CONCLUSION

Erickson was not prejudiced by the trial court's error in failing to instruct the jury that manslaughter is a lesser-included offense of intentional child abuse resulting in death. The trial court did not err in denying Erickson's motion to change venue, and his sentence is not excessive. Therefore, the judgment of the trial court is affirmed.

AFFIRMED.

CHARLES F. ROBINSON, APPELLANT, V. DUSTROL, INC., A FOREIGN CORPORATION DOING BUSINESS IN NEBRASKA, APPELLEE.

793 N.W.2d 338

Filed January 28, 2011. No. S-10-045.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
2. **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.
3. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
4. **Negligence: Proof.** The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.
5. **Negligence.** One is not negligent simply by failing to anticipate the negligence of another.
6. **Trial: Jury Instructions: Appeal and Error.** In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level.
7. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Adam J. Sipple, of Johnson & Mock, for appellant.

Stephen G. Olson II and Kristina J. Kamler, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Charles F. Robinson filed a suit for negligence against Dustrol, Inc. Following a jury trial, judgment was entered for Dustrol. Robinson appeals. We affirm.

FACTUAL BACKGROUND

ACCIDENT

This case involves injuries allegedly sustained by Robinson following a motorcycle accident which occurred in Wahoo, Nebraska, where he lived. Robinson had spent the evening of July 6, 2005, at a motorcycle show in Omaha, Nebraska. Robinson testified that while at the show, he had some food and drank one beer. According to Robinson, following the show, he and his friends went to another establishment for pizza. While at that establishment, Robinson ate some pizza and drank another beer. Upon returning to Wahoo, the group again stopped at a local establishment, where, Robinson testified, he drank a soda.

Robinson left for home on his motorcycle around midnight on July 7, 2005. He was riding on Fifth Street in Wahoo, heading westbound toward the intersection of Fifth Street and U.S. Highway 77. Robinson testified that the traffic light was red as he was headed toward the intersection, but that the light turned green prior to his reaching the intersection. As such, Robinson proceeded through the intersection at 20 to 25 m.p.h. Robinson testified that he did not observe any warning signs or other indication that construction was being conducted on the road ahead.

Robinson testified that upon entering the intersection of Fifth Street and Highway 77, his motorcycle dropped upon hitting an "edge" or a "mill cut." Robinson indicated that his motorcycle "bucked" and that he began applying the brakes. However, according to Robinson's testimony, he was unable to bring his motorcycle to a complete stop before hitting the "west edge" of the intersection. Robinson then testified:

> The motorcycle made contact with the west edge, there was a big bump, and the back end of the motorcycle started to come up. At the same time, I'm lunging forward, hanging onto the handlebars. About that time, then I let go of the brake instantaneous, and the bike popped up over the ledge. I'm trying to get my rear end down. In other words, my butt and legs back over the bike down. I was up over, and I'm trying to get back down to catch the floorboard. I stuck my left foot out to try to brace the bike. The bike at that time is starting to fall over.
>
> . . . .
>
> . . . The bike started to fall over. It weighs about 800 pounds, and once it started to go over, I tried putting my foot down. I couldn't stop it from going over because I couldn't back down in time.
>
> . . . .
>
> . . . I fell on the left side. I was hanging onto the handlebars, and it launched me over.

Robinson also testified that he hit his head on the concrete.

Robinson testified that he went home following the accident and woke his wife to tell her about what had happened. He returned to the scene in the morning to speak with representatives from the various contractors working on the road construction project. The next day, July 8, 2005, Robinson went to the local emergency room due to pain in his neck, head, shoulders, and left foot. Since that time, Robinson has been treated by several physicians and has had surgery, but reportedly continues to suffer from pain which he attributes to the July 7 accident.

CONSTRUCTION

The stretch of Highway 77 upon which Robinson claimed to be injured was, at the time of the accident, under construction. Pavers, Inc., was the general contractor chosen by the Nebraska Department of Roads to resurface this portion of the roadway. Pavers had at least two subcontractors on this job: Trafcon, Inc., which provided construction signs and traffic control, and Dustrol, which did the milling, or grinding, of the surface to remove the old asphalt layer.

The milling process is accomplished by using specialized equipment to remove, in this case, about 2½ inches of old asphalt from the surface of the road. In removing this layer, "edges" are left around utilities like manholes and water valves, as well as in intersections, because once the milling is complete, the milled surface sits at a level below the utility or cross street. Those edges can sometimes be of enough depth that they require "ramping," a process by which the edges are tapered to make the transition between the two surfaces more gradual. And the depth of these edges can sometimes be greater than the depth of asphalt being milled from the surface.

On July 6, 2005, Dustrol was milling the asphalt surface of Highway 77, while Pavers was working behind Dustrol to ramp the utilities. There are three different materials that can be used for ramping: excess millings, which is the debris left after the milling process; "hot mix," which is the material used to pave the roadway; and "cold mix," a sticky material which can also be used to fill potholes. In this case, Dustrol's milling foreman, Neil Thoene, testified that it was his understanding that Pavers was going to ramp all of the vertical edges. Thoene also testified that Dustrol did not have hot or cold mix onsite, that the excess millings were being hauled away from the site, and that Pavers did have hot mix available onsite and, in fact, was using that to ramp utilities.

At the conclusion of the workday, Dustrol pulled its equipment off the road and the crew began equipment maintenance offsite. Because Pavers was still ramping, a few Dustrol employees remained behind to flag traffic until Pavers was finished. Thoene left for the day around 8 p.m. and drove through the intersection of Fifth Street and Highway 77 on his way home. He did not notice that the edges had not been ramped. Thoene also indicated that he was not driving through the intersection to inspect for such edges.

In contrast to Thoene's testimony, Pavers' general manager testified that his crew was responsible for ramping the manholes in the center of the street, but when asked whether Pavers was "doing any type of ramping work with the side streets," he responded, "I do not believe we were, no." He further testified

that Pavers was using hot mix to ramp the manholes and that it had the ability to use the same hot mix to ramp Fifth Street at Highway 77.

Justin Grusing, a manager with Dustrol, also testified. He acknowledged that as a subcontractor, Dustrol had a responsibility to comply with the contract between Pavers and the Department of Roads, and that Dustrol, through its milling, created the dangerous condition. Grusing testified that the contract between Pavers and the Department of Roads provided that ramping would be done, but did not state who would do it. Grusing also testified that although there was "nothing in writing," it was his understanding that Dustrol was only milling the road surface and that Pavers would be doing the ramping because it had hot mix available. Grusing also indicated that based on his experience, Pavers would want to do the ramping, because it was in its best interests to control the ramping so that it was simpler for Pavers to clean up the ramping when it was later removed. Grusing additionally noted that it was general practice to not split the ramping: whoever did the ramping did all of it.

LAWSUIT

Robinson filed an amended complaint against Dustrol, Pavers, and Trafcon, on April 7, 2008. In the amended complaint, Robinson alleged that the defendants were negligent in failing to (1) warn of the danger of the mill cut; (2) properly block the millcut from motor vehicle traffic; (3) conform with applicable standards, regulations, or guidelines relating to the dropoff resulting from the mill cut; (4) sufficiently separate the construction work from the general public; (5) adequately supervise the construction activity; and (6) recognize and correct the pavement edge condition.

A jury trial was held with respect to Robinson's allegations. Pavers and Trafcon were not litigants and did not participate in this trial. The jury was instructed as follows with regard to Dustrol's alleged negligence:

> Robinson . . . claims that Dustrol . . . was negligent in one or more of the following ways:

1. In failing to recognize and correct the dangerous pavement edge condition that existed at the time of the accident.

2. In failing to properly warn [Robinson] of the danger associated with the millcut.

3. In failing to conform with reasonable standards in the road construction industry regarding the protection of drivers from edge drop-offs and large bumps on the road surface.

The jury found that Robinson had not met his burden and entered judgment for Dustrol. Robinson appeals.

ASSIGNMENTS OF ERROR

On appeal, Robinson assigns, renumbered, that the district court erred in (1) overruling Robinson's motion for directed verdict on the issues of negligence and proximate cause; (2) overruling Robinson's motion for new trial on the basis that the verdict was not supported by sufficient evidence; (3) giving instructions Nos. 2, 13, and 15 and thus submitting to the jury the issues of negligence and proximate cause; (4) defining negligence in instruction No. 10 as what a "reasonably careful person," rather than a "reasonably careful contractor," would do; and (5) failing to instruct that Dustrol was not excused from its duty to ramp the edges even if it was more convenient for Pavers to ramp the edges.

STANDARD OF REVIEW

[1] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.[1]

[2] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.[2]

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[1] *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010).

[2] *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

[3] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[3]

ANALYSIS

Directed Verdict and Motion for New Trial

In his first assignment of error, Robinson argues that the district court erred in denying his motion for a directed verdict and instead submitting the case to the jury. Robinson's second assignment is related: He contends the district court erred in denying his motion for new trial on the basis that the jury verdict was not supported by sufficient evidence. In particular, Robinson argues that certain uncontroverted facts establish Dustrol's negligence. These facts, as well as Dustrol's response to them, will be discussed in more detail below.

Robinson first argues that "Dustrol had knowledge the milling creates excessive vertical edges that are dangerous and require ramping if too deep" and that "Dustrol had knowledge the intersection was controlled by a traffic signal, increasing the risk presented by excessive unramped edges."[4] Dustrol responds that

> [h]aving knowledge that dangers exist and certain conditions increase risks associated with those dangers does not conclusively prove the issue at hand — whether Dustrol knew or should have known that the milling performed on the project in question created excessive vertical edges that Dustrol was responsible for ramping.[5]

The record shows that Dustrol knew that milling could create excessive vertical edges and that those edges can be dangerous. But the record also shows that Dustrol had reason to believe that Pavers was responsible for ramping those edges. Though there was no agreement in writing, Dustrol representatives testified that Pavers and Dustrol had an oral agreement that Pavers would ramp the vertical edges. Moreover, Dustrol did not have the necessary materials on hand to ramp vertical

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[3] *Sinsel v. Olsen*, 279 Neb. 38, 777 N.W.2d 54 (2009).

[4] Brief for appellant at 15.

[5] Brief for appellee at 15.

edges—excess millings were being hauled away, and Pavers, not Dustrol, had access to hot mix. And Pavers employees were still present on the jobsite ramping vertical edges when Dustrol's employees were finished milling and began maintenance in preparation for the next day's work. Finally, there is no evidence that Dustrol was responsible for reopening the roadway to the traveling public. For these reasons, reasonable minds could differ as to whether Dustrol knew or should have known that the dangerous vertical edge was left unramped when the road was reopened.

Robinson next asserts that "Dustrol had the means to ramp any excessive edges with the day's old millings and had done so many times in the past."[6] While the record shows that Dustrol had used excess milling to ramp at other jobs in the past, the record also shows that excess millings were being hauled away from this particular site. Thus, reasonable minds could also differ as to whether Dustrol had the ability to ramp the vertical edges.

Robinson next contends that the following facts are uncontroverted: (1) "When Dustrol's foreman left the job site on July 6, the edges were between two and a half and four and [a] half inches at the intersection"; (2) "[h]aving done the milling that day, Dustrol knew or should have known of the four and a half inch edges"; and (3) "Dustrol's foreman knew a four and a half inch edge constituted a dangerous condition and was contrary to state regulations."[7]

We first note that as concluded above, reasonable minds could differ as to whether Dustrol left the jobsite the evening of July 6, 2005, aware that the roadway was left in a dangerous condition. Moreover, the evidence at trial was that the mainline of the intersection—where the traveling public drove—was at a vertical depth of 2½ inches, not the 4½ inches measured at the curb. In fact, the chief of police for the city of Wahoo testified that he drove through that intersection on his motorcycle the morning of July 7. He did not believe a

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[6] Brief for appellant at 16.

[7] *Id.*

dangerous condition existed and therefore did not close the road, although he had the power to do so. It is clear that reasonable minds could differ as to the conclusions one could draw from this evidence.

Robinson also asserts the evidence shows that Thoene, Dustrol's milling foreman, knew the edge was contrary to state regulations. But Thoene's only statement to that effect was that he thought the "State spec is anything over two inches has to be ramped." Robinson failed to introduce evidence as to any actual state regulations, thus no such regulations were presented to the jury. And the district court declined to give an instruction with respect to the violation of a state regulation. Robinson does not now appeal from this failure.

Robinson next argues that "Dustrol's foreman was one of the last workers to leave the job site and was both required and empowered by contract to correct the hazard by using Dustrol employees to ramp it, by calling Pavers to ramp it, or by calling Trafcon for signage" and that "[t]hough responsible under the contract to cause the placement of signs warning of existing hazards, Dustrol failed to request or otherwise cause such signage to be placed."[8]

Under the subcontract with Pavers, Dustrol was required to provide a competent person who was capable of indentifying existing and predictable hazards and authorized to take corrective action to eliminate such hazards. Moreover, Dustrol agreed to take "responsibility to protect [its] work . . . by lights, barricades, and signs so as to avoid injury or damage." But the contract did not explicitly require Dustrol to ramp any vertical edges. The record shows that as the general contractor, Pavers was responsible for overseeing its subcontractors, and that Dustrol was not generally in the position to oversee other contractors or subcontractors on a job.

Conversely, Pavers did actually contract with the Department of Roads that "someone on that job" would ramp vertical edges. The record demonstrates that at the very least, reasonable minds could differ as to whether Pavers had agreed to do

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[8] *Id.*

this ramping itself. In addition to the reasons set forth above, the record also shows that it was in Pavers' best interests to do the ramping itself because it was simpler for Pavers to clean up that ramping when it was later removed. Again, based on the above, reasonable minds could differ as to the conclusion that could be drawn from this evidence.

Robinson also asserts that "Dustrol's foreman was expected to inspect the area for hazards before leaving the job site, drove his vehicle through the intersection, but failed to notice the excessive edges because he assumed Pavers would ramp them because they had been ramping the manhole covers."[9] Again, reasonable minds could differ as to this fact. Thoene did drive through the jobsite and admittedly did not notice the vertical edge. But a review of the record shows Thoene complied with his job duties by making sure that all of the excess millings and other debris were removed from the road, as well as Dustrol's equipment, and that Dustrol's work had been otherwise completed satisfactorily. Reasonable minds could find that Thoene did not further inspect Pavers' work, because Pavers was still working when Dustrol finished its milling work.

Robinson also contends that "[a]fter a subsequent investigation, Dustrol gave its foreman a written warning for failing to address the hazard and instead assuming, absent a formal agreement, Pavers would do the ramping."[10] But a review of the record on this point shows that a Dustrol representative indicated the written warning was used as a "learning tool." There was no finding that Thoene and his crew were actually responsible for ramping the edge, only a finding that Thoene should have observed the absence of adequate ramping. We note that finding this "warning" was some proof of negligence provides no incentive to contractors to improve their safety records. Put another way, just because it might not have legally been negligence does not mean that Dustrol still does not have an interest in preventing accidents. Thus, again, reasonable minds could differ as to the conclusions to be drawn from this evidence.

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[9] *Id.*

[10] *Id.*

Finally, Robinson argues that "Dustrol admitted after investigating the accident it had no information suggesting Pavers was responsible."[11] But this is not an accurate recitation of the record. Robinson refers to the portion of the record wherein Dustrol representatives admit there was no written contract detailing who was responsible for ramping vertical edges. There was sufficient evidence presented that Pavers would be responsible for ramping vertical edges, and in fact, Pavers was undisputedly ramping utilities in the roadway. There was also evidence that at jobsites such as this, there was generally not a split in ramping duties—if you ramped some vertical edges, then you ramped all vertical edges.

[4,5] The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.[12] As is demonstrated by a review of the record, following the introduction by Robinson of his case in chief, Dustrol introduced contrary evidence that it was Pavers' action or inaction that was the sole proximate cause of this incident. The record shows that it would be reasonable for a fact finder to conclude that Pavers had agreed to ramp all vertical edges and thus proximately caused the accident. Moreover, one is not negligent simply by failing to anticipate the negligence of another[13]; thus Dustrol should not be found to have proximately caused the accident simply because it failed to anticipate that Pavers might be negligent.

Because reasonable minds could differ as to the conclusions to be drawn from the evidence presented, Robinson was not entitled to a directed verdict and his assignment of error to the contrary is without merit.

For these same reasons, we also conclude that the district court did not err in overruling Robinson's motion for a new trial. Therefore, Robinson's second assignment of error is also without merit.

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[11] *Id.* at 17.

[12] *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278 Neb. 289, 770 N.W.2d 619 (2009).

[13] *Shupe v. County of Antelope*, 157 Neb. 374, 59 N.W.2d 710 (1953).

Instructions Nos. 2, 10, 13, and 15

In his third assignment of error, Robinson assigns that the district court erred in giving instructions Nos. 2, 13, and 15. Robinson does not allege that these three instructions were an incorrect statement of the law, but, rather, argues that the instructions were in error because the strength of the evidence against Dustrol suggested that a directed verdict on the issues covered by these instructions should have been granted. As we have concluded above, Robinson was not entitled to a directed verdict, thus it was not error for the district court to submit the issue of negligence to the jury.

[6] In his fourth assignment of error, Robinson assigns that the district court erred in giving instruction No. 10, which defines negligence as what a "reasonably careful person" would do. Robinson argues instead that the definition should be what a "reasonably careful contractor" would do. However, Robinson failed to object to the giving of this instruction. In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level.[14] Because no objection was made, we need not further address Robinson's argument.

Robinson's third and fourth assignments of error are without merit.

Proposed Instruction

[7] In his fifth and final assignment of error, Robinson argues that the district court erred in failing to instruct the jury that Dustrol was not excused from its duty to ramp the edges even if it was more convenient for Pavers to do so. However, Robinson failed to request this instruction. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.[15] Therefore, we need not consider Robinson's fifth and final assignment of error.

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[14] *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003).

[15] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

JOCELYN SHEPHERD, APPELLANT, V. PHYLLIS CHAMBERS, DIRECTOR OF THE NEBRASKA PUBLIC EMPLOYEES RETIREMENT SYSTEMS, AND DENIS BLANK, CHAIRPERSON OF THE NEBRASKA PUBLIC EMPLOYEES RETIREMENT BOARD, APPELLEES.

794 N.W.2d 678

Filed January 28, 2011. No. S-10-157.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
3. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
4. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

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

Timothy J. Cuddigan, Sean D. Cuddigan, and Jessica Levine Finkle, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellant.

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

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