/Houston Centers*, 146 S.W.3d 79 (Tex. 2004), the warranty of workmanlike performance was extended to a subsequent owner under the Texas Deceptive Trade Practices Act, and, in so doing, the concurring opinion prudently suggested that such extension should be limited to latent defects which could not be discovered at the time of sale to the subsequent owner.

In *Richards, supra*, the court held that privity should not be required between a remote purchaser and a contractor with respect to "the implied warranty of workmanship and habitability." 139 Ariz. at 245, 678 P.2d at 430. The *Richards* court relied on a warranty of habitability case, *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979), and stated that " '[t]he purpose of the warranty is to protect innocent purchasers and hold builders accountable for their work. With that object in mind, any reasoning which would arbitrarily interpose a first buyer as an obstruction to someone equally deserving of recovery is incomprehensible.' " 139 Ariz. at 245, 678 P.2d at 430 (quoting *Moxley, supra*). The *Richards* court explained that the policy considerations underlying the "implied warranty" in favor of original owners are equally applicable to subsequent homeowners. Those considerations include that "house-building is frequently undertaken on a

large scale, that builders hold themselves out as skilled in the profession, that modern construction is complex and regulated by many governmental codes, and that homebuyers are generally not skilled or knowledgeable in construction, plumbing, or electrical requirements and practices." *Richards*, 139 Ariz. at 245, 678 P.2d at 430. The *Richards* court also noted that in a mobile society, homebuilders should anticipate the houses they construct will change ownership.

[6,7] Upon due consideration, we agree that liability under the implied warranty of workmanlike performance should be further implied and extended to subsequent home purchasers as against general contractors and that this extension should be circumscribed by certain limitations which we note other courts have adopted. E.g., *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 678 P.2d 427 (1984). Our extension of liability is thus limited to latent defects which manifest themselves after the subsequent purchase and are not discoverable by the subsequent purchaser's reasonably prudent inspection at the time of the subsequent purchase. Such liability is further subject to the statute of limitations found at Neb. Rev. Stat. § 25-223 (Reissue 1995). In extending the implied warranty of workmanlike performance to subsequent purchasers as against contractors, we note that the subsequent owner has the burden, inter alia, of proving a latent defect which is attributable to the actions or inactions of the builder, and the builder retains the traditional defenses, affirmative and otherwise.

Given our conclusion that the implied warranty of workmanlike performance extends in favor of subsequent purchasers against contractors with the limitations noted above, and drawing all reasonable inferences in the complaint in favor of appellants, we conclude that the district court erred in dismissing count I as to the McNeil Company. This portion of the district court's order is reversed, and the cause remanded for further proceedings.

Count II, Breach of Implied Warranty of Habitability Was Properly Dismissed.

Appellants allege in count II of the complaint that the McNeil Company breached an implied warranty of habitability. On appeal, appellants claim that the district court erred when it dismissed count II for failure to state a cause of action. We conclude the district court did not err in dismissing count II.

[8] It has been stated that

> the basic elements of the implied warranty of habitability are that it applies to purchasers of residences against builders and ensures that there are no defects in materials or workmanship that make a dwelling unfit for habitation. . . .
>
> The premise behind the warranty is that every contract to erect a structure contains an implied warranty that the structure shall be fit to live in.

3 C. Allen Foster et al., Construction and Design Law § 20.4a at 44 (1998).

[9] Relying primarily on language found in *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993), and *Henggeler v. Jindra*, 191 Neb. 317, 214 N.W.2d 925 (1974), appellants assert that Nebraska has indicated its approval of a cause of action based on implied warranty of habitability. On appeal, appellants argue that we should extend such purported cause of action in favor of subsequent owners such as appellants. However, contrary to appellants' reading of *Lange* and *Henggeler*, Nebraska has not adopted a cause of action based on implied warranty of habitability. The cases cited by appellants involved issues pertaining to whether the structures had been constructed in a workmanlike manner, and the language on which appellants rely was merely incidental to the decisions therein. See, similarly, *Eliker v. Chief Indus.*, 243 Neb. 275, 498 N.W.2d 564 (1993).

We are aware that the implied warranty of habitability has been adopted by a great many states and extended to subsequent owners. E.g., *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324, 65 Ill. Dec. 411 (1982); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979). We are also aware of authority to the contrary. E.g., *Arvai v. Shaw*, 289 S.C. 161, 345 S.E.2d 715 (1986).

In a case describing the implied warranty of habitability, it has been observed that "[h]abitability is synonymous with suitability for living purposes; the home must be occupiable." *Aronsohn v. Mandara*, 98 N.J. 92, 104, 484 A.2d 675, 681 (1984). In the instant case, there are numerous allegations describing defects in the house, but there are no allegations in the complaint which could fairly be taken to allege that the house is not fit for habitation. Given the allegations in the complaint and given the state of

the law in Nebraska where we have not recognized an implied warranty of habitability in favor of original owners, we are not inclined to adopt such cause of action in the first instance in favor of subsequent purchasers. The district court did not err in dismissing count II alleged only against the McNeil Company for failure to state a cause of action.

Count III in Negligence Was Properly Dismissed.

Appellants claim that the district court erred when it dismissed the negligence count, count III, asserted against all appellees. Appellants contend on appeal, as they did in district court, that the law ought to impose on all appellees a duty of care in favor of subsequent owners such as appellants. Appellees claim that the district court was correct when it concluded that, notwithstanding appellants' characterization of count III as a cause of action in "negligence," the duties alleged therein stemmed from the underlying contract between the contractor and the original owners such that count III failed to allege a legal duty owed to subsequent owners and thus failed to state a negligence cause of action. We agree with the district court that the complaint does not state a cause of action in negligence in favor of appellants.

In urging this court to conclude that a cause of action in negligence exists as against each appellee, appellants focus primarily on foreseeability. Appellants argue that the risk of harm to subsequent owners was clearly foreseeable, thus giving rise to a case in negligence. Appellants refer us to cases such as *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670 (Miss. 1983), in which it was held, inter alia, that a builder of a home could be liable in negligence to a second or subsequent purchaser and that it was not necessary that privity exist between the builder and subsequent owner. See, similarly, *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980) (stating that subsequent owners are members of class for whom home was constructed, that they are entitled to duty of care in construction, and that key inquiry is foreseeability).

Appellees direct us to contrary authority such as *Foxcroft Townhome Owners v. Hoffman Rosner*, 105 Ill. App. 3d 951, 957, 435 N.E.2d 210, 215, 61 Ill. Dec. 721, 726 (1982), in which the court rejected a purported "general duty" as nebulous and held that subsequent purchasers could not recover for damages from the builder under a negligence theory. See, similarly, *Redarowicz*

v. Ohlendorf, 92 Ill. 2d 171, 441 N.E.2d 324, 65 Ill. Dec. 411 (1982) (stating in action by subsequent owner against builder that economic losses not recoverable under negligence theory). See, also, *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041 (Colo. 1983) (Rovira, J., dissenting) (in action by subsequent owner against builder, dissent rejecting action based on negligence because no legal duty owed subsequent purchaser).

[10] Whether a legal duty in negligence exists is a question of law. *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004). Appellants propose that we establish a legal duty; that is, appellants suggest we declare that a tort duty exists in favor of subsequent owners based upon the builder's contractual undertaking to build a house. The legal duty appellants propose is not an inevitable consequence of the contract between the builder and the original owners. That no such legal duty is inevitable is apparent from a comparison of the concepts of contractual duty and tort duty. The difference between the two has been described by Prosser as follows:

> The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. They may be owed to all those within the range of harm, or to some considerable class of people. Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.

William L. Prosser, Handbook of the Law of Torts § 92 at 613 (4th ed. 1971).

[11,12] In analyzing appellants' argument, it is important to distinguish between the question of to *whom* a duty is owed upon which appellants focus and the question of *what* duty is owed. We have repeatedly said that in negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001). We have stated:

> In determining whether a duty exists, [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.

Fuhrman v. State, 265 Neb. 176, 183-84, 655 N.W.2d 866, 873 (2003).

[13,14] Because this case was decided on a motion to dismiss, we refer to the complaint to determine the duties of the parties. We have stated:

> In order to decide the form of redress, whether contract or tort, it is necessary to know the source or origin of the duty or the nature of the grievance. Attention must be given to the cause of the complaint; in other words, the character of the action must be determined from what is asserted concerning it in the petition in the cause.

Fuchs v. Parsons Constr. Co., 166 Neb. 188, 192, 88 N.W.2d 648, 651 (1958). With the exception of the duty based on city building codes discussed below, it is clear from the complaint that appellants seek to benefit from and establish a duty based on the original owners' contractual arrangement with the contractor. The duty appellants seek to establish cannot be made without reference to the contract, and such duties do not exist independent of the contract. Although we have found that a negligence cause of action will lie between the original owner and builder flowing from their contract, *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001), we decline to extend and impose a legal duty on appellees in favor of subsequent homeowners stemming from the contract between the original homeowners and the contractor.

[15] With respect to appellants' allegation that the defects violated Omaha building codes, we agree with appellants that building codes create a legal duty, thus giving rise to a potential negligence claim. See *Mondelli, supra* (discussing negligence action based on violation of construction building code brought by original owners against city). Assuming for analysis that the failure to construct the house according to code is a breach of a legal duty giving rise to a potential negligence claim, a review of the

complaint shows that due to the "accepted work doctrine" discussed below, the claim does not benefit appellants.

We review the complaint to ascertain the facts underlying our analysis, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of appellants. The complaint shows that appellants were not the original owners or occupiers of the house. The complaint alleges that the defects existed in January 1997, but that appellants did not purchase the house from the original owners until August 2001. The original owners thus accepted the house. The complaint does not allege that appellants had an inspection performed prior to purchasing the house. The complaint does not allege that appellants protected themselves by express agreement in the deed or contract for sale by taking an assignment of the rights which the original owners may have had. See *Lee v. Clark and Associates Real Estate, Inc.*, 512 So. 2d 42 (Ala. 1987) (declining to find action based on negligence in favor of subsequent purchasers and suggesting that subsequent purchasers can protect themselves by express agreement in deed or contract for sale).

[16] Appellees refer us to and appellants concede that Nebraska applies the "accepted work doctrine" in construction cases. See, *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999); *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 254 Neb. 754, 579 N.W.2d 526 (1998). We stated in *Parker*:

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

254 Neb. at 757, 579 N.W.2d at 528.

[17] We have also stated: "This court has recognized an exception to the accepted work doctrine in situations where the parties dealt with inherently dangerous elements or the defect at issue was latent and could not have been discovered by the owners or

employer." *Id.* The roofing defects and drainage defects alleged in the complaint are not inherently dangerous. Compare *Dvorak, supra* (stating that installation of high voltage wiring through conduit and connection of such wiring were inherently dangerous). Furthermore, although the complaint states that the defects were "not reasonably discoverable" by appellants, this allegation does not satisfy the exception to the accepted work doctrine that the defect "could not have been discovered." See *Parker*, 254 Neb. at 757, 579 N.W.2d at 528. To the contrary, the complaint alleges, inter alia, that the roofing defects were noted in December 2002 when appellants engaged a home inspector to inspect for insurance purposes. Even drawing all reasonable inferences in favor of appellants, it cannot be said that the defects could not have been discovered when the house was accepted by the original owners, and, therefore, appellants cannot benefit from the exceptions to the accepted work doctrine.

To summarize, count III fails to state a cause of action in negligence. There are no allegations which would impose a legal duty on any appellee in favor of appellants, and to the extent a legal duty based on building code violations is alleged, the accepted work doctrine precludes the cause of action based in negligence. Count III in negligence was properly dismissed.

CONCLUSION

With the exception of the dismissal of count I, implied duty to perform in a workmanlike manner alleged against the McNeil Company, the district court did not err in granting the appellees' motions to dismiss. Accordingly, we affirm in part, and in part reverse and remand for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

GONZALO VEGA, APPELLEE AND CROSS-APPELLANT, v. IOWA BEEF PROCESSORS, INC., APPELLANT AND CROSS-APPELLEE.

699 N.W.2d 407

Filed July 22, 2005. No. S-04-1181.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. **Workers' Compensation.** The determination of causation is, ordinarily, a matter for the trier of fact.
4. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
5. **Workers' Compensation: Expert Witnesses.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

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

Joseph C. Dowding, of Dowding, Dowding & Dowding, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Between 1994 and 1996, Gonzalo Vega suffered four separate injuries while employed by Iowa Beef Processors, Inc. (IBP). A single judge of the Nebraska Workers' Compensation Court found

these injuries to be compensable and ordered IBP to pay for future medical costs reasonably necessary as a result of Vega's accidents and resulting injuries.

In the instant case, the single judge entered an award in which it found that exploratory testing related to Vega's intestinal problems and Vega's need for back surgery were compensable medical expenses. The review panel affirmed the decision of the single judge with regard to medical expenses related to Vega's back surgery, but reversed regarding expenses related to his intestinal problems. The review panel also remanded the case to the single judge for his determination of whether certain medical expenses, which were not addressed in the single judge's order, were related to Vega's March 1996 accident. IBP appeals, and Vega cross-appeals, the review panel's decision.

BACKGROUND

In four separate accidents during 1994 and 1996, Vega suffered injuries to his right shoulder, right knee, left elbow, and lower back, all while employed with IBP. These injuries were found to be compensable by the single judge, and Vega was assigned permanent functional impairments for his right shoulder, right knee, and left elbow injuries, and a loss of earning capacity for his low-back injury. As a result of the single judge's findings, IBP was ordered to pay Vega permanent partial disability benefits for each of the injuries and current and future medical expenses which are reasonable and necessary. See *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002).

In the present appeal, the compensability of Vega's injuries and the single judge's 1998 award are not contested. Instead, the parties dispute the compensability of certain medical expenses related to Vega's back and digestive system.

In 1998, Vega sought medical treatment for gastrointestinal problems. Vega's medical records reflect that his physicians believed that his gastrointestinal problems were related to his diet and his weight. He was therefore advised to lose weight. Vega's medical records also reflect that he advised his physicians that he had been unable to take nonsteroidal, anti-inflammatory medication prescribed for his compensable right knee injury because the medication bothered his stomach. This in turn exacerbated Vega's

compensable right knee injury. At the request of his physician, Vega underwent the following additional treatments: a right upper quadrant ultrasound; an endoscopic examination of his esophagus, stomach, and duodenum; a CAT scan of his upper abdomen; and a small bowel study. Following these tests, it was determined that Vega's gastrointestinal problems were caused by Vega's general state of obesity, not the medication he was taking for his right knee problems.

Between 1997 and June 2000, Vega did not seek additional treatment for compensable injuries other than his right knee. However, Vega's medical records reflect that in June 2000, he complained of back pain which began while he was playing with a child. At that time, Vega was given a low-back injection. The record is again silent with regard to Vega's back complaints until February 2001, when Vega was hospitalized following a motor vehicle accident in which he suffered a fracture of L2. Thereafter, Vega was seen by Dr. David Benavides, who noted that Vega complained of low-back problems which had been going on intermittently for several years. At the request of Benavides, Vega underwent an MRI, which revealed disk herniations with a history of a previous fracture at L2. Benavides recommended a diskogram, or radiograph of his intervertebral disks, and advised Vega that he would be a candidate for a spinal fusion. Vega underwent the diskogram, which showed positive findings at L4-5 and L5-S1. Following the diskogram, Benavides recommended that Vega undergo a posterior decompression and stabilization of the disks at L4-5 and L5-S1, as well as a fusion.

At the heart of the parties' dispute regarding the compensability of certain treatment for Vega's back injury are contradictory opinions by Benavides. On December 6, 2001, IBP wrote a letter to Benavides asking him to answer the following hypothetical questions:

> 1. Absent specific trauma, aggravation in the work place since May 22, 1997 and no reported pain since 1997, are you able to state within a reasonable degree of medical certainty that the current low back complaints are still a continuation [of] work activities at IBP? . . .
>
> If yes, please explain the lack [of] reported pain over the last four years[.]

> 2. Could this condition just as likely be the result of pre-existing factors . . . ?

In response to IBP's inquiry, Benavides responded on December 11, 2001, that Vega's "symptoms may be due to degenerative changes which in turn may have been accelerated by work related activities." Thereafter, on January 4, 2002, in response to a letter from Vega's attorney, Benavides stated as follows:

> I have reviewed the prior medical records of . . . Vega, including the prior MRI of January 11, 1997 as well as [another physician's] records of September 4, 1996 and October of 1996 wherein he states within a reasonable degree of medical certainty . . . Vega's low back condition is an aggravation of a pre-existing condition he sustained doing cumulative repetitive work on the job site. He subsequently assigned him a 2% whole body permanent impairment and a 35 to 50 pound lifting restriction. [The other physician's] narrative report of June 14, 1996 and the office notes from the March 14, 1996 through January 9, 1997 are reviewed as well. With this information as well as the detailed history taken from . . . Vega and his examination, I am of the opinion that within a reasonable degree of medical probability . . . Vega's ongoing low back problems necessitating treatment are a continuation or reoccurrence of his original compensable work related accident on March 14, 1996.
>
> I believe his need for low back fusion is a result of the aggravation of his pre-existing degenerative back condition relating back to his original March 4, 1996 aggravation while working at IBP.
>
> I was in receipt of a request for information from [IBP's attorney] on December 6, 2001 where specifically I was asked about absent specific trauma, where the current low back complaints are still a continuation of work related activities at IBP. That was answered in the negative, but further discussion and explanation noted that his symptoms may be due to the degenerative changes which in turn may have been accelerated by the work related activities.

A hearing was held before the single judge to determine whether medical expenses related to Vega's gastrointestinal problems and low-back problems, including the recommended back

surgery, were compensable. The single judge entered an award in which he found that medical expenses incurred to explore and investigate the causal nexus, if any, between Vega's gastrointestinal problems and his knee injury were compensable under *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959). The single judge further found that medical expenses related to Vega's current low-back complaints were compensable and ordered IBP to pay for Vega's recommended surgery. IBP appealed to the review panel, which affirmed the decision of the single judge on the issue of the compensability of medical expenses related to Vega's low-back complaints and reversed the single judge's finding with regard to compensability of medical expenses related to Vega's gastrointestinal problems. The review panel also remanded the case back to the single judge on the issue of the compensability of certain medical expenses which were not addressed by the single judge in his award. IBP appeals the review panel's decision, and Vega cross-appeals.

ASSIGNMENTS OF ERROR

IBP asserts (1) the single judge's determination, as affirmed by the review panel, that Vega's current back problems are causally related to the March 1996 accident was clearly wrong and contrary to law and (2) the review panel's remand for further findings regarding outstanding medical expenses in exhibit 8, which were not addressed in the single judge's award, was clearly wrong and contrary to law.

In his cross-appeal, Vega asserts that the review panel erred in reversing the single judge's award requiring IBP to pay certain bills related to the diagnosis of Vega's gastrointestinal problems.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a compensation court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Zoucha v. Touch of Class Lounge*, 269 Neb. 89, 690 N.W.2d 610 (2005).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the compensation court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004).

ANALYSIS

Compensability of Current Back Problems

IBP argues that the single judge and review panel erred by finding that Vega's current back symptoms are causally related to Vega's March 1996 accident. At oral argument, IBP urged this court to set a threshold which the evidence must meet in order for it to be considered competent medical evidence. IBP argues that the medical evidence presented in the instant case falls below that as yet unstated threshold. We decline IBP's invitation. As explained below, we determine that the medical evidence in the present case was competent and supports the single judge's finding as to the compensability of Vega's low-back pain.

[3-5] The determination of causation is, ordinarily, a matter for the trier of fact. *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996). In testing the sufficiency of the evidence to support the findings of fact made by the compensation court, the evidence must be considered in the light most favorable to the successful party. *Sherwood v. Gooch Milling & Elevator Co.*, 235 Neb. 26, 453 N.W.2d 461 (1990). As the trier of fact, the compensation court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Kerkman v. Weidner Williams Roofing Co., supra*; *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995).

Pursuant to § 48-185(3), this court may modify, reverse, or set aside a compensation court decision where there is not sufficient competent medical evidence in the record to warrant the making of the order, judgment, or award. We determine that the record in the instant case contains sufficient competent evidence to allow the single judge to determine that Vega's current back complaints are causally related to his March 1996 accident. Vega's treating physician, Benavides, opined that "within a reasonable degree of

medical probability . . . Vega's ongoing low back problems necessitating treatment are a continuation or reoccurrence of his original compensable work related accident on March 14, 1996." At trial, Vega testified that since leaving the employment of IBP and retaining employment elsewhere, he had not experienced more pain than he had had on the date of his accident. Vega further testified that he had not experienced any pain, aside from that pain which he already feels, while lifting his child; that the pain he felt following his 2001 automobile accident was in a different location than the pain felt as a result of his March 1996 accident; and that he felt he had fully recovered from his automobile accident.

IBP argues that the conflicting opinions of Benavides to IBP's and Vega's attorneys do not establish the causal relationship between the compensable back injury and the current and projected medical charges with regard to Vega's back. A review of IBP's inquiry, however, reveals that IBP presented Benavides with hypothetical questions which did not accurately reflect the facts of the case. In IBP's inquiry, it asked Benavides to issue an opinion based upon facts that indicated Vega had not reported any back pain between 1997 and 2000. The record reflects, however, that Vega reported back problems which had been going on intermittently for several years. Benavides' report to Vega's attorney, on the other hand, is based on the review of Vega's prior medical records, a review of his MRI, and another physician's records and ratings wherein that physician stated with reasonable medical certainty that Vega's back condition is an aggravation of the preexisting condition he sustained doing repetitive work on the job.

In light of the foregoing, we determine that with regard to Vega's back, there is sufficient, competent medical evidence in the record to warrant the decision of the review panel. Thus, IBP's first assignment of error is without merit.

Uncompensated Medical Expenses

Exhibit 8 is a list of Vega's outstanding medical expenses. The review panel found:

> There are other medical expenses contained in Exhibit 8, which the Court did not discuss or rule on which may or

> may not be related to the accident and injury of 1996. The review panel will therefore remand to the trial court for further findings the amount of outstanding medical expenses, if any, in Exhibit 8, except for the excluded gastrointestinal problems previously discussed.

Vega had cross-appealed to the review panel the single judge's failure to address the compensability of those expenses in his award, and the review panel had remanded the case to the single judge for further findings regarding the compensability of those medical expenses, except where they related to Vega's gastrointestinal problems. IBP claims the review panel was clearly wrong to remand the matter because the single judge's silence on the issue should be interpreted as a denial of the compensability of the expenses.

IBP relies on *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), for the proposition that the silence of the single judge's order regarding some of Vega's claimed medical expenses should be interpreted as a denial of those expenses. In *Dawes*, we faced circumstances comparable to those of the instant case, in that the employee claimed certain medical expenses that were not discussed in the single judge's final award. However, in *Dawes*, we confronted two related but separate questions: (1) whether the single judge's award was a final, appealable order and (2) whether the single judge's omissions were erroneous. We concluded, as IBP correctly notes, that for purposes of determining the finality of the order, the silence of the single judge's order for relief not spoken to must be construed as a denial of those requests under the circumstances. We specifically noted, however, that while the single judge's omissions were not fatal to the finality of the award, they could nonetheless constitute error requiring reversal or remand of the case, as the failure of the single judge to clearly determine an issue may not provide the basis for "meaningful appellate review" required by Workers' Comp. Ct. R. of Proc. 11 (2000). In other words, while the single judge's failure to make necessary findings is not a jurisdictional defect, it may nonetheless be error requiring a remand for a complete determination of all the issues.

In *Dawes v. Wittrock Sandblasting & Painting, supra*, the review panel directed the single judge, on remand, to dispose of

the two medical bills to which the single judge did not speak. We stated in *Dawes*:

> [W]e do not conclude that the review panel erred in remanding this issue to the single judge. The single judge listed all of the medical expenses she found to be compensable, but expressly denied compensation for other medical expenses, one of which lacked a supporting medical record, and the remainder of which were incurred prior to the 1999 injury. The single judge's award simply does not mention the expenses noted above. We agree with the review panel that it cannot be discerned, from the single judge's award, why those expenses were omitted. In that respect, the single judge's award does not meet the requirements of rule 11, because we are unable to conduct a "meaningful appellate review."

266 Neb. at 548, 667 N.W.2d at 188.

The facts in *Dawes* are identical to the facts in the present case in all relevant respects. Here, the single judge awarded the expenses with regard to Vega's back condition and denied the expenses connected with his gastrointestinal problems. All of these expenses were set forth in exhibit 8. The balance of the expenses listed in exhibit 8 were not spoken to by the single judge.

We determine, therefore, that the review panel did not err in remanding the case for further findings by the single judge with regard to exhibit 8.

Compensability of Medical Expenses Incurred to Determine Cause of Vega's Stomach Problems

On cross-appeal, Vega argues that the single judge properly found that all charges associated with determining the cause of his gastrointestinal problems were compensable and that the review panel erred in reversing this decision. In reaching this conclusion, the single judge relied on our decision in *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959), wherein we allowed the recovery of medical expenses incurred to determine whether an employee's continued disability related to his work-related accident. In reaching that conclusion, we noted that from the record, it was obvious that expenses were incurred in an attempt to "eliminate as well as to determine causes of

plaintiff's continued disability." *Id.* at 739, 94 N.W.2d at 499. On appeal, the review panel found that the facts in *Pavel* are distinguishable. We agree with the review panel.

In *Pavel v. Hughes Brothers, Inc., supra*, the employee underwent surgery for a compensable back injury, but nevertheless continued to be disabled despite the surgically satisfactory procedure. While the question of another surgical operation was pending, the employee incurred additional medical expenses which the employer refused to pay. We held that the expenses were compensable because it was clear from the record that the expenses were incurred in an effort to eliminate as well as to determine the cause of the employee's continued disability. In the present case, there is no medical evidence causally relating Vega's gastrointestinal problems to his compensable knee injury. To the contrary, the record reflects that Vega's physicians were of the opinion Vega's gastrointestinal problems were related to his diet and obesity and that it was Vega who attributed his gastrointestinal problems to the medication prescribed for his knee injury. Absent any medical evidence that Vega's gastrointestinal problems were causally related to a compensable injury, we agree with the review panel that the single judge erred in awarding payment for medical expenses incurred to determine the cause of the problems. We therefore affirm the review panel's decision on this issue.

CONCLUSION

For the reasons discussed above, we affirm the decision of the review panel.

AFFIRMED.

NEW TEK MANUFACTURING, INC., A NEBRASKA CORPORATION, APPELLANT, V. JOHN A. BEEHNER ET AL., APPELLEES.

702 N.W.2d 336

Filed July 29, 2005. No. S-03-457.

1. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated under Neb. Ct. R. of Prac. 9D(4) (rev. 2001) if affirmative relief is to be obtained.

2. **Appeal and Error.** An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.
3. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
4. **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.
5. **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.
6. **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.
7. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
8. **Jurisdiction: Licenses and Permits.** Pursuant to 28 U.S.C. § 1338(a) (2000), federal courts have exclusive jurisdiction in cases in which a well-pleaded complaint establishes either that (1) federal patent law creates the cause of action or (2) the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.
9. ____: ____. Not every case involving a patent question is within the exclusive jurisdiction of the federal courts, because not every dispute involving a patent arises under the patent laws within the meaning of 28 U.S.C. § 1338(a) (2000).
10. ____: ____. State courts have jurisdiction to decide questions arising under the patent law when they are incidental to cases that do not arise under that law.
11. **Actions: Jurisdiction: Licenses and Permits.** A cause of action will arise under federal patent law when it involves the validity, scope, or infringement of a patent. When patent issues are merely implicated incidentally in a cause of action, however, federal courts do not have jurisdiction of the case pursuant to 28 U.S.C. § 1338(a) (2000).
12. **Courts: States: Licenses and Permits.** Patent matters that are primarily concerned with tortious wrongdoing may be tried in the state courts, and where such a state court suit is brought, the validity of a patent or its infringement may properly be considered by the state court.
13. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client. In such an action, the plaintiff must show that he or she would have been successful in the underlying action but for the attorney's negligence.
14. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled.
15. **Appeal and Error.** In a de novo review, an appellate court reaches a conclusion independent of the trial court.

16. **Summary Judgment.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
17. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.
18. ____: ____. A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence, showing the existence of a material issue of fact that prevents judgment as a matter of law, shifts to the party opposing the motion.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Reversed and remanded for further proceedings.

Roger P. Cox and Gregory D. Barton, of Harding, Shultz & Downs, and Roger D. Greer and Steven P. Fallon, of Greer, Burns & Crain, Ltd., for appellant.

William H. Selde and Michael G. Monday, of Sodoro, Daly & Sodoro, for appellees.

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

GERRARD, J.

The plaintiff, New Tek Manufacturing, Inc. (New Tek), sued John A. Beehner, its former attorney, and his law office for professional negligence, alleging that Beehner's negligence had caused the expiration of a patent issued to New Tek. New Tek alleged that its patent had been infringed and that because of Beehner's negligence, New Tek was unable to sue the alleged infringer. The district court entered summary judgment against New Tek, concluding that the alleged infringer's device would not have been found to infringe on New Tek's patent, and that thus, New Tek had not been damaged by Beehner's conduct. The issues in this appeal are whether the district court correctly construed New Tek's patent and whether the district court correctly concluded that the accused device could not have been found to infringe on New Tek's patent. For the reasons that follow, we reverse the judgment of the district court and remand the cause for further proceedings.

BACKGROUND

The patented device at issue in this case is a "row following guidance device for a tractor-drawn row crop implement," designed to help operators of farm equipment guide implements through a crop field without accidentally deviating from the crop row and destroying planted crops. As the patent explains, tractor-drawn farm implements may carry groundworking tools spaced as close as 4 inches apart, and a tractor operator is generally situated in a cab located several feet above and forward of the implement, so it can be difficult to view the actual engagement of the tools with the ground. In an operation such as cultivating, only a slight misalignment of the tractor with the crop row may cause the implement to uproot several rows.

The patented device was intended, generally, to be a "row following guidance device" that connects the left and right sides of the forward end of an implement to the tractor, and adjusts the length of each left and right connection so that the implement will follow a crop row independently, even if the tractor deviates from the crop row. A wheel, following the crop row, signals a steering valve upon any deviation from the alignment of the implement with the crop row, and the steering valve corrects the deviation by lengthening one of the connections between the implement and the tractor and shortening the other connection.

Eugene Schmidt invented this "row following guidance device" and assigned his rights to Sunco Systems, Inc. (Sunco). A patent application was filed with the U.S. Patent and Trademark Office (the Patent Office) on April 24, 1985, and patent No. 4,640,365 (the '365 patent) was issued on February 3, 1987. After Schmidt saw a potentially infringing device at a farm equipment show, Sunco decided to broaden the patent by filing a reissue patent application on December 14, 1987.

In 1988, while the reissue patent application was pending, Sunco's counsel retired from the practice of law and recommended that Sunco retain Beehner. In 1989, New Tek was formed to assemble farm equipment based on Sunco parts, and the rights for the '365 patent and the reissue patent application were assigned to New Tek.

For purposes of this appeal, New Tek's allegations of Beehner's duties, and breach thereof, are not at issue. New Tek

alleged that Beehner was responsible for pursuing the reissue patent application and maintaining the '365 patent, in part by ensuring that the maintenance fees for the '365 patent were filed. However, Beehner did not diligently prosecute the reissue patent application, nor did he pay the maintenance fees for the '365 patent, which became due in August 1990. Beehner revived the reissue patent application pursuant to a petition filed on December 18, 1990, but did not take action with respect to the '365 maintenance fee before the end of the maintenance fee grace period, which expired on February 3, 1991. Although this resulted in the expiration of the '365 patent and rendered the reissue patent application defective, Beehner continued prosecution of the reissue patent application. Eventually, New Tek lost patience with Beehner's prosecution of the reissue patent application and retained new counsel.

The reissue patent application was eventually allowed, and reissue patent No. 34,080 (the '080 patent) was issued on September 29, 1992. However, the '080 patent was defective because of the expiration of the '365 patent, of which New Tek was still unaware. On November 16, 1994, New Tek's counsel submitted the maintenance fee for the '080 patent to the Patent Office but, on December 19, was informed that the maintenance fee would not be accepted because the '080 patent had expired due to the failure to timely pay the maintenance fee for the '365 patent.

Ultimately, the Patent Office accepted New Tek's petition for late payment of the '365 maintenance fee, and the '365 patent was revived. However, New Tek lost the benefit of the expanded scope of the '080 patent—specifically, claim 22 of the '080 patent, which was not contained in the '365 patent, and will be explained in more detail below. Furthermore, the revival of the '365 patent did not afford New Tek protection from infringing uses that began between the expiration of the patent and the acceptance of the late maintenance fee. See 35 U.S.C. § 41(c)(2) at 754 (2000) ("[a] patent, the term of which has been maintained as a result of the acceptance of a payment of a maintenance fee . . . shall not abridge or affect the right of any person . . . who made, purchased, offered to sell, or used anything protected by the patent . . . after the 6-month grace period but prior to the acceptance of a maintenance fee").

New Tek filed suit against Beehner and his law office in the district court on December 12, 1995, alleging professional negligence. Beehner died during the pendency of the suit, and Beehner's estate was substituted (hereinafter the defendant). After proceedings unrelated to the issues presented in this appeal, the district court held a "*Markman* hearing" pursuant to *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995), *affirmed* 517 U.S. 370, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996), and entered an order construing the '080 patent for purposes of this litigation.

The defendant then filed a motion for summary judgment, which the court sustained. The parties had narrowed their inquiry to a particular device made by Orthman Manufacturing, Inc. (the Orthman device). The court determined as a matter of law that the Orthman device would not have been found to infringe on the '080 patent. The court's construction of the '080 patent and its reasoning with respect to the hypothetical infringement of that patent will be discussed below in more detail, after an explanation of the legal principles governing the issues presented. New Tek's claim was dismissed to the extent that it relied on allegations of hypothetical third-party infringement on the '080 patent, and New Tek voluntarily dismissed its remaining claims so that it could proceed with this appeal on the issue of infringement.

ASSIGNMENTS OF ERROR

New Tek assigns, consolidated and restated, that the district court erred in (1) conducting a *Markman* hearing to construe the '080 patent claims instead of submitting claim construction to the jury; (2) failing to consider that the '080 patent had intrinsic value aside from potential enforcement against third parties for infringement; (3) concluding that element 4 of claim 22 of the '080 patent was a means-plus-function element pursuant to 35 U.S.C. § 112, ¶ 6 (2000); and (4) concluding that the accused device would not have been found to infringe the '080 patent under the doctrine of equivalents.

[1-3] The defendant assigns several errors to the district court in a purported cross-appeal, arguing that the court erred in rejecting other grounds for dismissing New Tek's claims. However, the

defendant did not comply with the requirements of Neb. Ct. R. of Prac. 9D(4) (rev. 2001). A cross-appeal must be properly designated under rule 9D(4) if affirmative relief is to be obtained. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered. *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002). Thus, we will not consider the defendant's purported assignments of error, except insofar as the defendant argues that this court lacks subject matter jurisdiction over issues of patent law. Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002).

STANDARD OF REVIEW

[4] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004).

[5,6] 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. *Blair v. State Farm Ins. Co.*, 269 Neb. 874, 697 N.W.2d 266 (2005). 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. *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005).

ANALYSIS

SUBJECT MATTER JURISDICTION

[7] Prior to discussing New Tek's assignments of error, we address the defendant's argument that we do not have subject matter jurisdiction over this case. Before reaching the legal issues presented for review, it is the duty of an appellate court to

settle jurisdictional issues. *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005).

[8] The defendant argues that the district court and this court lack subject matter jurisdiction over this case due to 28 U.S.C. § 1338(a) (2000), which provides that federal district courts "have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . . Such jurisdiction shall be exclusive of the courts of the states in patent . . . cases." Pursuant to § 1338(a), federal courts have exclusive jurisdiction in cases in which a well-pleaded complaint establishes either that (1) federal patent law creates the cause of action or (2) the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims. *Stark v. Advanced Magnetics, Inc.*, 50 Mass. App. 226, 736 N.E.2d 434 (2000), citing *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988).

[9-12] However, not every case involving a patent question is within the exclusive jurisdiction of the federal courts, because not every dispute involving a patent arises under the patent laws within the meaning of § 1338(a). See, *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d 1422 (Fed. Cir. 1984), *overruled on other grounds, Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998); 7 Ernest Bainbridge Lipscomb III, Lipscomb's Walker on Patents § 23:5 (3d ed. 1988). State courts have jurisdiction to decide questions arising under the patent law when they are incidental to cases that do not arise under that law. 7 Lipscomb, *supra*.

> A cause of action will arise under federal patent law when it involves the validity, scope or infringement of a patent. . . . When patent issues are merely implicated incidentally in a cause of action, however, federal courts do not have jurisdiction of the case pursuant to § 1338.

Kaufman Malchman & Kirby, P.C. v. Hasbro, Inc., 897 F. Supp. 719, 721 (S.D.N.Y. 1995), citing *Ballard Medical Products v. Wright*, 823 F.2d 527 (Fed. Cir. 1987). Patent matters that are primarily concerned with tortious wrongdoing may be tried in the state courts, and where such a state court suit is brought, the validity of a patent or its infringement may properly be considered by

the state court. *Leesona Corporation v. Concordia Mfg. Co.*, 312 F. Supp. 392 (D.R.I. 1970).

[13] The cause of action alleged here is the tort of legal malpractice. In civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client. *Borley Storage & Transfer Co. v. Whitted*, 265 Neb. 533, 657 N.W.2d 911 (2003). In such an action, the plaintiff must show that he or she would have been successful in the underlying action but for the attorney's negligence. *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000).

We conclude that contrary to the defendant's suggestion, this case is not one "arising under" the patent law within the meaning of § 1338(a). The sole cause of action presented in this case is professional negligence. Patent law is implicated only incidentally, in that the measure of New Tek's alleged damages requires consideration of the hypothetical infringement of the '080 patent. But the precise question is not whether Orthman Manufacturing infringed on the '080 patent; rather, the question is whether, absent Beehner's negligence, New Tek would have been successful in an infringement action against Orthman. See *Bowers, supra*. The construction and alleged infringement of the '080 patent is relevant only insofar as it helps us to determine who would have prevailed in that hypothetical action. Simply stated, it is difficult to see how this case arises under federal patent law when on the record before us, the only patent that has been construed, and of which infringement is alleged, has expired. The federal government has no interest in hypothetical determinations regarding an unenforceable patent.

In short, the cause of action asserted in this case, and the remedy sought, arise entirely under state law. The defendant's argument regarding subject matter jurisdiction is without merit.

MARKMAN HEARING ON CLAIM CONSTRUCTION

In its first assignment of error, New Tek asserts that the court erred in holding a *Markman* hearing to construe the '080 patent. Instead, New Tek argues that the construction of the patent claims should have been given to a jury.

The Federal Circuit held in *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (*Markman I*), *affirmed* 517 U.S. 370, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996) (*Markman II*), that claim construction is a matter of law and that the court has the power and obligation to construe as a matter of law the meaning of the language used in the patent claim. See, also, Neb. Rev. Stat. § 25-1104 (Reissue 1995) ("[i]ssues of law must be tried by the court"). *Markman I* and *II* have established, in practice, a bifurcated procedure for patent infringement cases, in which the court first determines the scope and meaning of the patent claims asserted, and then the properly construed claims are compared to the allegedly infringing device. See *Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448 (Fed. Cir. 1998). The construction of a patent, including terms of art within its claim, is exclusively within the province of the court. See, *Markman II*; *Cybor Corp., supra.*

New Tek does not dispute that rule; rather, New Tek argues that *Markman* hearings did not exist prior to the *Markman I* decision and, thus, should not be applied in this action because any action against Orthman Manufacturing to enforce the '080 patent would have taken place prior to the *Markman I* decision. But New Tek's argument that *Markman I* represented a change in the law is contrary to the Federal Circuit's decision in that case.

New Tek contends that prior to *Markman I*, claim construction was a jury question. However, in *Markman I*, the court explained that its opinions had contained some inconsistent statements as to whether, and to what extent, claim construction was a legal or factual issue. Compare, e.g., *Tol-O-Matic v. Proma Produkt-Und Marketing*, 945 F.2d 1546 (Fed. Cir. 1991), *abrogated, Markman I*; *Unique Concepts, Inc. v. Brown*, 939 F.2d 1558 (Fed. Cir. 1991). New Tek cites only cases implying that claim construction was a question of fact and fails to acknowledge the second line of Federal Circuit opinions discussed in *Markman I*, which held that claim construction was a question of law for the court.

But the Federal Circuit resolved that split in authority by noting that "[n]otwithstanding the apparent inconsistencies in our opinions, the Supreme Court has repeatedly held that the construction of a patent claim is a matter of law exclusively for the

court." *Markman I*, 52 F.3d at 977 (citing cases). New Tek's argument that *Markman I* was a change in the law is incorrect. While, as the *Markman I* court explained, there were Federal Circuit decisions containing erroneous statements of law, there was an equally authoritative line of decisions to the contrary, and most significantly, the U.S. Supreme Court had decided the matter in favor of the holding reaffirmed in *Markman I*. Pursuant to the U.S. Supreme Court's established precedent, claim construction was a matter of law to be decided by the court, even prior to the Federal Circuit's decision in *Markman I*. Thus, even assuming that New Tek is correct in contending that a change in the law should not be applied retroactively, the district court did not err in applying the *Markman I* holding in the present case.

New Tek also argues that a state court should refrain from holding a *Markman* hearing, because state courts are inexperienced in patent claim construction. This argument is meritless for two reasons. First, New Tek does not explain how asking a jury to decide issues of claim construction solves the problem of alleged inexperience. Absent the unlikely circumstance of a venire composed entirely of mechanical engineers and patent lawyers, a jury would be at least equally inexperienced. Second, the fact that patent law does not regularly appear on our docket does not change our responsibility to decide the issues presented to us under the applicable law. It is well established that claim construction is a question of law for a court to decide, and we will faithfully discharge that duty. We, therefore, reject New Tek's first assignment of error.

Intrinsic Value of '080 Patent

New Tek argues that even assuming it could not have prevailed in an infringement action, it was still damaged because it lost the intrinsic value of the '080 patent. New Tek claims that the '080 patent was personal property and, like other personal property, had monetary value. See 35 U.S.C. § 261 (2000). New Tek asserts that even in the absence of damages resulting from the loss of a potential infringement action, it was still entitled to recover for the loss of the cash value of the '080 patent. Thus, New Tek claims that summary judgment was improper.

New Tek's argument is unavailing for two reasons. First, New Tek's petition fails to allege a theory of damages based on the

intrinsic worth, if any, of the '080 patent. Under our former code pleading system, which was applicable in the present case, the purpose of pleadings was to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled. See *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004). New Tek specifically alleged damages for costs and attorney fees incurred in pursuing the revival of the '365 and '080 patents, and damages resulting from alleged infringement of the '080 patent. New Tek did not allege that the '080 patent had inherent property value, or plead any theory of damages on such a basis.

Second, after summary judgment was granted with respect to damages resulting from third-party infringement, New Tek waived trial on the remaining damages. Any claims beyond damages for third-party infringement were voluntarily dismissed, with prejudice, in order to allow New Tek to appeal the issues relating to infringement. See, generally, *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004). In other words, even if New Tek had properly presented a claim for the property value of the '080 patent, it necessarily waived that claim in order to secure a final, appealable judgment.

New Tek also argues, in very general terms, that the district court should not have entered summary judgment on the issue of damages because New Tek alleged that it had been damaged. New Tek points out that an "issue of fact" arises upon a material allegation in a pleading that is denied by a responsive pleading. Neb. Rev. Stat. § 25-1102 (Cum. Supp. 2004). An issue of fact arising in actions for the recovery of money shall be tried by a jury. § 25-1104. New Tek concludes that because the issue of damages was pled and denied, the court was required to submit the issue to the jury. In addition, much of New Tek's brief is devoted to similar assertions that because a particular issue was an "issue of fact," it could only be decided by a jury, and summary judgment was improper.

[14] New Tek's arguments in that regard lack merit. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2004) provides that after a hearing on a motion for summary judgment, "[t]he judgment sought shall be rendered forthwith if the pleadings and the evidence admitted at the hearing show that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law." New Tek fails to apprehend the distinction between an "issue of fact" within the meaning of § 25-1104, and a "*genuine* issue as to any *material* fact" within the meaning of § 25-1332. (Emphasis supplied.) The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled. *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004). New Tek's argument that simply alleging an issue of fact is sufficient to defeat a motion for summary judgment is contrary to the language and purpose of § 25-1332, and we need not consider it further.

MEANS-PLUS-FUNCTION CONSTRUCTION

[15] New Tek's third assignment of error is that the district court erred in construing element 4, claim 22, of the '080 patent as a means-plus-function element. Whether an element of a claim is in means-plus-function format is a matter of claim construction and is thus a question of law, reviewed de novo by an appellate court. *Kemco Sales Inc. v. Control Papers Co., Inc.*, 208 F.3d 1352 (Fed. Cir. 2000). In a de novo review, an appellate court reaches a conclusion independent of the trial court. *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003).

To understand New Tek's argument, it is necessary to explain what is meant by a "means-plus-function element" of a patent claim. Generally, an applicant for a patent is required to describe an invention in full, clear, and concise terms and conclude the specification "with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." 35 U.S.C. § 112, ¶ 2. In *Halliburton Co. v. Walker*, 329 U.S. 1, 67 S. Ct. 6, 91 L. Ed. 3 (1946), the U.S. Supreme Court prohibited the use of exclusively functional language to describe crucial elements of a combination claim, i.e., a claim for an invention comprised of a combination of separate elements. The Court held that a patent failed to satisfy the requirements of distinctiveness and specificity in a combination claim when a crucial element was described in terms of what it would do, rather than in terms of its physical characteristics or arrangement in the invention. See *id.*

In response, Congress enacted § 112, ¶ 6, providing that

> [a]n element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

This new language permitted a patent applicant to express an element in a combination claim as a means for performing a function. The applicant need not recite structure, material, or acts in the claim's means-plus-function element. See *Valmont Industries, Inc. v. Reinke Mfg. Co., Inc.*, 983 F.2d 1039 (Fed. Cir. 1993). However, a claim element described as a means for performing a function, if read literally, could encompass any conceivable means for performing the function. See *id.* In order to narrow the literal scope of such a recitation, the applicant must describe in the patent specification some structure which performs the specified function. See *id.*

In short, a patent applicant must conclude the specification of his or her invention with one or more claims particularly describing the invention. Such a claim may be for an invention consisting of a combination of different elements. An element may be expressed in terms of a means for performing a function, so long as the specification contains some description of a structure that performs that function. Such an element is a means-plus-function element.

The word "means" is part of the classic template for means-plus-function elements. *Rodime PLC v. Seagate Technology, Inc.*, 174 F.3d 1294 (Fed. Cir. 1999). The use of the word "means" in an element of a claim gives rise to a presumption that § 112, ¶ 6, applies. *TI Group Automotive Systems v. VDO North America*, 375 F.3d 1126 (Fed. Cir. 2004), *cert. denied* 543 U.S. 1147, 125 S. Ct. 1305, 161 L. Ed. 2d 109 (2005). Two specific rules, however, overcome that presumption. First, a claim element that uses the word "means" but recites no function corresponding to the means does not invoke § 112, ¶ 6. Second, even if the claim element specifies a function, if it also recites sufficient structure or material for performing that function, § 112, ¶ 6, does not apply. *Rodime PLC, supra.*

It is the second exception that is implicated in this case. According to its express terms, § 112, ¶ 6, governs only claim elements that do not recite sufficient structural limitations. *Al-Site Corp. v. VSI Intern., Inc.*, 174 F.3d 1308 (Fed. Cir. 1999). Therefore, the presumption that § 112, ¶ 6, applies is overcome if the claim itself recites sufficient structure or material for performing the claimed function. *Al-Site Corp., supra.* In other words, a *specification* containing an alleged means-plus-function claim element must also recite a description of a structure for performing that function, but to invoke § 112, ¶ 6, the *claim element* itself must not recite a definite structure which performs the described function. See, *TI Group Automotive Systems, supra*; *Cole v. Kimberly-Clark Corp.*, 102 F.3d 524 (Fed. Cir. 1996).

With those principles in mind, we turn to the specific language of the '080 patent disputed by the parties. Claim 22 of the '080 patent describes a "guidance device for a tractor-drawn implement" and contains four elements. The first three elements of claim 22 are (1) a horizontal elongated member having means for attachment to the front end of a farm implement; (2) a means for increasing the distance between one end of the elongated member and the tractor and decreasing the distance between the other end of the elongated member and the tractor, including two articulated members, each of which includes an elongated arm pivotally connected to one side of the tractor and a lever pivotally connected to one side of the elongated member; and (3) a means, connected to the elongated member and responsive to lateral movements of the elongated member in relation to the crop rows, for transmitting signals to the means for controlling the distance between the elongated member and the tractor. The dispute here concerns element 4, which is a

> means activated by said signal transmitting means for pivoting said levers oppositely and proportionally directionwise about their pivotal connections to said elongated member, further including:
>
> a first hydraulic cylinder pivotally connected at one end to the free end of the lever of said first articulated member and pivotally connected at the other end to said elongated member at a point spaced away from the pivotal

connection of said first member lever to said elongated member; and

a second hydraulic cylinder pivotally connected at one end to said elongated member and pivotally connected at the other end to the lever of said second articulated member at a point spaced away from the pivotal connection of said lever to said elongated member.

The district court concluded that element 4 was a means-plus-function element. The court concluded that while element 4 recited a detailed structure, it did not provide the structure necessary to perform the claimed function in its entirety. Therefore, the court concluded the presumption that element 4 was a means-plus-function element was not rebutted. See *TI Group Automotive Systems v. VDO North America*, 375 F.3d 1126 (Fed. Cir. 2004), *cert. denied* 543 U.S. 1147, 125 S. Ct. 1305, 161 L. Ed. 2d 109 (2005).

We conclude that the district court correctly determined that the presumption of a means-plus-function element had not been rebutted. As the court noted, the function of element 4 is " 'pivoting said levers oppositely and proportionately directionwise about their pivotal connections to said elongated member.' " The hydraulic cylinders recited in element 4 provide a means for moving each lever, but no structure to translate that movement in a directly proportional amount in the opposite direction. Instead, the structure disclosed in the specification includes a component not recited in element 4: a tie rod, attached to the top of the two levers, that serves to translate the movement to the opposing cylinder.

Element 4 itself does not recite sufficient structure for performing the function of pivoting the levers oppositely and proportionally, because of the absence of any means of translating movement in the opposite direction to the opposing cylinder. In other words, element 4 does not recite sufficient structure to entirely perform the claimed function. See, *TI Group Automotive Systems, supra*; *Rodime PLC v. Seagate Technology, Inc.*, 174 F.3d 1294 (Fed. Cir. 1999). The district court did not err in concluding New Tek had not overcome the presumption that element 4 was a means-plus-function element. See *id.* We reject New Tek's third assignment of error.

DOCTRINE OF EQUIVALENTS

As previously noted, the district court concluded the Orthman device did not infringe on claim 22 of the '080 patent. New Tek argues the court erred in not finding an issue of material fact based upon the doctrine of equivalents.

The doctrine of equivalents prevents a copyist from evading patent claims with insubstantial changes. *Valmont Industries, Inc. v. Reinke Mfg. Co., Inc.*, 983 F.2d 1039 (Fed. Cir. 1993). An unscrupulous copyist may not make unimportant and insubstantial changes and substitutions in a patent which, though adding nothing, would be enough to take the copied matter outside the claim. *Id.*, citing *Graver Mfg. Co. v. Linde Co.*, 339 U.S. 605, 70 S. Ct. 854, 94 L. Ed. 1097 (1950). An equivalent under the doctrine of equivalents results from an insubstantial change which, from the perspective of one of ordinary skill in the art, adds nothing of significance to the claimed invention. *Id.* An equivalent under the doctrine of equivalents, though not literally meeting the claims, still infringes the patent. *Id.* Each element contained in a patent claim is deemed material to defining the scope of the patented invention, and the doctrine of equivalents is applied to individual elements of the claim, not to the invention as a whole. *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 117 S. Ct. 1040, 137 L. Ed. 2d 146 (1997). If an accused device lacks any limitation or an equivalent, it does not infringe the claim. *Valmont Industries, Inc., supra.*

In this case, it is not entirely clear whether the district court's analysis of allegedly equivalent structure in the Orthman device was conducted pursuant to § 112, ¶ 6, or the equitable doctrine of equivalents. Section 112, ¶ 6, and the doctrine of equivalents have separate origins and purposes. Section 112, ¶ 6, limits the broad language of means-plus-function elements in combination claims to equivalents of the structures, materials, or acts in the specification. The doctrine of equivalents equitably expands exclusive patent rights. *Valmont Industries, Inc., supra.* But although these analyses are not coextensive, and have different origins and purposes, their tests for equivalence are closely related. *Chiuminatta Concrete Concepts v. Cardinal Industries*, 145 F.3d 1303 (Fed. Cir. 1998), citing *Warner-Jenkinson Co., supra.*

One difference is a question of timing. A proposed equivalent must have arisen at a definite period in time, either before or after the patent filing. If before, then a § 112, ¶ 6, structural equivalents analysis applies and any analysis for equivalent structure under the doctrine of equivalents collapses into the § 112, ¶ 6, analysis. *Frank's Casing Crew v. Weatherford Intern.*, 389 F.3d 1370 (Fed. Cir. 2004). If after, then a nontextual infringement analysis proceeds under the doctrine of equivalents. *Id.* See, generally, *Al-Site Corp. v. VSI Intern., Inc.*, 174 F.3d 1308 (Fed. Cir. 1999); *Chiuminatta Concrete Concepts, supra.* Another difference is that under § 112, ¶ 6, the accused device must perform the identical function as recited in the claim element, while the doctrine of equivalents may be satisfied when the function performed by the accused device is only substantially the same. *Al-Site Corp., supra.*

But where, as here, there is no evidence that the alleged equivalent is after-arising technology, and equivalence of the function of the claimed element is not disputed, the test for insubstantial differences is the same under either § 112, ¶ 6, or the doctrine of equivalents. See, e.g., *Frank's Casing Crew, supra*; *Searfoss v. Pioneer Consol. Corp.*, 374 F.3d 1142 (Fed. Cir. 2004); *Chiuminatta Concrete Concepts, supra.* Where there is identity of function and no after-arising technology, a means-plus-function limitation that is infringed under the doctrine of equivalents is also literally present in the accused device. Similarly, if an accused product performs an identical function yet avoids literal infringement under § 112, ¶ 6, for lack of a structural equivalent, it will fail the doctrine of equivalents test for the same reason. See *Frank's Casing Crew, supra*; *Al-Site Corp., supra.* Therefore, it is not significant, for purposes of our review, that the district court's analysis did not clearly distinguish between these two related inquiries.

The inquiry for equivalent structure under § 112, ¶ 6, examines whether the assertedly equivalent structure performs the claimed function in substantially the same way to achieve the same result as the corresponding structure described in the specification. *Frank's Casing Crew, supra.* See, also, *Ishida Co., Ltd. v. Taylor*, 221 F.3d 1310 (Fed. Cir. 2000). The doctrine of equivalents does not require a one-to-one correspondence of components. *Wiener*

v. NEC Electronics, Inc., 102 F.3d 534 (Fed. Cir. 1996), *abrogated on other grounds, Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448 (Fed. Cir. 1998). The vantage point of one of ordinary skill in the relevant art provides the perspective for assessing the substantiality of the differences between the claimed invention and the accused device. *Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354 (Fed. Cir. 2004).

Here, the district court determined that a substantial difference existed and that the Orthman device did not infringe on claim 22. The court noted that claim 22 specifically described a "pivotal connection" between each hydraulic cylinder in element 4 and the elongated member and respective lever. The Orthman device, on the other hand, employs a single hydraulic cylinder, directly mounted on the elongated member without employing a pivotal connection. The court did not address whether the single hydraulic cylinder of the Orthman device was equivalent to the two hydraulic cylinders recited in claim 22 of the '080 patent; rather, the court concluded that the difference between a pivotal connection and direct mount to the end of the hydraulic cylinder on the elongated member was substantial.

[16-18] However, we conclude that the record fails to establish the defendant's prima facie case for summary judgment on this issue. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Range v. Abbott Sports Complex*, 269 Neb. 281, 691 N.W.2d 525 (2005). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence, showing the existence of a material issue of fact that prevents judgment as a matter of law, shifts to the party opposing the motion. *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004).

Determination of infringement, both literal and under the doctrine of equivalents, is a question of fact. *Lockheed Martin Corp. v. Space Systems/Loral, Inc.*, 324 F.3d 1308 (Fed. Cir. 2003). Whether the accused device exactly contains each element, as properly construed, or its equivalent, is a determination of fact. *Overhead Door Corp. v. Chamberlain Group, Inc.*, 194 F.3d 1261 (Fed. Cir. 1999). See, also, *Odetics, Inc. v. Storage Technology Corp.*, 185 F.3d 1259 (Fed. Cir. 1999) (whether accused device infringes § 112, ¶ 6, claim as equivalent is question of fact).

Here, the evidence adduced in support of the defendant's motion for summary judgment consisted of the relevant patent documents and the depositions of William Orthman, of Orthman Manufacturing, and Richard Wood, New Tek's expert witness. Orthman's testimony primarily concerned the development and sales of the Orthman device, although Orthman's counsel took the position, on behalf of Orthman Manufacturing, that the Orthman device did not infringe the '080 patent. It suffices to say that no aspect of Orthman's testimony provides a basis for a finding of noninfringement. Wood, on the other hand, clearly expressed his opinion that the Orthman device infringed on the '080 patent pursuant to the doctrine of equivalents. Wood is a patent attorney and has a degree in mechanical engineering and experience as an engineer. The primary purpose of Wood's testimony was to opine about the relevant standard of care for a patent attorney, and Beehner's alleged breach of that standard. However, Wood was also asked to opine on the doctrine of equivalents. Wood specifically opined, although not in great detail, that the Orthman device incorporated equivalents to each and every element recited in claim 22 of the '080 patent.

We recognize that Wood's opinion is similar to conclusory opinions regarding infringement that have been rejected by the Federal Circuit as insufficient to defeat a motion for summary judgment. See, e.g., *Schoell v. Regal Marine Industries, Inc.*, 247 F.3d 1202 (Fed. Cir. 2001). Compare, e.g., *Optical Disc Corp. v. Del Mar Avionics*, 208 F.3d 1324 (Fed. Cir. 2000). But equivalence is evaluated from the perspective of one of ordinary skill in the relevant art. *Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354 (Fed. Cir. 2004). An element in the accused product is equivalent to a claim limitation if the differences

between the two are insubstantial to one of ordinary skill in the art. *Searfoss v. Pioneer Consol. Corp.*, 374 F.3d 1142 (Fed. Cir. 2004); *Overhead Door Corp., supra.* Here, aside from Wood's admittedly conclusory testimony, there is no evidence that would permit a trier of fact to conclude, one way or the other, whether one of ordinary skill in the pertinent art would consider the difference between element 4, claim 22, of the '080 patent and the corresponding structure of the Orthman device to be substantial, or whether the different structure of the Orthman device is merely an insubstantial change which adds nothing of significance to the structure disclosed in the '080 patent specification. See *Ishida Co., Ltd. v. Taylor*, 221 F.3d 1310 (Fed. Cir. 2000). The defect in the defendant's motion for summary judgment was its failure to present evidence regarding the perspective of one of ordinary skill in the relevant art. See *Lighting World, Inc., supra.*

The district court, however, concluded that because the Orthman device did not employ a pivotal connection, the "pivotal connection limitation" of element 4 was missing from the Orthman device. But a pivotal connection is not a "limitation" for purposes of determining whether each limitation of claim 22 has been met, literally or equivalently, by the structure of the Orthman device.

> The individual components, if any, of an overall structure that corresponds to the claimed function are not claim limitations. Rather, the claim limitation is the overall structure corresponding to the claimed function. This is why structures with different numbers of parts may still be equivalent under § 112, ¶ 6, thereby meeting the claim limitation.

Odetics, Inc. v. Storage Technology Corp., 185 F.3d 1259, 1268 (Fed. Cir. 1999). Here, the limitation at issue was the overall structure corresponding to the function recited in element 4. The district court erred in construing the pivotal connection as a "limitation," instead of determining whether the structure of the Orthman device was equivalent, pursuant to the principles explained above, to the overall structure corresponding to the function recited in element 4.

The defendant contends that the issuance of patent No. 5,511,623 (the '623 patent) for the Orthman device tends to

prove noninfringement; presumably, the Patent Office would not have issued the '623 patent if the Patent Office had believed it to interfere with the '080 patent, which had been disclosed as prior art in the application for the '623 patent. However, federal law permits a civil action to resolve claims of interference between issued patents, which implicitly admits the possibility that issued patents may nonetheless conflict. See, generally, 35 U.S.C. § 291 (2000); *Slip Track Systems, Inc. v. Metal-Lite, Inc.*, 304 F.3d 1256 (Fed. Cir. 2002). Moreover, the application for the '623 patent was filed September 12, 1994, and the patent was not issued until April 30, 1996—well after the expiration of the '080 patent due to Beehner's failure to pay the maintenance fee for the '365 patent. Even if it was presumed that the Patent Office would not issue a patent that conflicted with a preexisting patent, that presumption would not apply where the preexisting patent had expired.

The defendant's burden, under Nebraska law, was to present evidence that would, if uncontradicted at trial, prove that New Tek could not have prevailed in an action against Orthman Manufacturing for enforcement of the '080 patent. But there was no evidence sufficient to support a finding that element 4, claim 22, of the '080 patent was not equivalent to the corresponding structure of the Orthman device, and no other evidence that would show that the Orthman device, as a matter of law, did not infringe on the '080 patent. In the absence of evidence tending to prove noninfringement, when New Tek is given the benefit of all reasonable inferences deducible from the evidence, the defendant did not present a prima facie case for summary judgment. The district court erred in concluding to the contrary.

CONCLUSION

We conclude that we have subject matter jurisdiction over the instant case, as the questions of patent law presented are merely incidental to a state law cause of action. The district court did not err in holding a *Markman* hearing and construing the '080 patent as a matter of law, or in determining that element 4 of claim 22 of the '080 patent was a means-plus-function element. However, the court erred in entering summary judgment on the issue of damages, given the record with which it was presented.

The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GARY'S IMPLEMENT, INC., APPELLEE, V. BRIDGEPORT TRACTOR PARTS, INC., FORMERLY KNOWN AS GARY'S TRACTOR PARTS, INC., APPELLANT.

702 N.W.2d 355

Filed July 29, 2005. Nos. S-03-941, S-03-1242.

1. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **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.
4. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
5. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Contracts.** Whether a contract is ambiguous is a matter of law.
7. ____. The meaning of an ambiguous contract is generally a question of fact.
8. ____. A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
9. ____. When a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder.
10. ____. When agreements are inextricably intertwined, a breach of one agreement may excuse or reduce obligations on the other agreement.
11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeals from the District Court for Morrill County: BRIAN SILVERMAN, Judge. Reversed and vacated, and causes remanded for further proceedings.

Jerrold L. Strasheim and Mary Leiter Swick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., and

James L. Zimmerman, of Sorensen, Zimmerman & Mickey, P.C., for appellant.

Howard P. Olsen, Jr., and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This contract case, embodied in cases Nos. S-03-941 and S-03-1242, generally involves one transaction, the sale of a business by appellee, Gary's Implement, Inc. (Seller), to appellant, Bridgeport Tractor Parts, Inc. (Buyer). The transaction was accomplished by execution of several documents on July 15, 1998. The three documents critical to this appeal are labeled: "Agreement," "Promissory Note," and "Non-Competition Agreement." The three documents refer variously to one another. In this lawsuit, Seller generally claimed that Buyer failed to make certain payments due after the sale, and Buyer generally alleged and counterclaimed that Seller improperly competed with it and failed to deliver goodwill and that, therefore, its obligation to make periodic payments to Seller was excused. Buyer sought damages. Buyer did not seek rescission. Buyer's counterclaim was rejected by a jury, Seller's claims were successful before the court, and judgment in favor of Seller in the amounts of $612,225 and $20,000 on the Promissory Note and Non-Competition Agreement, respectively, plus interest, was entered by the district court for Morrill County. Buyer appeals. As explained below, we reverse and vacate, and remand for further proceedings.

SUMMARY OF CASE

The business underlying the transaction involved agricultural equipment, more particularly, Seller's "salvage and used parts business." In summary, the total purchase price of $1,050,000 was allocated and payable as follows: pursuant to the Agreement, $525,000 was allocated to equipment and inventory to be paid at closing; pursuant to the agreements, $500,000 was allocated to the sale of goodwill to be paid pursuant to the Promissory Note

over 5 years; and, pursuant to the Non-Competition Agreement, $25,000 was allocated to Seller's agreement to not compete with Buyer, payable over 5 years.

On October 5, 2000, Seller filed a petition against Buyer in the district court for Morrill County. The petition contained two breach of contract "causes of action." In its petition, Seller alleged that Buyer had failed to make the separate payments due in 2000 under the Promissory Note and the Non-Competition Agreement. In its answer, Buyer alleged that its obligation to make these payments had been excused as a result of Seller's violation of the Non-Competition Agreement and Seller's failure to transfer goodwill, the purchase of which was reflected in the Promissory Note. Buyer alleged it had been damaged. Buyer also filed a counterclaim against Seller. In its counterclaim, Buyer alleged that Seller had breached the Non-Competition Agreement and other promises and sought damages therefor. In view of our disposition of the case, we do not comment on Buyer's claims for damages.

A trial was conducted over several days. The issue raised in Buyer's counterclaim as to whether Seller had breached the Non-Competition Agreement was given to the jury, and the issues raised in Seller's petition as to whether Buyer had violated its payment obligations under the Promissory Note and the Non-Competition Agreement were ultimately decided by the court. The parties do not disagree on appeal with the case having been submitted in this fashion.

During the trial, the parties and the court dedicated considerable time to the meaning of the Non-Competition Agreement and, in particular, to the nature of the business activities not subject to the Non-Competition Agreement and therefore reserved to Seller. After concluding that the Non-Competition Agreement was valid, the court instructed the jury on the meaning of the Non-Competition Agreement and submitted to the jury Buyer's counterclaim that alleged Seller had breached the Non-Competition Agreement and that Buyer had been damaged thereby. In its instruction summarizing and paraphrasing the Non-Competition Agreement, the court inserted additional language not found in the Non-Competition Agreement. After being so instructed, the jury rejected Buyer's counterclaim.

Pursuant to the jury's verdict on the counterclaim, on July 22, 2003, the district court entered judgment in favor of Seller on Buyer's counterclaim and in addition found in favor of Seller on its contract claims that alleged that Buyer's failure to make payments violated the Promissory Note and the Non-Competition Agreement. The court entered monetary judgment in favor of Seller on these breach of contract claims. Buyer appeals.

As explained below, we conclude that by virtue of its orders and instructions to the jury, the district court concluded that the Non-Competition Agreement was ambiguous, and we do not disagree with this conclusion. However, because the interpretation of the ambiguous Non-Competition Agreement was a question of fact that should have been determined by the jury, we conclude that the district court committed prejudicial error when it instructed the jury as to the meaning of certain provisions within the ambiguous Non-Competition Agreement. Because of this prejudicial error, judgment based on the verdict on the counterclaim must be reversed and vacated, and Buyer's counterclaim must be properly resubmitted to a jury. Further, it logically follows that the judgment in favor of Seller on its contract claim based on Buyer's failure to make payments under the Non-Competition Agreement must be reversed, and the resolution of this claim must await a proper jury outcome on Buyer's counterclaim.

As explained below, we further determine that in this transaction, the Promissory Note representing the sale of goodwill by Seller is inextricably intertwined with Seller's contractual obligation not to compete as embodied in the Non-Competition Agreement. Thus, the issue of whether the Promissory Note should be enforced as Seller seeks or whether Buyer's payment obligation under the Promissory Note should be excused or reduced by a damage award or setoff must necessarily follow a proper resolution of Buyer's counterclaim alleging that Seller violated the Non-Competition Agreement. We therefore conclude that the district court erred in entering judgment in favor of Seller on its breach of contract claim based on Buyer's failure to make payments under the Promissory Note and that such judgment must be reversed and vacated.

In summary, we reverse and vacate the judgment of the district court entered in favor of Seller on its petition and against Buyer

on its counterclaim and remand the causes for further proceedings consistent with this opinion.

STATEMENT OF FACTS

Seller is owned by Gary and Joan Phillips and has been doing business in Bridgeport, Morrill County, Nebraska, since approximately 1970. The record reflects that Seller was engaged in at least two separate businesses, a salvage and used parts yard, and a used whole goods business, sometimes referred to as the "sales business," which sold used tractors, trucks, and farm equipment. On July 15, 1998, Seller entered into the Agreement with Buyer, by which Seller sold its "salvage and used parts business in Morrill County, Nebraska (the 'Salvage Business')" to Buyer for a total purchase price of $1,050,000.

The terms of the transaction were carried out in three separate but interrelated documents: the Agreement, the Promissory Note, and the Non-Competition Agreement, all executed on July 15, 1998. The Agreement refers to and incorporates the Promissory Note and the Non-Competition Agreement, both of which are attached as exhibits to the Agreement. The Promissory Note refers to the Agreement. The Non-Competition Agreement refers to the Agreement and the Promissory Note.

Pursuant to the Agreement, Buyer purchased the following assets of the Salvage Business: (1) the equipment, motor vehicles, bookkeeping computer system, and radios used by Seller in the Salvage Business (the equipment); (2) the inventory of the Salvage Business; and (3) all goodwill and other intangible assets of the Salvage Business, including all customer lists and customer names (goodwill). Certain of Seller's assets were specifically excluded from the sale, including all of Seller's assets associated with Seller's business of selling whole used farm equipment and trucks.

Under the provisions of the Agreement, the purchase price for the sale was allocated and was to be paid by Buyer as follows:

(1) $525,000 was allocated to the purchase of Seller's equipment and inventory and was to be paid at the closing.

(2) $500,000 was allocated to the purchase of Seller's goodwill. This sum was to be paid in annual payments of $100,000 plus interest at the rate of 6 percent per annum. The first payment was due 1 year after the closing, with additional payments

due on the same day of each subsequent year until paid in full. This amount was evidenced by the Promissory Note. Under the terms of the Promissory Note, Seller was to provide Buyer with "30 days of written notice" to cure any default under the Promissory Note.

(3) $25,000 was allocated to the Non-Competition Agreement to be executed by Seller and the Phillipses. Buyer agreed to pay Seller and the Phillipses $5,000 per year for 5 years, with the first payment due 1 year from the date of the execution of the Non-Competition Agreement, and with each additional payment due on the same day of each subsequent year.

The Non-Competition Agreement provided in pertinent part as follows:

> 1. [Seller and the Phillipses] will not, directly or indirectly, for a period of 5 years from the Closing Date:
>
> a. manage, operate, join, control, own, be an employee of, participate or become interested in or be connected with, as a partner, owner, member, shareholder, director, officer, employer or investor, or in any other individual or representative capacity, or otherwise;
>
> b. lend credit or money for the purpose of establishing, operating or otherwise finance;
>
> c. furnish consultation or advice to;
>
> d. sell services on behalf of; or
>
> e. permit their name(s) to be used by anyone other than Buyer, or its successors and assigns;
>
> in connection with any business, partnership, joint venture, corporation, trust or other organization or entity (other than that of Buyer) engaged in the agricultural and machinery salvage and used, new or rebuilt agricultural parts business within 150 miles of Bridgeport, Nebraska.

Paragraph 5 of the Non-Competition Agreement contained the following exceptions:

> 5. Notwithstanding any other provision to the contrary, this Non-Competition Agreement shall not restrict the following actions of Seller and/or [the Phillipses]:
>
> a. The purchase and sale of antique (1961 and prior year [sic]) vehicle or machinery parts.
>
> b. The purchase and sale of cores on a wholesale basis.

Paragraph 6 of the Non-Competition Agreement provided that in the event Seller violated the Non-Competition Agreement, "Buyer . . . shall have a cause of action for any damages caused by the competition . . . ."

As stated above, on July 15, 1998, Seller and Buyer executed the Agreement. On the same day, Seller, the Phillipses, and Buyer executed the Non-Competition Agreement, and Buyer executed the Promissory Note. Also on July 15, Buyer paid Seller the $525,000 due under the Agreement for the equipment and inventory of the Salvage Business.

Following its purchase of Seller's Salvage Business, Buyer became concerned that Seller and/or the Phillipses were violating the Agreement and Non-Competition Agreement by salvaging and selling used, nonantique parts; by competing with Buyer for the supply of salvage tractors and machinery; and by trading on the goodwill that Seller had sold to Buyer. This concern arose, in part, due to a series of advertisements Seller published in the Bridgeport area. One of these advertisements, published on November 7, 1998, stated "Save 50% to 80% on used tractor, harvest and farm equipment parts." Despite these concerns, on July 15, 1999, Buyer paid Seller $105,000, in accordance with the terms of the Promissory Note and the Non-Competition Agreement.

Buyer's concerns about Seller's adherence to the Agreement and Non-Competition Agreement continued after the July 1999 payment, and David Dyke, one of Buyer's owners, had several conversations with Gary Phillips in regard to this perceived competition. On June 27, 2000, Buyer, through its attorneys, sent a letter to Seller and the Phillipses, stating, in part, as follows:

> [Seller and Gary Phillips] are currently engaging in direct competition with [Buyer] with respect to operating a salvage and used parts business. We understand you are purchasing salvage and used parts inventory and that you are selling the same to the general public to the damage and detriment of [Buyer].

The letter further provided that as a result of

> such salvage and used parts business, [Seller and Gary Phillips] are in default of the Non-Competition Agreement and your agreement to sell [Buyer] the goodwill associated

> with the salvage and used parts business purchased by [Buyer]. Because you are selling salvage parts and used parts from [Seller] you are essentially capitalizing on the "goodwill" which you sold to [Buyer].

The letter demanded that "salvage and used parts business activities" engaged in by Seller and the Phillipses cease immediately. The letter further stated that in the event such "competitive activity" did not cease, Buyer would deem the "Non-Competition agreement and the agreement to sell goodwill to have been breached" and that as a result, Buyer would not make the July 15, 2000, payments called for under the Non-Competition Agreement or the Promissory Note. On July 15, Buyer did not pay Seller the payments provided for under the Non-Competition Agreement and the Promissory Note.

On July 21, 2000, the attorney for Seller and the Phillipses sent a letter to Buyer's counsel enclosing a "Notice of Nonpayment" as a result of Buyer's failure to pay the July 15 payments. Payments were not forthcoming. On October 5, Seller filed suit against Buyer in the district court for Morrill County. In its petition, Seller asserted two causes of action against Buyer. The first cause of action alleged, in summary, that Buyer had breached "the Agreement and the terms of the [Promissory] Note" by failing to make the July 15, 2000, payment of $100,000. The second cause of action alleged, in summary, that Buyer had breached the Non-Competition Agreement by failing to make the July 15, 2000, payment of $5,000. For relief, Seller sought the balance due under the Promissory Note and interest, the $5,000 due under the Non-Competition Agreement, and postjudgment interest on the Non-Competition Agreement.

On October 31, 2000, Buyer filed its "Answer and Counterclaim." Buyer denied that it had breached either the Promissory Note or the Non-Competition Agreement. Buyer further alleged, in summary, that Seller had competed against Buyer in violation of Seller's agreement to sell its goodwill to Buyer and in violation of Seller's agreement not to compete with Buyer. Buyer alleged that as a result of this competition, Seller had breached the Agreement and the Non-Competition Agreement and that, therefore, Buyer asserted it was excused from making payments to Seller under the Non-Competition Agreement and

the Promissory Note. Buyer alleged it had been damaged. For its counterclaim, Buyer alleged that Seller had breached the Agreement and the Non-Competition Agreement and that Buyer had been damaged thereby, which damages included revenue and inventory losses. For relief, Buyer sought, inter alia, the dismissal of Seller's petition with prejudice, a finding that Seller had materially breached the Agreement and the Non-Competition Agreement, a finding that Buyer was no longer obligated to make payments due under the various agreements, and damages Buyer had allegedly sustained as a result of Seller's breaches of the agreements. Buyer did not seek rescission. Seller replied, inter alia, that Buyer had waived its rights under the Non-Competition Agreement by modifying its terms.

The case came on for a jury trial beginning on July 14, 2003, and continuing through July 17. A total of 15 witnesses testified, and over 100 exhibits were offered into evidence. The issue in Buyer's counterclaim alleging that Seller had violated the Non-Competition Agreement was given to the jury, and the issues of whether Buyer had violated its obligations under the Promissory Note and the Non-Competition Agreement were presented to the court.

During the trial, considerable evidence was adduced from the parties describing what the parties believed to be the nature of the Salvage Business sold to Buyer and the nature of the business that had been excepted from the Non-Competition Agreement and retained by Seller. In this regard, Joan Phillips testified that Buyer purchased "the business of the used parts business and the salvage inventory that supported this business" from Seller. She further testified as to her understanding of the term "salvaging," stating that it meant "[t]aking a part off of a piece of equipment" to either sell individually or use to restore another piece of equipment. She stated that after Seller sold the Salvage Business to Buyer, Seller continued to buy salvage machinery and tractors to "backup [Seller's] whole goods business" that had been retained by Seller after its sale of the Salvage Business to Buyer. According to Joan Phillips, Seller would take parts off the salvage machinery and tractors it purchased and use those parts to restore or refurbish the used whole goods which Seller sold as part of its "whole goods operation." Joan Phillips further testified

that "[w]e agreed in the noncompete not to compete against them in the used parts business."

Gary Phillips also testified concerning Seller's business activities after it sold the Salvage Business to Buyer. On direct examination, in response to the question whether Seller continued to operate the used parts business that was sold to Buyer, Gary Phillips testified that "[w]e operated it for our own in-house use on tractors that we were rebuilding." On cross-examination, Gary Phillips agreed that Seller would buy farm equipment to salvage parts for other farm equipment that Seller was refurbishing. When asked whether that conduct constituted "salvaging," Gary Phillips said "[y]es" and stated that "[t]hat was part of the business we reserved."

Dyke testified that he was concerned with Seller's competition with Buyer following Buyer's purchase of the Salvage Business. According to Dyke, Seller's purchase of salvage tractors and equipment conflicted with the goodwill that Seller had sold to Buyer. With regard to the goodwill that Seller had prior to the sale, Dyke testified that Gary Phillips indicated that he

> knew everybody and everything that had to do with the farm machinery company in this entire region. He could introduce me to people to buy salvage, he could introduce me to the dealers that traded him salvage . . . he could identify what type of the machinery, where to locate it.

In the course of the trial, the district court entered a one-page order dated July 14, 2003, interpreting paragraph 5 of the Non-Competition Agreement. Regarding the activities reserved to Seller, the court ruled:

> "Notwithstanding any other provision to the contrary, this Non-Competition Agreement shall not restrict the following actions of [S]eller and/or [the Phillipses]: a) the purchase and sale of antique (1961 and prior year [sic]) vehicle or machinery parts . . ." contemplated that [Seller] could salvage parts as long as they were 1961 or prior.

At the close of evidence, the district court instructed the jury. In instruction No. 9, the substance of which Buyer objected to, the district court instructed the jury that Seller's breach of contract claims were a matter for the court to decide, stating:

> The Court has determined as a matter of law that the instruments alleged by [Seller] and admitted by [Buyer] are valid and that [Buyer] did not make the payments which were due on July 15, 2000. The Court will determine what are the rights and obligations of the parties in light of these facts. The matter which you must decide is [Buyer's] Counterclaim.

In instructing the jury on the counterclaim, the district court stated in Instruction No. 9 as follows:

> The interpretation of [the Non-Competition Agreement] is [the court's] responsibility. You are to determine whether the non-competition agreement was breached. Insofar as relevant to the question which you must decide, you are instructed that the proper interpretation of the non-competition agreement is as follows:
>
> 1. The agreement did not restrict [Seller's] purchase, sale, *or salvage* of antique vehicle or machinery parts (1961 and prior years);
>
> 2. The agreement permitted [Seller] to retain its sales business which was the sale of used and rebuilt machinery *to include the salvage function that supported that business*; and
>
> 3. The non-competition agreement was not effective and did not restrict [Seller's] activities in any way at any time after August 20, 2000.

(Emphasis supplied.)

The jury was also instructed on Seller's defense that Buyer had waived any of Seller's breaches of the Non-Competition Agreement and further instructed on Buyer's damage claim for "the reasonable value of the profits it has lost."

The case was given to the jury at approximately 3:30 p.m. on July 17, 2003. By 7:35 p.m., the jury had returned a unanimous verdict in favor of Seller on Buyer's counterclaim, finding that Buyer had not met its burden of proof. In view of the verdict, the jury did not reach the issue of damages, if any, suffered by Buyer. In accordance with the jury verdict, the district court entered judgment in favor of Seller and against Buyer on Buyer's counterclaim. Thereafter, the district court entered judgment in favor of Seller and against Buyer in the amounts of

$612,225 on the Promissory Note and $20,000 on the Non-Competition Agreement, plus interest from and after the judgment date. Buyer appealed.

ASSIGNMENTS OF ERROR

On appeal, Buyer assigns three errors. Buyer claims, renumbered and restated, that the district court erred (1) in failing to submit Buyer's entire counterclaim to the jury, incorrectly instructing the jury on the counterclaim, and entering judgment against it on its counterclaim; (2) in entering judgment in Seller's favor on its breach of contract claims; and (3) in awarding Seller double satisfaction of its claims and subjecting Buyer to forfeiture.

STANDARDS OF REVIEW

[1,2] The meaning of a contract and whether a contract is ambiguous are questions of law. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004); *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

[3] 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. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003).

ANALYSIS

The Jury Was Improperly Instructed on Buyer's Counterclaim and the District Court Erred in Entering Judgment Against Buyer on Its Counterclaim and in Favor of Seller on Its Contract Claim Based on the Non-Competition Agreement.

We first address Buyer's claim that the district court incorrectly instructed the jury on its counterclaim, because resolution of this issue is dispositive of this case. On appeal, Buyer asserts that the district court erred when it instructed the jury in instruction No. 9 with regard to the meaning of the Non-Competition Agreement. Specifically, Buyer argues that the district court prejudicially erred when it added to instruction No. 9 the terms "salvage" and "salvage function that supported that business" to

the business activities retained by Seller in paragraph 5 of the Non-Competition Agreement. We agree with Buyer that instruction No. 9 constituted prejudicial error requiring that the judgment in favor of Seller and against Buyer on Buyer's counterclaim be reversed and vacated. Buyer also argues that as a consequence of a reversal of the judgment on the counterclaim, a corresponding reversal of entry of judgment in favor of Seller on its breach of contract claim based on the Non-Competition Agreement is also required. We agree that the resolution of Seller's breach of contract claim based on Buyer's failure to make payments under the Non-Competition Agreement must await proper resolution of the counterclaim, and therefore, the judgment in favor of Seller based on Buyer's alleged violation of the Non-Competition Agreement is also reversed and vacated.

[4-7] Initially, we note that there is no claim by either party that the Non-Competition Agreement was not valid. The rules of law applicable to this contract case are familiar. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). However, a contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Jensen v. Board of Regents*, 268 Neb. 512, 684 N.W.2d 537 (2004). Whether a contract is ambiguous is a matter of law. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004). The meaning of an ambiguous contract is generally a question of fact. *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994).

[8,9] We have stated that a court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include. *Honda Cars of Bellevue v. American Honda Motor Co.*, 261 Neb. 923, 628 N.W.2d 661 (2001). Rather, when a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder. *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990). In this regard, we have stated in a jury case that when the terms of the contract are in dispute and the real intentions of the

parties cannot be determined from the words used, the jury, not the court, should determine the issue from all the facts and circumstances. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987).

In the instant case, it is apparent that the district court, through its July 14, 2003, order and instruction No. 9, effectively concluded that the Non-Competition Agreement was ambiguous and supplied terms to the Non-Competition Agreement which the parties had not included. As noted, paragraph 1 of the Non-Competition Agreement prohibited Seller and the Phillipses from competing with Buyer "in the agricultural and machinery salvage and used, new or rebuilt agricultural parts business within 150 miles of Bridgeport, Nebraska" for a period of 5 years. The Non-Competition Agreement, however, contained the following exceptions:

> 5. Notwithstanding any other provision to the contrary, this Non-Competition Agreement shall not restrict the following actions of Seller and/or [the Phillipses]:
>
> a. The purchase and sale of antique (1961 and prior year [sic]) vehicle or machinery parts.
>
> b. The purchase and sale of cores on a wholesale basis.

The Non-Competition Agreement did not provide an explanation as to the meaning of these two exceptions. However, during the trial, the district court in its order of July 14 concluded, inter alia, that paragraph 5 of the Non-Competition Agreement "contemplated that [Seller] could salvage parts."

Consistent with its July 14, 2003, ruling, in instruction No. 9, when advising the jury on Buyer's counterclaim, the district court instructed the jury that

> the proper interpretation of the non-competition agreement is as follows:
>
> 1. The agreement did not restrict [Seller's] purchase, sale, *or salvage* of antique vehicle or machinery parts (1961 and prior years);
>
> 2. The agreement permitted [Seller] to retain its sales business which was the sale of used and rebuilt machinery *to include the salvage function that supported that business.*

(Emphasis supplied.) In this instruction, the district court added the language "salvage" and "salvage function that supported that

business" to paragraph 5 of the Non-Competition Agreement. Upon our review of the district court's rulings and in particular instruction No. 9, we determine that the district court effectively concluded that the Non-Competition Agreement was ambiguous and that despite that conclusion, through instruction No. 9, interpreted the Non-Competition Agreement, whereas it should have given the issue of the meaning of the ambiguous Non-Competition Agreement to the jury.

The meaning of a contract, and whether a contract is ambiguous, are questions of law. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.* In reviewing the district court's decision that the Non-Competition Agreement was ambiguous, we conclude that the district court did not err. However, once the district court determined that the Non-Competition Agreement was ambiguous, and given the record as we read it, the meaning of the ambiguous contract became a question of fact for the fact finder. See *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990). Because it was the role of the jury and not the court to determine the meaning of the ambiguous contract from all the facts and circumstances, the district court erred in instructing the jury as it did in instruction No. 9. See *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987).

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. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003). When the error in this case consisted of supplying terms to an ambiguous contract in the jury instruction, such error cannot be cured by the giving of other jury instructions. This is so because such an error consists not in the omission of some material fact, but in the affirmative statement by the court as to the existence of a fact which the jury ought to decide. See *Wilch v. Western Asphalt Paving Corporation*, 124 Neb. 177, 245 N.W. 605 (1932). See, also, *Platte Valley Public Power & Irr. Dist. v. Armstrong*, 159 Neb. 609, 68 N.W.2d 200 (1955); *Nocita v. Guiliano*, 130 Neb. 241,

264 N.W. 672 (1936). We conclude that the error in the giving of instruction No. 9 was prejudicial.

In concluding that instruction No. 9 was prejudicial error, we note that Buyer introduced evidence on its counterclaim designed to show that Seller was buying used tractors and equipment in order to salvage parts to support its whole goods business and that such salvage activity violated the Non-Competition Agreement. Despite Buyer's allegations, by instructing the jury that paragraph 5 of the Non-Competition Agreement permitted Seller to conduct the salvage activity demonstrated by Buyer's evidence, there was little if anything factually for the jury to decide on Buyer's counterclaim. The district court incorrectly removed an issue from the jury and in effect instructed the jury that Seller had not violated the Non-Competition Agreement. Therefore, as noted above, instruction No. 9 constituted prejudicial error that we determine requires reversal of the judgment dismissing the counterclaim entered upon the jury verdict.

As a consequence of this reversal, we turn to the propriety of the judgment in favor of Seller based on its claim that Buyer failed to make payments due under the Non-Competition Agreement. In view of the reversal of the judgment on the counterclaim based on the Non-Competition Agreement, it necessarily follows that judgment in favor of Seller on its contract claim based on the Non-Competition Agreement must be reversed and vacated and await proper resolution of Buyer's counterclaim.

In sum, the district court's judgment entered in favor of Seller dismissing Buyer's counterclaim based on the jury's verdict is reversed and vacated, and the resolution of the counterclaim is remanded for further proceedings consistent with this opinion. In addition, judgment in favor of Seller based on Buyer's alleged breach of the Non-Competition Agreement is also reversed and vacated.

The District Court Erred in Entering Judgment in Favor of Seller on the Promissory Note.

Buyer claims that the district court erred in entering a money judgment in favor of Seller on both of Seller's breach of contract claims which alleged separately that Buyer failed to make payments on the Non-Competition Agreement and the Promissory

Note. We have explained above that the entry of judgment on Seller's claim that Buyer violated the payment obligations under the Non-Competition Agreement must be reversed and vacated. As explained below, resolution of whether Buyer improperly failed to make payments under the Promissory Note, or whether Buyer's payment obligation under this instrument will be excused or reduced, as by a damage award or setoff, must also await a proper resolution of Buyer's counterclaim, and therefore, entry of judgment in Seller's favor on its contract claim based on the Promissory Note must also be reversed and vacated at this time.

In answer to Seller's petition, Buyer alleged, inter alia, that Seller had competed against Buyer, in violation of Seller's agreement not to compete against Buyer, and that Seller had failed to sell its goodwill to Buyer, the purchase of which would be accomplished under an instrument to pay, denominated "Promissory Note." We note that the quantity and the quality of Seller's alleged violations of the agreements were substantial and not trivial and that a finder of fact could find the violations material. Buyer further alleged that by virtue of Seller's actions, Buyer was excused from making additional payments to Seller under both the Promissory Note and the Non-Competition Agreement. As discussed earlier in this opinion, Buyer counterclaimed, alleging Seller had violated the Non-Competition Agreement, and sought damages therefor. We have concluded that whether Seller violated the Non-Competition Agreement has not yet been properly submitted to the fact finder.

In the instant case, the transaction involving the sale of the Salvage Business was accomplished by three documents: the Agreement, the Promissory Note, and the Non-Competition Agreement. These three agreements were all executed at the same time and in the same place, and shared parties in common. Indeed, the Agreement refers to and incorporates the Promissory Note and the Non-Competition Agreement, the Promissory Note refers to the Agreement, and the Non-Competition Agreement refers to the Agreement and the Promissory Note. The three agreements were related and part of one transaction, and therefore their substance will be read together. See *Nowak v. Burke Energy Corp.*, 227 Neb. 463, 418 N.W.2d 236 (1988). See, also, *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983);

Northland Mortgage Co. v. Royalwood Estates, Inc., 190 Neb. 46, 206 N.W.2d 328 (1973); *Cedars Corp. v. H. Krasne & Sons, Inc.*, 189 Neb. 220, 202 N.W.2d 205 (1972).

There is no dispute that the Agreement covered the sale of equipment and inventory and that the Non-Competition Agreement required Seller, with certain exceptions, not to compete with Buyer. Although we are aware of the long-term tax consequences of structuring the transaction as the parties did, we nevertheless determine that as the Agreement states and as the evidence shows, the Promissory Note in fact represented the payments Buyer was to make for acquisition of the goodwill sold by Seller.

We have stated generally that goodwill may be described as "'"the habit of customers to return to the concern with which they have been previously dealing."'" *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 759, 472 N.W.2d 391, 399 (1991) (quoting *Meeker v. Stuart*, 188 F. Supp. 272 (D.D.C. 1960)). More particularly, we have said that "'good will is that "value which results from the probability that old customers will continue to trade or deal with the members of an established concern."'" 238 Neb. at 759, 472 N.W.2d at 399 (quoting *Jackson v. Caldwell*, 18 Utah 2d 81, 415 P.2d 667 (1966)).

We have recognized that where the sale of goodwill is involved in the sale of a business, such as in the instant case, "'the buyer's interest in what he has acquired cannot be effectively realized unless the seller engages not to act so as unreasonably to diminish the value of what he has sold.'" 238 Neb. at 756, 472 N.W.2d at 397 (quoting Restatement (Second) of Contracts § 188, comment *b*. (1981)). We have explicitly recognized the interrelationship between goodwill and noncompetition in a single transaction, and we so recognize the interrelationship in the instant transaction between Seller's sale of goodwill under the Promissory Note and Seller's agreement not to compete under the Non-Competition Agreement. In this regard, we have stated that "a covenant not to compete which is contained in a contract for sale of a business is a seller's self-imposed restraint from trade and is frequently necessary to make goodwill in the seller's business a transferable asset and ensure that the buyer receives the full value of acquired goodwill." 238 Neb. at 756,

472 N.W.2d at 398. We apply the principles noted above to the instant transaction.

[10] Given the nature of the entire transaction, we determine that Seller's promise not to compete and Seller's agreement to sell goodwill, reflected in the Non-Competition Agreement and the Promissory Note respectively, are inextricably intertwined. Given the intertwined nature of the Non-Competition Agreement and the Promissory Note, we further determine that whether payment under the Promissory Note will be enforced or excused, or reduced as by damage award or setoff, must await a proper resolution of whether Seller improperly competed with Buyer as alleged in Buyer's counterclaim. When agreements are inextricably intertwined, a breach of one agreement may excuse or reduce obligations on the other agreement. For the sake of completeness, we note that our recognition of the effect of the Non-Competition Agreement and the Agreement on the instrument to pay is consistent with Neb. U.C.C. § 3-117 (Reissue 2001) (pertaining to negotiable instruments and entitled "Other agreements affecting instrument"). Accord *Skiles v. Security State Bank*, 1 Neb. App. 360, 365, 494 N.W.2d 355, 359 (1992) (discussing earlier codification of § 3-117, denominated Neb. U.C.C. § 3-119 (Reissue 1980) and repealed in 1991, and noting that code provision "is consistent with longstanding Nebraska case law").

It is not uncommon for suit on a promissory note to be subjected to a defense. See, e.g., *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994) (discussing duress as defense to promissory note); *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983) (discussing fraud as defense to promissory note). See, also, Neb. U.C.C. § 3-305(a) (Reissue 2001) (discussing defenses to negotiable instruments). Indeed, in *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 197 N.W.2d 646 (1972), although the obligor challenged enforcement of a promissory note in a "cross-petition" and the obligor's evidence was insufficient, we suggested that a promissory note was subject to a setoff where the entity entitled to enforce the note had allegedly violated a covenant not to compete. Our opinion in *Midlands Transp. Co.*, endorsing damages as a setoff against a promissory note, is consistent with well-recognized contract law that a minor breach of contract is compensable in

damages. See Restatement (Second) of Contracts §§ 236, 237, and 241 (1981). We note, however, that a material breach will excuse the nonbreaching party from its performance. *Id.* Thus, in *Electrical Distributors, Inc. v. SFR, Inc.*, 166 F.3d 1074, 1086 (10th Cir. 1999), it was stated in a case where the breach was material that "because [the breaching party] breached his covenant not to compete, [obligor] was excused from performance, *i.e.*, making payments on the note to [the breaching party]." See, also, *England v. O'Flynn*, No. 18952, 2002 WL 27314 (Ohio App. Jan. 11, 2002) (unpublished opinion) (affirming decision determining that defendant was not obligated to pay on promissory note when plaintiff had materially breached other related contract).

Elsewhere, the courts have recognized that where a promissory note is connected with certain other contractual obligations, the resolution of enforcement of the note must await resolution of the defenses thereto. Thus, for example, when the seller of a business in a summary proceeding sought to recover moneys owed on a promissory note, the appellate court concluded that denial of a seller's motion for summary judgment was proper because "the note being sued upon is inextricably intertwined with certain contractual obligations, including a noncompetition agreement, entered into between the parties." *Cohen v. Marvlee, Inc.*, 208 A.D.2d 792, 618 N.Y.S.2d 62, 63 (1994). The court in *Cohen* continued by stating: "While generally the breach of a related contract cannot defeat a motion for summary judgment on an instrument for money only, that rule does not apply where the contract and instrument are intertwined . . . ." *Id.* Similarly, in a termination of employment case involving a promissory note for severance pay and redemption of an employee's shares made in connection with a master termination agreement, the appellate court affirmed the denial of the former employee's motion for summary judgment on the note, stating that

> one of the defenses [to enforcement of the promissory note] is predicated upon the anti-competition provisions contained in the Master Agreement [and] given the fact the Master Agreement and the promissory note are intertwined, [the former employer] has shown the existence of a triable issue of fact with respect to a bona fide defense . . . .

Lavelle v. Urbach, Kahn & Werlin P.C., 198 A.D.2d 751, 751-52, 604 N.Y.S.2d 614, 615 (1993). See, also, *Eurotech Development v. Adirondack Inc.*, 224 A.D.2d 738, 636 N.Y.S.2d 956 (1996); *Regal Limousine v. Allison Limousine Service*, 136 A.D.2d 534, 523 N.Y.S.2d 154 (1988).

In response to Seller's claim seeking to enforce the Promissory Note, Buyer, in part, alleged as a defense that Seller had breached the Non-Competition Agreement and that such breach excused Buyer's obligation to make further payments under both the Promissory Note and the Non-Competition Agreement. We have determined that there is an interrelationship between the Non-Competition Agreement and the Promissory Note, and as noted above, adherence to the agreement not to compete is often critical to the transfer of goodwill. It therefore follows that the jury's finding on Buyer's counterclaim alleging Seller violated the Non-Competition Agreement necessarily must precede any decision on Seller's breach of contract claim based on the Promissory Note, because in this case, a breach of the Non-Competition Agreement can excuse or reduce payment under the Promissory Note. Accordingly, we reverse the judgment in favor of Seller on the Promissory Note and remand the causes for further proceedings consistent with this opinion.

Remaining Assignments of Error.

[11] Having concluded that the district court erred in instructing the jury with regard to Buyer's counterclaim and erred in entering judgment in Seller's favor on both of its breach of contract claims, we do not address Buyer'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. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

CONCLUSION

We conclude that the district court prejudicially erred in instructing the jury with regard to the Non-Competition Agreement and that the issues on the counterclaim must be resubmitted to the fact finder. Judgment against Buyer on its counterclaim and judgment in favor of Seller on the Non-Competition Agreement are both reversed and vacated. We further determine that the

Non-Competition Agreement and the Promissory Note are inextricably intertwined and that enforcement of the Promissory Note must be determined after the issues related to the Non-Competition Agreement are resolved. We therefore conclude that the district court erred in entering judgment at this time in favor of Seller and against Buyer on Seller's claim that Buyer breached the Promissory Note.

For the reasons stated above, we reverse and vacate the district court's judgment in its entirety and remand the causes for further proceedings consistent with this opinion.

REVERSED AND VACATED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

GERRARD, J., dissenting.

I respectfully dissent. In my opinion, the record does not support the majority's characterization of the district court's determinations regarding the ambiguity of the Non-Competition Agreement. Rather, I believe the court determined that the Non-Competition Agreement was not ambiguous but that the plain language of the Non-Competition Agreement contemplated Seller's salvage of parts from 1961 and prior. I agree with the majority's conclusion that the plain language of the Non-Competition Agreement does not, standing alone, support this interpretation and is ambiguous in that regard.

However, this is an appeal from a judgment entered pursuant to jury verdict; thus, the question is whether the court erred in instructing the jury that the Non-Competition Agreement was intended to permit Seller to continue salvaging pre-1961 parts. While the Non-Competition Agreement was ambiguous, and the meaning of an ambiguous contract is generally a determination to be made by the trier of fact, the evidence presented at trial established as a matter of law that Seller's continued salvage of parts from 1961 and before was contemplated. Therefore, I conclude that the court did not err in instructing the jury to that effect.

AMBIGUITY OF AGREEMENT

The majority premises its disposition of this appeal on its conclusion that "it is apparent that the district court, through its July 14, 2003, order and instruction No. 9, effectively concluded that the Non-Competition Agreement was ambiguous and supplied

terms to the Non-Competition Agreement which the parties had not included." The majority then concludes that the district court did not err in determining that the Non-Competition Agreement was ambiguous, but that the court erred in not submitting the meaning of the Non-Competition Agreement to the jury.

However, I see no support in the record for the assertion that the district court, even implicitly, found that the Non-Competition Agreement was ambiguous. At the pretrial hearing held on July 14, 2003, the court engaged in the following colloquy with Seller's counsel, memorializing for the record a discussion held in chambers prior to jury selection:

> THE COURT: Let's see. I think I said something else, didn't I . . . ?
>
> [Seller's counsel]: Yes, Your Honor.
>
> THE COURT: Go ahead.
>
> [Seller's counsel]: I think you reacted to your — the Court's responsibility to interpret the contract. You noted that there had been no allegations that the contract was ambiguous on behalf of either [side]. That being the case, I think, Nebraska law is quite clear in terms of if contracts are clear . . . the Court may not resort to the rules of construction simply to interpret the contract as a matter of law.
>
> With regard to the issue of antiques, you look particularly at page 3 of the covenant not to compete,
>
> THE COURT: I think it was 5A.
>
> [Seller's counsel]: I think it's with regard to page 2 of the covenant not to compete that says specifically — and I wanted to quote that language for you, Judge. Here it is, page 2 of the noncompete clause, particularly paragraph no. 5 that "Notwithstanding any other provision to the contrary, this Non-Competition Agreement shall not restrict the following actions of seller and/or Phillips: a. The purchase and sale of antique (1961 and prior year) vehicle or machinery parts."
>
> I think you determined that you are going to find as a matter of law that because of the language "notwithstanding any other provision to the contrary," that, in fact, that provision also contemplated that [Gary] Phillips and Gary's

Implement could salvage antique parts as long as they were 1961 or prior.

THE COURT: That is the finding of the Court.

At the conclusion of the hearing, the court accepted two exhibits into evidence: the Agreement and the Non-Competition Agreement. Significantly, other exhibits were received solely for the purposes of Buyer's offer of proof, but apparently were not considered by the court.

These events are reflected in the court's pretrial order, rendered on July 14, 2003. The court's order specifically noted that "there were no allegations that the contract was ambiguous." The court found that "the language" of the Non-Competition Agreement quoted above "contemplated that [Seller] could salvage parts as long as they were 1961 or prior." The court received the Agreement and Non-Competition Agreement into evidence for purposes of this order, but only "received the remaining exhibits for the purpose of the Offer of Proof."

My reading of the foregoing portions of the record is that contrary to the majority's assertion, the district court expressly did *not* conclude that the Non-Competition Agreement was ambiguous. The court noted the absence of any argument that the contract was ambiguous and determined the meaning of the contract "as a matter of law," basing its determination solely on the language of the Agreement and Non-Competition Agreement—the only evidence the court received for purposes of making that determination.

I recognize the quandary faced by the majority, because the district court's reasoning in making its determination is not crystal clear. The plain language of the Non-Competition Agreement, even when considered in conjunction with the Agreement, does not indicate as a matter of law that the parties contemplated Seller could continue to salvage parts from 1961 and before. However, I believe it is a fairer reading of the record to conclude that the court simply erred in its reading of the contract, rather than to assume that the court overlooked the basic proposition that the meaning of an ambiguous contract is a matter for the trier of fact. See, e.g., *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994).

No matter how the majority gets to the question, however, I agree with the majority's conclusion that the Non-Competition Agreement is ambiguous. While each of the parties contends that the contract is unambiguous and supports their respective positions, we are not bound by their arguments. See *Younker Brothers, Inc. v. Westroads, Inc.*, 196 Neb. 168, 241 N.W.2d 679 (1976). Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision. *Union Ins. Co. v. Land and Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773 (1995). Therefore, this court's decision about the ambiguity of the contract does not depend on its characterization of the district court's determination.

Considering the Agreement and the Non-Competition Agreement together, see *Norwest Corp. v. State*, 253 Neb. 574, 571 N.W.2d 628 (1997), it is apparent that the parties intended for Buyer to purchase some aspects of Seller's business enterprises, but reserve other aspects for Seller. Buyer was to acquire Seller's salvage business, but the parties also contemplated that Seller's trade in antique tractor parts would be reserved. What is unclear, from these agreements, is whether Seller was to be precluded from the act of salvaging parts, to the extent that activity was being performed in support of Seller's purchase and sale of antique parts. This represents, at the very least, a latent ambiguity in the Non-Competition Agreement. See *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). Stated another way, the agreements, considered together, are ambiguous on whether the salvage of antique tractor parts was part of the salvage business, acquired by Buyer, or the antique business, retained by Seller. I agree with the majority's ultimate conclusion that the Non-Competition Agreement is ambiguous.

EVIDENCE OF MEANING OF NON-COMPETITION AGREEMENT

The majority states that "once the district court determined that the Non-Competition Agreement was ambiguous, the meaning of the ambiguous contract became a question for the fact finder." The meaning of an ambiguous contract is generally a question of fact. *Kropp, supra.*

However, while instructions withdrawing consideration of material issues of fact presented by the pleadings and evidence

are erroneous, the trial court must eliminate all matters not in dispute and submit only the controverted questions of fact on which the verdict must depend. *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994). Under the former code pleading system, which was applicable in this case, jury instructions were to be confined to issues presented by the pleadings and supported by the evidence. See *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). A trial court did not need to instruct the jury on an issue where the facts did not justify such an instruction. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003).

Here, the majority assumes, without discussion, that because the meaning of an ambiguous contract is a question of fact, the meaning of the contract at issue in this case should have been decided by the trier of fact. However, if the evidence at trial would not support differing conclusions on the meaning of the ambiguous contract, then the district court did not err in taking that issue away from the jury. See, e.g., *Selig v. Wunderlich Contracting Co.*, 160 Neb. 215, 69 N.W.2d 861 (1955) (holding trial court erred in instructing jury on possible interpretation of agreement that was unsupported by evidence presented at trial). As explained by Justice Breyer, then on the U.S. Court of Appeals for the First Circuit:

> The words of a contract may be so clear themselves that reasonable people could not differ over their meaning. Then, the judge must decide the issue himself, just as he decides any factual issue in respect to which reasonable people cannot differ. . . . Courts, noting that the judge, not the jury, decides such a threshold matter, have sometimes referred to this initial question of language ambiguity as a question of "law," which we see as another way of saying that there is no "genuine" factual issue left for a jury to decide. . . . Even if there is ambiguity in the language, however, the evidence presented about the parties' intended meaning may be so one-sided that no reasonable person could decide the contrary. In such a circumstance, the judge also would take the matter from the jury, deciding the factual question of meaning himself as (in the same sense) one of "law."

(Citations omitted.) *Boston Five Cents Sav. Bank v. Dept. of Housing*, 768 F.2d 5, 8 (1st Cir. 1985). See, also, *Don J. McMurray Co. v. Wiesman*, 199 Neb. 494, 260 N.W.2d 196 (1977) (when terms of contract and facts and circumstances that aid in ascertaining intent of parties are insufficient to raise issue of fact, interpretation of contract is matter of law).

In the instant case, the record does not contain substantial evidence to suggest that the Non-Competition Agreement was intended to preclude Seller from engaging in the salvage of parts from 1961 and prior in support of its antique business. David Dyke testified at trial that he was upset, generally, by Seller's salvage operations because he thought "that was the goodwill I bought." Dyke explained:

> A significant portion of it was increased in the price I paid for the company because [Gary Phillips] convinced me that he knew everybody and everything that had anything to do with the farm machinery company in this entire region. [Gary Phillips] could introduce me to people to buy salvage, he could introduce me to the dealers that traded him salvage, he could keep in contact with all of the customers, big and small, he could identify what type of the machinery, where to locate it.

However, this testimony, and Buyer's other evidence, did not specifically address salvage in the context of Seller's antique business.

In contrast, Seller's evidence addressed that subject directly. Joan Phillips explained the operation of the antique business as a discrete operation from both the salvage business that was sold to the Buyer and the whole goods business that was also retained by Seller. The antique business, although operated separately from the salvage business, also involved "salvage" in the sense of taking a part off a piece of equipment to sell or use to restore another piece of equipment. The Phillipses each testified that the business purchased by Buyer was the used parts business and the salvage inventory that supported that business, but that the whole goods business and antique business continued to operate as before.

In short, the evidence adduced at trial established that the "salvage business" sold to Buyer was distinct from the "whole goods business" or "sales business," and the "antique business," both of

which were to be retained by Seller. The antique business, as it was operated before and after the Agreement, was supported by the salvaging of antique parts. However, the record is clear that the Non-Competition Agreement was not meant to prevent Seller from operating its whole goods and antique businesses and, thus, was not intended to preclude Seller from salvaging antique parts to support the antique business. Regardless of how it determined that the Non-Competition Agreement allowed Seller to salvage antique parts, the district court did not err, based on the evidence presented at trial, in instructing the jury to that effect.

Consideration of Extrinsic Evidence

I recognize that given the posture of this case when it went to trial, Buyer was in a precarious position with respect to extrinsic evidence of the meaning of the Non-Competition Agreement. Neither party was arguing that the Non-Competition Agreement was ambiguous, and the district court had endorsed that conclusion.

Nonetheless, Buyer could have argued that even if the Non-Competition Agreement was ambiguous, extrinsic evidence existed to support an interpretation that was favorable to Buyer's position, and Buyer could have preserved that argument at trial by proffering such evidence. Instead, Buyer made the strategic choice, at trial and on appeal, to rely on the plain language of the contract, and the plain language of the contract simply does not support Buyer's position. Buyer chose not to make offers of proof containing evidence supporting its interpretation of the Non-Competition Agreement, and in my view, that choice has consequences on appeal.

In many ways, this case illustrates the limitations placed on litigants and courts by Nebraska's adherence, albeit implicit, to the "plain meaning" or "four corners" rule for determining the ambiguity of a contract. The rule in Nebraska has been that extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id.* Courts that subscribe to the "'plain meaning

rule' " hold that the decision as to whether ambiguity exists must be made without reference to any source other than the contract itself. 5 Margaret N. Kniffin, Corbin on Contracts § 24.7 at 33 (Joseph M. Perillo rev. ed. 1998). See, e.g., *Sack Bros. v. Great Plains Co-op*, 260 Neb. 292, 616 N.W.2d 796 (2000).

However, as a noted commentator has explained, there is a growing trend toward admitting extrinsic evidence to explore whether ambiguity exists. See 5 Kniffin, Corbin on Contracts, *supra*, § 24.30 (citing cases). This court has not always been completely consistent in its adherence to the four corners doctrine, see, e.g., *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993), but we have not expressly recognized the sensible principle that in many instances, it is impossible to ascertain the intended meaning of contract terms without reference to the evidence of surrounding circumstances.

> Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have acquired a particular meaning by trade usage, but exists whenever the parties' understanding of the words used may have differed from the judge's understanding.
>
> Accordingly, rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.

Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co., 69 Cal. 2d 33, 39-40, 69 Cal. Rptr. 561, 565, 442 P.2d 641, 645 (1968). Simply stated, "[w]hen determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the ' "extrinsic evidence of the judge's own linguistic education and experience." ' " (Citations omitted.) *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995). Accord, e.g., *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz.

148, 854 P.2d 1134 (1993) (en banc); *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 817 P.2d 238 (1991); *Harrigan v. Mason & Winograd, Inc.*, 121 R.I. 209, 397 A.2d 514 (1979); *Simpson v. State Mutual Life Assurance Co.*, 135 Vt. 554, 382 A.2d 198 (1977); *Anderson v. Kammeier*, 262 N.W.2d 366 (Minn. 1977). See, also, 5 Kniffin, Corbin on Contracts, *supra*, § 24.30; 2 E. Allan Farnsworth, Farnsworth on Contracts § 7.12a (2d ed. 1998). Consequently, in determining whether a term or expression to which the parties have agreed is unclear, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance. *C.R. Anthony Co., supra.*

In accord with this view, the Restatement (Second) of Contracts § 212(1) at 125 (1981) states that "[t]he interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances . . . ." The Restatement, *supra*, comment *b*. at 126, further explains:

> It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. . . . But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.

In my opinion, this process for determining whether a contract is ambiguous is more sensible and practical than rigidly adhering to an obsolete fixation on the "four corners" of the document. Just as significantly, I believe this process accurately reflects what courts are actually doing when determining the meaning of contracts, even if not permitted to acknowledge it.

In this case, for instance, the trial court and the parties would have been on much firmer ground had they known, from the outset, that the court could consider extrinsic evidence relevant to

the ambiguity of the contract. They would not have been forced to choose between arguing that the contract was unambiguous or presenting evidence relevant to the intent of the parties. And, had the relevant extrinsic evidence been considered prior to trial, the court could have openly relied on that evidence to support its conclusion that the Non-Competition Agreement did not prohibit Seller from continuing to salvage antique parts in support of its antique business—a conclusion which I believe, as explained above, is apparent when the relevant evidence is considered.

In short, the dubious procedural posture of this case demonstrates the impracticality of the "four corners" rule for determining whether a contract is ambiguous. But this case was tried under that rule, and it is pursuant to that rule that this appeal must be decided. However, this court should, in an appropriate case, consider expressly adopting the more sensible rule expressed in the Restatement, *supra*, advocated by respected commentators, and already embraced in several well-reasoned decisions from other jurisdictions.

CONCLUSION

The evidence presented at trial in this case established, as a matter of law, that Seller was entitled, under the Non-Competition Agreement, to continue salvaging antique tractor parts. Thus, the court did not err in instructing the jury to that effect. I respectfully dissent.

CONNIE JOHNSON, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

700 N.W.2d 620

Filed July 29, 2005. No. S-03-1362.

1. **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.
2. **Judgments: Statutes: Appeal and Error.** In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings admits the truth of all well-pled facts in the opposing party's pleadings, together with

all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted.

4. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
5. **Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
6. **Tort Claims Act: Public Officers and Employees: Immunity.** Where a plaintiff's tort claim is based on the mere fact of government employment or on the employment relationship between the intentional tort-feasor and the government, the exception in Neb. Rev. Stat. § 81-8,219(4) (Cum. Supp. 1998) applies and the State is immune from suit.

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

Vincent M. Powers, of Vincent M. Powers & Associates, for appellant.

Jon Bruning, Attorney General, and Jennifer M. Tomka for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Connie Johnson filed this action against the State of Nebraska, "the State of Nebraska d/b/a the Omaha Correctional Center and the State of Nebraska d/b/a the Department of Corrections" (collectively the defendants) under the State Tort Claims Act (Tort Claims Act), Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 1996 & Cum. Supp. 1998). The issue presented is whether the defendants are immune from liability under § 81-8,219(4), which excludes from the Tort Claims Act any claim "arising out of assault."

BACKGROUND

On June 6, 2001, Johnson filed her petition against the defendants. She alleged that on or about June 8, 1999, she was sexually assaulted by an employee of the Nebraska Department of Correctional Services assigned to work at the Omaha Correctional

Center, where Johnson was incarcerated. She further alleged that the employee was acting in the scope and course of his employment at all relevant times.

For Johnson's first theory of recovery, she alleged that the defendants were negligent in (1) violating the "Nebraska Jail Standards" with respect to the housing of female inmates, (2) failing to properly supervise its employees, (3) failing to properly hire employees, (4) failing to properly maintain the Omaha Correctional Center, and (5) failing to discipline the employee who allegedly perpetrated the sexual assault. Johnson alleged that the defendants' negligence proximately caused her damages.

For Johnson's second theory of recovery, she alleged:

> [T]the actions of the employee of the Defendant was [sic] so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community. Said actions were in reckless disregard of the fear and emotional suffering that he was inflicting upon [Johnson].

Johnson alleged that "the above described conduct" caused her emotional distress.

In the defendants' answer, they denied the material allegations of Johnson's petition. They also affirmatively alleged, among other things, that they were immune from suit under § 81-8,219(4).

On June 20, 2003, the defendants filed a motion for judgment on the pleadings. (We note that because Johnson's petition was filed prior to January 1, 2003, our former system of code pleading governs this case. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004)). The defendants' motion asserted that the district court lacked jurisdiction and that under § 81-8,219(4), Johnson failed to state a claim upon which relief could be granted. The district court granted the defendants' motion in an October 29, 2003, order, finding that Johnson's claims were barred by § 81-8,219(4) because they arose out of an assault. The court dismissed Johnson's petition with prejudice after concluding that an opportunity to amend the petition would not remedy the deficiency. Johnson appealed, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

Johnson assigns, consolidated and rephrased, that the district court erred in concluding that § 81-8,219(4) barred her action against the defendants and in not allowing her to amend her petition.

STANDARD OF REVIEW

[1,2] A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. *Guenzel-Handlos v. County of Lancaster*, 265 Neb. 125, 655 N.W.2d 384 (2003). In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

[3] A motion for judgment on the pleadings admits the truth of all well-pled facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted. *Id.*

ANALYSIS

The Tort Claims Act waives the State's sovereign immunity with respect to certain, but not all, types of tort actions. See *First Nat. Bank of Omaha v. State*, 241 Neb. 267, 488 N.W.2d 343 (1992). The State's sovereign immunity remains intact with respect to those types of claims listed in § 81-8,219, to which the Tort Claims Act does not apply. Among them are claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." § 81-8,219(4). The defendants argue that they are immune from suit in this case because Johnson's claim arises out of an assault.

[4,5] Our analysis begins with standard statutory construction principles to determine the meaning of the phrase "arising out of assault." Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against its waiver. *Butler Cty. Sch. Dist. No. 502 v. Meysenburg*, 268 Neb. 347, 683 N.W.2d 367

(2004). A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction. *Id.*

This court has not yet had an opportunity to interpret the scope of § 81-8,219(4), sometimes called the intentional torts exception. Because Nebraska law is limited, we can look to federal law for additional guidance. The Federal Tort Claims Act contains an intentional torts exception virtually identical to § 81-8,219(4). See 28 U.S.C. § 2680(h) (2000). We have recognized that Nebraska's Tort Claims Act is patterned after the Federal Tort Claims Act. *Northland Ins. Co. v. State*, 242 Neb. 10, 492 N.W.2d 866 (1992); *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989).

In *United States v. Shearer*, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985), the plaintiff, the mother of a murdered soldier, brought an action against the United States under the Federal Tort Claims Act. The plaintiff alleged that the U.S. Army negligently failed to exert sufficient control over a soldier known to be dangerous and who had murdered her son. The U.S. Supreme Court held that the plaintiff could not recover against the government for negligently failing to prevent another serviceman's assault and battery. A majority of the Court based its holding on a doctrine of law specific to military personnel; however, four of the eight participating justices also concluded that the plaintiff's suit was barred by the intentional torts exception in 28 U.S.C. § 2680(h). Those four justices relied in large part upon § 2680's legislative history to say:

> No semantical recasting of events can alter the fact that the battery was the immediate cause of [the soldier's] death and, consequently, the basis of [the plaintiff]'s claim.
>
> [The plaintiff] cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like [the plaintiff's] that sound in negligence but stem from a battery committed by a Government employee.

(Emphasis in original.) *United States v. Shearer*, 473 U.S. at 55. In the years following *Shearer*, several circuit courts adopted the same position. See, *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986); *Garcia v. United States*, 776 F.2d 116 (5th Cir. 1985); *Franklin v. United States*, 992 F.2d 1492 (10th Cir. 1993); *Guccione v. U.S.*, 847 F.2d 1031 (2d Cir. 1988). See, also, *Westcott v. City of Omaha*, 901 F.2d 1486 (8th Cir. 1990) (applying *Shearer* reasoning to intentional tort exception of Nebraska Political Subdivisions Tort Claims Act).

United States v. Shearer, supra, however, was not the U.S. Supreme Court's final word on the subject. Three years after *Shearer*, the Court decided *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988). In *Sheridan*, an intoxicated off-duty serviceman was found by several naval corpsmen at Bethesda Naval Hospital. They attempted to take the serviceman to the emergency room, but abandoned their efforts when the serviceman brandished a rifle. Later that night, the serviceman fired shots into a vehicle, injuring the occupants. Those occupants brought an action against the federal government, alleging that their injuries were caused by the government's negligence in allowing the serviceman to leave the hospital with a loaded rifle in his possession. The district court dismissed the action, and the court of appeals affirmed, concluding that the action was barred by 28 U.S.C. § 2680(h) because it arose out of an assault.

The U.S. Supreme Court began its analysis by stating that "it is both settled and undisputed that in at least some situations the fact that an injury was directly caused by an assault or battery will not preclude liability against the Government for negligently allowing the assault to occur." *Sheridan v. United States*, 487 U.S. at 398. Attempting to explain when such situations occur, the Court declined to adopt or reject a broad, *Shearer*-like interpretation of 28 U.S.C. § 2680(h), but instead relied on a different theory. The Court explained that the intentional tort exception of § 2680(h) simply did not apply in cases where the government would not be liable under the general immunity waiver provisions of the Federal Tort Claims Act. Thus, if an assault were committed by a nongovernment employee or if it were committed by a government employee acting outside the scope of his

employment (as in *Sheridan*), the government would not have liability for the assault under the general waiver statute; therefore, the exception would not apply. In those situations where the exception is inapplicable, the Court stated that "the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent" of the employment status of the person committing the assault. *Sheridan v. United States*, 487 U.S. at 401. In *Sheridan*, a duty was imposed upon the government because it had adopted regulations prohibiting firearms on the property and also because the naval corpsmen had voluntarily undertaken to provide care to the tort-feasor. Thus, the U.S. Supreme Court reversed the court of appeals' decision and allowed the plaintiffs' suit against the government to proceed.

Because the serviceman's employment status was irrelevant to its decision, the Court expressly declined to address whether negligent hiring, negligent supervision, or negligent training could provide a basis for liability under the Federal Tort Claims Act for an assault by a government employee. See *Sheridan v. United States, supra*. However, the concurrence saw no way around that question, recognizing that an injury could arise from multiple causes, i.e., from an intentional tort and from antecedent negligence. The concurrence stated:

> To determine whether a claim arises from an intentional assault or battery and is therefore barred by the exception, a court must ascertain whether the alleged negligence was the breach of a duty to select or supervise the employee-tortfeasor or the breach of some separate duty independent from the employment relation. . . . If the allegation is that the Government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception of § 2680(h) bars the claim. Otherwise, litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors. To allow such claims would frustrate the purposes of the exception.

Sheridan v. United States, 487 U.S. 392, 406-07, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988) (Kennedy, J., concurring in judgment).

[6] We agree with and adopt the reasoning of the concurrence. Where the plaintiff's tort claim is based on the mere fact of government employment (such as a respondeat superior claim) or on the employment relationship between the intentional tortfeasor and the government (such as a negligent supervision or negligent hiring claim), the exception in § 81-8,219(4) applies and the State is immune from suit. See *Sheridan v. United States, supra* (Kennedy, J., concurring in judgment). Johnson's causes of action against the defendants fall squarely within the second of the two enumerated instances; each are based upon the employment relationship between Johnson's alleged assailant and the defendants. Thus, the intentional tort exception of § 81-8,219(4) applies and bars Johnson's action against the defendants. Accordingly, we affirm the district court's order dismissing Johnson's petition without an opportunity to amend.

AFFIRMED.

WRIGHT and CONNOLLY, JJ., concur in the result.

IN RE ESTATE OF RICHARD P. ROSSO, DECEASED.
LINDA ROSSO, APPELLANT, V.
SANDRA A. ROSSO, APPELLEE.

701 N.W.2d 355

Filed July 29, 2005. No. S-04-391.

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. **Joint Tenancy: Words and Phrases.** An interest held in joint tenancy is considered "per my et per tout"—by the half and by the whole—which means that each joint tenant owns the whole of the property from the time at which the interest is created.
4. **Joint Tenancy: Conveyances: Decedents' Estates.** A surviving joint tenant's interest attaches by means of the original conveyance, not by transfer from the decedent.
5. **Wills: Joint Tenancy.** Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not pass by virtue of the provisions of the will of the first joint tenant to die.
6. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.

7. **Decedents' Estates: Executors and Administrators.** A personal representative is a fiduciary, and there is a fiduciary relationship between a personal representative and the estate of the deceased, as well as the heirs, beneficiaries, and all persons interested in the estate.
8. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
9. **Contracts: Evidence: Proof.** A party seeking to recover upon a lost instrument has the burden of proving the former existence, execution, delivery, theft or loss, and contents of the instrument by clear and convincing evidence.
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.
11. **Joint Tenancy.** An existing estate in joint tenancy can be destroyed by the act of one joint tenant which is inconsistent with joint tenancy, and such act has the effect of destroying a right of survivorship incidental to it.
12. ____. The common-law rule that a joint tenancy must contain the four unities of time, title, interest, and possession still persists unless modified by statute; in other words, joint tenants have one and the same interest accruing by one and the same conveyance commencing at one and the same time and held by one and the same undivided possession.
13. ____. Any act of a joint tenant which destroys one or more of the coexisting unities operates as a severance and extinguishes the right of survivorship.
14. **Corporations: Stock: Words and Phrases.** A share of stock is the actual property of the shareholder, while the stock certificate is merely the authentic evidence of the stockholder's ownership of shares.
15. **Joint Tenancy.** Where property is held in joint tenancy, each joint tenant owns the whole of the property from the time at which the interest is created.

Appeal from the County Court for Douglas County: MARCENA M. HENDRIX, Judge. Reversed and remanded for a new trial.

James H. Monahan and Maureen K. Monahan, of Monahan & Monahan, for appellant.

Thomas K. Harmon, of Respeliers & Harmon, P.C., for appellee.

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

GERRARD, J.

This is an appeal from a formal probate proceeding involving the estate of Richard P. Rosso. Richard's wife, Sandra A. Rosso, and Richard's daughter, Linda Rosso, dispute the ownership of stock Richard held in the Strata Real Estate Corp. (Strata).

Specifically, Linda contends that Richard was the sole owner of the stock, while Sandra argues that the stock was held in joint tenancy by Richard and Sandra. The county court ruled in favor of Sandra and determined that the stock became the sole property of Sandra when Richard died. The issues presented in this appeal are whether Sandra was precluded from making a personal claim to the stock by virtue of her appointment as personal representative of the estate and whether the court required Sandra to meet the correct burden of proof.

BACKGROUND

Sandra and Richard were married in 1969 and had two daughters together. Linda is Richard's daughter from a previous marriage. As relevant, Richard's will, executed February 13, 2001, devised one-half of his estate to Sandra and divided the other half equally among his three daughters. Sandra was nominated in the will to be the personal representative of Richard's estate. The validity of the will is not at issue on appeal.

Richard died on April 10, 2003. On June 12, Linda filed a petition for formal adjudication of intestacy in the county court. However, on June 27, Sandra filed an application for informal probate of Richard's will and nominated herself as personal representative of the estate. The inventory of Richard's estate, filed June 27, included shares of Strata, which, according to the inventory, had been held by Richard and Sandra in joint tenancy with right of survivorship. The shares were valued in the inventory at $220,000, although the record suggests that the corporation was worth far more. The inventory also listed investment accounts that Richard held in joint tenancy with each of his three daughters.

On July 3, 2003, Sandra filed a petition for formal probate of Richard's will. The court scheduled a hearing on the formal petition, and prior to the hearing, Linda filed an objection to Sandra's appointment as personal representative, because "she has a conflict of interest, in that she claims property of the Deceased as her property as joint tenant." After a hearing, on November 20, the court found in favor of Sandra, admitted Richard's will to formal probate, and appointed Sandra to serve as personal representative of Richard's estate in unsupervised administration. Thereafter,

the court scheduled a hearing on Sandra's application for a declaration of ownership of assets. A hearing was held on March 1, 2004, to determine whether the Strata stock was held in joint tenancy with Sandra.

At the hearing, Sandra testified that she became involved in Richard's business enterprises the day they were married, initially doing office work, and then becoming a corporate officer and director. According to Sandra, she had been the secretary-treasurer of Strata from 1970 to the present. In her answers to Linda's interrogatories, Sandra stated that she had become a shareholder in Strata in the winter of 1979-80 and that the shares had been reissued in the name of Richard and Sandra as joint tenants with right of survivorship. However, Sandra stated that all the original documents "were destroyed in a flood of the corporate office in the early 1990's."

Sandra testified at the hearing that Strata had two shareholders: herself and Richard. Sandra said that she became a shareholder "about in the late '70's," because Strata was negotiating with the government for the purchase of some land, and they were required to bring the corporate minutes up to date. Sandra testified that shares of Strata stock had been generated that were held by Richard and Sandra in joint tenancy with right of survivorship and that she had physically prepared those shares of stock in her capacity as secretary-treasurer of the corporation. Sandra also said that the transfer had been made on the corporate books.

However, Sandra did not have copies of the corporate books or stock certificates. Sandra explained that

> [w]e had a lateral file in [Richard's] office. And all of the abstracts for — for the properties that we owned, the corporate books, were all kept in the top shelf of the lateral file. And a pipe — there's a bathroom upstairs above his office, and a pipe broke and everything flooded. And I — I was working at the hospital at that time, so I wasn't — didn't go in and out of the offices frequently. And it was some time between '92 and '98, and we went to find them [and Richard] had thrown everything away.

Roger Alger, a certified public accountant, testified that he had been Richard's accountant since 1979. Alger testified that he had also "dealt considerably" with Sandra. Alger stated that Sandra

had been responsible for keeping all the monthly accounting records and payroll records for Strata and another, now-defunct corporation in which Richard had an interest. Alger had also prepared other documents for several limited partnerships. Alger testified that he had "fairly good knowledge of the intricate workings" of Strata but had never seen any stock certificates or corporate minutes books for Strata. Alger explained, with reference to the stock ownership, that

> [t]he stock was held jointly, but for tax purposes we always considered that [Richard] held them in his own. And that was only because of tax attributions — a man and wife are considered one for tax purposes, so we never — we never designated one or the other. It was always Richard had a hundred percent.

An IRS Form 2553 subchapter S election form for Strata, dated March 30, 2001, listed Richard as the sole shareholder of Strata. Alger explained with reference to that form that "the hundred percent just meant that he and his wife — he controlled his wife's shares. So that's how come we filed it that way." Alger explained that the subchapter S election was done to avoid double taxation but that Strata had to remain an S corporation for a period of 10 years or "everything would be sucked back into the 'C' corporation and double-taxed." Alger said that the subchapter S election form was not an attempt to illustrate the ownership of the shares and that Richard "wanted that to be jointly held because he didn't feel that he would live the ten years, and we had to keep the corporation alive ten years. He knew [about] that ten-year period."

The schedule K-1 attached to the tax return for Strata for the tax year 2001, prepared January 15, 2003, identified only Richard as a shareholder. Strata's tax return for the tax year 2002, prepared December 26, 2003, included both Richard and Sandra on attached schedules K-1. Alger explained that the forms for tax year 2001 had been filed on extension, because Richard had been ill. Alger testified that the tax forms for the tax year 2002 had been completed differently because Richard specifically told Alger that the corporate stock of Strata was held in joint tenancy with Sandra. Alger also explained that the forms for the tax year 2002 had been prepared according to

Richard's instructions, although because a filing extension was obtained, the forms were not prepared and filed until after Richard's death. Alger indicated there was no question in his mind that Richard understood all shares of Strata stock were held in joint tenancy with right of survivorship and that Richard "was even angry that I asked the question."

James Stumpf, an Omaha attorney, testified that he became acquainted with Richard in 1997 and 1998, when Richard sought Stumpf's legal advice with respect to some contracts. Stumpf was somewhat familiar with the workings of Strata and was also responsible for preparing Richard's will. Stumpf testified that during the preparation of Richard's estate plan, Richard told Stumpf that with the exception of some oil revenues, all of Richard's assets were in joint tenancy. Stumpf said Richard had specifically indicated that the Strata stock was held in joint tenancy with Sandra. Stumpf said that he had explained to Richard that because his assets were in joint tenancy, a written will was superfluous, but Richard had insisted on having a will anyway.

Linda testified that she was not the record holder of any Strata stock. However, Linda testified that Richard "talked to me at different times, and he told me that I had forty-nine percent, and he had fifty-one percent." Linda also testified that Richard had told her, on one occasion, that she was "down as Vice President" and told her at another point that she was treasurer, although she had never filed a treasurer's report. Linda admitted Richard had never given her any stock certificates. Linda said Richard had given her money on occasion, but did not know if any of that money represented corporate dividends.

Linda said that she was surprised to be informed Richard's property was held in joint tenancy, because "he told me something totally different." Linda testified Richard had told her she would receive one-sixth of his estate, but never told her his Strata stock was held in joint tenancy.

Linda stated that Sandra had been hostile toward Linda and that Richard advised Linda to

> get an attorney because he was afraid I wasn't going to get my fair share; and that — he said [Sandra] wanted the whole thing, but he only gave her half. And in an earlier point he

had told me he was gonna introduce me to . . . Stumpf because he was afraid I wouldn't get my fair share.

After the hearing, the county court determined by a preponderance of the evidence that the Strata stock was held by Richard and Sandra in joint tenancy with right of survivorship and that Sandra owned the stock as the surviving joint tenant. The court entered an order to that effect. Linda appeals.

ASSIGNMENTS OF ERROR

Linda assigns, as summarized and restated, that the county court erred in (1) allowing Sandra to present her personal claim to the assets of the estate rather than following her fiduciary duty to claim the assets for the estate and (2) determining that (a) joint tenancy need only be proved by a preponderance of the evidence and (b) Sandra proved Richard's assets were jointly held assets and not the property of his estate.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

[3-5] The underlying dispute in this case is whether the Strata stock had been solely Richard's or had been held in joint tenancy with Sandra. An interest held in joint tenancy is considered "per my et per tout"—by the half and by the whole—which means that each joint tenant owns the whole of the property from the time at which the interest is created. *Mahlin v. Goc*, 249 Neb. 951, 547 N.W.2d 129 (1996). A surviving joint tenant's interest attaches by means of the original conveyance, not by transfer from the decedent. *Id.* Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not pass by virtue of the provisions of the will

of the first joint tenant to die. *Norwest Bank Neb. v. Katzberg*, 266 Neb. 19, 661 N.W.2d 701 (2003).

Thus, if the Strata stock was held in joint tenancy, it belongs solely to Sandra. If it was solely Richard's property, however, a portion of the stock could pass to Linda under Richard's will. Linda claims Sandra should not have been permitted to claim that the Strata stock was held jointly, because of her fiduciary duty to the estate, and that the evidence presented at the hearing was insufficient to establish that the stock was held in joint tenancy.

FIDUCIARY DUTY OF PERSONAL REPRESENTATIVE

We begin this section of our analysis by explaining what issues are presented here. Not all of the arguments made in Linda's brief are properly before us in this appeal.

For multiple reasons, we do not consider the argument in Linda's appellate brief that the administration of the estate should be supervised and that Sandra and her attorney "should be removed as representatives of the estate and their actions voided." Brief for appellant at 13. First, while Linda objected in the county court to the appointment of Sandra as personal representative of the estate, she did not make a motion to have Sandra removed, or take any other timely action to seek appellate review of that issue. See, *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005); *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989) (order overruling motion to remove personal representative is final, appealable order). Cf. *In re Estate of Casselman*, 219 Neb. 653, 365 N.W.2d 805 (1985) (affirming order that had appointed personal representative over objection). See, also, *Moss v. Eaton*, 183 Neb. 71, 157 N.W.2d 883 (1968) (explaining interdependency between objection to appointment of personal representative and proceedings to remove personal representative). Furthermore, even if the question of Sandra's appointment as personal representative was presented in a timely appeal, Linda did not assign Sandra's appointment as error in this appeal.

Linda's assignment of error and supporting argument, as we understand it, is that Sandra's fiduciary duty to the estate, as personal representative, should have precluded her from claiming that the Strata stock was held in joint tenancy. However, there is no indication in the record that this argument was presented to the county court. Linda objected in the county court to Sandra's

appointment as personal representative, on the basis of an alleged conflict of interest, and then litigated the issue of the Strata stock ownership on the merits of that dispute. The record does not indicate that Linda ever argued to the county court that Sandra's claim to ownership of Strata should be stricken because of a conflict of interest.

[6] In the absence of plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). We find no such plain error. Linda appears to be arguing that by virtue of her fiduciary duty to the estate, Sandra was required, in her capacity as personal representative, to claim that the Strata stock was the property of the estate, and was further required, in her individual capacity, to refrain from claiming personal ownership of the Strata stock. Linda is incorrect on both points.

[7] It is not disputed that a personal representative is a fiduciary and that there is a fiduciary relationship between a personal representative and the estate of the deceased, as well as the heirs, beneficiaries, and all persons interested in the estate. See, § 30-2464; *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952). The personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and the Nebraska Probate Code, and as expeditiously and efficiently as is consistent with the best interests of the estate. § 30-2464.

But that duty does not extend beyond the assets that actually belong to the estate. For instance, in *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998), the plaintiff and decedent had been the joint owners of three bank accounts. A bank, acting as personal representative of the decedent's estate, took possession of the proceeds of each account, and took the position that the funds were assets of the estate. The plaintiff sued the bank for conversion. The district court entered summary judgment for the bank, but we reversed that judgment. We concluded that the "uncontroverted facts [were] sufficient to establish distinct acts of dominion inconsistent with [the plaintiff's] ownership rights" and that under the facts of the case, "the record [did] not reflect a bona

fide reasonable detention of the funds by [the bank] for the purpose of ascertaining ownership." *Id.* at 420-21, 585 N.W.2d at 453. *Zimmerman* stands squarely for the proposition that a personal representative's fiduciary duty does not permit, much less require, the personal representative to take possession of property that does not lawfully belong to the estate.

Furthermore, we have recognized that as a general rule, those who are directly interested in estates are usually selected and appointed as personal representatives. See *Estate of Haeffele*, 145 Neb. 809, 18 N.W.2d 228 (1945). It is common practice for a will to nominate a personal representative who is close to, or related to, the testator, and it is thus not uncommon for the nominated personal representative to have an interest in the estate, or in other property of the decedent. That the named personal representative is interested in the estate and that his or her interest may become hostile to those of the other interested beneficiaries does not necessarily render the personal representative legally incompetent. See *id.* If the individual interest of the personal representative comes into irreconcilable conflict with the interests of the estate, then the county court has the authority to act to protect the interests of all by restraining or removing the personal representative, or supervising the personal representative's administration of the estate. See, *id.*; §§ 30-2440 through 30-2443 and 30-2450. In other words, the procedure established by the Nebraska Probate Code for dealing with a personal representative's actual conflict of interest is to replace, restrain, or seek supervision of the personal representative, not to try and eliminate the personal representative's individual interests.

Linda cites *In re Estate of Kennedy*, 220 Neb. 212, 214, 369 N.W.2d 63, 65 (1985), for the general rule that "a personal representative cannot deal with the estate's assets for personal profit or gain." However, that proposition is not relevant here. In that case, the administratrix of an estate maintained the decedent's ranching operation and, as the landowner, provided pasturing and feed for the cattle. The county court allowed the administratrix compensation from the estate for the pasturing and feed. We concluded that the compensation was allowable, as the administratrix had not profited from the transaction. But the question there was premised on the fact that the administratrix was engaged in self-dealing,

because she had done business, in an individual capacity, with the estate for which she served as a fiduciary. For instance, in this case, if Sandra had purchased corporate stock from the estate, she would have had the burden of showing that the transaction was in good faith and promotive of the interests of the estate. See *id.* But no such self-dealing occurred here, and *In re Estate of Kennedy* has no application under these circumstances.

Finally, we note that to resolve contested issues, the probate code permits a personal representative to "invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate or its administration." § 30-2465. That authority was used in this case to allow the county court to hold a hearing and determine the ownership of the Strata stock. Plain error must prejudicially affect a substantial right of a litigant. See *McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003). Given Sandra's invocation of the county court's jurisdiction to determine the question of stock ownership in a contested hearing, we have difficulty seeing how, if at all, Linda was prejudiced by Sandra's purported conflict of interest, since the dispute was resolved by a disinterested party: the county court.

For the foregoing reasons, we find no plain error in the county court's permitting Sandra to claim that the Strata stock had been held in joint tenancy. We reject Linda's first assignment of error.

EVIDENCE OF JOINT TENANCY

[8] We note, initially, that Linda's appellate brief makes passing references to a bank account, treasury note, and investment account; Linda argues that Sandra presented no evidence that these assets were held in joint tenancy. Sandra's failure to present evidence regarding those assets is not surprising, given that the only issues actually raised in or decided by the county court related to the Strata stock. Consequently, our consideration of Linda's assignment of error and supporting argument is limited to the ownership of the Strata stock, because in appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003).

Linda assigns that the county court erred in determining that the relevant burden of proof on the issue of joint tenancy was a

"preponderance of evidence." Linda cites *White v. Ogier*, 175 Neb. 883, 891, 125 N.W.2d 68, 74 (1963), for the proposition that a joint tenancy must be proved by "clear, satisfactory, and convincing" evidence. But the question presented in this case is not the same as that presented in a case such as *White*, in which the issue was whether an instrument or transaction created a joint tenancy with right of survivorship, as opposed to some other ownership interest.

[9] The question in this case is not what ownership interest Richard intended to create by transferring his stock, but, rather, whether he did so at all. For that reason, the trial in this matter focused on proving the existence and contents of the stock certificates. In that regard, this case is less like a joint tenancy case, such as *White*, than it is a case involving proof of the terms of a lost or destroyed instrument. A party seeking to recover upon a lost instrument has the burden of proving the former existence, execution, delivery, theft or loss, and contents of the instrument by clear and convincing evidence. *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992); *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984). See, also, e.g., *Fales v. Norine*, 263 Neb. 932, 644 N.W.2d 513 (2002); *In re Estate of Miller*, 231 Neb. 723, 437 N.W.2d 793 (1989). See, generally, 52 Am. Jur. 2d *Lost and Destroyed Instruments* § 24 et seq. (2000).

For these purposes, a stock certificate, while not a negotiable instrument, is still fairly considered an "instrument" in the broader sense of the term, as a token of the legal rights it represents, normally delivered to any person to whom the rights are transferred. See *Citizens Nat. Bank of Orlando v. Bornstein*, 374 So. 2d 6 (Fla. 1979), citing *First Nat'l Bk. In Grand P. v. Lone Star Life Ins. Co.*, 524 S.W.2d 525 (Tex. App. 1975). See, also, *Matter of Estate of Evanco*, 955 P.2d 525 (Alaska 1998); *State ex rel. N. American Co. v. Koerner*, 357 Mo. 908, 211 S.W.2d 698 (1948) (stock certificate is instrument representing tangible evidence of title to unique type of intangible property). Because the existence and contents of the allegedly destroyed stock certificates are the linchpin of Sandra's argument, we conclude that the appropriate burden of proof is the burden of proof applicable when a party seeks to recover on a lost instrument.

The county court, however, concluded that Sandra had proved her claim only by a preponderance of the evidence. We cannot say that the court would have necessarily concluded that Sandra had presented clear and convincing evidence of her claim. Therefore, the county court's judgment must be reversed, and this cause remanded for a new trial on the narrow issue of whether Sandra has presented clear and convincing evidence of the existence and contents of the allegedly destroyed stock certificates.

[10] Although that conclusion is dispositive of this appeal, we nonetheless consider Linda's remaining arguments with respect to the sufficiency of the evidence, as they are likely to recur on retrial. 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. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004). For the reasons that follow, we reject Linda's claim that the record before us was insufficient to establish Sandra's claim even by a preponderance of the evidence.

[11-13] Linda argues that even assuming that the stock was jointly held and that the certificates were destroyed, as Sandra testified, Richard's disposal of those certificates and failure to replace them were actions inconsistent with joint tenancy that destroyed Sandra's right of survivorship. An existing estate in joint tenancy can be destroyed by the act of one joint tenant which is inconsistent with joint tenancy, and such act has the effect of destroying a right of survivorship incidental to it. *Krause v. Crossley*, 202 Neb. 806, 277 N.W.2d 242 (1979). The common-law rule that a joint tenancy must contain the four unities of time, title, interest, and possession still persists unless modified by statute; in other words, joint tenants have one and the same interest accruing by one and the same conveyance commencing at one and the same time and held by one and the same undivided possession. *Id.* Any act of a joint tenant which destroys one or more of the coexisting unities operates as a severance and extinguishes the right of survivorship. *Id.*

[14] But Richard's disposal of the stock certificates, if shown at retrial, would do nothing to alter any aspect of the stock's ownership. There is a distinction between the certificate issued to a shareholder and the "share" issued to the shareholder. A share of

stock is the actual property of the shareholder, while the stock certificate is merely the authentic evidence of the stockholder's ownership of shares. *Renner v. Wurdeman*, 231 Neb. 8, 434 N.W.2d 536 (1989), citing *Federal Deposit Ins. Corporation v. Gunderson*, 106 F.2d 633 (8th Cir. 1939). Although stock certificates are tokens of ownership, there was no evidence to suggest that Richard destroyed the stock certificates at issue in this case in an attempt to affect the actual ownership of the corporation. Richard merely disposed of the damaged evidence of stock ownership; his act did not affect the actual ownership of the stock and, consequently, did not affect any of the unities of joint tenancy.

Linda also contends that even if Alger's testimony is accepted, his statement that Richard "controlled his wife's shares" would serve to negate any sort of joint tenancy. Linda cites *Young v. McCoy*, 152 Neb. 138, 40 N.W.2d 540 (1950), for the proposition that the transfer of a bank account, to take effect at the death of the depositor who retains control during his life, is testamentary in character and void if not executed as a will. We first note that this proposition has long since been abrogated by statute, as the Nebraska Probate Code specifically authorizes the creation of nontestamentary, nonprobate transfers on death. See § 30-2715 et seq.

But even if the proposition cited by Linda retained vitality, it is not relevant in the instant case, because Richard and Sandra's asserted joint tenancy of Strata would give Sandra immediate ownership of the whole of the property, regardless of who controlled the corporation as a practical matter. See *Mahlin v. Goc*, 249 Neb. 951, 547 N.W.2d 129 (1996). Although she possessed a right of survivorship, Sandra's joint ownership interest in Strata was immediately effective and was not contingent upon Richard's death.

[15] Furthermore, where property is held in joint tenancy, each joint tenant owns the whole of the property from the time at which the interest is created. *Heinold v. Siecke*, 257 Neb. 413, 598 N.W.2d 58 (1999). Thus, Richard's control of Strata was consistent with his right, as a joint tenant, to possession of the whole of the property. The fact that Richard retained control of the stock would not defeat the transfer of the stock into joint tenancy with a right of survivorship. See *Crowell v. Milligan*, 157

Neb. 127, 59 N.W.2d 346 (1953), *overruled on other grounds, White v. Ogier*, 175 Neb. 883, 125 N.W.2d 68 (1963) (decedent's control of stock and collection of dividends did not defeat valid inter vivos gift creating joint tenancy with right of survivorship).

CONCLUSION

We conclude that the county court did not commit plain error in permitting Sandra to claim that the Strata stock had belonged to herself and Richard as joint tenants. However, the county court's judgment did not conform to the law when it found the appropriate burden of proof to be a preponderance of the evidence in this matter. Therefore, the judgment of the county court is reversed, and the cause is remanded for a new trial consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

GARY'S IMPLEMENT, INC., APPELLEE, V. BRIDGEPORT TRACTOR PARTS, INC., FORMERLY KNOWN AS GARY'S TRACTOR PARTS, INC., APPELLANT.

701 N.W.2d 367

Filed July 29, 2005. No. S-04-608.

1. **Judgments: Appeal and Error.** An order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree that is reversed shares its fate and falls with it.

Appeal from the District Court for Morrill County: BRIAN SILVERMAN, Judge. Reversed and vacated.

Jerrold L. Strasheim and Mary Leiter Swick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., and James L. Zimmerman, of Sorensen, Zimmerman & Mickey, P.C., for appellant.

Howard P. Olsen, Jr., and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee.

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

MILLER-LERMAN, J.

INTRODUCTION

In this case, No. S-04-608, a successful plaintiff, Gary's Implement, Inc. (Seller), was granted an order in aid of execution on its judgment, and the defendant, Bridgeport Tractor Parts, Inc., formerly known as Gary's Tractor Parts, Inc. (Buyer), appeals. The underlying judgment has been reversed in the related cases Nos. S-03-941 and S-03-1242. See *Gary's Implement v. Bridgeport Tractor Parts, ante* p. 286, 702 N.W.2d 355 (2005) (*Gary's I*). Accordingly, we reverse and vacate the order in aid of execution in this case.

PRESENT APPEAL

This case involves an appeal from the attempt by Seller to collect on a judgment in the amount of $632,225 plus interest and costs, entered on July 22, 2003, in favor of Seller and against Buyer. The July 22 judgment entered against Buyer was not superseded and has not been satisfied. The validity of the judgment was the subject of *Gary's I*.

In the present case, Buyer appeals from the May 10, 2004, order of the district court for Morrill County granting a motion in aid of execution filed by Seller. In summary, the order imposed sanctions against Buyer for bad faith for having filed a chapter 11 bankruptcy case in the U.S. Bankruptcy Court for the District of South Dakota, which bankruptcy the district court concluded was filed "for the sole and only purpose of frustrating [the] efforts [of Seller] to collect and enforce its judgment." The May 10 order also determined the amount of secured indebtedness held by another creditor of Buyer who was not a party to the underlying litigation, and directed that Buyer "cease and desist" from making any transfers or sales of personal property from its salvage yard in Bridgeport, Nebraska, outside of the ordinary course of business.

[1] Generally, an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree that is reversed shares its fate and falls with it. *Upah v. Ancona Bros. Co.*, 246 Neb. 608, 521 N.W.2d 906 (1994); *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). Because of our decision in *Gary's I*, we reverse and vacate the

order of the district court granting the motion in aid of execution filed by Seller.

REVERSED AND VACATED.

GERRARD, J., dissenting.

I agree with the general principle that an order that is ancillary and accessory to a judgment that has been reversed shares its fate and falls with it. See *Upah v. Ancona Bros. Co.*, 246 Neb. 608, 521 N.W.2d 906 (1994). However, I would affirm the judgment underlying the district court's order in this case. See *Gary's Implement v. Bridgeport Tractor Parts, ante* p. 286, 702 N.W.2d 355 (2005) (Gerrard, J., dissenting). Therefore, I respectfully dissent.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN M. GILROY, RESPONDENT.

701 N.W.2d 837

Filed July 29, 2005. No. S-04-875.

1. **Disciplinary Proceedings.** Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of the case.
2. ____. For purposes of determining the proper discipline, the Nebraska Supreme Court considers the attorney's acts both underlying the events and throughout the proceeding.
3. ____. To determine whether and to what extent discipline should be imposed in a lawyer disciplinary proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline demonstrate nothing less than a total disrespect for the Nebraska Supreme Court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.
5. ____. An attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline is an important matter and is a threat to the credibility of attorney disciplinary proceedings.
6. ____. An attorney bears the responsibility to accurately account for his client's funds.
7. ____. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment.

Original action. Judgment of disbarment.

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

John A. Sellers for respondent.

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

PER CURIAM.

NATURE OF CASE

The office of the Counsel for Discipline of the Nebraska Supreme Court, as relator, filed formal charges against respondent, John M. Gilroy, who was admitted to the practice of law in the State of Nebraska on April 21, 1977. After respondent failed to file an answer to these charges, this court sustained the Counsel for Discipline's motion for judgment on the pleadings and limited briefs and arguments to the appropriate sanction. On April 8, 2005, this court suspended respondent from the practice of law on an unrelated matter. We must now determine the appropriate sanction.

BACKGROUND

The formal charges state that respondent was retained by Helene Elliott (Helene) in 1995 to provide legal services primarily related to Helene's estate planning. Helene was referred to respondent by David Andersen, an insurance agent who had sold Helene insurance policies and annuities. Andersen and respondent maintained a professional relationship in which Andersen referred clients to respondent and respondent provided legal services for Andersen and Andersen's employer. In January 2003, Helene contacted respondent seeking additional legal services related to her estate planning. At that time, respondent took over the responsibility of paying all of Helene's bills by preparing checks on Helene's bank account for her to sign.

In January 2003, Helene's daughter, Diana Elliot (Diana), became concerned that Andersen had sold Helene unnecessary life insurance and annuity policies, and asked respondent to look into the matter on Helene's behalf. Respondent advised Diana and Helene that he had a business relationship with Andersen and was currently representing Andersen, but would nevertheless look into

the matter. Respondent further advised Diana and Helene that should any legal action need to be brought against Andersen, they would need a different lawyer. On July 31, the Elliotts terminated respondent's legal services after discovering respondent had not taken any immediate action against Andersen.

The formal charges further state that Diana incurred expenses on Helene's behalf, for which Helene agreed to reimburse her. Diana submitted to respondent receipts for such expenses totaling $763, and on February 28, 2003, respondent wrote Diana a check for $763. On that same date, respondent issued a billing statement to Helene which included the $763 respondent advanced on her behalf. On March 3, respondent's billing statement was paid. Diana deposited respondent's check in her bank account; however, it was later returned due to insufficient funds. Diana notified respondent that his check had been returned and was assured by respondent that he would pay her. Despite these assurances, Diana was not paid until July 31, when respondent's legal services were terminated.

On January 8, 2004, the Counsel for Discipline received a grievance from Diana on behalf of Helene, alleging respondent charged Helene excessive fees for doing little or no work, refused to provide an accounting for his services, and refused to return documents belonging to Helene after he was notified his services were terminated. On January 9, the Counsel for Discipline sent respondent a copy of the grievance by certified mail, together with a letter instructing respondent to file an appropriate written response to the grievance within 15 working days. Respondent signed the certified mail receipt for the grievance and the Counsel for Discipline's letter on January 12. However, respondent did not reply.

On February 4, 11, and 26, 2004, the Counsel for Discipline sent additional letters to respondent seeking his reply to the Elliotts' complaint. Again, respondent failed to file a response as requested by those letters. On July 29, the Counsel for Discipline filed formal charges against respondent. The formal charges set forth three counts that included charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) and (5) (violating disciplinary rule and engaging in conduct prejudicial to administration

of justice); Canon 2, DR 2-110(B)(2) (failing to withdraw representation known to violate disciplinary rule); Canon 5, DR 5-101(A) (accepting employment known to conflict with personal interests) and 5-105(A) through (C) (refusing to accept or continue employment if interests of another client may impair independent professional judgment of lawyer); and Canon 9, DR 9-102(A) and (B) (failing to preserve the identity of client funds), as well as Neb. Ct. R. of Discipline 9(E) (rev. 2001), and his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent failed to file an answer to the formal charges. On September 15, 2004, this court sustained the Counsel for Discipline's motion for judgment on the pleadings. Accordingly, the sole issue before this court is the appropriate sanction.

ANALYSIS

[1-3] Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of the case. *State ex rel. Counsel for Dis. v. Rokahr*, 267 Neb. 436, 675 N.W.2d 117 (2004). For purposes of determining the proper discipline, we consider respondent's acts both underlying the events of this case and throughout the proceeding. *Id.* To determine whether and to what extent discipline should be imposed, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005).

[4,5] We have repeatedly emphasized the importance of responding to the inquiries and requests for information from the Counsel for Discipline. In order for the public to have confidence in the integrity of the legal profession and to be protected from unscrupulous acts, the disciplinary process as a whole must function effectively. *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004); *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000). Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline demonstrate nothing less than a total disrespect for our disciplinary

jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice. *State ex rel. Counsel for Dis. v. Sutton, supra.* Most recently, we stated that "[w]e consider an attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline as an important matter and as a threat to the credibility of attorney disciplinary proceedings." *State ex rel. Counsel for Dis. v. Sutton,* 269 Neb. at 643, 694 N.W.2d at 650.

In *State ex rel. Counsel for Dis. v. Sutton, supra,* the Counsel for Discipline filed formal charges against John I. Sutton, alleging the attorney's conduct violated his oath of office as an attorney, and Cannon 1, DR 1-102(A)(1) and (5), and Canon 6, DR 6-101(A)(3), of the Code of Professional Responsibility. Sutton failed to respond to inquiries and requests for information from the Counsel for Discipline and failed to file an answer to the formal charges. We granted the Counsel for Discipline's motion for judgment on the pleadings and suspended Sutton indefinitely. In reaching that decision, we stated that the sparse record failed to inform us regarding the nature and extent of Sutton's misconduct and his present or future fitness to practice law. Sutton had previously been suspended, and then his license placed on probation because of his having abused prescription medications, and he was suffering depression and medical problems related to an untreated illness. This distinguishes respondent's situation from that of Sutton's. In respondent's case, however, the only reason we can discern from the record as to why respondent has not responded to the Counsel for Discipline is utter contempt for the disciplinary process.

The record establishes that respondent's conduct violated several disciplinary and trust account rules, as well as his oath of office as an attorney. The record further reflects that the present case is not respondent's first violation of the trust account rules. As noted above, respondent was previously suspended for 1 year for, among other things, violations of trust account rules. We also take judicial notice of the fact that respondent was temporarily suspended by this court on April 8, 2005. See *Jessen v. Jessen,* 259 Neb. 644, 611 N.W.2d 834 (2000) (court may take judicial notice of document in separate but related action concerning same subject matter in same court). In that matter, respondent

failed to reply to requests by the Counsel for Discipline with regard to an unrelated grievance and failed to file an answer with this court resisting the entry of an order temporarily suspending his license to practice law. *State ex rel. Counsel for Dis. v. Gilroy*, 269 Neb. xxii (No. S-05-163, Apr. 8, 2005).

[6,7] An attorney bears the responsibility to accurately account for his client's funds. *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000). Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment. *Id.* Because respondent failed to reply to the Counsel for Discipline or file a pleading, we have no basis for considering any factors that mitigate in favor of respondent.

We have reviewed the record, and upon due consideration, this court finds that respondent should be disbarred from the practice of law in the State of Nebraska.

CONCLUSION

It is the judgment of this court that respondent should be, and is, disbarred from the practice of law in the State of Nebraska effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., not participating.

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

702 N.W.2d 791

Filed July 29, 2005. No. S-05-766.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

Respondent, Richard E. Carlson, was admitted to the practice of law in the State of Nebraska on May 12, 1967. On April 27, 2005, the U.S. Attorney for the District of Nebraska filed an information (Information) in the U.S. District Court for the District of Nebraska, "*United States of America v. Richard E. Carlson*, Case 4:05CR3056," charging respondent with one count of violating 18 U.S.C. § 1344 (2000) (violation of banking laws of United States), a felony. In summary, the Information charged respondent with devising a scheme to defraud two banks by obtaining funds by false and fraudulent pretenses. On April 27, respondent offered to plead guilty and filed a "Petition to Enter a Plea of Guilty" in the U.S. District Court for the District of Nebraska.

FACTS

On June 21, 2005, 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 he "freely, knowingly and voluntarily admit[ted] that the allegations made against [him] in the Information are true and that [his] conduct as alleged in the Information constitute[d] violations of [his] oath of office as an attorney . . . and [Canon 1,] DR 1-102(A)(1), (3) and (4) of the Code of Professional Responsibility." 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, stated in writing that he knowingly admits the truth of the suggested disciplinary allegations against him, and waived all proceedings against him in connection therewith. We further find that for purposes of this voluntary surrender, respondent has admitted the allegations against him in the Information, which, in summary, allege that respondent devised a scheme to defraud two banks by obtaining funds by false and fraudulent pretenses, that respondent has admitted that he violated Canon 1, DR 1-102(A)(1), (3), and (4), and his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997), and that respondent has consented to the entry of an order of disbarment. We further find that respondent has admitted to facts which facts are not consistent with adherence to the Code of Professional Responsibility or his oath of office as an attorney.

CONCLUSION

Upon due consideration of the voluntary surrender in this matter, the court finds, for purposes of this voluntary surrender, that respondent knowingly has admitted the suggested disciplinary allegations and the allegations in the Information filed against him and that his admissions are knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 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. 2003) and 23 (rev. 2001).

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., not participating.

JOHN A. TROSHYNSKI, APPELLEE, V. NEBRASKA STATE BOARD OF PUBLIC ACCOUNTANCY, AN AGENCY OF THE STATE OF NEBRASKA, APPELLANT.

701 N.W.2d 379

Filed August 5, 2005. No. S-04-510.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **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. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
5. **Statutes: Words and Phrases.** As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.
6. **Statutes: Legislature: Intent.** There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions. Ordinarily, such differences must be determined by the intent of the Legislature as gleaned from the whole statute.
7. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.
8. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision.
9. **Accountants: Licenses and Permits.** The Public Accountancy Act implicitly permits the Nebraska State Board of Public Accountancy to use its rulemaking authority under Neb. Rev. Stat. § 1-112 (Reissue 1997) to promulgate standards and procedures whereby the character and fitness of an applicant for initial certification may be considered by the board in determining whether the applicant is a qualified person under Neb. Rev. Stat. § 1-105.01 (Reissue 1997).
10. **Administrative Law: Due Process: Notice.** Where an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings.
11. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

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

Jon Bruning, Attorney General, and Lynn A. Melson for appellant.

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

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

STEPHAN, J.

The Nebraska State Board of Public Accountancy (the Board) appeals from an order of the district court for Lancaster County reversing the Board's decision to deny John A. Troshynski a certificate of certified public accountant (CPA) based upon his prior felony conviction. We are asked to decide whether Neb. Rev. Stat. § 1-114 (Cum. Supp. 2004) prohibits the Board from exercising discretion to refuse a certificate when an applicant meets the statute's enumerated requirements. We determine that the statute does not prohibit the Board from using its rulemaking powers to establish character and fitness standards, but conclude that it has not done so, and we therefore affirm the judgment of the district court.

BACKGROUND

In 1990, Troshynski pled guilty to a felony charge of conspiracy to distribute cocaine and was sentenced to 46 months' incarceration and 3 years of supervised release. During his incarceration, Troshynski earned his associate's degree and successfully completed drug and alcohol recovery programs. His supervised release was terminated 1 year early in May 1996.

Following his release, Troshynski earned a bachelor's degree in business administration from Creighton University. Subsequently, he worked for various firms, including an accounting firm where he was employed for 3½ years. At least two of the partners at this firm knew of his felony conviction and nonetheless recommended him for the position of controller with one of the firm's clients. In 1996, Troshynski submitted an application to the Board to sit

for the CPA examination. On that application, he disclosed his felony conviction. In November 1999, Troshynski sat for and passed the CPA examination, and on September 8, 2000, the Board received his application for a CPA certificate. On this application, Troshynski again disclosed his felony conviction. At the Board's request, he also provided additional information, letters of explanation, and certain federal court documents related to his conviction and sentence.

In a letter dated May 18, 2001, the Board advised Troshynski that it had denied his application for a certificate at its April 30-May 1 meeting. No reason for the denial was stated. Troshynski appealed the Board's decision to the district court pursuant to the Administrative Procedure Act. The district court determined that the Board's use of discretion in denying Troshynski's application was a quasi-judicial function, entitling Troshynski to due process rights. The court therefore reversed the Board's decision and remanded the case for a full and fair hearing after proper notice.

On April 4, 2003, the Commission issued a notice of hearing directed to Troshynski and his attorney, indicating that pursuant to the order of the district court, it would conduct a hearing on May 8, 2003, "with respect . . . to [Troshynski's] application filed with the Board on September 8, 200[0]." The notice did not provide any further specification regarding the facts or issues to be addressed at the hearing. After the hearing, the Board issued a final order declaring that based upon Troshynski's 1990 felony conviction, he was not entitled to the issuance of a CPA certificate. The Board concluded that although "the technical requirements for the issuance of the certificate may have been met, the Board has the right to pass upon the fitness of the applicant and to take into consideration the prior conviction of a felony of the nature committed by the respondent."

Troshynski appealed again. In its de novo review, the district court concluded that the Board was statutorily mandated to issue a certificate once an applicant met the criteria of § 1-114. The court also noted that Troshynski had demonstrated, through his accounting career and his personal life, that he would likely achieve a high degree of moral and ethical integrity as a certified public accountant. The court reversed the Board's decision

and remanded the matter with instructions that the Board grant Troshynski a certificate of certified public accountant.

ASSIGNMENTS OF ERROR

The Board assigns that the district court erred in (1) determining that the Board lacked discretion to grant or refuse a certificate of certified public accountant and (2) suggesting that Troshynski had demonstrated the requisite fitness for the issuance of a certificate of certified public accountant.

STANDARD OF REVIEW

[1,2] 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. *Zwygart v. State, ante* p. 41, 699 N.W.2d 362 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Forgét v. State*, 265 Neb. 488, 658 N.W.2d 271 (2003).

[3,4] 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. *Lein v. Nesbitt*, 269 Neb. 109, 690 N.W.2d 799 (2005). Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993).

ANALYSIS

The Public Accountancy Act is codified at Neb. Rev. Stat. §§ 1-105 to 1-171 (Reissue 1997 & Cum. Supp. 2004) and provides for the creation of the Board in § 1-107. The stated purpose of the Board is

> to protect the welfare of the citizens of the state by assuring the competency of persons regulated under the Public Accountancy Act through (1) administration of certified public accountant examinations, (2) issuance of certificates

> and permits to qualified persons and firms, (3) monitoring the requirements for continued issuance of certificates and permits, and (4) disciplining certificate and permit holders who fail to comply with the technical or ethical standards of the public accountancy profession.

§ 1-105.01. In furtherance of its general purpose, the Board is authorized to "adopt and promulgate rules and regulations of professional conduct appropriate to establish and maintain a high standard of integrity and dignity in the profession of public accountancy." § 1-112.

Concerning issuance of certificates, § 1-114(2) provides:

> On and after January 1, 1998, the board shall issue a certificate of certified public accountant to any person (a) who is a resident of this state or has a place of business in this state or, as an employee, is regularly employed in this state and (b) who has passed a written examination in accounting, auditing, and such other related subjects as the board determines to be appropriate.

At issue is whether inclusion of the word "shall" in § 1-114 mandates that in all instances, the Board must issue a certificate to any applicant who meets the residency requirement and passes the CPA examination.

[5-7] As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002); *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002). However, there is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions. *Anderson v. Board of Educational Lands & Funds*, 198 Neb. 793, 256 N.W.2d 318 (1977). Ordinarily, such differences must be determined by the intent of the Legislature as gleaned from the whole statute. *Id.* While the word "shall" may render a particular provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998); *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977). We have expressed reluctance to find statutory provisions mandatory where some-

thing less than strict compliance would not interfere with the fundamental purpose of a statute. See, *State v. $1,947, supra* (holding "shall" directory because failure to strictly adhere to outlined procedures did not interfere with fundamental purpose of ensuring due process); *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990) (holding "shall" directory where failure to comply with time limitations did not interfere with statute's purpose to protect best interests of child).

[8] The fundamental purpose expressed in the Public Accountancy Act is to "ensur[e] that the public is able to distinguish among those who are permitted [through appropriate qualification] to practice public accountancy and those who are not." *Forgét v. State*, 265 Neb. 488, 497-98, 658 N.W.2d 271, 279 (2003). Under the act, the Board is charged with overseeing and regulating the educational, demonstrated knowledge, and administrative requirements of the CPA examination to ensure the act's purpose is served. In particular, the Board is charged with issuing certificates to "qualified persons" and "monitoring the requirements for continued issuance of certificates and permits." § 1-105.01(2) and (3). A reasoned refusal to issue a certificate under § 1-114 would not interfere with the public interest which the public accountancy statutes are intended to protect, but, rather, may further that purpose. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005); *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004). We therefore conclude that the term "shall" as used in § 1-114 is permissive rather than mandatory.

This does not, however, dispose of the action. We must further determine whether the Board has the power to refuse to issue a certificate based upon the character and fitness of the applicant and, if so, whether the Board properly exercised that power when it refused to issue a certificate to Troshynski. The Board does not contend that it has express statutory authority to consider the character and fitness of an applicant in deciding whether to issue a certificate. Instead, it relies on our holding in *Bartlett v. State Real Estate Commission*, 188 Neb. 828, 199 N.W.2d 709 (1972), for the proposition that its duty to maintain a high standard of

integrity and its authority to revoke certificates under § 1-137 give it inherent authority to refuse to issue a certificate based on an applicant's character and fitness.

After passing the necessary written examination, the applicant in *Bartlett* applied to the State Real Estate Commission for licensure as a real estate salesman. The commission denied the application because earlier in the same year, the Nebraska Department of Insurance had revoked the applicant's license to sell insurance for 5 years after finding that he had engaged in multiple acts of fraud, misrepresentation, and dishonest practices. The applicant argued that the commission did not have discretion to deny a license to any individual who possessed the qualifications enumerated in the statute that governed licensure. We rejected this argument and upheld the commission's denial of the license, stating that "[w]hile the statute here does not expressly provide that applicants for a real estate salesman's license must be of good moral character or must be fit and proper persons to engage in the business, we think such a requirement is implicit in the qualifications necessary for a license." 188 Neb. at 832, 199 N.W.2d at 712. The same is true for those applying for a certificate of public accountancy. We agree with the district court that, like attorneys or medical professionals, certified public accountants must demonstrate a high degree of moral and ethical integrity.

[9] The Board's duty to protect the public from unqualified individuals and firms encompasses oversight of those already practicing in the profession and oversight of those making initial application to practice. The Public Accountancy Act specifically grants the Board the authority to take disciplinary action against certificate or permit holders for violating a number of causes inconsistent with good moral character. § 1-137. The act also charges the Board with monitoring the requirements for continued issuance of certificates and permits. § 1-105.01(3). No person may practice or engage in business as a certified public accountant without a certificate issued by the Board. § 1-151. There is no reasonable justification for requiring the Board to ignore the character or fitness of an applicant and to shut its eyes to all prior conduct of an applicant simply because the statute does not specify those requirements in detail. See *Bartlett, supra.* Therefore, we hold that the act implicitly permits the Board to

use its rulemaking authority under § 1-112 to promulgate standards and procedures whereby the character and fitness of an applicant for initial certification may be considered by the Board in determining whether the applicant is a qualified person under § 1-105.01.

The rules and regulations enacted by the Board are found in title 288 of the Nebraska Administrative Code. Pursuant to § 1-112, the Board has adopted rules of professional conduct in chapter 5. See 288 Neb. Admin. Code, ch. 5, § 001 (1999). Additionally, the Board has adopted rules regarding allegations that certificate or permit holders have violated a provision of chapter 5 or one or more of the items listed in § 1-137. See 288 Neb. Admin. Code, ch. 4, §§ 004.02, 005, and 006 (1995). These rules require, inter alia, an investigation into probable cause, a formal hearing where probable cause has been established, appropriate notice of the hearing, and that the complaint sets forth specific charges. *Id.* Chapter 6 governs the application process for the CPA examination and administration of the examination. There are no rules in chapter 6 specifically, or in title 288 generally, pertaining to character and fitness standards or procedures applicable to initial certification.

[10] The Board relies upon *Bartlett v. State Real Estate Commission*, 188 Neb. 828, 199 N.W.2d 709 (1972), for its authority to refuse an initial application even when the applicant has met the statutory requirements. In that case, the State Real Estate Commission retained specific authority to deny an initial license without administrative rules where a "thorough examination of the statutes" reflected the "clear intent of the Legislature to vest full power in the commission to regulate the issuance of licenses." *Id.* at 832, 199 N.W.2d at 712. In *Bartlett*, the State Real Estate Commission was expressly given the " 'full power to regulate the issuance of licenses and to revoke or suspend licenses.' " 188 Neb. at 830, 199 N.W.2d at 711 (quoting Neb. Rev. Stat. § 81-879 (Reissue 1971), repealed by 1973 Neb. Laws, L.B. 68). The Board is not expressly granted any similar power to regulate license issuance under the Public Accountancy Act. Moreover, the statutes before us in *Bartlett* provided due process by statutorily instructing that

> "[b]efore the commission shall deny any application for a license . . . it shall give the applicant . . . a hearing on the matter and shall, at least twenty days prior to the date set for the hearing, notify the applicant . . . in writing. Such notice shall contain an exact statement of the charges against him and the date and place of hearing."

188 Neb. at 831, 199 N.W.2d at 711 (quoting Neb. Rev. Stat. § 81-882(1) (Reissue 1971), repealed by 1973 Neb. Laws, L.B. 68). There is no similar provision in the Public Accountancy Act or in the Board's rules and regulations. Where an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings. *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998); *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996).

Thus, unlike the instant case, the statutory scheme in *Bartlett* granted the licensing commission more specific power with regard to initial licensing and also provided applicants with notice and an opportunity to be heard with respect to possible denial of an initial application. The statutory scheme also specifically provided an applicant with due process in the case of a license denial. Contrarily, when Troshynski applied for and was permitted to take the CPA examination, there was nothing in the statutes or in the Board's rules and regulations which would have placed him on notice that certification could be denied on character and fitness grounds even if he passed the examination. The fact that Troshynski was nevertheless granted a hearing by order of the district court to contest the validity of the denial of his certificate does not cure this deficiency. Although the Board determined after the court-ordered hearing that "an applicant for the CPA certificate must demonstrate the fitness of the applicant for such a certificate, which includes the prior moral conduct of the applicant and prior criminal conduct," this requirement is not mentioned in either the Board's rules or the notice of hearing issued to Troshynski. Because the Board had not established character and fitness standards and procedures through the proper exercise of its rulemaking authority, its attempt to do so on an ad hoc basis resulted in a denial of Troshynski's right to due process.

[11] Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003). Although we disagree with the district court's interpretation of § 1-114 for the reasons set forth above, we conclude that its judgment is correct.

CONCLUSION

The Board has not exercised its rulemaking authority to establish character and fitness standards and procedures applicable to persons applying for initial certification as a certified public accountant. In the absence of any such standards and procedures, the denial of Troshynski's application after he successfully passed the written examination and demonstrated that he met the residency requirements set forth in § 1-114 denied him due process of law. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

SHARON L. FARBER, PERSONAL REPRESENTATIVE OF THE ESTATE OF JERRY L. FARBER, DECEASED, AND SHARON L. FARBER, INDIVIDUALLY, APPELLANT, V. LOK-N-LOGS, INC., A NEW YORK CORPORATION, ET AL., APPELLEES.

701 N.W.2d 368

Filed August 5, 2005. No. S-04-523.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Products Liability: Words and Phrases.** The language, "first sold or leased for use or consumption," contained in Neb. Rev. Stat. § 25-224(2) (Cum. Supp. 2004), refers to when a product is first surrendered or relinquished to the individual or entity.
4. **Products Liability: Limitations of Actions.** Upon the passage of the 10-year repose period in Neb. Rev. Stat. § 25-224(2) (Cum. Supp. 2004), the defendant acquires a substantive right protected by statute.

5. ____: ____. The effect of the 10-year statute of repose in Neb. Rev. Stat. § 25-224(2) (Cum. Supp. 2004) can be to prevent what might otherwise be a cause of action from ever arising.
6. **Limitations of Actions.** A statute of limitations is generally procedural in nature, whereas a statute of repose is generally substantive in nature.
7. **Products Liability: Limitations of Actions: Legislature.** The Legislature, as a matter of policy, has decided that with respect to the statute of repose and in the absence of legislative exception, a product liability defendant should not be subjected to liability 10 years after the product was first sold or leased for use or consumption.
8. **Limitations of Actions.** Unlike a statute of limitations, a statute of repose is not triggered by the discovery rule.

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

Howard N. Epstein and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellant.

Michael S. Degan, of Blackwell, Sanders, Peper & Martin, L.L.P., and Robert L. Shuftan, Anthony G. Hopp, and Richard J. Jancasz, of Wildman, Harrold, Allen & Dixon, L.L.P., for appellee Wood Treating Chemicals Company.

Robert Keith, of Engles, Ketcham, Olsen & Keith, P.C., for appellees Lok-N-Logs, Inc., and Webb & Sons, Inc.

Kurth A. Brashear, of Brashear & Ginn, and Bruce A. Moothart and Leonard L. Wagner, of Husch & Eppenberger, L.L.C., for appellee Monsanto Company.

Jill Robb Ackerman, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., and David Bartel and Nora M. Platt, of Quarles & Brady, for appellee Vulcan Materials Company.

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

MILLER-LERMAN, J.

NATURE OF CASE

Plaintiff-appellant Sharon L. Farber (appellant), individually and as the personal representative of the estate of Jerry L. Farber (Farber), brought this product liability action against defendants-appellees Lok-N-Logs, Inc.; Monsanto Company; Vulcan Materials Company; Wood Treating Chemicals Company; Webb

& Sons, Inc.; and John Doe—"Real Name Unknown" (collectively appellees). Dow Chemical Company, Blair Lumber Company, and Christensen Lumber Company originally were also named as defendants, but were dismissed from the case. Appellees filed motions for summary judgment. The district court for Washington County sustained the motions on the basis that appellant's action was barred by the 10-year statute of repose contained in Neb. Rev. Stat. § 25-224(2) (Cum. Supp. 2004). The district court dismissed the case with prejudice. Appellant filed an appeal from the district court's order dismissing the case. We conclude that the district court correctly concluded that the action was barred by the statute of repose in § 25-224(2), and accordingly, we affirm.

STATEMENT OF FACTS

Beginning in 1978 and continuing essentially until his death on March 17, 2003, Farber was employed by the Nebraska Game and Parks Commission at Fort Atkinson State Historical Park in Washington County, Nebraska. In June 1978, Farber began work constructing replica barracks at the park. The barracks were made of logs treated with "Pentachlorophenol" (penta), a wood preservative. Farber also applied a liquid form of penta to treat previously untreated wood used in the construction of the barracks. Farber worked on the construction of additional barracks in 1979. These barracks were also built using penta-treated logs and wood. The logs used in the construction of the barracks were allegedly supplied by appellee Lok-N-Logs, Inc., a New York corporation, and the logs were allegedly treated with penta by appellee Webb & Sons, Inc., also a New York corporation. The penta was allegedly manufactured by appellees Wood Treating Chemicals Company, Monsanto Company, and Vulcan Materials Company.

Farber's testimony was preserved in depositions. Farber testified that in the late summer or early fall of 1979, he was instructed to stop using liquid penta, allegedly because the federal government had determined that penta was a carcinogen. Thereafter, when the park constructed additional barracks, different wood preservatives were used on the logs and other materials. Farber testified, however, that he regularly worked in and around the barracks constructed of penta-treated logs and wood

and that his responsibilities included opening and airing out the barracks for the season after they had been closed, as well as various construction projects that required him to work on the penta-treated materials.

Regarding his medical condition, the record reflects that Farber smoked and that during his lifetime, he had had numerous surgeries, including six angioplasties, four stents, double bypass surgery, left knee replacement surgery, and gallbladder surgery. In December 2001, Farber underwent a series of medical tests to determine the cause of certain medical problems he was experiencing. In January 2002, Farber was diagnosed with myelodysplastic syndrome, a blood disorder. Farber testified that he was also informed by his doctors that he had suffered some sort of chromosome damage. In spring 2002, Farber was diagnosed with acute myelogenous leukemia. On December 27, 2002, Farber and appellant filed the original petition. Farber died on March 17, 2003.

Appellees each moved for summary judgment. The motions came on for hearing on February 24, 2004. Numerous exhibits, including two separate depositions of Farber, were offered and admitted into evidence. On March 31, the district court sustained appellees' motions and dismissed the case with prejudice, determining that the applicable statute of repose in § 25-224(2) had extinguished the action and that appellant was therefore barred from bringing her claims against appellees. Appellant filed an appeal from the district court's order sustaining appellees' motions for summary judgment.

ASSIGNMENT OF ERROR

Appellant assigns one error. Appellant claims that the district court erred in determining that appellant's lawsuit was barred by § 25-224(2).

STANDARDS OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Blair v. State Farm Ins. Co.*, 269 Neb. 874, 697 N.W.2d 266 (2005).

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

ANALYSIS

In its memorandum and order filed March 31, 2004, the district court granted summary judgment in favor of all appellees and dismissed appellant's petition. As established by the record and noted by the district court, the liquid penta and penta-treated logs were first delivered to Fort Atkinson State Historical Park in 1978 and in any event "no later than 1979," whereupon Farber was exposed to the penta. The district court correctly noted that these determinative facts were not in dispute. The district court further noted that appellant's case was a product liability action, see Neb. Rev. Stat. § 25-21,180 (Cum. Supp. 2004), and, relying on *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991), concluded that the action was barred "no later than 1989" by the 10-year statute of repose found in § 25-224(2).

On appeal, appellant contends that the district court erred in concluding that appellant's case was barred by the statute of repose found in § 25-224(2). In urging this court to reverse the district court's grant of summary judgment in favor of appellees, appellant makes several claims including the argument that *Givens* should be overruled or, in the alternative, that this court should make a judicial exception to the statute of repose for latent medical conditions, which exception would afford relief from the bar otherwise imposed by § 25-224(2). Upon due consideration, we reject appellant's arguments and conclude that the district court did not err in concluding that appellant's action was barred by the statute of repose and in granting summary judgment in favor of appellees.

A review of the statutory limitations periods applicable to products liability actions is critical to our resolution of this case. Section 25-224(1), effective July 22, 1978, preserved the 4-year statute of limitations previously found at Neb. Rev. Stat. § 25-207 (Reissue 1995) and, in addition, enacted a 10-year statute of repose. Section 25-224(1) and (2) (Cum. Supp. 1978) thus provided as follows:

> (1) All product liability actions shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.
>
> (2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

A 2-year sunset provision, not relevant here, was contained in § 25-224(4).

By virtue of 1981 Neb. Laws, L.B. 29, effective August 30, 1981, § 25-224 was amended by adding § 25-224(5), thus affording asbestos-related claims the protection of a discovery rule and relieving such claims from the strictures of the statute of repose. Section 25-224(5) provides:

> Any action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, shall be commenced within four years after the injured person has been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, or within four years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier. No action commenced under this subsection based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless such seller is also the manufacturer of such product or the manufacturer of the part thereof claimed to be defective. Nothing in this subsection shall be construed to permit an action to be brought based on an injury described in this subsection discovered more than two years prior to August 30, 1981.

By virtue of 2001 Neb. Laws, L.B. 489, operative September 1, 2001, § 25-224(2) was amended to provide a distinction between products manufactured inside Nebraska and products

manufactured outside Nebraska with respect to the application of the statute of repose. Section 25-224(2) provides in part:

> (a) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced as follows:
>
> (i) For products manufactured in Nebraska, within ten years after the date the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption; or
>
> (ii) For products manufactured outside Nebraska, within the time allowed by the applicable statute of repose, if any, of the state or country where the product was manufactured, but in no event less than ten years. If the state or country where the product was manufactured does not have an applicable statute of repose, then the only limitation upon the commencement of an action for product liability shall be as set forth in subsection (1) of this section.

In ruling on the summary judgment motions, the district court focused on the language "first sold or leased for use or consumption" consistently found in the product liability statute of repose in § 25-224(2), and concluded that

> [b]ecause there is no dispute of fact that the liquid penta and penta treated logs were first delivered to the Fort Atkinson job site in 1978, and no later than 1979, the period of repose set forth in § 25-224 extinguished Plaintiff's claim no later than 1989. Because . . . Farber did not commence his cause of action within that period, the Court finds that any cause of action against the Defendants was forever barred in 1989 by operation of the statute of repose. This action, which was not commenced until 2001, must therefore be dismissed as a matter of law. *See Givens v. Anchor Packing Co.*, 237 Neb. 565 (1991).

[3] In applying the law to the facts, the district court correctly noted that the dates of delivery of the penta and penta-treated logs were critical to the commencement of the statute of repose. We previously examined § 25-224(2)'s triggering language, "first sold or leased for use or consumption," in *Witherspoon v. Sides*

Constr. Co., 219 Neb. 117, 362 N.W.2d 35 (1985), a case involving the composition of a pipe used in the construction of a home. In *Witherspoon*, we stated that the pipe was "first sold for use" as understood under § 25-224(2), when the pipe was first surrendered or relinquished to the homeowner, not when it was placed into the stream of commerce. 219 Neb. at 123, 362 N.W.2d at 41. See, also, *Radke v. H.C. Davis Sons' Mfg. Co.*, 241 Neb. 21, 486 N.W.2d 204 (1992). Given the delivery dates in the instant case, the district court did not err in concluding that the statute of repose ran from "1978, and no later than 1979," thus barring the action no later than 1989.

In an effort to avoid the bar imposed by the statute of repose, appellant asserted in district court that appellees should be estopped from relying on the statute of repose because appellees allegedly fraudulently concealed the dangers of penta. Given the record made before it, the district court correctly rejected this argument. In the March 31, 2004, order, the district court reviewed the record and noted that there was no evidence of fraudulent concealment or conduct by appellees which would otherwise estop application of the statute of repose and that, in fact, the record showed "Farber was not diagnosed until after the statute of repose had extinguished any claim against the Defendants." See *Groth v. Sandoz, Inc.*, 601 F. Supp. 453 (D. Neb. 1984) (stating that when plaintiff was not diagnosed until after statute of repose had extinguished her claim, any alleged concealment did not deprive plaintiff of opportunity to preserve or pursue her claim). See, also, *Peterson v. Fuller Co.*, 807 F.2d 151 (8th Cir. 1986) (stating that when injury occurs after expiration of 10-year statute of repose, plaintiff could not have been fraudulently induced to postpone timely filing of lawsuit). Having reviewed the record and taking all inferences in favor of appellant as the nonmoving party, see *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005), we determine that the district court did not err when it determined that no facts precluded or otherwise estopped application of § 25-224(2) and that the statute of repose in § 25-224(2) barred appellant's action.

Despite the undisputed material facts and existing law, appellant argues that the order of the district court granting summary judgment in favor of appellees should be reversed because the

outcome is " 'manifestly unjust.' " Brief for appellant at 37. In this regard, appellant seeks to invoke the terms of § 25-224(2)(a)(i) and (ii) which became operative September 1, 2001. Thus, notwithstanding the 10-year provision of § 25-224(2) as it existed in statutes from 1978 to 2001, and notwithstanding our case law on the subject, all of which extinguished appellant's claims no later than 1989, appellant contends that because the penta-treated logs were manufactured in New York, which does not have an applicable statute of repose, appellant should be able to take advantage of the new in-state/out-state distinction found in § 25-224(2)(a)(i) and (ii), thereby resurrecting appellant's extinguished action. In support of this argument, appellant takes issue with the rationale of *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991), which held that the 1981 amendment to § 25-224 could not resurrect an asbestos-related action which had already been extinguished by the statute of repose. Appellant suggests we overrule *Givens*. In the alternative, appellant suggests we make a judicial exception to the application of § 25-224(2) for latent medical conditions such as Farber's. We are thus asked by appellant to graft a discovery rule for latent medical conditions onto the statute of repose found in § 25-224(2). We reject appellant's suggestion. As explained more fully below, we determine that the rationale of *Givens* is sound and that it is for the Legislature, not this court, to create exceptions to the statute of repose.

In *Givens, supra*, by certified question from the U.S. District Court for the District of Nebraska, see Neb. Rev. Stat. § 24-219 (Reissue 1995), we were asked whether the 1981 asbestos-related amendment, § 25-224(5), could be applied retroactively. That is, we were asked whether § 25-224(5) could revive a claim which had been barred by application of the statute of repose in the earlier version of § 25-224. We concluded that the amendment could not resurrect an action which the prior version of the statute had already extinguished. We explained that the rationale behind this conclusion was grounded upon the concept of due process, which prevents persons from being deprived of their property without due process of law. In *Givens*, we noted the distinction between a statute of limitations and a statute of repose, and we further stated that the immunity afforded by a statute of repose was a substantive right protected by Nebraska law and the

due process clause in the Nebraska Constitution, Neb. Const. art. I, § 3.

Recently, in *Budler v. General Motors Corp.*, 268 Neb. 998, 689 N.W.2d 847 (2004), we again had the opportunity to comment on § 25-224(2). In *Budler*, in answer to a certified question, we concluded that the 10-year statute of repose in § 25-224(2) was not tolled by a person's status as a minor pursuant to Neb. Rev. Stat. § 25-213 (Reissue 1995). In *Budler*, we noted the distinction between a statute of limitations and a statute of repose and referred to *Stuart v. American Cyanamid Co.*, 158 F.3d 622 (2d Cir. 1998), *cert. denied* 526 U.S. 1065, 119 S. Ct. 1456, 143 L. Ed. 2d 543 (1999). In this regard, in *Budler*, we noted that the U.S. Court of Appeals for the Second Circuit had stated that

> a statute of limitations generally establishes the time period within which lawsuits may be commenced after a cause of action has accrued and that, as such, it is "an affirmative defense, affecting the remedy, but not the existence of the underlying right. [Citation omitted.] In contrast, a statute of repose extinguishes the cause of action, the right, after a fixed period of time, usually measured from the delivery of the product . . . regardless of when the cause of action accrued."

Budler, 268 Neb. at 1002, 689 N.W.2d at 850 (quoting *Stuart, supra*).

Elsewhere, it has been observed that

> [i]t is important to differentiate between a statute of limitations and a statute of repose. A statute of limitations usually specifies the time limit for commencing an action after the cause of action has accrued, but a statute of repose is an absolute limitation which prevents a cause of action from arising after a certain period which begins to run upon occurrence of a specified event. A statute of repose thus eliminates a cause of action at a specified time, regardless of whether an injury has occurred or a cause of action accrued as of that date. *See* 54 C.J.S. *Limitations of Actions* § 4 (1987).

Elliott C. Winograd, *Products Liability: A Critical Analysis of the Statute of Repose*, 63 N.Y. St. B.J. 14 n.5 (Nov. 1991). In this regard, it has been observed that a statute of repose prevents what

might otherwise be a cause of action from arising after a particular period. See *Van Slyke v. Worthington*, 265 N.J. Super. 603, 628 A.2d 386 (1992). See, similarly, *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972) (stating that statute of repose extinguishes cause of action at ascertainable time and "prevent[s] what might otherwise be a cause of action . . . from ever arising").

[4,5] In Nebraska, we have recognized that upon the passage of the 10-year repose period in § 25-224(2), the defendant acquires a substantive right protected by statute. *Spilker v. City of Lincoln*, 238 Neb. 188, 469 N.W.2d 546 (1991). In Nebraska, we have also recognized that the effect of the 10-year statute of repose in § 25-224(2) can be to prevent what might otherwise be a cause of action from ever arising. In *Gillam v. Firestone Tire & Rubber Co.*, 241 Neb. 414, 416-17, 489 N.W.2d 289, 291 (1992), we stated:

> The 10-year statute of repose begins to run when the product is first relinquished for use or consumption. *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985). Where the injury occurs within the 10-year period, and a claimant commences his or her action after the 10 years have passed, an action accrues but is barred. *Miers v. Central Mine Equipment Co.*, 604 F. Supp. 502 (D. Neb. 1985). Where the injury occurs outside the 10-year period, no substantive cause of action ever accrues, and a claimant's actions are likewise barred. *Peterson v. Fuller Co.*, 807 F.2d 151 (8th Cir. 1986).

[6] It has been observed that a statute of limitations is generally procedural in nature, whereas a statute of repose is generally substantive in nature. See 51 Am. Jur. 2d *Limitation of Actions* § 32 (2000). We have recently noted that statutes of limitations are generally considered procedural, *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005), and in *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991), and *Spilker, supra*, we recognized that the Legislature created a substantive right in products liability defendants by passage of § 25-224(2). In considering § 25-224(2), the U.S. Court of Appeals for the Eighth Circuit stated:

> A statute of repose . . . directly impacts on the accrual of a cause of action in the first instance. It operates as a statutory bar independent of the actions (or inaction) of the litigants—often before those litigants can even be identified . . . [A statute of repose] creates in the potential products-liability defendant a right to immunity from suit under the circumstances set out in the statute. . . . The statute of repose "regulates rights," not remedies.

(Citations omitted.) *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 737 (8th Cir. 1995), *cert. denied* 516 U.S. 814, 116 S. Ct. 67, 133 L. Ed. 2d 28.

[7] It has been observed that statutes of repose represent a legislative decision that

> "as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability. Thus a 'statute of repose' is intended as a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights."

School Bd. of the City of Norfolk v. U.S. Gypsum, 234 Va. 32, 37, 360 S.E.2d 325, 328 (1987) (quoting Robert I. Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislature Rescue Squad*, 16 U. Rich. L. Rev. 323 (1982)). See, also, *Albrecht v. General Motors Corp.*, 648 N.W.2d 87 (Iowa 2002) (stating that statute of repose reflects legislative conclusion that point in time arrives beyond which potential defendant should be immune from liability for past conduct). In *Budler v. General Motors Corp.*, 268 Neb. 998, 689 N.W.2d 847 (2004), we implicitly acknowledged that in enacting the statute of repose in § 25-224(2), the Legislature deliberately overrode the infancy tolling provision of § 25-213, and we continue to believe that the Legislature, as a matter of policy, has decided that with respect to the statute of repose and in the absence of legislative exception, a product liability defendant should not be subjected to liability 10 years after the product was first sold or leased for use or consumption. As a matter of law, we conclude that the plain language of § 25-224(2) bars the instant action. See *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005).

Although phrased somewhat differently than the foregoing discussion, *Givens, supra*, correctly differentiated between a statute of limitations and a statute of repose and recognized that the statute of repose found in § 25-224(2) represented a substantive right which the Legislature by statute had chosen to confer on products liability defendants and that once vested by virtue of the passage of the 10-year period, it could not be removed by the Legislature or this court. In this regard, we recently reiterated: "It has long been the law of Nebraska . . . that the Legislature is free to create and abolish rights so long as no vested right is disturbed." *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 951, 663 N.W.2d 43, 74 (2003).

Givens v. Anchor Packing, 237 Neb. 565, 466 N.W.2d 771 (1991), held that an amendment to § 25-224 could not resurrect an action which the prior version of the statute of repose had already extinguished. *Givens* was decided in 1991, and its holding regarding retroactivity has not evoked a change by the Legislature. We therefore understand that the Legislature has acquiesced in this decision. *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004). We believe that the rationale expressed in *Givens* is sound, and we, therefore, continue to adhere to its holding.

[8] Appellant expresses dissatisfaction with the fact that application of the statute of repose in § 25-224(2) can and, in this case, does prevent what might otherwise be a cause of action from ever arising. To ameliorate this result, appellant urges us to graft a discovery rule onto § 25-224(2) for latent medical condition cases. We are aware that we have determined that the discovery rule is applicable to the statute of limitations found in § 25-224(1). *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984). However, unlike *Condon*, the subsection of § 25-224 at issue in this case is the statute of repose in § 25-224(2), and judicially amending the statute of repose to incorporate discovery would not be prudent. In this regard, it has been stated, and we agree, that "[u]nlike a statute of limitations, a statute of repose is not triggered by the discovery rule." *Carven v. Hickman*, 135 Md. App. 645, 652, 763 A.2d 1207, 1211 (2000). Thus,

> [t]he period of repose gives effect to a policy different from that advanced by a period of limitations; the purpose

> of a statute of repose is to impose a cap on the applicability of the discovery rule so that the outer limit terminates the possibility of liability after a definite period of time, regardless of a potential plaintiff's lack of knowledge of his cause of action.

Serafin v. Seith, 284 Ill. App. 3d 577, 588, 672 N.E.2d 302, 310, 219 Ill. Dec. 794, 802 (1996).

As explained above, § 25-224(2) as it existed from 1978 to 2001, was a substantive provision which the Legislature created and, after the passage of the 10-year period, conferred a substantive right on appellees in this case to not be subjected to liability after 1989 at the latest. We are aware that relief from certain of the consequences of the statute of repose in § 25-224(2) has been accorded by the Legislature by passage of certain amendments. See § 25-224(2)(a)(i) and (ii) and (5). Specifically, the Legislature demonstrated that it can create a discovery exception for a latent disease when it chose to enact § 25-224(5) covering asbestos-related medical conditions. We believe modification of the statute of repose is more properly the province of the Legislature. *Spilker v. City of Lincoln*, 238 Neb. 188, 469 N.W.2d 546 (1991). Accordingly, we decline to impose a discovery rule for latent medical conditions on the statute of repose for products liability actions, and in view of the foregoing, we conclude that the district court did not err when it granted appellees' motions for summary judgment.

CONCLUSION

The district court did not err when it concluded that appellant's action was barred by the applicable statute of repose in § 25-224(2), thus entitling appellees to summary judgment. We, therefore, affirm the district court's order granting summary judgment in favor of appellees and dismissing appellant's case.

AFFIRMED.

HENDRY, C.J., concurs in the result.

IVAN EICHER AND DELORES EICHER ET AL., APPELLEES AND CROSS-APPELLANTS, V. MID AMERICA FINANCIAL INVESTMENT CORPORATION ET AL., APPELLANTS AND CROSS-APPELLEES.

IVAN EICHER AND DELORES EICHER ET AL., APPELLEES, V. MID AMERICA FINANCIAL INVESTMENT CORPORATION ET AL., APPELLANTS.

702 N.W.2d 792

Filed August 12, 2005. Nos. S-03-1257, S-04-1184.

1. **Trial: Joinder.** Whether claims should be joined for purposes of trial is within the discretion of the district court.
2. **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.
3. **Actions: Fraud: Proof.** To recover on a fraudulent misrepresentation claim, one must show (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be relied upon; (5) that the party reasonably did so rely; and (6) that he or she suffered damage as a result.
4. **Contracts: Fraud.** The rule that one who signs a contract is bound by its terms does not apply where the controversy is between the parties and the execution of the instrument was induced by fraud.
5. ____: ____. The doctrine that the carelessness or negligence of a party in signing a writing estops him or her from afterward disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto when the defense is that such writing, by reason of fraud, does not embrace the contract actually made.
6. **Judgments: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
7. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
8. **Conspiracy: Damages.** The gist of a civil conspiracy action is not the conspiracy charged, but the damages the plaintiff claims to have suffered due to the wrongful acts of the defendants.
9. **Conspiracy: Corporations: Pleadings.** To set forth a claim of conspiracy between a corporation and its corporate employees, the petition must allege that the latter are acting outside the scope of their authority or other than in the normal course of their corporate duties.
10. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.

11. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
12. **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.
13. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of res judicata and collateral estoppel is a question of law.
14. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
15. **Judgments: Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
16. **Res Judicata.** The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action. The doctrine rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.
17. **Judgments: Collateral Estoppel.** Under the doctrine of collateral estoppel, or issue preclusion, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.
18. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
19. **Trial: Witnesses: Judgments: Appeal and Error.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. An appellate court will not reweigh the testimony or reevaluate the credibility of the witnesses, but it will review the evidence to determine whether the trial court made findings which are clearly wrong.
20. **Fraud: Damages.** In an action for fraud, a party may recover such damages as will compensate him or her for the loss or injury actually caused by the fraud and will place the defrauded party in the same position as he or she would have been in had the fraud not occurred.
21. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeals from the District Court for Douglas County: PETER C. BATAILLON, Judge. Judgment in No. S-03-1257 affirmed in part and in part reversed, and cause remanded with directions. Appeal in No. S-04-1184 dismissed.

Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellants.

Mark C. Laughlin, Andrea F. Scioli, and Tamara D. Borer, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., and Catherine Mahern, of Creighton Legal Clinic, and D. Milo Mumgaard, of Nebraska Appleseed Center for Law in the Public Interest, for appellees.

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

STEPHAN, J.

These appeals result from a single action in which 13 individual plaintiffs sought damages based upon allegations of fraud, civil conspiracy, unjust enrichment, rescission, and violations of Nebraska's Consumer Protection Act and Uniform Deceptive Trade Practices Act. Plaintiffs claimed that while their homes were in foreclosure, defendants, Mid America Financial Investment Corporation (Mid America), Scott W. Bloemer, and Elaina Hollingshead, told them they would loan them money to save their homes from foreclosure but instead fraudulently obtained title to the homes. Following a bench trial, the district court for Douglas County found in favor of 10 of the 13 plaintiffs and granted relief in the form of rescission, damages, and attorney fees. Defendants below appeal from the court's judgment and separately appeal from a subsequent nunc pro tunc order involving the award of fees. The district court dismissed the claims of plaintiffs William Street and David Welton, who have cross-appealed by filing a notice of appeal of those dismissals. In plaintiff's brief on cross-appeal, a third issue affecting all plaintiffs is addressed. We consolidated the appeals and moved them to our docket on our own motion, pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

I. BACKGROUND

In May 2001, plaintiffs Ivan Eicher and Delores Eicher, Patrick Sweeney and Lois Sweeney, Emmett Gulley, Steven W. Starman, Street, Welton, and Don Novachich filed an action against Mid America, Bloemer, and Hollingshead. Subsequently, Jerry Gills,

Renee Righter, Lori Hill, and Jennifer Frans Griess were joined as additional plaintiffs in the operative third amended petition. Plaintiffs alleged that Bloemer and Hollingshead, acting through Mid America as their alter ego, conducted a fraudulent scheme in which they identified people whose homes were in foreclosure, approached them under the guise of loaning them money to stop the foreclosures, and then deceitfully acquired title to the homes by acquiring warranty deeds. Plaintiffs alleged they were victims of this scheme and prayed for relief, including rescission and reconveyance, damages, and attorney fees. Plaintiffs' action was based on multiple theories of recovery including fraud, civil conspiracy, unjust enrichment, and violations of the Consumer Protection Act (hereinafter CPA), Neb. Rev. Stat. §§ 59-1601 to 59-1622 (Reissue 1998 & Cum. Supp. 2000), and the Uniform Deceptive Trade Practices Act (hereinafter UDTPA), Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 1999).

At a bench trial, plaintiffs testified that Bloemer and Hollingshead, acting on behalf of Mid America, offered to loan them money to stop foreclosure so that defendants could keep their homes, but never disclosed that defendants were actually taking title to the homes. Bloemer and Hollingshead testified to the contrary, asserting that the terms of the transaction were fully explained to each plaintiff and that each plaintiff understood that he or she was conveying title to the home to defendants. During the trial, the district court dismissed the claim of plaintiff Gills without prejudice because he did not appear and could not be located.

Following the bench trial, the district court entered an order, filed May 1, 2003, in which it dismissed the action with respect to plaintiff Street pursuant to a motion for partial summary judgment previously filed on behalf of defendants. In the same order, the court found the testimony of plaintiffs to be credible and the testimony of Bloemer and Hollingshead not credible. The court determined that defendants had engaged in a civil conspiracy to commit fraud and had fraudulently induced plaintiffs to enter into transactions of conveyance which were falsely represented as loans. The court further found that defendants had violated the CPA. It found defendants jointly and severally liable to all remaining plaintiffs except Welton. The court found that although

Welton was induced by the fraudulent actions of defendants to enter into the transaction with Mid America, he did not incur any damages. The court stated in its order that attorney fees were to be awarded under the CPA and scheduled a hearing date to determine the amount of the fees.

On June 17, 2003, the district court entered an order awarding attorney fees to the prevailing plaintiffs. The order made no reference to the CPA, but instead referred to the UDTPA as the basis for the award. After considering the time spent and reasonable hourly charge of plaintiffs' attorneys, the court awarded fees using a multiplier of 1.3 to arrive at a final amount. This resulted in plaintiffs' primary attorneys receiving a fee of $374,224.50, and their other attorneys receiving fees of $1,045.20 and $2,053.70, respectively.

Defendants filed a motion for new trial. Welton and Street filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial. In addition, all plaintiffs filed a motion requesting the district court to clarify its prior orders by making specific findings of fact with respect to their claims under the UDTPA. All plaintiffs also asked the court to clarify that the award of attorney fees was pursuant to both the UDTPA and the CPA. The district court entered an order overruling the motions for new trial and specifically finding that plaintiffs were not entitled to relief under the UDTPA. From that order, defendants perfected a timely appeal and plaintiffs cross-appealed. The appeal and cross-appeal were docketed in this court as case No. S-03-1257.

While the parties were submitting appellate briefs to this court, plaintiffs filed a motion in the district court for an order nunc pro tunc declaring that the award of attorney fees was pursuant to the CPA and that the reference to the UDTPA was a clerical error. The court entered such an order on October 7, 2004, and defendants, who are the appellants herein, filed a timely appeal. That appeal was docketed in this court as case No. S-04-1184 and, as previously noted, consolidated with case No. S-03-1257.

Additional facts relevant to specific assignments of error are included in the analysis.

II. ANALYSIS

1. APPEALS

(a) Severance

[1] In defendants' first assignment of error, they contend that the district court erred in denying a pretrial motion to sever and separately try the claims of the individual plaintiffs. Whether claims should be joined for purposes of trial is within the discretion of the district court. See *Mondelli v. Kendel Homes Corp.*, 262 Neb. 663, 641 N.W.2d 624 (2001) (supplemental opinion). Accordingly, we review the district court's overruling of the motion to sever for abuse of discretion.

Neb. Rev. Stat. § 25-705 (Cum. Supp. 2004) provides in relevant part:

> (1) This section applies when an action involves multiple parties or more than one cause of action.
>
> . . . .
>
> (3) The court may . . . order separate trials or make other orders to prevent delay or prejudice.
>
> . . . .
>
> (5) Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

The relevant joinder statute, Neb. Rev. Stat. § 25-311 (Cum. Supp. 2004), provides:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Defendants contend that the "same transaction, occurrence, or series of transactions or occurrences" requirement of § 25-311 is not met in this case and that the trial court's failure to sever plaintiffs' claims was prejudicial to them.

The record does not reflect either misjoinder or prejudice resulting from denial of the motion to sever. The operative petition alleged and the evidence presented at trial generally demonstrated that each plaintiff asserted the same causes of action against defendants. Each plaintiff alleged that his or her right to relief arose out of the same series of transactions occurring between September 1997 and June 2000, in which defendants told plaintiffs they would loan them money in order to stop the foreclosure of their homes. Plaintiffs generally alleged and testified that Bloemer and Hollingshead never told them they would be selling their homes to Mid America. Plaintiffs alleged and testified that they were told they were signing loan documents and did not realize that defendants were actually presenting them with purchase agreements. Due to the similar nature of all the transactions, joinder of the claims was proper, particularly in a bench trial where there is no concern about jury confusion and it is presumed that the court considered only competent and relevant evidence in rendering its decision. See *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996). Defendants' first assignment of error is without merit.

(b) Pretrial and Trial Procedures

[2] In defendants' second assignment of error, they contend that the district court "erred in its pretrial and trial handling of the case." 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. *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004). We therefore address only that argument in defendants' brief which is specifically directed to this assignment, namely, that the district court's pretrial orders and trial scheduling did not allow defendants sufficient time to prepare for trial. Because a trial judge has broad discretion over the general conduct of a trial, we review this assignment of error for abuse of discretion. See *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991).

As noted, this action was commenced in May 2001. The record reflects that plaintiffs served discovery requests some time prior to August 28 of the same year. In November and again

in December 2001, plaintiffs sought to take the depositions of Bloemer and Hollingshead, but were unsuccessful in obtaining dates on which these defendants would agree to appear for deposition. Defendants first served discovery requests on plaintiffs in December 2001. Plaintiffs responded in part in January 2002.

The district court conducted a hearing on pending discovery issues and other matters on January 4, 2002. At that hearing, counsel for defendants suggested that the depositions could be scheduled in the latter part of January, and the court ordered that they be scheduled by February 15. On January 30, the court scheduled the trial to commence on May 13. The court later clarified for the record that it set the date partly based upon its concern that the nature of the case, which involved foreclosures and evictions, demanded a speedy trial in order to protect the interests involved.

Apparently due to a pending criminal case involving Bloemer and Hollingshead, their depositions were not taken in this case until late April 2002. It appears that no request was made by defendants to depose any of the plaintiffs until April 2002. On May 3, the district court granted defendants' motion for continuance in part and continued the first day of trial to May 15. It scheduled various trial days from May 15 through 23 and from June 17 through 28 and permitted discovery to continue through June 14.

Under case progression standards adopted by this court, trials in nonjury civil cases are to be held within 1 year from the date of filing, although a longer interval may be approved where deemed necessary because of extraordinary eventualities, such as exceptionally complicated discovery. See Neb. Ct. R. of Case Progression Standards (rev. 2000). The trial of this case began exactly 1 year after the initial petition was filed. From our review of the record, we conclude that the district court made reasonable efforts to accommodate the stated needs of the parties for discovery and trial preparation while at the same time insisting that the case be resolved in a timely manner consistent with the standards promulgated by this court. We conclude that the district court did not abuse its discretion in its pretrial rulings regarding case progression or in setting the case for trial.

(c) Fraud

[3] In defendants' third assignment of error, they contend that the district court erred in finding in favor of plaintiffs on their claims that they were fraudulently induced to sell their homes to Mid America. To recover on a fraudulent misrepresentation claim, one must show (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be relied upon; (5) that the party reasonably did so rely; and (6) that he or she suffered damage as a result. *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003). In this case, there was conflicting evidence as to the representations made to each plaintiff in connection with the disputed transactions. The district court made a specific finding that the testimony of the individual plaintiffs was credible and that the testimony of the individual defendants was not. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998); *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997). Thus, we give deference to the district court's findings that plaintiffs were induced to sign documents conveying their property based upon defendants' knowingly false representations that the transactions were loans; that the false representations were made with the intent that plaintiffs would rely upon them; and that to their detriment, plaintiffs did in fact rely on the false representations.

Although defendants do not directly challenge these factual findings on appeal, they argue that each plaintiff signed contractual documents which "unmistakably disclose the nature of the transaction as a 'sale' rather than a 'loan.' " Brief for appellants at 22. Defendants contend that these written contracts were binding, based upon the rule that "[o]ne who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument." See *Bock v. Bank of Bellevue*, 230 Neb. 908, 916, 434 N.W.2d 310, 316 (1989). They

further contend that because plaintiffs had the contract documents available for review, plaintiffs could not have reasonably relied on any verbal misrepresentation. See *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996).

[4,5] The general rule that one who fails to read a contract cannot avoid the effect of signing it applies only in the absence of fraud. See, *Mayer v. Howard*, 220 Neb. 328, 370 N.W.2d 93 (1985); *Day v. Kolar*, 216 Neb. 47, 341 N.W.2d 598 (1983). Restated, the rule that one who signs a contract is bound by its terms

> does not apply where the controversy is between the parties and the execution of the instrument was induced by fraud.
>
> The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing is not applicable in a suit thereon between the original parties thereto when the defense is that such writing, by reason of fraud, does not embrace the contract actually made.

West v. Wegner, 172 Neb. 692, 694, 111 N.W.2d 449, 451 (1961). Because the district court specifically found that each of the plaintiffs was fraudulently induced to sign what were misrepresented as loan documents, the general rule binding a party to a signed contract does not apply.

Moreover, defendants' reliance on *Schuelke, supra*, is misplaced. In that case, a buyer of a business contended that the seller made certain fraudulent misrepresentations regarding the anticipated profitability of the business and that he was therefore entitled to rescission. However, the record reflected that the seller stated that his financial projections were approximations and urged the buyer, during negotiations, to have the information verified. The buyer did not do so. Under these circumstances, we determined that there was no fraudulent intent or reasonable reliance. Defendants attempt to analogize the present case to *Schuelke* by contending that because plaintiffs had access to the contract documents, any reliance on a representation made by defendants was not reasonable. Clearly, however, the basis of plaintiffs' action in this matter is that they were induced to sign the contract documents based upon assertions that the documents contained merely loan terms, when in fact

they constituted conveyances. Under these circumstances, the rationale of *Schuelke* is entirely inapplicable.

Defendants also argue that the fraud claims should fail because their misrepresentations were not shown to have proximately caused plaintiffs' claimed damages. Specifically, they contend that the undisputed evidence established that even without the transaction with Mid America, all of the plaintiffs would have lost their homes in foreclosure and that in such an action, plaintiffs would have received no distribution of the equity in their homes. Plaintiffs generally testified that although their options were limited, they would have considered other alternatives to save their homes from foreclosure if the opportunity with Mid America had not presented itself. We conclude that this evidence was sufficient to establish that the damages claimed were proximately caused by defendants' conduct. Defendants' third assignment of error is without merit.

(d) Civil Conspiracy

[6] In defendants' fourth assignment of error, they argue that the district court erred in finding in favor of plaintiffs with respect to their allegations of civil conspiracy. When reviewing the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

[7,8] A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997); *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, 247 Neb. 547, 529 N.W.2d 33 (1995). The gist of a civil conspiracy action is not the conspiracy charged, but the damages the plaintiff claims to have suffered due to the wrongful acts of the defendants. *Wiekhorst Bros. Excav. & Equip., supra.*

[9] To set forth a claim of conspiracy between a corporation and its corporate employees, the petition must allege that the latter are acting outside the scope of their authority or other than in the normal course of their corporate duties. *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 291 N.W.2d 230 (1980). The

operative petition alleged that Bloemer and Hollingshead formed and used Mid America, a Nebraska corporation, as a "conduit . . . to carry out the fraudulent scheme." Plaintiffs further alleged

> a unity of interest in ownership between Bloemer and Hollingshed [sic] and Mid America such that the individuality and separateness of Bloemer and Hollingshed [sic] and Mid America did not and do not exist and Mid America was and is the alter ego of Bloemer and Hollingshed [sic] and merely a conduit through which Bloemer and Hollingshed [sic] engaged in the herein scheme to defraud. Adherence to the fiction of the separate existence of Mid America would sanction fraud and promote injustice.

These allegations were sufficient to set forth a claim of conspiracy among all three defendants under the rule stated in *Dixon, supra.*

The district court found that defendants "were involved in a civil conspiracy to defraud each of the Plaintiffs," resulting in their joint and several liability. Defendants challenge this finding, arguing that the evidence did not establish that Bloemer and Hollingshead acted outside the scope of their authority with the corporation. Viewing the evidence in a light most favorable to plaintiffs, we conclude that this argument is without merit. The record supports the allegation that the individual defendants acted outside any legitimate scope of corporate employment by utilizing the corporate entity as part of a scheme to defraud third parties.

(e) Attorney Fees

[10,11] In defendants' fifth and final assignment of error, they argue that the trial court erred in awarding attorney fees to plaintiffs. As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005); *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002). When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *In re Estate of Stull*, 261 Neb. 319, 622 N.W.2d 886 (2001); *Barnett*

v. Peters, 254 Neb. 74, 574 N.W.2d 487 (1998). Defendants challenge both the statutory basis and the amount of the attorney fee award.

(i) Statutory basis

In its initial order entered following trial, the district court held that defendants' conduct violated the CPA as to each plaintiff who was awarded damages and that "[d]amages are awarded under the [CPA] in the form of attorney fees" in an amount to be determined at a later date. However, in its order following the subsequent hearing, the court referred to a provision in the UDTPA which permits an award of attorney fees to a prevailing party. This order triggered the confusing sequence of events which ultimately generated subsequent orders and the consolidated appeal docketed as case No. S-04-1184.

The district court's initial order after trial included a specific determination that the prevailing plaintiffs were entitled to an award of attorney fees under the CPA, which specifically permits such an award. See § 59-1609. The only issue left open was the amount of the fees to be awarded. Accordingly, we treat the award as having been made pursuant to § 59-1609 and reject defendants' argument that there is no statutory basis for the award. Our disposition of this issue eliminates any need to reach the issues raised in case No. S-04-1184, and renders such issues moot.

(ii) Amount

With respect to the amount of the fee award, defendants argue that the "lodestar multiplier" utilized by the district court is not recognized in Nebraska and that our law requires the district court to consider the nature of the proceeding, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. See, *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001); *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873 (1998).

It is true that this court has never specifically approved the "lodestar multiplier" approach to calculating court-ordered attorney fees. However, defendants' brief does not include any argument as to why we should not do so, and plaintiffs provide no reasons why we should. Accordingly, we apply the standards articulated in *In re Guardianship & Conservatorship of Donley, supra*, and *Schirber, supra*, in our review of whether the fee award constitutes an abuse of discretion.

At the hearing on attorney fees, the court received affidavits offered on behalf of plaintiffs which generally detailed the amounts of time their attorneys devoted to the case, as well as expenses they incurred. Also received was a contingency fee agreement with one of the plaintiffs which was represented as being similar to that entered into with all other plaintiffs. Plaintiffs also requested that the court take judicial notice of trial testimony related to each plaintiff's ability to pay a fee and the risk undertaken in the representation.

The affidavit of plaintiffs' lead counsel reflected 2,589 hours of billable time by various persons in his law firm for a total of $294,907.50 in fees before application of any multiplier. In its fee award, the district court reduced this amount to $287,865 before applying a multiplier of 1.3 to arrive at a fee award of $374,224.50. Using the same method of calculation, the court awarded fees of $1,045.20 and $2,053.70 to two other attorneys who had represented plaintiffs in the case.

The time and labor devoted by attorneys to the case and the customary charges for such services are two of the factors to be considered in arriving at a fee award under our case law. Defendants take no exception to these factors, as reflected in the affidavits and the district court's calculations, and we conclude that they are reasonable. Thus, the principal issue is whether the district court abused its discretion in awarding a fee which was 30 percent greater than the product of the hours devoted to the case multiplied by customary hourly charges. To resolve that issue, we consider the other factors which may form the basis of a court-ordered attorney fee under existing Nebraska law, which include the nature of the litigation, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence

exhibited, the result of the suit, and the character and standing of the attorney. See, *In re Guardianship & Conservatorship of Donley, supra*; *Schirber, supra.*

The record reflects that plaintiffs' attorneys were members of the Nebraska bar and experienced in civil litigation. This case involved multiple plaintiffs, three defendants, and multiple theories of recovery. At stake was title to the homes of the plaintiffs, many of whom were persons of modest income and means. The financial responsibility assumed by plaintiffs' counsel was substantial. Lead counsel represented each plaintiff on a "fully-contingent basis," advancing all costs. Each plaintiff agreed to pay the greater of the total fees at the standard hourly rates or 33⅓ percent of the amounts recovered if the court awarded attorney fees. Plaintiffs' lead counsel averred that none of the plaintiffs had the financial resources to pay attorney fees and costs if they had been unsuccessful in the litigation. Although the legal issues in the case were not particularly complex, there was a significant amount of evidentiary material presented to the district court in an organized and cogent manner. The record indicates that plaintiffs' counsel were diligent and effective in presenting plaintiffs' case, and they obtained a favorable result for the successful plaintiffs. Based upon these factors, we conclude that the district court did not abuse its discretion in awarding attorney fees to plaintiffs' counsel in the amounts indicated above.

2. Cross-Appeal

(a) William Street

Prior to trial, defendants filed a motion for partial summary judgment with respect to the claim of Street. A hearing on the motion was held, at which time evidence was received in support of and in resistance to the motion. For reasons which are not entirely clear from the record, the court did not rule on the motion prior to trial. After the trial was concluded, but before the court announced its decision, the motion was renewed and another hearing was held, at which time the court received additional evidence on the motion, including Street's trial testimony. In its subsequent order setting forth its decision following trial, the district court sustained the motion for partial summary judgment after determining that Street's claim was barred by res

judicata and collateral estoppel, because the facts and issues previously litigated in Street's bankruptcy were "identical to the facts and issues of this case." Street cross-appeals from the order granting partial summary judgment which resulted in the dismissal of his claim.

[12-14] 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. *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005); *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005). The applicability of the doctrines of res judicata and collateral estoppel is a question of law. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003); *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002). On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Billingsley, supra.*

The record reflects that in 1998, Street and his wife filed an adversary proceeding complaint against Mid America in their chapter 13 bankruptcy action pending in the U.S. Bankruptcy Court for the District of Nebraska. The complaint generally alleged that the transfer of ownership of the Streets' residence to Mid America was for "less than a reasonable [sic] equivalent value for the property transferred" and was thus fraudulent pursuant to 11 U.S.C. § 548 (2000) and should be avoided. Mid America moved for summary judgment, arguing that the Streets lacked standing under 11 U.S.C. § 522(h) (2000) to bring the action. In support of its motion, Mid America offered the affidavit of Hollingshead, in which she averred that the Streets agreed to sell their property for the total sum, including assumed mortgages, of $48,468.48. In opposition, Street offered his affidavit in which he averred that he did not "realize that he may have transferred the real property to Mid-America" and that Mid America "told him that they would stop the foreclosure[, that] the payments would be made to Mid-America[, and] that the payment due in June of 1998 would be paid at the end of the loan." Street also averred that "[a]t the time of the sale [he was] handed

paperwork and told to sign it" and that he "had no choice regarding signing the paperwork nor was the paperwork explained to him." Street's wife offered a similar affidavit.

Pursuant to 11 U.S.C. § 522(h), a debtor in a bankruptcy proceeding may avoid a transfer of property if, inter alia, the trustee could avoid the transfer under 11 U.S.C. § 548 but declines to do so. See, generally, *In re Merrifield*, 214 B.R. 362 (B.A.P. 8th Cir. 1997). A trustee may avoid a transfer under 11 U.S.C. § 548 if the debtor "voluntarily or involuntarily" received "less than a reasonably equivalent value in exchange for such transfer or obligation" and meets certain other criteria. Courts have interpreted 11 U.S.C. § 522 as imposing only limited avoidance powers on debtors, as the code generally entrusts such powers to the bankruptcy trustee. See *In re Merrifield, supra*. Specifically, a five-part test has been utilized to determine whether a debtor may personally exercise avoidance powers under § 522(h). *In re Merrifeld, supra*. Relevant to this case is the initial requirement that the debtor must demonstrate that the transfer of property was "involuntary." See *id.* at 365. If such a showing is lacking, the debtor lacks standing to bring the action. *Id.* In Street's bankruptcy proceeding, the bankruptcy court entered an order awarding summary judgment in favor of Mid America. The court determined that Mid America had made a prima facie showing that the transfer was voluntary, and that

> [t]he affidavits submitted by the [Streets] do not contain any assertions of facts from which the trier of fact could, if a trial was necessary, determine that the execution and delivery of the warranty deed was anything other than a voluntary action by the [Streets]. Therefore, the [Streets] do not meet the Merrifield test and they do not have standing to bring this action.

[15,16] The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002); *Lincoln Lumber Co. v.*

Fowler, 248 Neb. 221, 533 N.W.2d 898 (1995). The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action. *Lincoln Lumber Co., supra*. The doctrine rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause. *Id.*

In order to constitute a bar to a subsequent action under the doctrine of res judicata, a judgment in a prior action must be on the merits in that action. See, *Billingsley, supra*; *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001). A determination by a federal court that a party lacks standing to bring an action "is not 'on the merits' of the underlying substantive claim" for purposes of claim preclusion. *McCarney v. Ford Motor Co.*, 657 F.2d 230, 234 (8th Cir. 1981). Here, the bankruptcy court determined that Street lacked standing under federal bankruptcy law, and it therefore did not reach the merits of his fraudulent conveyance claim against Mid America. Because there was no prior judgment on the merits, we conclude that Street's claim in this action is not barred by the doctrine of res judicata.

[17,18] Under the doctrine of collateral estoppel, or issue preclusion, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001); *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994). See, also, *Billingsley, supra*. There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Woodward, supra*. In determining whether issues in a prior and subsequent action are "identical," we are guided by the following test:

> "A former verdict and judgment are conclusive only as to the facts directly in issue, and do not extend to facts which may be in controversy, but which rest on evidence and are merely collateral. It must appear that the matter set up as a bar was in issue in the former case. The test as to whether

> the former judgment is a bar generally is, whether or not the same evidence will sustain both the present and the former action." . . . "[Where] different proof is required, a judgment in . . . [the former action] is no bar to [the subsequent action.]"

(Citations omitted.) *Suhr v. City of Scribner*, 207 Neb. 24, 27-28, 295 N.W.2d 302, 304 (1980). See, also, *In re Interest of Marcus W. et al.*, 11 Neb. App. 313, 649 N.W.2d 899 (2002).

The issue addressed by the bankruptcy court was whether Street's transfer of his property to Mid America was involuntary. Although some of the evidence related to whether there was collusion involved, the issue of whether the transfer was involuntary for purposes of standing under the federal Bankruptcy Act does not equate with the issue of whether the transfer was induced by fraudulent representations on the part of Mid America, Bloemer, or Hollingshead. That precise issue was neither presented nor resolved in the bankruptcy litigation. Accordingly, the doctrine of collateral estoppel is inapplicable. Because Street's claim in this case was not barred by the judgment in the prior bankruptcy action under the doctrines of either res judicata or collateral estoppel, the district court erred in granting the motion for partial summary judgment dismissing his claim.

(b) David Welton

The district court made the following findings and determination with respect to the claim of Welton:

> Although the Court finds that David Welton entered into the transaction by fraud of the Defendants, the Court finds that . . . Welton did not incur any damages by the fraudulent actions of the Defendants. After the mortgage foreclosure was stopped by Mid America in April of 1999 for approximately $2,000.00, Plaintiff resided in the residence and paid Defendant approximately $500.00 per month. In March of 2001, Plaintiff moved out of this residence and moved into the residence of his mother. Soon thereafter, Plaintiff quit making payments to Mid America and then Mid America quit making the mortgage payments to the mortgage company, WMC of California. The mortgage company then proceeded with foreclosure. The Plaintiff was notified of the

> foreclosure and the foreclosure sale was completed by the mortgage company. The Plaintiff had . . . personal property in the residence at the time of the foreclosure, which he did not recover. Any responsibility for that property would not have been with Defendants. As such, Plaintiff incurred no damages in this matter and judgment is not awarded to him as a result of the fraudulent actions of the Defendants.

[19] In his cross-appeal, Welton contends that the district court erred in determining that he failed to prove damages. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. An appellate court will not reweigh the testimony or reevaluate the credibility of the witnesses, but it will review the evidence to determine whether the trial court made findings which are clearly wrong. *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002). The issue presented here is whether the district court was clearly wrong in determining that Welton had not incurred damages as a result of defendants' fraudulent conduct.

[20] In an action for fraud, a party may recover such damages as will compensate him or her for the loss or injury actually caused by the fraud and will place the defrauded party in the same position as he or she would have been in had the fraud not occurred. *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). Damages claimed by Welton in this action included the loss of title to his home and his equity therein. The record reflects that immediately prior to the transaction with Mid America, Welton's home had a fair market value of between $80,000 and $89,000 and that the mortgage balance was between $41,000 and $46,000.

In *Burling v. Allvord*, 77 Neb. 861, 864, 110 N.W. 683, 684 (1906), an action for damages alleging fraudulent representations with respect to title of real property, this court held that "[t]he alleged wrong was fully perpetrated when [the plaintiff buyer] parted with his money on the strength of such representations." Here, Welton lost his title and equity in April 1999 when he deeded his home to Mid America on the basis of fraudulent misrepresentations that the transaction constituted a loan. After that point, Mid America characterized the monthly payments

which it received from Welton until August 2001 as "rental" payments. Welton's right to recover his equity lost in the April 1999 transaction is not affected by the fact that he subsequently stopped making "rental" payments to Mid America pursuant to the fraudulently induced transaction or by the mortgage foreclosure which occurred after Mid America had fraudulently acquired title. Likewise, Welton is entitled to recover any payments made to Mid America to the extent such payments exceed the amounts which Mid America paid to Welton's mortgage company prior to foreclosure. We conclude that the district court was clearly wrong in determining that Welton did not prove damages resulting from the fraud of defendants, and we remand the cause for determination of the specific amount of damages attributable to Welton's loss of equity and payments made to Mid America.

(c) UDTPA

[21] Plaintiffs cross-appeal from the determination by the district court that there was no private right of action under the UDTPA. Because we have determined that plaintiffs are entitled to recover their damages and attorney fees under their alternative theories of fraud and violation of the CPA, we need not reach this issue. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

III. CONCLUSION

In case No. S-03-1257, we affirm that portion of the judgment of the district court in favor of the Eichers, the Sweeneys, Gulley, Starman, Novachich, Righter, Hill, and Griess against defendants. Likewise, we affirm the award of attorney fees by the district court. We reverse that portion of the judgment of the district court which dismissed the claim of Street and remand that portion of the cause to the district court with directions to adjudicate Street's claim on its merit. We also reverse that portion of the judgment of the district court which declined to award damages to Welton, and remand that portion of the cause to the district court with directions to award damages to Welton in an amount which it shall determine from the existing record.

For the reasons discussed above, we dismiss case No. S-04-1184 as moot.

JUDGMENT IN NO. S-03-1257 AFFIRMED IN PART AND IN PART REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.
APPEAL IN NO. S-04-1184 DISMISSED.

IN RE PETITION FOR REINSTATEMENT OF THE LICENSE OF HARVEY J. NAVRKAL, M.D., TO PRACTICE MEDICINE AND SURGERY.

HARVEY J. NAVRKAL, M.D., APPELLEE, V. STATE OF NEBRASKA ON BEHALF OF THE NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES REGULATION AND LICENSURE AND THE NEBRASKA CHIEF MEDICAL OFFICER, APPELLANT.

703 N.W.2d 247

Filed September 9, 2005. No. S-04-808.

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. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
5. **Statutes: Words and Phrases.** Generally, the word "may," when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
6. **Public Health and Welfare.** There exists no vested right to practice medicine; rather, it is a conditional right subordinate to the police power of the State to protect and preserve the public health.
7. **Courts: Appeal and Error.** Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. In the absence of plain error, where an issue is raised for the first time in the

higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with directions.

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

Charles M. Pallesen, Jr., of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Harvey J. Navrkal, M.D., seeks reinstatement of his license to practice medicine and surgery, which was revoked in 1997. The State of Nebraska on behalf of the Department of Health and Human Services Regulation and Licensure and the Nebraska chief medical officer appeals the decision of the district court for Lancaster County, which ordered that Navrkal's license be reinstated. We reverse, and remand with directions.

BACKGROUND

EARLY 1990'S

Navrkal graduated from the University of Nebraska Medical Center in 1990. Following his graduation, he entered a family practice residency program in Lincoln, Nebraska. He was suspended from that program in July 1991 to undergo treatment for alcohol dependency and was reinstated in September upon completing his treatment. One month later, he suffered a relapse and resigned from the program.

Navrkal went on to become a licensed physician in Colorado in April 1994. Because of his past issues with alcohol and depression, his Colorado license was subject to a 5-year probationary term and numerous terms and conditions designed to address his alcohol problems. Just 2 months after Navrkal received the license, it was suspended. The Colorado Board of Medical Examiners suspended the license because Navrkal had been suspended from his residency program in Colorado for

"significant attendance lapses and marginal performance" and also for missing two urine tests required under the terms of his license. His Colorado license is still suspended today.

Nebraska Licensure and Revocation

Navrkal applied for a medical license in Nebraska in 1996. In letters to the then Nebraska Department of Health Professional and Occupational Licensure Division, Navrkal informed it that he had successfully completed a treatment program for alcoholism and had been sober for 2 years. He also wrote that he took full responsibility for his past lapses and was agreeable to any reasonable stipulations on his license. His application was also supported by several letters of recommendation.

On April 4, 1996, the Nebraska Board of Examiners in Medicine and Surgery (board) granted a license to Navrkal subject to a 5-year probationary period. Among the terms and conditions attached to his license, Navrkal was required to abstain from the consumption of alcohol and submit a practice plan for approval by the board. The board subsequently approved a practice plan that permitted Navrkal to practice at the Douglas County Hospital in Omaha, Nebraska.

Despite having been approved to practice medicine only at the Douglas County Hospital, Navrkal also began practicing occasionally at the Schuyler Memorial Hospital in Schuyler, Nebraska. Navrkal claimed that he erroneously thought he had been approved to practice in Schuyler. Navrkal "moonlighted" at the hospital in Schuyler without authorization for approximately 1 year.

While working at the Douglas County Hospital in early 1997, Navrkal met T.M., a female patient in the hospital's psychiatric ward. The details of Navrkal's relationship with T.M. were set forth in the State of Nebraska's petition to revoke Navrkal's license. Navrkal did not contest any of the following allegations from that petition:

> 22. Patient TM is a 27 year old female with a ninth grade education who was admitted to the Douglas County Hospital on January 11, 1997, for major depression with suicidal ideation and panic disorder. She was also treated at the Douglas County Hospital for drug and alcohol

dependency prior to her discharge to the Hastings Regional Center on February 7, 1997 for another month of chemical dependency treatment.

23. [Navrkal's] responsibilities for treating Patient TM at the Douglas County Hospital included screening and assessing her medical condition, collaborating with the Advanced Registered Nurse Practitioner who also treated Patient TM's medical condition, and medical follow-up as needed or indicated for Patient TM.

24. [Navrkal] was notified of Patient TM's admission to Douglas County Hospital on the afternoon of January 11, 1997. [Navrkal] directed that Patient TM's initial medical history and physical be performed by the Advanced Registered Nurse Practitioner for whom [Navrkal] was the designated collaborating physician.

25. [Navrkal] made and/or annotated treatment orders for Patient TM on at least five occasions while she was a patient in the Douglas County Hospital. The five occasions included [Navrkal's] documentation of the following matters on "Physician's Order/Progress Notes" of Patient TM's medical records: Patient TM's history of abnormal PAP smears, scheduling for pelvic and PAP smear in the hospital's clinic for which [Navrkal] was the Medical Director, prescribing medications on separate occasions, examining Patient TM after her complaint of lower left quadrant pain, discussing results of PAP smear, and treating Patient TM's complaint of sinus congestion.

26. [Navrkal] regularly visited and communicated with Patient TM while she was a patient at Douglas County Hospital.

27. Several of the nursing and professional staff at Douglas County Hospital warned [Navrkal] against having personal involvement with patients in the psychiatric unit, specifically including Patient TM after observing [Navrkal's] interactions with Patient TM. [Navrkal] ignored the warnings.

28. Patient TM was transferred directly from the Douglas County Hospital to the Hastings Regional Center on February 8, 1997.

29. Patient TM was a patient in the Hastings Regional Center from February 8, 1997, through March 7, 1997, when she was discharged.

30. During the time Patient TM was a patient in the Hastings Regional Center, [Navrkal] regularly phoned Patient TM.

31. During the time Patient TM was a patient in the Hastings Regional Center, [Navrkal] sent her flowers.

32. During the time Patient TM was a patient in the Hastings Regional Center, [Navrkal] engaged in written correspondence of a romantic nature with Patient TM.

. . . .

35. Patient TM responded by sending numerous letters to [Navrkal]. The letters became more sexually explicit as time moved toward her anticipated discharge from the Hastings Regional Center, including references to a rendezvous with [Navrkal] upon Patient TM's discharge.

36. On March 7, 1997, Patient TM was discharged from the Hastings Regional Center.

37. On March 7, 1997, [Navrkal] picked Patient TM up at a prearranged meeting location.

38. After picking up Patient TM, [Navrkal] drove straight to a motel in Schuyler, Nebraska.

39. [Navrkal] registered and paid for a motel room for two people in his name. [Navrkal] and Patient TM stayed at the motel the entire weekend of March 7 through 10, 1997.

. . . .

41. [Navrkal] and Patient TM had sexual relations in the motel at various times during the weekend.

42. [Navrkal] also worked as a physician and was on call at the Schuyler Memorial Hospital the same weekend.

43. When Patient TM was discharged from the Hastings Regional Center, her discharge treatment recommendations included the recommendation that she contact a specific psychiatrist who had treated Patient TM at the Douglas County Hospital.

44. After Patient TM's discharge from the Douglas County Hospital [sic], Patient TM told [Navrkal] of Patient TM's desire to pursue out-patient treatment with

the psychiatrist at the Douglas County Hospital. [Navrkal] told Patient TM that she couldn't see this particular psychiatrist for aftercare because of [Navrkal's] sexual relationship with Patient TM and [Navrkal's] employment at the Douglas County Hospital. [Navrkal] advised Patient TM to go elsewhere for out-patient treatment.

45. The psychiatrist at Douglas County Hospital subsequently had to advise Patient TM, when she contacted him for treatment, that he could not treat her because of Patient TM's personal involvement with [Navrkal], who was an employee of the same hospital. The psychiatrist referred her to another hospital for out-patient treatment.

46. On April 15, 1997, [Navrkal] was placed upon a leave of absence, pending further investigation, by the Douglas County Hospital when supervisory staff became aware of [Navrkal's] correspondence with Patient TM.

47. The day [Navrkal] was placed on a leave of absence, he called Patient TM. While the son of a cardiologist was listening in on the phone conversation, with the consent of Patient TM, [Navrkal] made comments such as the following to Patient TM:

"You can't tell anyone that we had relations - promise me! Can you promise me?"

"You have to tell them that we had no relations, you have to tell them that you were unstable and that I kept asking you to quit sending them, you have to tell them that or I will lose my license and that can't happen."

"We need to get our stories straight."

48. Douglas County Hospital, at all times relevant herein, had a written hospital policy that stated, in part, as follows:

"Personnel will not be personally involved with any patient during the patient's hospitalization . . . at Douglas County Hospital and for a period of 6 months following discharge, unless the relationship existed prior to hospitalization/residency or is part of the patient's written care plan."

[Navrkal] would have been made aware of the policy during his orientation as a hospital employee in 1996.

49. On or about April 24, 1997, [Navrkal] resigned his position with Douglas County Hospital.

50. At approximately the same time [Navrkal] resigned his position, he went to the trailer where Patient TM was residing and entered the trailer without being invited. While Patient TM was hiding in a closet, [Navrkal] went through drawers and other areas of the trailer. Two witnesses, in addition to Patient TM, caught [Navrkal] in the act of searching Patient TM's trailer.

51. [Navrkal] was observed consuming beer, by persons other than Patient TM, from March through April, 1997.

52. Patient TM, upon discharge from chemical dependency treatment at the Hastings Regional Center, was also taken by [Navrkal] to bars in the town of Schuyler, Nebraska during the same weekend of March 7-10, 1997. Patient TM observed [Navrkal] drinking beer.

53. [Navrkal] has been interviewed by an investigator for the Department of Health and Human Services Regulation and Licensure concerning the above events.

54. [Navrkal] has admitted to the investigator that he sent the previously alleged written correspondence to Patient TM while she was a patient in the Hastings Regional Center, that he sent her [a] stuffed animal, that he called her, that he picked her up, and that they stayed in the same motel room in Schuyler on the weekend of March 7-10, 1997. However, [Navrkal] denied having any sexual relations with Patient TM and explained that he and Patient TM had just been good friends.

55. [Navrkal] lied to the Department's investigator when he denied having sexual relations with Patient TM.

As mentioned, the State filed a petition for disciplinary action against Navrkal on June 27, 1997. The petition sought to revoke Navrkal's medical license because of his relationship with T.M., his consumption of alcohol in violation of the terms of his probationary license, and his practicing medicine in Schuyler without approval. On October 17, 1997, the chief medical officer approved an agreement between Navrkal and the State that resulted in the revocation of his license. Under the terms of the revocation, Navrkal could not seek reinstatement of his license for 2 years. The terms of the revocation also stated that "any future reinstatement of [Navrkal's] license is

completely discretionary and that he has received no promises or assurances that his license will be reinstated."

Navrkal was 34 years old in 1997.

POSTREVOCATION

Although he was eligible to apply for reinstatement in 1999, Navrkal testified that he did not apply at that time because he "wasn't ready. I was still struggling with the depression and I'd had a relapse of alcohol abuse." That year, he was arrested in Texas for driving under the influence. During the stop, Navrkal refused to take a breath test when the arresting officer did not agree to release him if such a test "was negative." Navrkal eventually pled no contest to a charge of reckless driving, for which he was placed on 1 year's probation, received a suspended sentence of 30 days' imprisonment, was fined $200, and was ordered to complete 100 hours of community service.

Navrkal earned a juris doctor degree from the University of Texas School of Law in 2000 and a master of laws degree from the University of Houston Law Center in 2002. Since 1997, he has earned 324 credit hours of continuing medical education and has authored more than a dozen papers and presentations concerning medical legal issues. At the time of the hearing before the board in this case, Navrkal was employed with Medical Law Associates, where he participated in medical case reviews involving medical legal issues. He had applied to take the Texas bar examination in July 2003, his second attempt at passing the examination. Navrkal was also nearing completion of his thesis for a master's degree in public health at the University of Texas Health Science Center. Navrkal was engaged to be married in October 2003.

Since 1997, Navrkal has addressed his alcohol and depression issues in several ways. He began seeing a psychiatrist and a psychologist. The record contains a letter from Dr. Edgar Nace, a psychiatrist Navrkal met regularly with from October 1997 to September 1998. Nace met Navrkal again in February 2003 to review Navrkal's progress over the prior few years. Nace had the following to say about Navrkal:

> Dr. Navrkal has entered into a sustained period of recovery from alcohol dependence. This is documented through the Travis County Medical Society Physician's Health

> Program as well as through his educational and work record since he moved to Texas. He remains committed to 12-Step programs and carries a very good prognosis.
>
> Dr. Navrkal also has shown full understanding of the error he made years ago regarding an intimate relationship with a patient. This was clearly an alcohol abuse related incident. This was a one-time occurrence in Dr. Navrkal's career and there is no reason to expect that this behavior would be repeated. This issue has been dealt with in Dr. Navrkal's therapy with me. . . . Further, Dr. Navrkal has experienced considerable remorse and regret over this issue of judgment which occurred early in his career. I have many years of experience treating physicians with addictive and exploitive behaviors through my role as committee member of [the] Texas Medical Association Physician Health Committee. Dr. Navrkal does not fit a profile of physicians who are likely to engage in repetitive exploitive behaviors.
>
> There is no reason why Dr. Navrkal could not return to the practice of medicine. He is committed to fulfilling his ambition to be a primary care physician in spite of the fact that he has demonstrated considerable accomplishments in other academic areas.

Navrkal has also participated in a monitoring program and a voluntary drug screening program through the Texas Medical Association. At the time of the hearing before the board, Navrkal had been sober for 3 years, 9 months. He has been actively involved in International Doctors of Alcoholics Anonymous meetings. In addition to the letter from Nace, Navrkal's application was accompanied by numerous letters of recommendation from doctors, lawyers, the pastor of his church, and others he has worked with.

At the time of the board hearing, Navrkal had been accepted into two residency programs: one at the University of Massachusetts and the other at Louisiana State University. His participation in either program was subject to having his Nebraska license reinstated. Navrkal testified that if his Nebraska license were to be reinstated, he would "probably" move to Massachusetts or Louisiana and enter into one of those

two programs. Navrkal testified that physicians' health rehabilitation committees in Massachusetts and Louisiana had indicated their willingness to work with and support Navrkal should he relocate to either of those states.

Reinstatement Proceedings

On November 6, 2002, Navrkal filed a petition for reinstatement of his medical license. A hearing was held before the board on June 6, 2003. During the hearing, evidence was received that established the facts recited above. While testifying, Navrkal repeatedly said that he took full responsibility for his past actions. In a written personal statement, Navrkal wrote:

> Since leaving Nebraska, there has not been a single day go by where I have not felt regret for the immaturity, irresponsibility, un-professionalism and inappropriate behavior I exhibited in the past. Though in large part due to alcohol abuse, I do not wish to use that as an excuse now.
>
> . . . .
>
> My primary desire has always been that of a doctor. Not any physician, but one whom is held in high esteem by the profession and the community. With all my experiences, both the negative and positive experiences, I feel I have a lot to add to the profession. I worked hard to achieve my medical education. I hope and pray the Nebraska Medical Board will work with me to achieve my primary desire.

The board recommended, by a unanimous vote, to reinstate Navrkal's license with numerous terms, conditions, and restrictions. The board forwarded its recommendation to the chief medical officer. The chief medical officer rejected the recommendation of the board and denied reinstatement of Navrkal's license. The chief medical officer stated:

> The record and evidence presented at the hearing shows Dr. Navrkal's failure to take advantage of the multiple opportunities given him; shows an insufficient commitment, effort and sustained attempts on the part of Dr. Navrkal to reform his behavior; and inadequate evidence of sustained sobriety to afford the public the protection to which it is entitled, and to justify the trust that Nebraska licensure entails.

> . . . The recommendations of the Board are inadequate to appropriately monitor the licensee in order to afford the public protection, particularly if Dr. Navrkal will be absent from this state.

Navrkal filed a petition for review of the chief medical officer's decision in the district court pursuant to the Administrative Procedure Act (APA). The court reversed the chief medical officer's decision and ordered that Navrkal's license be reinstated. The court reached that conclusion after first determining that Navrkal had the burden of proving by the preponderance of evidence that his license should be reinstated. The court then found that Navrkal had proved, not merely by a preponderance but by clear and convincing evidence, that his license should be reinstated. The State filed this timely appeal, and we granted its petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred in (1) concluding that a medical license is to be reinstated after discipline revocation when the applicant satisfies a burden of proof evidentiary standard; (2) failing to clearly or accurately determine the elements of proof which must be established for reinstatement; (3) concluding that if an applicant must satisfy an evidentiary standard, the applicable standard is preponderance of the evidence; (4) disregarding the chief medical officer's finding and conclusion that the board's probation requirements were inadequate to monitor Navrkal; (5) finding that Navrkal had an alcohol relapse when he was arrested for driving under the influence in 1997, rather than 1999, and had no law enforcement contacts after 1997; and (6) reversing the chief medical officer's decision.

STANDARD OF REVIEW

[1-4] 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. *Lein v. Nesbitt*, 269 Neb. 109, 690 N.W.2d 799 (2005). 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 evidence, and is not arbitrary, capricious, or unreasonable. *Id.* 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. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

ANALYSIS

Licenses to practice medicine and surgery are issued by the Nebraska Department of Health and Human Services Regulation and Licensure (hereinafter department) under the provisions of the Uniform Licensing Law, Neb. Rev. Stat. § 71-101 et seq. (Reissue 1996 & Cum. Supp. 2002). The Uniform Licensing Law provides for the disciplinary revocation of licenses, § 71-147, as well as the reinstatement of licenses previously revoked, § 71-161.04(2).

A petition for reinstatement is first considered by the board. § 71-161.06. The board makes a recommendation to the director of the department regarding reinstatement, § 71-161.07(1), although the duties of the director may be performed, as in this case, by the chief medical officer. See § 71-155.01 and Neb. Rev. Stat. § 81-3201(2) (Supp. 2003). Upon receiving an affirmative recommendation from the board, an applicant may apply to the director of the department for reinstatement. § 71-161.20(1).

> The director shall then review the application and other documents and *may* affirm the recommendation of the board and grant reinstatement or *may* reverse or modify the recommendation if the board's recommendation is (a) in excess of statutory authority, (b) made upon unlawful procedure, (c) unsupported by competent, material, and substantial evidence in view of the entire record, or (d) arbitrary or capricious.

(Emphasis supplied.) § 71-161.20(2).

[5] Generally, the word "may," when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

[6] It is clear from a review of the applicable statutes that the director's or chief medical officer's decision to reinstate a license to practice medicine and surgery is a discretionary one; an applicant is not entitled to have his or her license reinstated as a matter of right upon satisfying any particular quantum of proof. See, also, *State v. Hinze*, 232 Neb. 550, 441 N.W.2d 593 (1989) (there exists no vested right to practice medicine; rather, it is conditional right subordinate to police power of State to protect and preserve public health). The parties recognized this in the 1997 agreement revoking Navrkal's license, which provided that "any future reinstatement of [Navrkal's] license is completely discretionary." Such discretion, however, is not boundless. As provided in § 71-161.20(2), the director may reverse or modify the recommendation of the board if the board's recommendation is (a) in excess of statutory authority; (b) made upon unlawful procedure; (c) unsupported by competent, material, and substantial evidence in view of the entire record; or (d) arbitrary or capricious.

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. *Lein v. Nesbitt*, 269 Neb. 109, 690 N.W.2d 799 (2005). 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 evidence, and is not arbitrary, capricious, or unreasonable. *Id.* The chief medical officer found that Navrkal "seeks reinstatement of his Nebraska license in order to allow his . . . return to practice outside of Nebraska." The chief medical officer determined that the recommendations of the Board were inadequate to afford the public protection by appropriately monitoring Navrkal if he was practicing outside the State of Nebraska. The district court, in reversing the chief medical officer's decision, "presume[d] that the jurisdiction to which Navrkal applies to practice will have its own acceptance guidelines for new applicant's [sic] to the medical community and will take into consideration Navrkal's prior disciplinary actions, when determining the terms and conditions of any license it grants Navrkal." There is no evidence in the

record to support such a presumption. Therefore, we find error on the record and reverse the district court's order.

DISCRIMINATION CLAIM

[7] Navrkal contends that denying reinstatement of his license to practice medicine would amount to illegal discrimination under title II of the Americans with Disabilities Act of 1990. He also raises a number of constitutional arguments with respect to the hearing before the board and other aspects of his petition for reinstatement. None of these arguments were included in his petition for review filed in the district court, and none were decided by the district court. Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition. *McQuinn v. Douglas Cty. Sch. Dist. No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2000). Therefore, we decline to consider these arguments.

CONCLUSION

We conclude that the decision of the chief medical officer, performing the acts of the director under § 71-155.01 in denying the reinstatement of a license to practice medicine and surgery, is a discretionary one and that an applicant is not entitled to have his or her license reinstated as a matter of right. We further conclude that the district court erred in reversing the decision of the chief medical officer denying reinstatement of Navrkal's license. Accordingly, we reverse the district court's order and remand the cause with directions to reinstate the order of the chief medical officer.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. GREGORY C. LAUBY, RESPONDENT.

703 N.W.2d 132

Filed September 9, 2005. No. S-05-616.

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, Gregory C. Lauby. As indicated below, 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 January 26, 1976. At all times relevant hereto, respondent was engaged in the private practice of law in Cheyenne County, Nebraska.

On May 18, 2005, 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 Sixth Disciplinary District. The application stated that on January 27, 2005, respondent had been charged with first degree sexual assault on a child, a Class II felony. The application further stated that on May 3, respondent had been taken into custody on a Colorado arrest warrant on suspicion that respondent had committed the crimes of "Sexual Assault on a Child" and "Sexual Assault on a Child — Pattern of Abuse." The application further stated that "[i]t appear[ed] that the Respondent was engaging in conduct that, if allowed to continue until final disposition of disciplinary proceedings, will cause serious damage to the public and to the legal profession."

On May 25, 2005, 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 June 27, respondent entered a plea of guilty to a

felony sexual assault charge in Cheyenne County, Nebraska. On June 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.

On July 13, 2005, 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 admitted that he violated Canon 1, DR 1-102(A)(1) (violating disciplinary rule) and (6) (engaging in conduct adversely reflecting on fitness to practice law), and his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). 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; admitted in writing that he violated DR 1-102(A)(1) and (6), as well as his oath of office as an attorney; and 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 pleadings in this matter, the court finds that respondent has admitted he engaged in conduct that violated DR 1-102(A)(1) and (6) and his oath of office as an attorney and that his admission was knowingly made. The court

accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 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. 2003) and 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

HENDRY, C.J., not participating.

BOARD OF EDUCATION OF JEFFERSON COUNTY SCHOOL DISTRICT NO. 8 AND JEFFERSON COUNTY SCHOOL DISTRICT NO. 8, APPELLEES AND CROSS-APPELLEES, V. BOARD OF EDUCATION OF YORK COUNTY SCHOOL DISTRICT NO. 12 AND YORK COUNTY SCHOOL DISTRICT NO. 12, APPELLEES AND CROSS-APPELLANTS, AND NEBRASKA STATE BOARD OF EDUCATION AND DOUGLAS D. CHRISTENSEN, COMMISSIONER OF EDUCATION, NEBRASKA DEPARTMENT OF EDUCATION, STATE OF NEBRASKA, APPELLANTS.

703 N.W.2d 257

Filed September 16, 2005. No. S-03-1190.

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. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.

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

Jon Bruning, Attorney General, and Leslie S. Donley for appellants.

Kent E. Rauert, of Svehla, Barrows, Thomas & Rauert, P.C., for appellees Board of Education of York County School District No. 12 and York County School District No. 12.

Susan Kubert Sapp, of Cline, Williams, Wright, Johnson & Oldfather, P.C., for appellees Board of Education of Jefferson County School District No. 8 and Jefferson County School District No. 8.

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

MCCORMACK, J.

NATURE OF CASE

Nebraska law requires the board of education of every school district to provide or contract for special education programs and transportation for all resident children with disabilities who would benefit from such programs. Neb. Rev. Stat. § 79-1127 (Reissue 2003). The issue in this case is whether C.G., a student with disabilities who receives special education and related services, is a resident of Jefferson County School District No. 8 or York County School District No. 12.

FACTUAL BACKGROUND

C.G. was born on February 2, 1983. Prior to July 14, 1998, C.G. lived with his grandparents, who were his legal guardians, in Fairbury, Nebraska, and attended school there. In the early summer of 1998, C.G. exhibited behavior that was intolerable to his grandparents. As a result of that behavior, C.G.'s grandparents requested assistance from the Nebraska Department of Health and Human Services developmental disabilities system (DHHS). DHHS recommended placing C.G. in a Region V group home in Hebron, Nebraska. C.G.'s grandparents accepted the recommendation. On July 14, 1998, C.G. was placed at the group home in Hebron.

On September 9, 1998, C.G. was moved from Hebron to another Region V group home in York, Nebraska, once again on the recommendation of DHHS and acceptance by his grandparents. Since that date, C.G. has moved to other Region V group homes, but all have been within the boundaries of York School District No. 12. C.G.'s initial and continued placement in Region V group homes has been for noneducational reasons.

C.G. began attending school in York in September 1998. On December 10, 1998, the board of education of York County School District No. 12 and its school district (hereinafter collectively York) filed a "Report of Resident Children With Verified Disabilities, December 1, 1998" with the Nebraska Department of Education. In the report, York identified C.G. as a special education student and identified C.G.'s "Resident County-District" on the report as "York Public Schools." A year later, on December 8, 1999, York filed with the Nebraska Department of Education a "SESIS [Special Education Student Information System] Child Count as of Tuesday, November 30, 1999." York identified C.G. as one of its students in this report.

On March 25, 1999, C.G. became a ward of the State of Nebraska as a result of two separate adjudications in the York County Court sitting as a juvenile court. His status as a state ward continued until August 1, 2000, when the juvenile court terminated its jurisdiction over him. Thereafter, C.G. continued to reside in Region V group homes and to attend school in York. C.G.'s grandparents have consistently expressed their intention not to allow him to return to their home in Fairbury.

PROCEDURAL BACKGROUND

On July 11, 2002, the board of education of Jefferson County School District No. 8 and its school district (hereinafter collectively Fairbury) filed a petition for a declaratory order with the State Board of Education pursuant to Neb. Rev. Stat. § 84-912.01 (Reissue 1999) and 92 Neb. Admin. Code, ch. 62 (1995). Fairbury sought a declaratory order stating that § 79-1127 did "not require Fairbury . . . to provide a special education to [C.G.] by contracting with York . . . pursuant to Neb. Rev. Stat. §79-215 (2001 Supp.) for the 2002-2003 school year because Fairbury . . . is not [C.G.'s] resident school district under Neb. Rev. Stat.

§79-215." York consented to the use of a declaratory order proceeding to determine Fairbury's petition. See 92 Neb. Admin. Code, ch. 62, § 003.08.

On July 12, 2002, the Commissioner of Education delegated Fairbury's petition to a hearing officer, who was to consider the petition and recommend a decision to the Board. See 92 Neb. Admin. Code, ch. 62, §§ 005.01 and 005.01A through 005.01D. On that same day, York filed an answer to Fairbury's petition. York admitted in part and denied in part Fairbury's factual allegations and requested a declaratory order stating that C.G. is a resident of Fairbury for purposes of providing special education to C.G. for the 2002-03 school year. Fairbury filed a reply to York's answer on or about July 24.

On July 31, 2002, the hearing officer issued his findings of fact, conclusions of law, and recommendations to the State Board of Education. He recommended that the board issue a declaratory order finding that C.G. is a resident of Fairbury and that therefore, Fairbury is required to contract with York to provide special education services to C.G. for the 2002-03 school year.

On August 7, 2002, Fairbury requested a reconsideration of the hearing officer's findings of fact, conclusions of law, and recommendations. In response, the State Board of Education requested the parties submit additional arguments in light of the fact that C.G. had reached the age of majority on February 2, 2002. On September 3, the hearing officer issued an additional recommendation. The hearing officer found that C.G.'s adult status was immaterial to the issue presented and again recommended that the board issue a declaratory order concluding that Fairbury was required to contract with York to provide special education services to C.G. for the 2002-03 school year. The State Board of Education and the Commissioner of Education (hereinafter collectively the Board) entered a declaratory order on September 6, adopting the hearing officer's findings of fact, conclusions of law, and recommendations. Under the Administrative Procedure Act, Fairbury filed a petition for review in the district court on October 4.

On September 19, 2003, the district court reversed the order of the Board. The court determined that Neb. Rev. Stat. § 79-215(7)

(Supp. 2001), rather than § 79-215(8), was applicable and concluded that C.G. was a resident of York.

ASSIGNMENTS OF ERROR

The Board appealed, and York cross-appealed. See Neb. Ct. R. of Prac. 1C and 1E (rev. 2003). Their assignments of error are the same: The district court erred in (1) determining that C.G. was a resident of York rather than Fairbury, (2) applying § 79-215(7) to determine C.G.'s residency rather than § 79-215(8), and (3) finding that York's listing of C.G. as a resident student on reports required by the Nebraska Department of Education was evidence that C.G. was a resident of York.

STANDARD OF REVIEW

[1-4] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Lein v. Nesbitt*, 269 Neb. 109, 690 N.W.2d 799 (2005). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.* 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. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

ANALYSIS

Section 79-1127 provides that "[t]he board of education of every school district shall provide or contract for special education programs and transportation for all *resident* children with disabilities who would benefit from such programs." (Emphasis supplied.) Whether Fairbury or York is obligated to provide or contract for C.G.'s 2002-03 education depends on whether C.G. was a resident of Fairbury or York during that school year.

The answer to that question lies within § 79-215, which provides in relevant part:

> (1) Except as otherwise provided in this section, a student is a resident of the school district where he or she resides or any school district where at least one of his or her parents reside and shall be admitted to any such school district upon request without charge.
>
> . . . .
>
> (7) When a student as a ward of the state or as a ward of any court (a) has been placed in a school district other than the district in which he or she resided at the time he or she became a ward . . . *the student shall remain a resident of the district in which he or she resided at the time he or she became a ward.*
>
> (8) When a student is not a ward of the state or a ward of any court and is residing in a residential setting located in Nebraska for reasons other than to receive an education . . . *the student shall remain a resident of the district in which he or she resided immediately prior to residing in such residential setting*. . . . The resident district for a student who is not a ward of the state or a ward of any court does not change when the student moves from one residential setting to another.

(Emphasis supplied.)

The Board and York argue that § 79-215(8) applies because during the timeframe at issue, the 2002-03 school year, C.G. was not a state ward. Applying § 79-215(8), the Board and York conclude that C.G. was a resident of Fairbury because prior to being placed in Region V group homes in Hebron and York, C.G. resided in Fairbury with his grandparents. They further argue that § 79-215(7) cannot apply for two reasons: because C.G. was not a state ward during the 2002-03 school year and also because C.G. was never "placed in a school district *other than* the district in which he or she resided at the time he or she became a ward." (Emphasis supplied.) See *id.*

Fairbury argues that § 79-215(7) is the applicable provision in this case and establishes York as C.G.'s residency. Fairbury argues that it is applicable, rather than § 79-215(8), because

C.G. was a state ward at the time § 79-215 was enacted by the Legislature in 2000. Thus, Fairbury concludes that C.G. remained a resident of York because that is where he resided when he became a ward. Fairbury argues that § 79-215(8) cannot apply because C.G. has reached the age of majority. Citing the second sentence of § 79-215(8) that begins "Upon request by *a parent or legal guardian*," Fairbury interprets § 79-215(8) as applying only to minor students. (Emphasis supplied.) Brief for appellee Fairbury at 35.

We agree with York's position. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *24th & Dodge Ltd. Part. v. Acceptance Ins. Co.*, 269 Neb. 31, 690 N.W.2d 769 (2005). Section 79-215(7) plainly applies only to wards of the state or court. It is undisputed that C.G. was not a state ward at any time during the 2002-03 school year, the only year for which Fairbury sought a determination of its obligation to provide for C.G.'s education. Meanwhile, the plain language of § 79-215(8) applies in all respects. C.G. was not a ward of the state or any court during the 2002-03 school year, and he was residing in the described residential setting in Nebraska for reasons other than to receive an education. Fairbury's view that § 79-215(8) can apply only to minor students is unfounded. It is clear that some individuals may reach the age of majority, yet still remain a "student" entitled to a free education in Nebraska. See, Neb. Const. art. VII, § 1 ("[t]he Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years"); Neb. Rev. Stat. § 43-245(1) (Cum. Supp. 2002) (for purposes of Nebraska Juvenile Code, age of majority means nineteen years of age). Furthermore, the permissive language of § 79-215(8), "request by a parent or legal guardian," describes only a process for the contracting of a student's education. It does not affect a student's residency determination and therefore does not narrow the scope of the section to minor students only.

Fairbury also argues that York's inclusion of C.G. on two reports it filed with the Nebraska Department of Education in 1998 and 1999 serves as an admission that C.G. was a resident of

York. We disagree. Such reports may be relevant to determine C.G.'s residency during those years, but the only year at issue in Fairbury's petition for declaratory order is the 2002-03 school year. There is no such evidence in our record indicating York claimed C.G. as a resident student during that year. In addition, Fairbury alleged in its petition for a declaratory order that York received an increased amount of special education reimbursement funds by listing C.G. as one of its students in the 1998 report. However, York denied that allegation, and neither the hearing officer nor the Board ever made a finding of fact on that issue.

CONCLUSION

We conclude that, pursuant to § 79-1127, Fairbury is responsible for providing or contracting for the education of C.G. because C.G. is a resident of Fairbury under § 79-215(8). Therefore, we reverse the order of the district court.

REVERSED.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. DAVID R. MEDLIN, COUNTY ATTORNEY OF BOONE COUNTY, NEBRASKA, APPELLEE, V. RANDOLPH C. LITTLE, APPELLANT.

703 N.W.2d 593

Filed September 23, 2005. No. S-04-830.

1. **Quo Warranto: Equity: Appeal and Error.** Quo warranto is an action in equity and is reviewed de novo on appeal.
2. **Judgments: Evidence: Appeal and Error.** Despite de novo review, when credible evidence on material questions of fact is in irreconcilable conflict, an appellate court will, when determining the weight of the evidence, consider that the trial court observed the witnesses when testifying, and used those observations when accepting one version of the facts over the other.
3. **Agency: Words and Phrases.** In Nebraska, agency is a fiduciary relationship where two parties mutually agree that one may act on behalf of and subject to the control of the other.
4. **Agency.** Whether an agency relationship exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship.
5. **Principal and Agent.** The scope of an agent's authority is a question of fact.

6. ____. When establishing agency, a fact finder must consider the facts and circumstances of the case, the parties' relationship, their usual course of dealing, any instructions given, the parties' conduct, and the nature of the transaction.
7. ____. Apparent or ostensible authority gives a professed agent the power to affect the principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships.
8. **Principal and Agent: Words and Phrases.** Apparent authority is such authority as the agent seems to have by reason of the authority she or he actually has.
9. **Principal and Agent.** An alleged principal clothes an agent with apparent authority when the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent authority.
10. **Principal and Agent: Proof.** In order for the principal to incur responsibility for the acts of an agent with apparent authority, the authority must be traceable to the principal's own conduct; it cannot be established only by the agent's acts, declaration, or conduct.
11. **Principal and Agent.** Apparent authority to perform an act exists when a principal's conduct causes a third person to reasonably believe that the principal agreed that the person purporting to act for him or her could do so.
12. **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.

Appeal from the District Court for Boone County: MICHAEL OWENS, Judge. Affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

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

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

CONNOLLY, J.

Neb. Rev. Stat. § 32-562(5) (Reissue 2004) provides the procedure to follow when a county commissioner resigns from office. It states that a resignation becomes effective when accepted by the county clerk.

The appellant, Randolph C. Little, drafted and signed a letter of resignation and delivered it to Henry R. Thieman, the chairman of the Boone County Board of Commissioners. Thieman delivered the resignation to the Boone County clerk. Little claims that Thieman lacked authority to deliver the resignation letter.

After the county attorney filed a quo warranto action, the district court found that Little had resigned and ousted him from office. Little appeals. We affirm because, in our de novo review, we find that Thieman had apparent authority to deliver the resignation to the county clerk.

BACKGROUND

On November 5, 2002, Little was elected Boone County commissioner for road district No. 1. During his tenure, he had personal conflicts with the county clerk and Thieman. Little believed that Thieman frequently changed his position and that the county clerk constantly interfered with the board's business.

Before the board meeting, Little drafted and signed a resignation letter dated January 13, 2004, addressing it to Thieman and stating he was resigning effective March 1, 2004. At that time, both Little and Thieman were mistaken about the resignation procedures, thinking that the county clerk placed the resignation letter on the board's agenda and that the resignation was not final until accepted by a vote of the board.

On January 13, 2004, Little asked to meet with Thieman after the county clerk and Thieman opposed a proposal he made at a board meeting held earlier that same day. Little was frustrated because he expected Thieman to support it. Little testified that he "took the [resignation] letter that day with the idea that if [Thieman opposed the proposal], that that was going to be the act that caused [him] to start giving consideration to actually resigning."

During the private meeting with Thieman, Little delivered the resignation letter to him. He told Thieman he disapproved of the county clerk's interference and Thieman's inability to "rein" him in. Thieman asked him to reconsider. In response, Little said he would not resign if Thieman (1) would reconvene the board, (2) have a proper meeting without the county clerk's undue influence, and (3) vote the way Thieman had promised. After Thieman explained why he could not do that, Little handed him the letter and said "okay, there's your letter of resignation."

Ultimately, Thieman persuaded him to give the decision more thought, and the two agreed to keep the resignation confidential until Little told Thieman "to do different."

The next day, a friend of Little sent an e-mail to him and some of their mutual friends disclosing that Little had submitted his resignation. After receiving the e-mail, Little contacted Thieman by telephone on January 15, 2004, and told Thieman, "Do what you have to do."

Little, however, testified that when he said "do what you have to do," he intended to give Thieman discretion only when responding to questions from the media. But Thieman testified that he understood the conversation to mean that he had the discretion to decide what to do about delivering the letter. Specifically, Thieman stated, "Little had advised me to do what I had to do, so that's what I'm doing. . . . I'm doing it because I think I have a duty to do it, whether I like it or not." Thieman also explained that he felt he had to move quickly to inform the county clerk, county treasurer, and county attorney so they would not be "blind-sided" by the press, because they had to fill the vacancy.

Similarly when asked whether Little "specifically authorized" or gave him permission to deliver the letter to the county clerk, Thieman replied, "He told me to do what I need[ed] to do." Thieman also said he did not call Little to tell him the letter had been delivered to the county clerk because he "didn't feel it was necessary" because Little told him to do what he needed to do.

Thieman then called the county clerk and asked that he arrange a meeting later that day with the county treasurer and the county attorney. At the meeting, Thieman gave each a copy of the letter and a brief description of the telephone conversation he had had earlier that day with Little. He specifically stated, "Little called me and told me that I was to do what I had to do with it."

Little and Thieman did not speak again until Sunday, January 18, 2004, when Little called to say that after talking to his constituents, he had second thoughts about resigning. Thieman then told him he had delivered the letter. Although frustrated, Little never asked Thieman to retrieve the letter.

On January 26, 2004, Little gave Thieman a letter purporting to withdraw his resignation. When the board reconvened later on that date, Thieman gave the withdrawal letter to the county attorney.

The county attorney filed a quo warranto action seeking to enforce Little's resignation. The trial court entered a judgment ousting Little from office.

ASSIGNMENT OF ERROR

Little assigns, rephrased, that the district court erred by declaring his resignation effective.

STANDARD OF REVIEW

[1,2] Quo warranto is an action in equity and is reviewed de novo on appeal. See *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004). Despite the de novo review, when credible evidence on material questions of fact is in irreconcilable conflict, an appellate court will, when determining the weight of the evidence, consider that the trial court observed the witnesses when testifying, and used those observations when accepting one version of the facts over the other. See *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979).

ANALYSIS

Little argues that Thieman lacked the authority to deliver the letter to the county clerk and that therefore, he had not resigned. Section 32-562(5) prescribes the applicable resignation procedure. It provides that a resignation of a board member must be given to the county clerk and takes effect when accepted.

Here, Little drafted and signed a resignation letter, which the Boone County clerk received and stamped. The parties do not dispute whether the county clerk's actions constituted a proper acceptance. Instead, Little claims that Thieman lacked the authority to deliver Little's resignation. Thus, a discussion of agency law provides a prism through which to view our analysis.

Formation of Agency Relationship

[3,4] In Nebraska, agency is a fiduciary relationship where two parties mutually agree that one may act on behalf of and subject to the control of the other. See *Landmark Enterprises v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 554 N.W.2d 119 (1996). See, also, 3 Am. Jur. 2d *Agency* § 1 (2002). Whether an agency relationship exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used

by the parties to characterize or describe their relationship. See *Landmark Enterprises v. M.I. Harrisburg Assocs., supra.*

We find that an agency relationship existed between Little and Thieman. The two agreed that Thieman would hold the letter in confidence and deliver it to the county clerk once Little indicated he had made a decision. Thieman acted as an intermediary for Little, helping Little avoid further conflict with the county clerk, Little's self-described "political adversary." Similarly, Little controlled Thieman's performance because Thieman could not act without further instruction from Little.

SCOPE OF AGENCY: APPARENT AUTHORITY

[5,6] Although an agency relationship existed between Little and Thieman, we look to whether Thieman acted within the scope of the agency. The scope of an agent's authority is a question of fact. *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596 (1989). When establishing agency, a fact finder must consider the facts and circumstances of the case, the parties' relationship, their usual course of dealing, any instructions given, the parties' conduct, and the nature of the transaction. See *Goldfein v. Continental Ins. Co.*, 125 Neb. 112, 249 N.W. 78 (1933).

[7,8] Here, the relationship between Little and Thieman is best described as apparent agency. Apparent or ostensible authority gives a professed agent the power to affect the principal's legal relationships with third parties. The power arises from, and is limited to, the principal's manifestations to those third parties about the relationships. See *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994). Said another way, apparent authority is such authority as the agent seems to have by reason of the authority she or he actually has. *Double K, Inc. v. Scottsdale Ins. Co.*, 245 Neb. 712, 515 N.W.2d 416 (1994).

[9,10] An alleged principal clothes an agent with apparent authority when the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent authority. See *Landmark Enterprises v. M.I. Harrisburg Assocs., supra.* But in order for the principal to incur responsibility for the acts of an agent with apparent authority, the authority must be traceable to the principal's own conduct; it cannot be established only by the agent's acts, declaration, or

conduct. See, *Double K, Inc. v. Scottsdale Ins. Co., supra*; *Goldfein v. Continental Ins. Co., supra.*

[11] We examine apparent authority through the lens of the third party. Apparent authority to perform an act exists when a principal's conduct causes a third person to reasonably believe that the principal agreed that the person purporting to act for him or her could do so. See *First Nat. Bank of Omaha v. Acceptance Ins. Cos.*, 12 Neb. App. 353, 675 N.W.2d 689 (2004) (citing Restatement (Second) of Agency § 27 (1958)).

By drafting the letter, signing it, delivering it to Thieman, and then instructing him to "do what you have to do," Little clothed Thieman with apparent authority. Aware of these facts, the county clerk could reasonably believe that Thieman had the authority to tender Little's resignation. Moreover, Little's nonchalant instruction carelessly set off the chain of events leading to the county clerk's acceptance of the letter. Any lack of ordinary care is traceable to Little, the principal, not to Thieman, the agent. Because Little's actions clothed Thieman with the apparent authority to act, the district court correctly determined that Little had resigned.

MISTAKE OF LAW OR FACT

[12] Little argues, without specifically assigning as error, that Little and Thieman's mutual mistake as to the proper resignation procedure nullified any resulting resignation. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error. *Eicher v. Mid America Fin. Invest. Corp., ante* p. 370, 702 N.W.2d 792 (2005); *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004). Thus, we do not address this argument.

CONCLUSION

We conclude that Little clothed Thieman with apparent authority and that thus, Thieman was authorized to effect the resignation. Because the judgment of ouster was proper, the district court's order is affirmed.

AFFIRMED.

JAYME HANS, APPELLANT, V. PENNY LUCAS, APPELLEE.

703 N.W.2d 880

Filed September 23, 2005. No. S-04-1179.

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. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
3. **Contracts.** When general and specific terms in a contract relate to the same thing, the more specific provision controls.
4. **Contracts: Property: Liability.** The doctrine of equitable conversion does not apply to determine which party to a purchase agreement for the sale of property will bear the risk of loss when the parties expressly provide in the contract which party will bear the risk.
5. **Contracts: Insurance: Property: Words and Phrases.** An express contractual agreement to maintain fire and extended coverage on property in a purchase agreement for the sale of the property is a promise to carry insurance for the benefit of both the seller and buyer's interests in the property.
6. **Contracts: Insurance: Property: Subrogation.** When a seller of property contractually assumes the buyer's risk of loss, the buyer is an implied coinsured for the limited purpose of defeating the seller's subrogation claim against the buyer.
7. **Contracts: Insurance.** An insurer cannot recover from an implied coinsured for the very risk it contracted to assume.
8. **Insurance: Subrogation: Negligence.** An insurer cannot seek to subrogate against its own insured, even if the insured was negligent in causing the loss.

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

Richard D. Dunn, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellant.

Mark A. Christensen and Travis P. O'Gorman, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

HENDRY, C.J.

INTRODUCTION

This is a subrogation action brought in the name of the seller, Jayme Hans, against the buyer of a home, Penny Lucas. The

action was filed as a result of damage sustained to the home in a fire. At the time of the fire, Hans and Lucas had entered into a purchase agreement, but closing had not yet occurred. The purchase agreement contained provisions permitting Lucas to reside in the home pending closing. Hans alleged that Lucas' conduct caused the fire and damages.

The legal issue, presented to the district court upon both parties' filing motions for summary judgment and agreeing to a stipulation of facts, was whether Hans could maintain a subrogation action against Lucas given the relationship between Hans and Lucas created by the purchase agreement.

The district court determined that Hans bore the risk of loss under the purchase agreement and was therefore precluded from seeking subrogation against Lucas. Upon the court's dismissal of Hans' motion for summary judgment and granting of Lucas' motion for summary judgment, Hans appeals.

BACKGROUND

The parties stipulated that on January 20, 2003, Lucas executed a purchase agreement to buy a home owned by Hans. The closing date was not set, and because Lucas wished to live in the house until closing, the parties executed an addendum at the same time, which was specifically made part of the purchase agreement. In subparagraph 3b of the addendum, Lucas agreed to compensate Hans $17 per day for the use of the house from February 8, 2003, until and including the closing date. Subparagraph 3k then provided: "Buyer [Lucas] is urged to procure insurance on Buyer's personal property as Seller [Hans] assumes no liability or responsibility for the personal property of Buyer. Seller will maintain fire and extended coverage on subject property."

In accordance with the "urging" contained in subparagraph 3k, Lucas obtained a renter's insurance policy, which afforded coverage for both personal property and personal liability. Also, in accordance with subparagraph 3k, Hans "maintained" a homeowner's insurance policy, which was in effect on the date of the fire. The parties stipulated that on March 5, 2003, a fire "broke out" as a result of Lucas' cooking french fries on the stove. The uncontroverted evidence further showed that $24,683.13 was

expended to effectuate repairs to the residence proximately caused by the fire.

In her complaint, Hans sought damages from Lucas under negligence, "Equitable Conversion/Unjust Enrichment," and breach of contract theories of recovery. In her answer, Lucas alleged that "Allied Insurance [Hans' insurer] and Plaintiff are precluded from recovering from Defendant by the well-established principle that an insurer cannot recover against its own insured. Allied Insurance has no subrogation rights against Defendant in light of the relationship between Plaintiff and Defendant."

After both parties filed motions for summary judgment, the district court entered judgment in favor of Lucas. Although the district court noted that portions of the addendum suggested that a landlord-tenant relationship had been established, it stated that the addendum was ambiguous with respect to that relationship. The district court then concluded:

> The most persuasive clause in the addendum is found in 3(k) where Defendant [Lucas] was urged to procure insurance on her personal property, and Plaintiff [Hans] assumed no liability or responsibility for the personal property of Defendant. Plaintiff agreed to maintain fire and extended coverage on the Residence. The contract language urges Defendant to purchase insurance on personal items and specifically denies any liability to Plaintiff. . . . Clause 3(k) illustrates that the parties allocated the risk of fire to Plaintiff. Although it was Defendant that negligently caused the fire, given the Addendum to Purchase Agreement read in whole, the reasonable expectation of the parties prohibits the placement of the risk of fire on Defendant. . . . It would be unreasonable to expect Defendant to insure the same structure on which fire insurance has already been contractually assigned to Plaintiff.

ASSIGNMENTS OF ERROR

Hans assigns that the district court erred in (1) failing to find that as the buyer, Lucas bore the risk of loss under the doctrine of equitable conversion; (2) determining that a landlord-tenant relationship existed between Hans and Lucas; and (3) determining that Hans should bear the risk of loss when Lucas was responsible for the fire.

STANDARD OF REVIEW

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

[2] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005).

ANALYSIS

[3] Initially, we note that the purchase agreement, apart from the addendum, contains a "Risk Loss" provision in paragraph 11. Although Lucas' attorney referenced paragraph 11 during oral argument, neither party argued in her brief that it is controlling, and we conclude that it is not. Paragraph 13 of the purchase agreement provided that the agreement "shall in no manner be construed to . . . give any right of possession." When read in context with paragraph 13, the risk-of-loss provision in paragraph 11 was clearly intended to apply to the "typical" situation in which the buyer takes possession upon closing, whereas the parties' addendum provided for and governed the specific circumstance of the buyer's taking possession prior to closing. When general and specific terms in a contract relate to the same thing, the more specific provision controls. *Krzycki v. Genoa Nat. Bank*, 242 Neb. 819, 496 N.W.2d 916 (1993). We will therefore look to the addendum to the extent it becomes necessary to determine the relationship of Hans and Lucas in this circumstance.

EQUITABLE CONVERSION

In her first assignment of error, Hans contends that the district court erred in granting summary judgment to Lucas because, under the doctrine of equitable conversion, the risk of loss was borne by Lucas as the buyer. Lucas argues that the doctrine of equitable conversion is not applicable under these facts because the addendum specifically allocated the risk of loss to Hans during the term of occupancy.

In support of her contention, Hans relies primarily upon *McGinley v. Forrest*, 107 Neb. 309, 186 N.W. 74 (1921), wherein this court adopted the equitable conversion doctrine. In *McGinley*, the buyer had contracted to purchase farmland, which included a house the buyer estimated to be worth $2,000 to $3,500. The house, which the seller had insured for $500, was destroyed by fire before the purchaser received legal title. The trial court abated the purchase price by an amount equal to the insurance proceeds. On appeal, the buyer argued that he was entitled to abatement equal to the full value of the house. This court affirmed, stating:

> [*W*]*here a contract for the sale of land contains no express provision as to which party shall bear the loss* . . . the vendor having at the time of the sale a fee simple title and there being no default on the part of the purchaser, the loss in equity, as upon a bill for specific performance, will fall upon the purchaser, he being regarded as the real owner. . . . The cases supporting the majority rule are based upon the theory that equity regards that as done which ought to be done, and that, when a valid and enforceable contract for the sale of land has been made, equity will regard the vendor as holding the title for the benefit of the purchaser, and the purchaser as holding the unpaid purchase money for the benefit of the vendor, and that, therefore, the purchaser must be regarded in equity as the real owner.

(Emphasis supplied.) *Id.* at 312, 186 N.W. at 75.

[4] Hans' reliance on *McGinley* is misplaced. Implicit in the equitable conversion rule enunciated in *McGinley* is this court's recognition that the rule will not apply when the parties expressly state which party to a contract for the sale of land will bear the risk of loss. See 107 Neb. at 314, 186 N.W. at 76 (Dean, J., dissenting) ("as the opinion suggests, the parties might have agreed, in their contract, as to which of them should suffer the loss of the building in case of fire or other casualty").

This court has determined in an analogous circumstance that a contractual agreement to obtain insurance inures to the benefit of both parties when they both have an insurable interest in the property that is the subject of the contract. See *Midwest Lumber Co. v. Dwight E. Nelson Constr. Co.*, 188 Neb. 308, 196

N.W.2d 377 (1972). *Midwest Lumber Co.* involved builder's risk insurance. In the construction contract, the builder agreed to obtain public liability insurance and the owner agreed to provide builder's risk, or fire and extended coverage, insurance. During construction, a windstorm blew down some of the framing, which had to be replaced. The owner's insurer alleged the damages were caused by the builder's negligence and sought subrogation from the builder in the owner's name. The issue was whether the insurance covered only the owner's risks, or the risks of both the owner and the builder. The trial court sustained the builder's motion for judgment on the pleadings, and this court affirmed.

Similar to the issue in this case, we stated in *Midwest Lumber Co.*, 188 Neb. at 310-11, 196 N.W.2d at 379, that "[i]n the absence of some contractual provision to the contrary the risk of loss by windstorm, fire, etc., to a new building in the course of construction is normally on the builder, that is, he is obligated to restore the building damaged or destroyed." However, we concluded that if the parties were interested only in covering their own risks, they need not have consulted each other. Thus, the only reason for including a provision to obtain insurance in the contract was to protect the interests of both parties. *Id.* Under those circumstances, the owner could not recover from the builder "because the risks of both contractor and owner were intended by the parties to the construction contract to be covered by insurance." *Id.* at 310, 196 N.W. at 379. We reasoned that through the construction contract, the owner became the builder's insurer and could not recover from its own insured. Because the owner's insurer could have no greater rights than its insured against a third party, it could not seek subrogation from the builder. *Id.*

[5] Similarly, in paragraph 3k of the addendum, Hans expressly agreed to carry fire insurance. At the summary judgment hearing, a stipulation of facts was offered by Hans and received without objection. Paragraph 11 of the stipulation reads: "Pursuant to the terms of the Addendum, [Hans] agreed to maintain fire and extended coverage on the Residence." Under *Midwest Lumber Co., supra*, Hans' express contractual agreement to "maintain fire and extended coverage on the subject property" was a promise to

carry insurance for the benefit of Lucas when both parties had an insurable interest in the property.

Hans counters that Lucas contractually agreed to bear the risk of fire, noting that in the addendum, Lucas agreed to accept liability for any damages over and above normal wear and tear. However, we agree with the district court that this provision was not an agreement to bear the risk of damages caused by fire. First, as the district court noted, the addendum also stated that Hans' reimbursement for such damages would be deducted from the earnest money deposit, refuting any purported intent to hold Lucas liable for material damages caused by fire. Second, Hans' argument is inconsistent with her specific agreement to carry fire insurance. See *Krzycki v. Genoa Nat. Bank*, 242 Neb. 819, 496 N.W.2d 916 (1993) (specific contractual provisions control over related general provisions).

We determine as a matter of law that the risk of loss for the damages sustained to the residence was to be contractually borne by Hans. See *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005) (interpretation of contract involves question of law). The issue then becomes whether the contractual relationship precludes Hans' subrogation action.

[6] Neither party contests that both Hans and Lucas had an insurable interest in the property. Applying the reasoning in *Midwest Lumber Co. v. Dwight E. Nelson Constr. Co.*, 188 Neb. 308, 196 N.W.2d 377 (1972), we determine that because Hans contractually assumed Lucas' risk of loss by fire, Lucas was an implied coinsured for the limited purpose of defeating Hans' subrogation claim. See *Employers Reins. Corp. v. Santee Pub. Sch. Dist. No. C-5*, 231 Neb. 744, 438 N.W.2d 124 (1989) (discussing *Midwest Lumber Co.* and concluding that both named insured and third party are insureds when insurer is obligated to indemnify third party because of its insured's agreement to indemnify third party); *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984) (concluding that subrogation against insured's guest was precluded when insured's promise to maintain insurance on home insured was not currently occupying showed insured's intent that insurance was to benefit guest living in home), citing *Alaska Ins. Co. v. RCA Alaska Commun.*, 623 P.2d 1216 (Alaska 1981) (commercial tenant was implied

coinsured for limited purpose of defeating insurer's subrogation claim when lease provision required landlord to obtain and keep in effect insurance on premises).

[7] Although an insurance company has the right to recover against a wrongdoer whose conduct has subjected the insurance company to liability, no right of subrogation can arise in favor of an insurer against its own insured. *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995). See, also, *Fellmer v. Gruber*, 261 N.W.2d 173 (Iowa 1978) (holding that seller carried insurance for benefit of buyer and held proceeds in trust for buyer when seller agreed to maintain insurance until possession date but barn burned before buyer took possession); *Housing Inv. Corp. v. Carris*, 389 So. 2d 689 (Fla. App. 1980) (provision in contractor's contract that owner would carry casualty insurance shifted risk to insurer, and owner was limited to insurance proceeds, barring subrogation action); 16 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 224:1 (2000) (antisubrogation rule extends to prevent subrogation against persons who have obtained status of additional insured or coinsured pursuant to agreement requiring insured to carry insurance for benefit of another). We conclude that Hans' insurance carrier may not recover from an implied coinsured for the very risk it contracted to assume.

Remaining Assignments of Error

In support of her second assignment of error, Hans argues that "if the lower court's decision, which is not entirely clear, rests upon a finding of a landlord/tenant relationship, thereby preventing subrogation against [Lucas], then the lower court's interpretation of the Addendum was erroneous." Brief for appellant at 15. See *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004). Having previously determined that Hans' express contractual provision that she would bear the risk of fire precluded a subrogation action for that loss, we need not consider whether subrogation was also precluded by a landlord/tenant relationship.

[8] Finally, in Hans' third assignment of error, she contends that "[t]he lower court erred in finding that [Hans] should bear the risk of loss notwithstanding the fact that [Lucas] was clearly the party responsible for the fire." This assignment of error is

resolved by our determination that Lucas was an implied insured. See *Tri-Par Investments*, 268 Neb. at 123, 680 N.W.2d at 194 (insurer "cannot seek to subrogate against its own insured, even if the insured was negligent in causing the loss").

CONCLUSION

The district court did not err in determining that there was no material issue of fact and that, as a matter of law, Hans' express agreement to maintain fire and extended coverage on the house during the time that Lucas occupied the house before closing precluded Hans' insurance carrier from seeking subrogation from Lucas.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. BAIBA D. SIMMONS, RESPONDENT.

703 N.W.2d 598

Filed September 23, 2005. No. S-04-1442.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.
2. ____: ____. When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.
3. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. ____. With respect to the imposition of attorney discipline in an individual case, each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
5. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
6. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.

7. ____. The determination of appropriate discipline to be imposed on an attorney requires consideration of any aggravating or mitigating factors.
8. ____. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment.

Original action. Judgment of disbarment.

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

No appearance for respondent.

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

PER CURIAM.

PROCEDURAL HISTORY

On December 22, 2004, formal charges containing one count were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against Baiba D. Simmons, respondent. Respondent's answer disputed certain of the allegations. A referee was appointed. On April 13, 2005, the referee's hearing was held on the charges. Respondent did not appear and was not represented by counsel at the hearing. Two witnesses testified, and 20 exhibits were admitted into evidence.

The referee filed a report on April 27, 2005. With respect to the charges, the referee concluded that respondent's conduct had breached the following disciplinary rules of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); Canon 9, DR 9-102(B)(3) (failing to maintain client account records); and DR 9-102(B)(4) (failing to return client property as requested), as well as her oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). With respect to the discipline to be imposed, the referee recommended that respondent be disbarred from the practice of law. Neither relator nor respondent filed exceptions to the referee's report.

On May 11, 2005, relator filed a motion for judgment on the pleadings under Neb. Ct. R. of Discipline 10(L) (rev. 2003). Respondent did not file a response to relator's motion. On June 8, we granted the motion for judgment on the pleadings and set

the matter for briefing and oral argument on the issue of the appropriate discipline.

FACTUAL BACKGROUND

Respondent was admitted to the practice of law in the State of Nebraska on December 13, 1989. She was engaged in the private practice of law in Lancaster County, Nebraska. On March 31, 2000, in an unrelated disciplinary proceeding, this court indefinitely suspended respondent from the practice of law in the State of Nebraska. *State ex rel. NSBA v. Simmons*, 259 Neb. 120, 608 N.W.2d 174 (2000). Respondent has not sought reinstatement following her suspension.

As stated above, the referee's hearing was held on April 13, 2005, in the instant case. The substance of the referee's report and findings made following that hearing may be summarized as follows: Helen Ulrich hired respondent to represent her in several different legal matters, including certain real estate transactions. According to the referee's report, Ulrich suffers from a mental disorder, possibly schizophrenia. One of the real estate transactions in which respondent represented Ulrich involved the sale of Ulrich's condominium. After the condominium was sold, Ulrich moved to Tabitha Village in Lincoln.

According to the referee's report, on April 1, 1996, Ulrich received a check as payee from State Title Services, Inc., in the amount of $47,785.88, representing the proceeds from the sale of the condominium (sale proceeds). During the referee's hearing, Ulrich testified that she endorsed the check for the sale proceeds over to respondent for deposit in respondent's attorney trust account. A copy of the escrow check, signed by Ulrich, endorsed over to respondent's trust account, and bearing the stamp of the National Bank of Commerce was introduced into evidence during the referee hearing. Ulrich testified that she endorsed the sale proceeds check over to respondent because she was concerned certain family members might try to take advantage of her with regard to the sale proceeds. Ulrich testified that respondent agreed to manage Ulrich's money for her.

Sometime prior to September 2003, respondent moved to Florida. The referee found that Ulrich, who was also a personal friend of respondent, visited respondent in Florida in September

and discussed the sale proceeds with respondent. Ulrich testified that respondent told her that respondent was still holding the money but did not inform Ulrich where the money was being held.

According to the referee's report, upon Ulrich's return from Florida, she retained an attorney practicing in Lincoln, Nebraska (Lincoln attorney), to represent her with regard to certain tax matters and to help her reclaim the sale proceeds from respondent. On November 18, 2003, the Lincoln attorney sent respondent a letter to advise her of his representation of Ulrich and to request the return of the sale proceeds. The referee notes in his report that "[c]oincidentally," on November 18, respondent sent a letter to Ulrich. In her November 18 letter, respondent admitted that she was in possession of a "large sum of money" belonging to Ulrich, writing:

> It occurred to me finally, that - after our last conversation - you must be worried about your money. I am deeply regretful that in all of our personal strife, I did not let you know that I have every intent of keeping it safe and secure - for you or yours. . . .
>
> . . . .
>
> I am concerned about any transfer right now because of Tabitha [Village]. If I dumped a large sum of money in your account, I think you would have a lot to explain, if they agreed to keep you there. They could recalculate on the basis of this income. That would mean that since you were at Tabitha you would pay the difference between what you paid and what you have in the bank. However if you want to risk this, we'll do it. If I get accused of fraud so will you. I deeply regret that we are both in this position but we are both adults. Let me know if you want changes made to the present arrangement and how you want them.

In the referee's report, he found that respondent did not reply to the Lincoln attorney's letter. However, in a letter addressed to Ulrich and dated November 24, 2003, she wrote the following: "I was very unhappy to receive a letter that indicated how much you mistrust me. I wish you had talked to me instead of this." Ulrich testified that in addition to the November 24 letter, respondent telephoned Ulrich on several occasions following November 18. The referee found that with the use of a caller identification

device, Ulrich was able to know it was respondent calling, and that she chose not to answer any of respondent's calls.

According to the referee's report, on December 8, 2003, the Lincoln attorney again wrote respondent concerning the sale proceeds. The Lincoln attorney also directed respondent not to contact Ulrich directly. In a letter to the Lincoln attorney dated December 17, 2003, respondent wrote that she had been in contact with several people who knew Ulrich and that not one of these persons could tell respondent that Ulrich was behaving normally. In her letter, respondent refused to do anything until she "ha[d] an indication from [Ulrich's] psychiatrist that [Ulrich] is functioning normally and that she has the capacity to make serious judgment calls."

The referee's report states that on January 7, 2004, the Lincoln attorney again wrote to respondent and repeated his demand that respondent return the sale proceeds to Ulrich. In his letter, the Lincoln attorney indicated that he was including a copy of a letter from Ulrich's therapist confirming that Ulrich was capable of handling her own affairs. The referee found that the January 7 letter was returned "ostensibly unopened."

According to the referee's report, on January 21, 2004, the Lincoln attorney contacted the Lincoln Police Department concerning respondent's refusal to return the sale proceeds to Ulrich. Investigator Steven Niemeyer interviewed the Lincoln attorney and Ulrich and reviewed correspondence between them and respondent. Thereafter, Niemeyer telephoned respondent and discussed with her the sale proceeds. Niemeyer tape-recorded his conversation with respondent, and a cassette tape recording of the conversation, together with a transcription of the recording, were admitted into evidence during the referee's hearing.

According to the record, at the start of the telephone conversation, Niemeyer introduced himself to respondent and advised her he was calling with regard to Ulrich, to which respondent replied, "Oh my God." Throughout the telephone conversation, respondent repeatedly denied having possession of the sale proceeds, but admitted that she once possessed the money and had deposited it into her trust account at the National Bank of Commerce. Respondent claimed that over the years, she had returned the money to Ulrich as cash transactions "because we

couldn't do anything otherwise because of Tabitha [Village]." During their telephone conversation, Niemeyer in effect asked respondent to explain the apparent inconsistency between her November 18, 2003, letter to Ulrich, in which she indicated she was holding a large sum of money for Ulrich, with her contention during the telephone interview that she was not holding any money for Ulrich. The referee found that respondent avoided answering the question and did not take the opportunity to explain the situation.

As noted above, based upon the record, the referee found by clear and convincing evidence that respondent had violated DR 1-102(A)(1) and (4) and DR 9-102(B)(3) and (4), as well as her oath of office as an attorney. The referee also found that "[t]here are absolutely no mitigating circumstances in this matter." Although not specifically identified by the referee as an aggravating factor, the referee acknowledged respondent's prior disciplinary proceeding that had resulted in her suspension from the practice of law, noting that "[r]espondent is not in good standing . . . ." With respect to the sanction that ought to be imposed for the foregoing violations, and considering the lack of mitigating factors in the case, the referee recommended that respondent be disbarred from the practice of law.

ASSIGNMENT OF ERROR

As noted above, neither relator nor respondent filed exceptions to the referee's report, and relator's motion for judgment on the pleadings was sustained on June 8, 2005. The sole issue before this court is the determination of appropriate discipline.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee. *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005).

ANALYSIS

Findings.

[2] When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.

See *State ex rel. Counsel for Dis. v. Widtfeldt, supra.* Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1) and (4); DR 9-102(B)(3) and (4); and her oath of office as an attorney, see § 7-104.

Factors Affecting Discipline to Be Imposed.

[3] We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. at 293, 691 N.W.2d at 535. Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court; or
> (5) Temporary suspension by the Court; or
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, rule 10(N).

[4,5] With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases." *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. at 293, 691 N.W.2d at 535. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Rokahr*, 267 Neb. 436, 675 N.W.2d 117 (2004).

[6,7] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Widtfeldt, supra.* We have noted that the determination of appropriate discipline to be imposed on an attorney requires consideration of any aggravating or mitigating factors. *State ex rel. Special Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004).

Discipline to Be Imposed.

The evidence in the present case establishes, among other facts, that Ulrich endorsed the check for the sale proceeds over to respondent and that respondent admitted depositing that check in her attorney trust account. The record contains respondent's November 18, 2003, letter to Ulrich, in which respondent admitted that she was still holding a large sum of money for Ulrich, and was "keeping it safe and secure." Despite these admissions, when asked by her former client to return the sale proceeds, respondent failed to return the proceeds and, indeed, told Niemeyer that she had returned Ulrich's money to her as cash transactions over the years. With regard to respondent's actions, the referee in his report concluded the following:

> Respondent was deceptive with . . . Niemeyer when he asked her directly whether she still had . . . Ulrich's money. Respondent was non-responsive to [the Lincoln attorney] when he asked respondent to return . . . Ulrich's money and provide an accounting. . . . Ulrich still does not have her money. The unavoidable conclusion is that . . . Ulrich will never see her money again. Respondent either has the money with the intent of keeping it for herself, or she spent it. . . .
>
> The only relevant facts for this inquiry, however, are the fact that . . . Ulrich does not have her money, and the admitted fact that respondent was given the money to hold in trust for . . . Ulrich during the period when [respondent]

> was authorized to practice law in Nebraska. The conclusion that respondent [retained] Ulrich's money to [respondent's] own benefit is the only reasonable one to be drawn from the evidence. . . . There is absolutely no question that respondent should be disbarred.

We agree with the referee's conclusions that respondent's statements to Ulrich and Niemeyer cannot both be true and that the record reflects that respondent has engaged in a course of action involving dishonesty, fraud, deceit, or misrepresentation with regard to the sale proceeds which respondent had deposited into her attorney trust account on behalf of Ulrich.

[8] This court has repeatedly stated that absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment. See, *State ex rel. Counsel for Dis. v. Rasmussen*, 266 Neb. 100, 662 N.W.2d 556 (2003); *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000); *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997); *State ex rel. NSBA v. Gregory*, 251 Neb. 41, 554 N.W.2d 422 (1996).

The referee concluded, and we agree, that there are no mitigating factors present in the instant case. We further agree with the referee's conclusions that

> [r]espondent preyed on a mentally and physically impaired person. . . .
>
> Respondent has expressed no attitude of regret or remorse. Respondent has not cooperated with [relator] or [the] Referee. She has provided no service to the legal community. There is nothing negligent about her conduct. Instead, her conduct evinces deceit and wrongful intent. She demonstrates no competence as a lawyer, and has no present fitness for the practice of law.

Moreover, we note the presence of at least one aggravating factor. Respondent is currently under an indefinite suspension of her license to practice law as a result of a prior disciplinary proceeding before this court. See *State ex rel. NSBA v. Simmons*, 259 Neb. 120, 608 N.W.2d 174 (2000).

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that respondent

should be and is hereby disbarred from the practice of law effective immediately.

CONCLUSION

We find by clear and convincing evidence that respondent violated DR 1-102(A)(1) and (4), DR 9-102(B)(3) and (4), and her oath of office as an attorney. It is the judgment of this court that respondent should be and is hereby disbarred from the practice of law, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, she shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997), rule 10(P), and Neb. Ct. R. of Discipline 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

JOHN S. MAGISTRO, APPELLANT, V. J. LOU, INC., A NEBRASKA CORPORATION, AND GREGORY J. NOLAN, APPELLEES.

703 N.W.2d 887

Filed September 30, 2005. No. S-04-138.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. ____: ____. 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. **Trade Secrets: Words and Phrases.** The definition of a "trade secret" is a question of law.

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

Norman Denenberg for appellant.

Cletus W. Blakeman, of Blakeman Law, P.C., L.L.O., for appellees.

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

WRIGHT, J.

NATURE OF CASE

John S. Magistro filed this action against Gregory J. Nolan and his corporation, J. Lou, Inc. (collectively referred to as "Nolan"), alleging breach of contract; violation of the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 1999); and violation of the Trade Secrets Act, Neb. Rev. Stat. §§ 87-501 to 87-507 (Reissue 1999). Magistro sought an injunction, liquidated damages, and attorney fees. The Douglas County District Court dismissed Magistro's petition and Nolan's counterclaim. Magistro appeals.

SCOPE OF REVIEW

[1] A suit for damages arising from breach of a contract presents an action at law. *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004).

[2] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Id.*

[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005).

FACTS

When this action was commenced, Magistro had been in the pizza restaurant business for more than 25 years and he had owned and operated a Don Carmelo's Pizzeria in Omaha, Nebraska, for 8 years. He owns the trade name "Don Carmelo's Pizzeria," which is registered with the U.S. Patent and Trademark Office.

On February 4, 1994, Magistro and Nolan entered into a contract under which Nolan was to operate a Don Carmelo's Pizzeria at 117th and Blondo Streets in Omaha (the Blondo Street restaurant). In return for $50,000, it was agreed that Nolan could use Magistro's information, methods, trade name, and trade secrets. The trade secrets, which Magistro's petition defined as "an entire

array of information starting with the ingredients that go into the Don Carmelo's pizza, strombli [sic], calzone and other Italian dishes," were to be used only in the operation of the Blondo Street restaurant and any subsequent Don Carmelo's Pizzeria licensed by Magistro. Magistro claimed that after licensing the Blondo Street restaurant, he spent months instructing Nolan as to the proper methods to prepare the menu items.

Magistro and Nolan entered into a second contract in 1995 for a Don Carmelo's Pizzeria at 76th and Dodge Streets in Omaha (the Dodge Street restaurant). Nolan agreed to pay royalties equal to 5 percent of the gross sales for this restaurant. In April 1996, Nolan changed the name of the Dodge Street restaurant to "Giavonni Santino's Pizzeria" and ceased paying royalties to Magistro. Nolan later began licensing restaurants using the name "Giavonni Santino's Pizzeria."

Magistro sued Nolan, alleging that Nolan's failure to pay royalties was a breach of contract. Magistro also claimed that Nolan had entered into a course of advertising to make it appear that Don Carmelo's Pizzeria and Giavonni Santino's Pizzeria were "essentially the same business" and that these deceptive trade practices were intended to confuse customers as to the relationship between the two restaurants. Magistro sought, inter alia, an accounting of royalties due while Nolan operated the Dodge Street restaurant; liquidated damages of $200,000, as called for by the contracts; an injunction against further violation of the Uniform Deceptive Trade Practices Act and the Trade Secrets Act; and attorney fees.

The trial court concluded that Magistro had failed to prove his claims and that Nolan's counterclaim had no merit. On November 18, 2003, the court entered an order dismissing Magistro's amended petition and Nolan's counterclaim. Magistro filed a motion for new trial, which was overruled.

ASSIGNMENTS OF ERROR

Magistro's assignments of error may be summarized and restated as follows: The trial court erred (1) in failing to find a breach of contract and a trade secret violation, (2) in failing to award liquidated damages, and (3) in failing to find deceptive trade practices.

ANALYSIS

The first question to be addressed is whether Nolan breached the contracts with Magistro by using trade secrets obtained from Magistro in the operation of Nolan's restaurants. A suit for damages arising from breach of a contract presents an action at law. *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004).

In his petition, Magistro claimed that his family recipes were trade secrets and that Nolan breached the contracts with him by continuing to use those recipes after Nolan changed the name of the Dodge Street restaurant from "Don Carmelo's Pizzeria" to "Giavonni Santino's Pizzeria" and stopped paying royalties to Magistro. Nolan asserted that the recipes used in Giavonni Santino's Pizzerias were different from those he received from Magistro. Nolan claimed that he did not breach the terms of the contracts and that the agreements were terminated in April 1996.

We first examine the contracts to determine the rights and obligations of the parties and then examine the evidence to determine whether the trial court erred in dismissing Magistro's action against Nolan.

The February 4, 1994, contract stated that Magistro owned the trade name "Don Carmelo's Pizzeria" and that he possessed trade secrets, including the manner in which ingredients were assembled and prepared for storage and baking. The contract provided that Nolan would pay $25,000 for a license agreement and $25,000 for services rendered. In return, Nolan could use the trade name Don Carmelo's Pizzeria and the methods and trade secrets obtained from Magistro.

Pursuant to the contract, Nolan promised to guard the recipes and methods as trade secrets and warranted that in the event the trade secrets became known to any other person, intentionally, negligently, or otherwise, he would be liable for liquidated damages of $100,000. Nolan agreed that the trade secrets would be used only in the operation of any "Don Carmelo's Pizzeria" licensed by Magistro. The contract granted Nolan a nonexclusive nontransferable license to use the trade name Don Carmelo's Pizzeria in connection with the Blondo Street restaurant. Magistro agreed to provide the recipes and methods to be used in connection with the operation of the business.

A second contract, dated June 29, 1995, stated that Nolan was granted license to use the trade name Don Carmelo's Pizzeria and to use Magistro's trade secrets in operating the Dodge Street restaurant. Nolan agreed to pay Magistro royalties equal to 5 percent of the restaurant's gross sales. The license was exclusive to Nolan within a geographic area bounded by 90th, 60th, Fort, and Center Streets in Omaha.

This contract also provided that the recipes and methods possessed by Magistro were trade secrets that would be used only in the operation of the Dodge Street restaurant and any subsequent Don Carmelo's Pizzeria licensed by Magistro. Nolan promised to guard the trade secrets and agreed to be liable for liquidated damages if the trade secrets became known to other persons. The agreement contained a provision concerning liquidated damages that was substantially similar to the one found in the February 1994 contract.

[4] The definition of a "trade secret" is a question of law. *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005).

Under § 87-502(4) of Nebraska's Trade Secrets Act, a trade secret is defined as

> information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that:
>
> (a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Magistro testified that the dough recipe used in Don Carmelo's Pizzerias was a recipe that his family created in Sicily before the family moved to the United States. When his father opened a pizza restaurant in New Jersey, only family members were privy to the recipes. Magistro moved to Omaha in 1980 and opened his first pizzeria. Magistro said he protected the family

recipes by putting the ingredients into packets that were sealed and refrigerated until needed. An employee would then add water to make the sauce and the dough.

Magistro's brother Carman Magistro testified that only members of his family created and prepared the recipes and that no one outside the family knew the recipes. Carman claimed that Don Carmelo's pizza was superior because the dough and sauce recipes were his father's personal recipes.

We conclude that the recipes Nolan acquired from Magistro were trade secrets. The recipes derived independent economic value from not being known to other persons, and Magistro and his family made reasonable efforts under the circumstances to maintain their secrecy. The trial court correctly determined that the recipes were trade secrets.

The issue, however, is not whether the recipes provided by Magistro were trade secrets but whether Nolan used the trade secrets in violation of the contracts. This presents a question of fact. In a bench trial, we review the findings of fact by the trial court and will not disturb such findings unless they are clearly wrong. See *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004).

The trial court noted that there were two agreements, but it declined to determine whether there were any breaches of the February 1994 contract concerning the Blondo Street restaurant. The court found that any moneys that were due and owing under the terms of that contract had been paid by Nolan. It was unable to determine whether any actions occurred while the business was operated as a Don Carmelo's Pizzeria that would give rise to another claim under this contract.

As to the June 1995 contract regarding the Dodge Street restaurant, the trial court found that the term of the contract was not stated and that the agreement did not contain a provision regarding termination. It concluded that the contract could be terminated "just by changing the name and starting to do business under another name" and that as long as Magistro's trade secrets were not used, there would be no violation of the contract.

The trial court stated, "[T]here's no way to show, in my opinion, that . . . Nolan is still using the same recipes." Although the recipes furnished by Magistro for the dough, sauce, and

meatballs were trade secrets, the evidence supported Nolan's contention that he no longer used those recipes. The court stated that it could not find by the greater weight of the evidence that Nolan was using the trade secrets in his business or the restaurants that he had franchised.

We agree with the trial court that Magistro failed to show that Nolan was still using Magistro's trade secrets. Magistro testified to his knowledge concerning the operation of a pizza restaurant and the secret family recipes. Magistro was not able to testify that he personally knew Nolan was still using the recipes in his new restaurants, nor did the evidence support that contention.

Nolan testified that when he opened the Blondo Street restaurant, Magistro provided him with a dough recipe, a sauce recipe, and a meatball recipe and that no other recipe-related information was given to him. After the Dodge Street restaurant opened in the spring of 1995, Nolan paid royalties to Magistro on that restaurant until April 1996. The restaurant was subsequently relocated to Cass Street, and the names of both restaurants were changed to Giavonni Santino's Pizzeria.

Nolan testified that the name change occurred only after Magistro had terminated the contracts by demanding that Nolan cease using the Don Carmelo's Pizzeria trade name, trade secrets, and recipes. Nolan stated that he understood this request to mean that "our contract was over and [Magistro] was going to go ahead and license somebody else in that zone."

Nolan also testified that upon attending a pizza convention in early 1996, he discovered that there were recipes for "anything you wanted: [p]izza sauce, pizza dough" and that the convention included demonstrations "to teach you how to do all of this type of thing." He said he then realized that "there were no secrets" because the people at the convention were willing to share information. He stated that he was given a recipe for thin crust New York-style pizza which produced the same type of crust that Magistro claimed was a family secret. Nolan said that when he returned from the convention, he began using the recipe in his restaurants. He testified that he no longer prepared his own meatballs and that they were being purchased commercially, already rolled and precooked. He also changed the sauces by using prepackaged spice mixes to ensure consistency. He stated

that these mixtures were different from the recipes provided by Magistro.

There was no evidence that Nolan was still using the trade secrets furnished to him by Magistro. Thus, the trial court's finding that Magistro failed to prove that Nolan was using Magistro's trade secrets in violation of the contracts was not clearly wrong.

We next address Magistro's claim that Nolan engaged in an advertising campaign with the intent to deceive customers, in violation of the Uniform Deceptive Trade Practices Act. We will not disturb the factual findings of the trial court unless we find them to be clearly wrong. See *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004).

Magistro claimed that several advertisements could confuse customers or mislead them into believing that Don Carmelo's Pizzeria and Giavonni Santino's Pizzeria were operated by the same parties. Magistro's evidence consisted of photocopies of the yellow pages from a telephone directory. One page listed Don Carmelo's Pizzeria and Giavonni Santino's Pizzeria at the same Blondo Street address and the same telephone number. Magistro claimed that Nolan tried to associate his restaurants with Magistro by calling them "family owned & operated."

The Uniform Deceptive Trade Practices Act provides in relevant part:

> (a) A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source.

§ 87-303. A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he: "(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services; (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another." § 87-302.

The trial court found no basis upon which it could rule in Magistro's favor on the issue of deceptive trade practices. We cannot say that the trial court was clearly wrong.

CONCLUSION

For the reasons set forth herein, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
LOUIS M. CONOVER II, APPELLANT.

703 N.W.2d 898

Filed September 30, 2005. No. S-04-576.

1. **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.
2. **Constitutional Law: Appeal and Error.** Generally, a constitutional question not properly raised in the trial court will not be considered on appeal.
3. **Constitutional Law: Statutes: Appeal and Error.** Where the constitutional invalidity of a statute is plain and such determination is necessary to a reasonable and sensible disposition of the issues presented, an appellate court is required by necessity to notice the plain error.
4. **Statutes: Legislature: Intent.** The Legislature, while in special session, may enact legislation relating to, germane to, and having a natural connection with the purpose for which it was convened. The purpose or subject as stated in the proclamation is to be determined by an analysis and construction of the proclamation as a whole.
5. **Constitutional Law: Legislature: Statutes: Presumptions.** The presumption is always in favor of the constitutionality of legislation, and an act should be held to be within the proclamation if it can be done by any reasonable construction.
6. **Sentences: Appeal and Error.** The Nebraska Supreme Court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.
7. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Adams County: TERRI HARDER, Judge. Affirmed in part, and in part vacated and remanded with directions for resentencing.

James R. Mowbray, Robert W. Kortus, and Matthew J. Connealy II, Senior Certified Law Student, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, J. Kirk Brown, Solicitor General, and Dan Money, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

The district court for Adams County sentenced Louis M. Conover II to two consecutive sentences of life imprisonment without parole after accepting his pleas of no contest to two counts of first degree murder charged as Class IA felonies. In this direct appeal, Conover contends that his sentences are erroneous because an amendment to the statute defining the penalty for a Class IA felony enacted during a 2002 special session of the Nebraska Legislature violated Neb. Const. art. IV, § 8. We find merit in this contention, and therefore, we vacate the sentences and remand the cause to the district court with directions for resentencing.

BACKGROUND

On March 24, 2003, Conover was charged with two counts of first degree murder and two counts of use of a deadly weapon to commit a felony in connection with the February 8 deaths of his parents. In a subsequent amended information, the State gave notice of its intent to seek the death penalty based on one or more of four aggravating circumstances. Conover entered pleas of not guilty to the charges.

Conover was represented in the district court by the Adams County public defender, who filed various pretrial motions in his behalf. The motions were overruled. Conover made, but then withdrew, a motion for appointment of different counsel. At various times, Conover complained to the district court that he had trouble communicating with his defense counsel, but he eventually withdrew each complaint.

As the result of a plea agreement, Conover was arraigned on an amended information charging him with two counts of first degree murder. The amended information did not include a notice of aggravating circumstances, and the prosecutor stated on the record that as a part of the plea agreement, the State was charging Conover with two Class IA felonies and was not seeking the death penalty. Conover entered pleas of no contest on each of the two counts. During the hearing at which his pleas were entered, Conover expressed satisfaction with his legal representation. Conover was subsequently sentenced to two consecutive terms of life imprisonment without parole and ordered to pay costs in the amount of $1,939.39.

After this direct appeal was perfected, this court entered an order relieving the Adams County public defender of any further responsibility to Conover and appointing the Nebraska Commission on Public Advocacy to represent him in this appeal. This order was based upon pro se filings by Conover indicating that he intended to raise issues of ineffective assistance of counsel in this appeal.

ASSIGNMENTS OF ERROR

Conover assigns, renumbered and restated, (1) that the sentences of life imprisonment without parole are unconstitutional because they were prescribed by a statute which was amended during a special session of the Legislature and the amendment did not fall within the legal scope of such session, (2) that his trial counsel was ineffective in failing to challenge the sentences in the district court, (3) that the district court erred in ordering his sentences to be served consecutively, and (4) that he was deprived of effective assistance of counsel and a fair trial in violation of his rights under the U.S. and Nebraska Constitutions.

STANDARD OF REVIEW

[1] 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. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

ANALYSIS

LIFE IMPRISONMENT WITHOUT PAROLE

[2,3] The constitutional issue presented in this appeal was not asserted by Conover's trial counsel in the district court at the time of sentencing. Generally, a constitutional question not properly raised in the trial court will not be considered on appeal. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996). However, where the constitutional invalidity of a statute is plain and such determination is necessary to a reasonable and sensible disposition of the issues presented, we are required by necessity to notice the plain error. See *State v. Goodseal*, 186 Neb. 359, 183 N.W.2d 258 (1971). See, also, *State v. Johnson*, 269 Neb. 507, 695 N.W.2d 165 (2005) (Gerrard, J., dissenting). We invoke this principle in reaching the constitutional issue presented here.

In response to the decision of the U.S. Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Nebraska Legislature amended Nebraska's capital sentencing statutes by passing L.B. 1 during a special session of the Legislature in 2002. See 2002 Neb. Laws, L.B. 1, 3d Spec. Sess. (Nov. 22, 2002). Under the law in effect both prior and subsequent to the 2002 amendments, the offense of murder in the first degree is punishable as either a Class I or a Class IA felony. Neb. Rev. Stat. § 28-303 (Reissue 1995 & Supp. 2003). The penalties for various felony classes are set forth in Neb. Rev. Stat. § 28-105 (Reissue 1995 & Cum. Supp. 2004). Conover's claim that his sentences were unconstitutional is based upon the 2002 amendment to § 28-105(1) included in L.B. 1, § 1. Prior to the amendment, the penalty for a Class IA felony was "Life imprisonment." § 28-105(1) (Reissue 1995). As a result of the amendment, the penalty for a Class IA felony is now "Life imprisonment without parole." § 28-105(1) (Cum. Supp. 2004). See *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003). Section 11 of L.B. 1 amended Neb. Rev. Stat. § 29-2520(1) (Cum. Supp. 2004) by adding a provision that "[i]f no notice of aggravation has been filed, the district court shall enter a sentence of life imprisonment without parole."

We addressed these amendments in *State v. Gales, supra*, a death penalty appeal which was pending in this court when the U.S. Supreme Court decided *Ring v. Arizona, supra*. We held in *Gales* that the new constitutional rule announced by the U.S. Supreme Court in *Ring* necessitated resentencing at which the presence or absence of aggravating circumstances sufficient to support imposition of the death penalty would be determined by a jury pursuant to the new procedures set forth in the amendments. With respect to the amendment to § 28-105(1), we conducted an ex post facto analysis and held:

> If, in a subsequent amendment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law. . . . Because the language used in L.B. 1 to describe the minimum penalty for first degree murder is clearly different than the prior statutory language, we presume that the Legislature intended to change the minimum penalty. For this reason, we conclude that subjecting [the defendant] to the enhanced minimum sentence of life without parole upon remand for resentencing would violate ex post facto principles.

(Citation omitted.) *State v. Gales*, 265 Neb. at 633, 658 N.W.2d at 629-30. We therefore ordered that upon resentencing, the minimum sentence to which the defendant could be exposed was "life imprisonment, not life imprisonment without parole." *Id.* at 636, 658 N.W.2d at 632. We reached the same conclusion in *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), another death penalty appeal pending in this court when *Ring* was decided. Neither *Gales* nor *Mata*, nor any other case, has presented the specific constitutional issue before us in this case.

[4,5] As noted, L.B. 1 was enacted during a special session of the Legislature. Neb. Const. art. IV, § 8, provides: "The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the Legislature shall enter upon no business except that for which they were called together." With respect to this constitutional provision, we have held that the Legislature, while in special session, may enact legislation

relating to, germane to, and having a natural connection with the purpose for which it was convened. *Arrow Club, Inc. v. Nebraska Liquor Control Commission*, 177 Neb. 686, 131 N.W.2d 134 (1964). The purpose or subject as stated in the proclamation is to be determined by an analysis and construction of the proclamation as a whole. See, *id.*; *Chicago, B. & Q. R. Co. v. Wolfe*, 61 Neb. 502, 86 N.W. 441 (1901). The presumption is always in favor of the constitutionality of legislation, and an act should be held to be within the proclamation if it can be done by any reasonable construction. *Arrow Club, Inc. v. Nebraska Liquor Control Commission, supra.*

With respect to the 2002 special session in which L.B. 1 was enacted, the Governor's proclamation stated that the session was being called

> for the purpose of considering and enacting legislation on only the following subjects:
>
> 1. To enact procedures for jury participation in the first degree murder sentencing process as required by the recent decision of the Supreme Court of the United States in *Ring v. Arizona*;
>
> 2. To enact procedures to establish lethal injection as a means of enforcing a sentence of death; and
>
> 3. To appropriate funds for the necessary expenses of the extraordinary session herein called.

Legislative Journal, 97th Leg., 3d Spec. Sess. 3 (Nov. 7, 2002). Conover argues that the amendment to § 28-105(1) was not germane to or related to any purpose stated in the Governor's proclamation and that the statute as amended is therefore unconstitutional.

The State argues that contrary to our holding in *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003), the amendment changed only the language and not the substance of the statutory penalty for a Class IA felony. The State contends that this is so because under both the prior and the amended versions of § 28-105(1), a person serving a life sentence is not eligible for parole. The State further argues that *Gales* incorrectly applied the legal presumption that the Legislature's use of different language effects a substantive change because no ambiguity existed and the Legislature's stated purpose, as reflected in

floor debate on the amendment, was to clarify that under then-existing law, life imprisonment necessarily meant life imprisonment without parole.

Even assuming for the sake of argument that the Legislature was merely attempting to clarify what it believed to be existing law when it amended § 28-105(1) in the 2002 special session, we conclude that the amendment was not related to or germane to any of the purposes for which it was called and had no natural connection to such purposes. The Governor's proclamation was narrow and specific, authorizing consideration of changes to existing statutes pertaining to the death penalty. There is no language in the proclamation which can reasonably be construed as authorizing the Legislature to amend a statute pertaining to life imprisonment, whether for purposes of clarification or substantive change. Thus, the 2002 amendments to §§ 28-105(1) and 29-2520(1), which insert the phrase "without parole" after "life imprisonment" contravene the constitutional directive that the "Legislature shall enter upon no business except that for which they were called together" in a special session. See Neb. Const. art. IV, § 8. We therefore conclude that whatever its intent, the Legislature lacked constitutional authority to amend the language of the statutory penalty for a Class IA felony during the 2002 special session.

In the context of our ex post facto analyses in *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), and *State v. Gales, supra*, we concluded that the phrase "without parole," as employed in L.B. 1, was severable so as to permit resentencing to life imprisonment under the prior version of the statute if the death penalty was not imposed on remand. Moreover, for the same reason that the Legislature lacked constitutional authority to add the phrase "without parole" to § 28-105(1) during the 2002 special session, it also lacked authority to repeal the version of the statute then in existence which prescribed the penalty for a Class IA felony as life imprisonment. Thus, at the time of Conover's sentencing, the district court had statutory authority to impose a sentence of life imprisonment on each of the two counts of first degree murder, but it lacked authority to add the phrase "without parole." Consequently, the sentences were erroneous but not void. See *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980), and *Draper*

v. Sigler, 177 Neb. 726, 131 N.W.2d 131 (1964) (both holding that indeterminate sentence imposed for crime, where not authorized by statute, is erroneous but not void). See, also, *State v. Alford*, 6 Neb. App. 969, 578 N.W.2d 885 (1998).

[6] In Conover's brief, he requests that we "[r]emand this case to the district court for resentencing with direction to impose the minimum sentences for first degree [murder] in effect prior to the imposition of L.B. 1." Brief for appellant at 17. Inasmuch as this court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced, *State v. Mentzer*, 233 Neb. 843, 448 N.W.2d 409 (1989), we conclude that remand with directions to resentence Conover to life imprisonment on each of the two convictions is warranted.

Other Assignments of Error

[7] Because we reach and resolve the constitutional issue on plain error, we need not address Conover's contention that his trial counsel was ineffective in not raising it in the district court. Conover also assigns, but does not argue, error in the imposition of consecutive sentences. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

Conover further assigns, without specificity, that he "was deprived of the effective assistance of counsel and a fair trial" in violation of his rights under the 5th, 6th, and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 11, of the Nebraska Constitution. Brief for appellant at 3. To the extent that this general assignment is intended to encompass matters other than Conover's claim that his trial counsel failed to challenge the constitutionality of his sentences, we conclude that the record is insufficient to permit meaningful review on direct appeal. We express no opinion as to whether Conover's general assignment of ineffective assistance of trial counsel is sufficient to preserve any such claims for postconviction review. See *State v. Marshall, supra.*

CONCLUSION

For the foregoing reasons, we affirm Conover's convictions on both counts of first degree murder, but vacate the sentences

of "life imprisonment without parole" and remand the cause to the district court with directions to resentence Conover to life imprisonment on each conviction, with the sentences to run consecutively.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS FOR RESENTENCING.

STATE OF FLORIDA EX REL. DEPARTMENT OF INSURANCE OF THE STATE OF FLORIDA, RECEIVER FOR THE UNITED SOUTHERN ASSURANCE COMPANY, A FLORIDA CORPORATION AUTHORIZED TO TRANSACT AN INSURANCE BUSINESS IN FLORIDA, APPELLEE, V. COUNTRYWIDE TRUCK INSURANCE AGENCY, INC., A FLORIDA CORPORATION, APPELLEE, AND COUNTRYWIDE INSURANCE AGENCY, INC., A NEBRASKA CORPORATION, AND DAVID L. FULKERSON, APPELLANTS.

703 N.W.2d 905

Filed September 30, 2005. No. S-04-686.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
3. **Attorneys at Law: Appeal and Error.** If an appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate.
4. **Judges: Recusal: Final Orders.** It has generally been held that the collateral order exception to the finality requirement does not encompass an order denying a motion to recuse.
5. **Judges: Recusal: Final Orders: Appeal and Error.** Recusal questions are fully reviewable on an appeal from a final judgment, and, therefore, the collateral order exception is unavailable.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Appeal dismissed.

William E. Gast, P.C., L.L.O., and Michael D. McClellan, of Nelson McClellan, for appellants.

Robert F. Craig, P.C., and, on brief, Shawn M. Grimsley for appellee State of Florida.

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

MCCORMACK, J.

NATURE OF CASE

This is an appeal from the denial of a motion for recusal filed by the appellants, Countrywide Insurance Agency, Inc., and David L. Fulkerson.

BACKGROUND

A detailed recitation of the factual background of this case is set forth in *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999). Set forth below are the facts relevant to the denial of the appellants' motion for recusal.

The State of Florida on the relation of the Department of Insurance of the State of Florida is the receiver of United Southern Assurance Company, an insolvent insurance company. On January 12, 1998, the State of Florida filed a petition in the district court for Douglas County alleging that Countrywide Truck Insurance Agency, Inc. (Truck), collected premiums for United Southern Assurance Company but failed to remit them pursuant to the parties' agreement. The petition further alleged that Countrywide Insurance Agency is the "alter ego" of Truck and that Fulkerson is the operator, director, and controlling person of both Truck and Countrywide Insurance Agency.

The appellants filed a motion for partial summary judgment on the issue of whether they are liable to the State of Florida based on the theory of alter ego. The motion was denied. Approximately 3 months later, the appellants filed a motion seeking the recusal of the district court judge based on partiality or bias. In their motion for recusal, the appellants argued that the district court judge should recuse himself because (1) the court continually failed to make the distinction between the defaulting defendant, Truck, and the nondefaulting defendants,

Countrywide Insurance Agency and Fulkerson, and that this action on the part of the court indicates a bias or prejudice, and (2) the court's order incorrectly observed that the motion for partial summary judgment requested that "[d]efendant Fulkerson should be dismissed from this lawsuit" when in fact there was no such request in the motion.

On May 24, 2004, the district court overruled the appellants' motion for recusal. Prior to the denial of their motion, the appellants, on May 21, petitioned this court for a writ of mandamus compelling the recusal of the district court judge. Before any action had been taken on this outstanding petition, the appellants, on June 1, perfected the present appeal, contesting the district court's denial of their motion for recusal. On June 9, we denied the appellants' writ of mandamus.

On appeal, the appellants argue that the district court erred in denying their motion for recusal.

ASSIGNMENT OF ERROR

The appellants allege that the district court erred in denying their motion for recusal.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002).

ANALYSIS

Before we address the appellants' assignment of error, we must determine whether this court has jurisdiction to adjudicate the instant appeal. In order for this court to possess jurisdiction, the district court's order denying the appellants' motion for recusal must be a final order or appealable under an exception to the final order requirement.

[2,3] Generally, for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558

(2004); *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997). The order in this case is not a final order, and it is not contended to be so by the appellants. Rather, the appellants claim that the order falls within the exception to the final order rule set forth in *Richardson v. Griffiths, supra*. In *Richardson*, we adopted the following exception to the final order requirement: If an appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate. See *Trainum v. Sutherland Assocs., supra*.

We conclude that the *Richardson* collateral order exception does not apply in the instant case. We agree that in some cases, a motion for a trial judge to recuse himself or herself may be based on considerations that are collateral to the merits of the controversy. E.g., generally, Neb. Code of Jud. Cond., Canon 3E(1) (rev. 2000). But even assuming that an appeal from the denial of such a motion involves issues that are collateral to the basic controversy, the collateral order exception does not apply because the parties' interests can adequately be protected in an appeal from a judgment dispositive of the entire cause.

[4,5] For this reason, it has generally been held that the collateral order exception to the finality requirement does not encompass an order denying a motion to recuse. See, e.g., *In re Martinez-Catala*, 129 F.3d 213 (1st Cir. 1997); *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82 (5th Cir. 1992); *Krieg v. Krieg*, 743 A.2d 509 (Pa. Super. 1999). Recusal questions are fully reviewable on an appeal from a final judgment, and, therefore, the collateral order exception is unavailable. See *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir. 1980). See, also, *In re Cargill, Inc.*, 66 F.3d 1256 (1st Cir. 1995); *State v. Forte*, 150 Vt. 654, 553 A.2d 564 (1988). As stated by the Seventh Circuit, in a plaintiff's attempted appeal from a judge's refusal to disqualify himself,

> strong judicial policy considerations caution against allowing piecemeal appeals through the review of otherwise unappealable orders in the course of considering substantively unrelated interlocutory appeals. . . . Since the plaintiff will be able to obtain appellate review of the order denying

> disqualification after a final decision on the merits, thus allowing for a full contextual assessment of any possible appearance of impropriety . . . we decline to contravene settled judicial policy in order to permit intermediate appeal on this issue.

Alexander v. Chicago Park Dist., 709 F.2d 463, 470-71 (7th Cir. 1983). We agree, and we reach the same conclusion.

Thus, the collateral order exception does not apply to the denial of a motion for recusal, and the parties do not contend that the denial of this motion was a final, appealable order for any other reason. Cf. *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005) (concluding that denial of motions to discharge violation of probation and to recuse judge did not present final, appealable order). In the absence of a judgment or a valid order finally disposing of this case, we are without jurisdiction and, therefore, we cannot consider the appellants' assignment of error. See *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

APPEAL DISMISSED.

DONALD D. MERRILL, APPELLEE, V.
GRISWOLD'S, INC., APPELLANT.

703 N.W.2d 893

Filed September 30, 2005. No. S-04-723.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
2. **Final Orders: Appeal and Error.** A party may appeal from a court's order only if the decision is a final, appealable order.
3. ____: ____. Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and CARLSON, Judges, on appeal thereto from the Nebraska Workers' Compensation

Court. Judgment of Court of Appeals vacated, and cause remanded with directions.

John W. Iliff and Francie C. Riedmann, of Gross & Welch, P.C., for appellant.

Gregory R. Coffey, of Friedman Law Offices, and Brett McArthur for appellee.

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

WRIGHT, J.

NATURE OF CASE

In this workers' compensation case, we granted the petition for further review filed by the employer, Griswold's, Inc., which argues that the Nebraska Court of Appeals erred in awarding attorney fees to the employee, Donald D. Merrill.

SCOPE OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

FACTS

Merrill was employed as a carpet installer for Griswold's. On June 25, 2002, Merrill filed an amended petition in the Workers' Compensation Court alleging that on March 3, April 5, and October 6, 2000, he incurred personal injury in accidents arising out of and in the course of his employment with Griswold's. Merrill alleged that he sustained lumbar degenerative disk disease or aggravation of lumbar degenerative disk disease as a result of repetitive motion injuries that occurred while he was installing carpet.

According to the record, on April 6, 2000, Merrill was examined by a nurse practitioner; diagnosed with lumbar muscle pain, spasm, and strain; and given medication. On May 1, he returned with continuing complaints of low-back pain and spasm, and physical therapy was recommended. Merrill attended one physical therapy session on May 11 and subsequently returned to

work. On October 6, Merrill experienced low-back pain while using a "knee kicker" while installing carpet. On October 9, he returned to the nurse practitioner with complaints of pain in his back. An MRI showed degenerative disk disease.

Merrill was referred to Dr. Andrew Messer. After an examination, Messer reported: "[Merrill] has had predating degenerative process, but the pain he had prior to the industrial related injury was tolerable and was not affecting his work. He does have a new onset of symptoms, predominantly radicular in nature and compatible with what I find on his MRI."

Surgery was performed, and Merrill was allowed to return to work on December 4, 2000. He was limited to lifting no more than 25 pounds and was to do no work on his hands and knees. Messer assessed Merrill on December 26 and recommended no further treatment. Merrill was released to work with no restrictions. He was to use common sense in determining his abilities.

On October 9, 2001, Merrill returned to Messer's office and reported that he had done well for some time, but he complained that he had developed pain in his right buttock and down into his right anterior thigh. An MRI showed several broad-based disk protrusions. Merrill had further back surgery on March 27, 2002, after which he developed infections and had a considerable amount of pain. He was unable to return to work.

Following a hearing, the trial court found that the medical treatment on April 6, 2000, and the physical therapy on May 11 were the result of an injury during the course and scope of Merrill's employment but that no temporary benefits were due, nor was there any permanent impairment or loss of earning power from this injury. The court found that on October 6, Merrill herniated a lumbar disk while using the knee kicker to install carpet. It also found that Merrill had missed 18 days of work and was entitled to 1⅔ weeks of temporary disability benefits. The first 7 days were not included in Merrill's entitlement, in accordance with Neb. Rev. Stat. § 48-119 (Reissue 2004).

In its order, the trial court noted that Merrill claimed Griswold's was liable for his treatment by Messer beginning October 1, 2001, but that Messer was unable to give an opinion as to the cause of the pain or the need for the surgery in March 2002. Therefore, the court was unable to find that the treatment

beginning October 1, 2001, and the surgery in March 2002 were the result of any injury during the course and scope of Merrill's employment.

The trial court noted in its order that at the time of the hearing, Merrill asked the court to determine liability only and to give him additional time to gather evidence on whether he had a permanent impairment. The record contains a letter dated February 4, 2003, in which Messer reported that Merrill had obtained maximum medical improvement. The court stated that the date of the report did not give Merrill enough time before trial to obtain an impairment rating and to request a determination of loss of earning power. It opined that until Merrill obtained a ruling on whether he was entitled to benefits for one or both surgeries, it would be difficult to prepare a loss of earning power report.

The trial court's order granted Merrill's request to determine at a later date any loss of earning capacity as a result of the October 6, 2000, injury. Merrill was directed to request an impairment rating based upon December 26, 2000, the date he reached maximum medical improvement. The order stated that if Merrill received an impairment rating, he should seek appointment of a vocational counselor to prepare a report identifying his loss of earning capacity as of December 26. Merrill was advised that if he obtained a permanent impairment rating, he could request a hearing to determine his entitlement to vocational rehabilitation services.

The trial court awarded temporary disability benefits to Merrill and directed Griswold's to pay certain medical expenses. The court ordered that upon the application of any party, a further hearing would be held regarding Merrill's loss of earning capacity and/or his entitlement to vocational rehabilitation services.

Following entry of the award, Griswold's sought review by a three-judge panel of the compensation court; however, Merrill argued before the panel that the award was not final because it did not determine the issue of his entitlement to permanent benefits. Merrill asserted that the trial court's determination of less than all the issues was an interlocutory order and was therefore not a final order for purposes of an appeal.

The review panel concluded that Merrill's permanent disability had not been presented to the trial court and that, therefore, the trial court had resolved all the issues submitted to it. The review panel held that the order of August 8, 2003, was a final, appealable order and affirmed the award of the trial court. Griswold's was also ordered to pay attorney fees of $1,500.

COURT OF APPEALS DECISION

In an opinion not designated for permanent publication, the Court of Appeals concluded that the trial court was not clearly wrong in finding that Merrill sustained work-related injuries in April and October 2000. See *Merrill v. Griswold's, Inc.*, No. A-04-723, 2005 WL 283573 (Neb. App. Feb. 8, 2005) (not designated for permanent publication). The appellate court noted that the trial court had agreed to bifurcate the trial and concluded that the trial court had a valid reason for postponing its determinations as to whether Merrill had a permanent injury after the October accident and whether he sustained a loss of earning capacity as a result.

Because Merrill was able to return to his employment after the November 2000 surgery and perform the same work he had previously performed, the Court of Appeals concluded that he was not entitled to vocational rehabilitation benefits. It modified the trial court's award to provide that Merrill was not entitled to vocational rehabilitation, and it affirmed the award in all other respects. The Court of Appeals awarded Merrill attorney fees in the amount of $1,060. We granted the petition for further review filed by Griswold's.

ASSIGNMENT OF ERROR

In its petition for further review, Griswold's claims that it obtained a reduction in Merrill's award on appeal from the review panel and that, therefore, the Court of Appeals erred in awarding attorney fees to Merrill.

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). A party may appeal from

a court's order only if the decision is a final, appealable order. *Id.* Thus, we consider whether the order of the trial court was a final order which conferred jurisdiction upon the review panel.

The trial court determined that Merrill had sustained a compensable injury in the course and scope of his employment, but it did not decide whether Merrill was entitled to permanent disability benefits or vocational rehabilitation. It granted Merrill a continuance to obtain a determination whether he had a permanent impairment and to determine his loss of earning capacity, if any. The court stated that if Merrill received an impairment rating, he could request a hearing to determine his entitlement to vocational rehabilitation services.

We have held that an appeal to a review panel of the Workers' Compensation Court must be taken from a final order. See *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999). Neb. Rev. Stat. § 48-179 (Reissue 2004) provides that "[e]ither party at interest who refuses to accept the *final findings, order, award, or judgment*" of the trial judge may seek review. (Emphasis supplied.)

In *Dawes, supra*, the claimant appealed from a decision of the trial judge in the Workers' Compensation Court that failed to address some of the issues raised by the claimant's petition. The review panel affirmed in part but ordered that the issues which were raised but not decided be remanded to the trial court for further consideration. The claimant appealed, and we granted bypass in order to address whether the trial court's award was a final, appealable order. We concluded that the trial court's order was intended to serve as a final adjudication of the rights and liabilities of the parties and that no issues were reserved for further determination. Although there were issues not discussed in the award, namely medical expenses and waiting-time penalties, the issues were not expressly reserved for later determination. We stated: "As a practical matter, the single judge affected a final adjudication by failing to award certain aspects of the relief requested by [the claimant]. Had the single judge expressly reserved ruling on those matters, the award would not have been final." *Id.* at 537, 667 N.W.2d at 181.

The Court of Appeals has also addressed this type of jurisdictional question. In *Hamm v. Champion Manuf. Homes*, 11

Neb. App. 183, 645 N.W.2d 571 (2002), the trial court awarded temporary total disability and permanent partial disability benefits, but expressly reserved ruling on medical expenses and mileage and set a later hearing date to resolve those issues. The employer filed an application for review, and the review panel remanded the cause to the trial court to resolve the issues. The employer then appealed to the Court of Appeals, which determined that the order of the trial court was not a final, appealable order because it did not resolve all the issues before it and that both the review panel and the Court of Appeals lacked jurisdiction over the matter.

In the case at bar, the trial court asked at the beginning of the hearing which issues were to be decided. Merrill's counsel replied that the court should decide causation. The following exchange then occurred:

> [Merrill's counsel]: . . . . The only — I think we agreed the only issue we'd try today was just liability.
>
> [Counsel for Griswold's]: No, we didn't agree to that. I don't think that's correct.
>
> THE COURT: Well, maybe we did. I don't know. I can't say. Well, what do you think we're trying today? Have you got the medical bills in here?
>
> [Merrill's counsel]: Well, I have the medical bills. I didn't offer them in the — as exhibits because my understanding was that we were going to try the issue of liability. The defense was denying any liability at all. They haven't paid any medical bills. So my understanding was we were bifurcating the trial.

The trial court asked Merrill's counsel what could not be tried at the hearing, and Merrill's counsel replied: "Well, obviously, I can't try damages, and my understanding was that we were going to try damages the second part of this trial." Counsel for Griswold's stated: "And I never understood that, Judge. I think the Court doesn't like to bifurcate these matters anyway." The court asked again what it should determine at that time, and Merrill's counsel responded: "Causation."

The trial court then stated that it would not decide Merrill's eligibility for permanent disability benefits at that time. Counsel for Griswold's objected that doing so would be prejudicial to

Griswold's, and he again stated he had no recollection that the trial was going to be bifurcated. Merrill's counsel stated that he and defense counsel had discussed bifurcating because Griswold's was not willing to pay for any services or vocational rehabilitation. The court then stated: "Usually when you bifurcate something, you basically just put the permanency off. You maybe put the rehab off, too. [I]f I find there's liability, I can send him out for a rating, too. Put the medical bills in. Get all your stuff. I'll decide all of it." The court admitted it did not know whether bifurcation had been discussed and stated: "I'll just decide it all, and if I find liability, I can ask certain questions of doctors, and so I'll find out if he has a permanency."

The trial court did not rule on whether Merrill was entitled to vocational rehabilitation benefits. The order stated that a further hearing would be held on his loss of earning capacity and entitlement to vocational rehabilitation services upon application of any party. Merrill was directed to obtain an impairment rating as of December 26, 2000, which was the date he reached maximum medical improvement after the injury of October 6. Merrill was directed to apply for appointment of a vocational counselor if it was determined that he had a permanent impairment. The vocational counselor was then to prepare a report stating Merrill's loss of earning capacity as of December 26, 2000, the date on which he was released from Messer's care and allowed to return to work with no restrictions.

Thus, the trial court did not determine what benefits for permanent impairment or vocational rehabilitation to which Merrill might be entitled at the time Griswold's appealed to the review panel.

[3] We have held that generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). The trial court reserved for later determination some of the issues presented, i.e., Merrill's permanent impairment and entitlement to vocational rehabilitation benefits relating to the

October 6, 2000, injury. As entered, the trial court's order did not determine all of the issues and was an interlocutory order. Because the trial court's order was not a final order, the review panel did not have jurisdiction to consider it, the Court of Appeals also lacked jurisdiction, and the appeal should have been dismissed. See *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999).

CONCLUSION

The trial court's order reserved ruling on the issues of Merrill's permanent impairment, if any, and his entitlement to vocational rehabilitation benefits. The order was not a final order, and the review panel lacked jurisdiction. The Court of Appeals also lacked jurisdiction to review the issues and to enter an award of attorney fees.

The decision of the Court of Appeals is vacated, including the award of attorney fees, and the cause is remanded with directions that the Court of Appeals is to remand the cause to the review panel with instructions to dismiss the application for review for lack of jurisdiction.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

VERONICA R. ROBERTSON, APPELLANT,
V. BENJAMIN D. ROSE, APPELLEE.

704 N.W.2d 227

Filed October 7, 2005. No. S-04-449.

1. **Jurisdiction: Fees: Appeal and Error.** The payment of the fee to docket a petition for further review is mandated by Neb. Rev. Stat. § 33-103 (Reissue 2004) and is therefore deemed jurisdictional.
2. **Fees: Time: Appeal and Error.** A petition for further review, albeit tendered to the Clerk of the Supreme Court within 30 days after the Nebraska Court of Appeals has issued its decision, is not properly filed unless and until the required docket fee is timely paid.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and CARLSON and MOORE, Judges, on appeal thereto from the District Court for Box Butte

County, BRIAN SILVERMAN, Judge. Petition for further review dismissed.

James L. Zimmerman, of Zimmerman Law Firm, P.C., L.L.O., for appellant.

Leland K. Kovarik, of Kovarik, Ellison, Mathis & Weimer, P.C., for appellee.

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

PER CURIAM.

This matter is before us on a petition for further review filed by Benjamin D. Rose, appellee. Because we conclude the petition was not timely filed, the petition is dismissed.

This is a motor vehicle accident negligence case in which Veronica R. Robertson, appellant, sued Rose. Following a jury verdict in favor of Rose, the district court for Box Butte County denied Robertson's motion for new trial. Robertson appealed.

On July 22, 2005, the Nebraska Court of Appeals, in a memorandum opinion, reversed the judgment of the district court which had denied Robertson's motion for a new trial. The Court of Appeals remanded the cause for a new trial.

On August 22, 2005, Rose attempted to file a petition for further review. That same day, the Clerk of the Supreme Court returned the petition for further review to Rose with a letter explaining that the petition was being returned because Rose had failed to include either the $50 docket fee required as of July 1, 2005, pursuant to Neb. Rev. Stat. § 33-103 (Reissue 2004) as amended by 2005 Neb. Laws, L.B. 348, § 6, or an application to proceed in forma pauperis and a poverty affidavit as required by Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2004). On August 24, Rose returned the petition for further review to the clerk's office along with a check for the $50 docket fee.

As noted in the clerk's letter to Rose, § 33-103 was amended by L.B. 348, § 6, effective July 1, 2005, to provide in relevant part: "At the time of filing a petition for further review to the Supreme Court from the Court of Appeals, there shall be paid to the clerk the sum of fifty dollars as a docket fee in lieu of any

other filing fees." Further, Neb. Ct. R. of Prac. 2F(1) (rev. 2002) was amended June 15, 2005, to provide in relevant part:

> As of July 1, 2005, pursuant to Neb. Rev. Stat. § 33-103 as amended by L.B. 348, § 6, a docket fee of $50 shall be paid to the Clerk of the Supreme Court at the time of the filing of the petition for further review. This docket fee shall be waived for an indigent person who has been granted leave to proceed in forma pauperis on appeal by the trial court.

The record shows that in this case, the minute entry that was provided to the parties when the Court of Appeals' memorandum opinion was filed on July 22, 2005, contained a legend as follows: "**NOTICE Docket Fee for Petitions for Further Review**." The notice stated: "Pursuant to L.B. 348, § 6, which was signed by the Governor on June 2, 2005, as of July 1, 2005, a docket fee of fifty dollars shall be paid to the Clerk of the Supreme Court at the time of filing a Petition for Further Review."

Neb. Rev. Stat. § 24-1107 (Reissue 1995) provides that "[w]ithin thirty days after the Court of Appeals has issued its decision in a case, any party to the case may petition the Supreme Court for further review of the decision in the manner prescribed by the rules of the Supreme Court." Rule 2F(1) states a petition for further review "must be filed within 30 days after the release of the opinion of the Court of Appeals or the entry of the order of the Court of Appeals finally disposing of the appeal, whichever occurs later." We have held that a petition for further review not filed within 30 days is untimely and should be dismissed. See *Ackerman v. Nebraska Dept. of Corr. Appeals Bd.*, 256 Neb. 896, 593 N.W.2d 728 (1999).

[1,2] In the context of the filing of an appeal, we have held that the filing of both a notice of appeal and the docket fee required by statute is mandatory and jurisdictional. *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996); *American Legion Post No. 90 v. Nebraska Liquor Control Commission*, 199 Neb. 429, 259 N.W.2d 36 (1977). See, also, *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004). In a like manner, the payment of the $50 fee to docket a petition for further review is now mandated by § 33-103 and is

therefore deemed jurisdictional. See, also, rule 2F(1). A petition for further review, albeit tendered to the clerk within 30 days after the Court of Appeals has issued its decision, is not properly filed unless and until the required docket fee is timely paid.

In the present case, the Court of Appeals' memorandum opinion was released July 22, 2005. Because the 30th day following July 22 fell on a weekend, the final day to timely file a petition for further review was Monday, August 22. Although Rose attempted to file a petition for further review on August 22, the petition was not accompanied by the required docket fee. Rose did not file a petition for further review accompanied by the required docket fee until August 24. Therefore, the petition for further review was not properly filed within 30 days as required under § 24-1107 and rule 2F(1).

Rose's petition for further review is untimely. Accordingly, the petition is dismissed.

PETITION FOR FURTHER REVIEW DISMISSED.

FRATERNAL ORDER OF POLICE, LODGE NO. 8, AND ROSS STEBBINS, APPELLANTS, V. COUNTY OF DOUGLAS, STATE OF NEBRASKA, APPELLEE.

___N.W.2d___

Filed October 7, 2005. No. S-04-611.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Former opinion modified. Motion for rehearing overruled.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellant Fraternal Order of Police, Lodge No. 8.

Andrew M. Steinbaugh, of John P. Fahey, P.C., for appellants.

Stuart J. Dornan, Douglas County Attorney, and James R. Thibodeau for appellee.

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

PER CURIAM.

Case No. S-04-611 is before this court on the motion for rehearing of appellant Fraternal Order of Police, Lodge No. 8, regarding our opinion reported at *Fraternal Order of Police v. County of Douglas, ante* p. 118, 699 N.W.2d 820 (2005). We overrule the motion but for purposes of clarification modify the opinion as follows:

In that portion of the opinion designated "Freedom of Association," we withdraw the seventh and eighth paragraphs, *id.* at 128, 699 N.W.2d at 830, and substitute the following paragraphs in their place:

> In *Spears v. Mo. Dept. of Corr. & Human Resources*, 210 F.3d 850 (8th Cir. 2000), a title VII action, the plaintiff brought a retaliation claim against the department of corrections. The district court granted summary judgment in favor of the department, concluding that the plaintiff had failed to establish any adverse employment action and, thus, had not presented a prima facie case of retaliation. The court of appeals affirmed.
>
> To establish a prima facie case of retaliation, a plaintiff must show, among other things, that the plaintiff suffered an adverse employment action at the hands of the employer. See *id.* "An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." *Id.* at 853. "Termination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects meet this standard . . . but minor changes in working conditions that merely inconvenience an employee or alter an employee's work responsibilities do not . . . ." (Citation omitted.) *Id.* See, also, *Meyers v. Starke*, 420 F.3d 738 (8th Cir. 2005) (employing title VII language as to what constitutes adverse employment action in First Amendment case).

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.