RACHEL CONNELLY, A MINOR, INDIVIDUALLY AND BY AND THROUGH HER NEXT FRIENDS AND NATURAL PARENTS, TIMOTHY JAMES CONNELLY AND KELLY JEAN CONNELLY, APPELLEE AND CROSS-APPELLANT, AND CHELSEA CONNELLY, A MINOR, INDIVIDUALLY AND BY AND THROUGH HER NEXT FRIENDS AND NATURAL PARENTS, TIMOTHY JAMES CONNELLY AND KELLY JEAN CONNELLY, APPELLEE, V. CITY OF OMAHA, APPELLANT AND CROSS-APPELLEE.

KELLY JEAN CONNELLY AND TIMOTHY JAMES CONNELLY, WIFE AND HUSBAND AND NATURAL GUARDIANS OF RACHEL AND CHELSEA CONNELLY, APPELLEES, V. CITY OF OMAHA, APPELLANT.

816 N.W.2d 742

Filed July 20, 2012. Nos. S-10-879, S-10-880.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong. When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, an appellate court is obligated to reach a conclusion independent of the decision reached by the court below.
4. **Damages.** While the amount of damages presents a question of fact, the proper measure of damages presents a question of law.
5. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages.
6. **Negligence: Liability: Invitor-Invitee: Proximate Cause: Proof.** An owner or occupier is liable for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves: (1) The owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the owner

or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the lawful visitor.

7. **Negligence: Liability.** Generally, when the danger posed by a condition is open and obvious, the owner or occupier is not liable for harm caused by the condition.
8. **Negligence: Proximate Cause.** A plaintiff is contributorily negligent if (1) she or he fails to protect herself or himself from injury, (2) her or his conduct concurs and cooperates with the defendant's actionable negligence, and (3) her or his conduct contributes to her or his injuries as a proximate cause.
9. **Trial: Negligence: Damages: Appeal and Error.** Because the purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.
10. **Negligence: Damages.** A person who suffers injury as a result of the negligence of another is entitled to recover for the reasonable value of medical care and expenses incurred for the treatment of the injuries.
11. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
12. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
13. ____: ____: ____. The unconstitutionality of a statute must be clearly established before it will be declared void.
14. **Constitutional Law: Statutes: Legislature: Presumptions.** The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality.
15. **Constitutional Law: Due Process.** The Due Process Clauses of both the federal and the state Constitutions forbid the government from infringing upon a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.
16. **Due Process.** Substantive due process relates to the content of the statute specifying when a right can be lost or impaired.
17. **Constitutional Law: Due Process: Statutes.** In cases involving due process challenges under the Nebraska Constitution, when a fundamental right or suspect classification is not involved in the legislation, a legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest.
18. **Statutes: Courts: Legislature: Intent.** Courts will not independently review the factual basis on which the Legislature justified a statute, nor will a court independently review the wisdom of a statute. Instead, courts inquire whether the Legislature reasonably could conceive to be true the facts on which the challenged statute was based.
19. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

20. **Actions: Torts: Minors: Damages.** Under Nebraska law, injury to a minor results in two causes of action—one on behalf of the minor and the other on behalf of the minor's parent. The minor's claim is based on damages caused by the personal or bodily injury sustained by the minor, while the claim of a parent is based on the loss of services during minority and the necessary expenses of treatment for the injured child.
21. **Actions: Torts: Minors.** The cause or right of action of parents is distinct from the cause of action of their child.
22. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
23. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeals from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Judgment in No. S-10-879 affirmed. Judgment in No. S-10-880 affirmed as modified.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellant.

Thomas M. Locher, Timothy M. Morrison, and Joseph J. Kehm, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellees.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN and PIRTLE, Judges.

STEPHAN, J.

Rachel Connelly and Chelsea Connelly are the minor daughters of Kelly Jean Connelly and Timothy James Connelly. On December 29, 2000, Rachel and Chelsea were injured in Memorial Park in Omaha, Nebraska, when their saucer-type plastic sled collided with a tree. Two actions were commenced against the City of Omaha (City) in the district court for Douglas County under the Political Subdivisions Tort Claims Act (PSTCA).[1] One action was brought by the parents to recover medical expenses and loss of services based on their daughters' injuries. The second action was brought by the daughters, by and through their parents, for injuries incurred

[1] Neb. Rev. Stat. §§ 13-901 to 13-927 (Reissue 2007 & Cum. Supp. 2010).

in the accident. The district court found that the accident and resulting injuries were proximately caused by the negligence of the City, and awarded damages in both actions. On appeal, the City argues that the district court erred in its assessment of both liability and damages. In her cross-appeal, Rachel, by and through her parents, contends that the damage cap set forth in § 13-926 as applied in this case violates her right to due process. We affirm the judgment of the district court in the daughters' action, and affirm as modified the judgment in the parents' action.

I. FACTS

Kelly, Timothy, Rachel, and Chelsea are residents of Omaha. The accident occurred in Memorial Park, which is public property owned by the City and may be used free of charge for recreational purposes. The City was solely responsible for planting, maintaining, and removing all trees in the park. The City knew that the park had been used by the public for sledding for many years, and it was aware of prior incidents in which persons sledding in the park had collided with trees.

1. Events Prior to Accident

In the late 1990's, the City began planning to restore and renovate Memorial Park. The primary purpose was to improve the park's infrastructure. The project involved planting 300 new trees.

The City held meetings to hear public comment on the project. At the first meeting held on March 7, 1997, attendees commented on "the essence, character, image and purpose of Memorial Park," which included "sledding opportunities." At a second meeting on April 25, attendees commented that new plantings should be avoided in the area of the park used for sledding. Mary Slaven, a park planner and the project manager for the City's reforestation project, understood these comments to mean that trees should not be planted in the area of the park used for sledding. Slaven thus made that one of her goals in planning the renovation project. But Slaven did not know which specific area of the park was used for sledding. During one meeting, one person showed Slaven the general area used

for sledding and city forester Philip Pierce offered to show her the area more specifically "when the time came." Slaven understood this to mean that when the time came for plantings to be made, she would contact Pierce in order to avoid planting trees in the sledding area. Pierce was familiar with the sledding area at the park.

Despite this offered assistance, Slaven moved forward on the project without soliciting information from Pierce and without observing sledding activity in the park. Trees were planted in 1998, including a set of small crab apple trees, which were placed on the southeast slope of the park next to a sidewalk.

After this initial renovation project was completed, federal funds became available to plant 500 additional trees in Memorial Park. In conjunction with the new reforestation project, Slaven asked Pierce to identify the sledding area on an aerial photograph. In April 1999, Pierce went to the park to view the crab apple trees and recommended that they be moved, partly because he believed the trees presented a hazard to people sledding in the park. Pierce's comments surprised Slaven, because she assumed people would not sled over a sidewalk. Without further inquiring about Pierce's comments, Slaven decided to leave the crab apple trees on the southeast slope. She reasoned the trees had made it through one sledding season without incident.

Several sledding injuries occurred after the renovation project was completed. One accident occurred on December 17, 2000. A father had sent his two children, who were 3 and 8 years old at the time, down the slope on a saucer sled. The sled got turned around, and they hit one of the crab apple trees on the right side of the slope that Pierce had told Slaven to move. One child sustained injuries as a result of the collision.

2. Daughters' Accident

On December 29, 2000, Timothy decided to take his daughters sledding at Memorial Park. Rachel and Chelsea were 5 and 10 years old, respectively, at the time. This was the first time Timothy had been to Memorial Park. He chose the park because his daughters were getting older and looking for a

longer sledding hill, and he knew Memorial Park was used by the public for sledding.

Upon arriving at the park, Timothy walked to the southeast slope. He assessed the slope's dangers and noticed trees to the left, to the right, and at the bottom. He chose a starting point near what appeared to be the center of the slope.

Chelsea then placed a saucer sled on the slope. The sled had no steering mechanism, and Timothy knew it could go in an unintended direction. Rachel sat on the saucer behind Chelsea, and Chelsea pushed off. The sled began veering right, and the sled collided with one of the crab apple trees on the right side of the slope.

Rachel and Chelsea were taken by ambulance to a nearby hospital. Chelsea sustained injuries to her ribs and chest, from which injuries she recovered. Rachel sustained a fracture dislocation of her spine, which resulted in permanent paralysis from the shoulders down.

II. PROCEDURAL HISTORY

1. Parents' Action

Kelly and Timothy filed tort claims with the City on December 27, 2001, pursuant to the PSTCA. When the City did not render a final disposition of the claims within 6 months, Kelly and Timothy withdrew their claims and filed a lawsuit against the City.

They alleged that the City's willful negligence proximately caused the injuries sustained by their daughters, and they sought damages for past and future medical expenses, loss of services, and emotional distress. They also challenged the constitutionality of the $1 million cap on damages imposed by § 13-926.

The district court entered an order on March 29, 2006, following a bench trial on the issue of liability. The court found that because the Recreational Liability Act[2] applied and was constitutional, the City would be liable only if it was willfully negligent. The court found the City liable under that standard,

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[2] Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 2008).

because "prior to December 29, 2000, the City was aware that the crab apple trees posed a danger to persons sledding in Memorial Park," and the City failed to take action. The court reasoned the City knew that sledding occurred in the park, that Pierce had instructed Slaven to move the crab apple trees, and that a sledding accident occurred with one of the crab apple trees 12 days before the Connelly accident. The court determined that Timothy bore 25 percent of the fault for his daughters' injuries and that his fault would be considered in the court's subsequent assessment of damages. Finally, the court dismissed the parents' claims for negligent infliction of emotional distress, finding the claims failed as a matter of law.

2. Daughters' Action

Shortly after this order was entered, Rachel and Chelsea, by and through their parents, filed a separate action which sought general damages arising from the same accident. They had previously filed tort claims with the City, which failed to finally dispose of the claims within 6 months. The operative complaint alleged that the City was both negligent and willfully negligent and that § 13-926 was unconstitutional. The district court consolidated this action with the parents' previously filed action.

3. Interlocutory Order of February 7, 2008

In an order ruling on motions for partial summary judgment, the district court concluded that four separate damage caps applied in these actions—one for each of the four individual claimants. Focusing on the language of § 13-926(1), which limits damages to "[o]ne million dollars for any person for any number of claims arising out of a single occurrence," the court concluded that each minor and each parent was asserting a separate cause of action.

In the same order, the district court determined that any negligence on the part of Timothy could not be imputed to reduce Kelly's recovery because of the lack of evidence that the two were engaged in a joint enterprise at the time of

their daughters' injuries. The court further determined that our decision in *Bronsen v. Dawes County*,[3] which held that the Recreational Liability Act did not shield political subdivisions from liability for ordinary negligence, required reconsideration of Timothy's comparative fault. The court then concluded that Timothy remained 25 percent at fault for his daughters' injuries, but that such fault could not be imputed to the daughters to reduce their recovery. The court also determined that Nebraska law did not recognize the parents' claims for loss of consortium for their daughters' nonfatal injuries.

On the City's motion, the district court certified its orders finding the City liable and apportioning fault among the parties as final for purposes of appeal. We dismissed the City's appeal, finding there was no final order because the issue of damages remained unresolved.[4]

4. Final Order of August 11, 2010

On remand, a trial was held on the remaining issues and the district court entered a final order on August 11, 2010. The court reiterated that the City was liable "for its actions in planting and maintaining the tree in Memorial Park." The court found that Chelsea was 25 percent at fault for failing to take steps to avoid the accident and determined her fault would reduce both her recovery and her parents' recovery with respect to losses stemming from her injury. The court determined that due to her young age and inability to see where the sled was going, Rachel had no fault in the accident.

After adjusting for the comparative negligence of Timothy and Chelsea, the court awarded $10,063,669.41 to Rachel, $8,176.84 to Chelsea, $623,661.02 to Timothy, and $831,775.17 to Kelly. The parents' damages award included in-home nursing services provided by Kelly to Rachel based upon the replacement cost for such services of $20 per hour. Finally, the district court determined that our decision in *Staley v. City*

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[3] *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

[4] See *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

of Omaha,[5] which upheld the constitutionality of the PSTCA damage cap, required it to reduce Rachel's damage award to $1 million.

The City perfected these timely appeals, and we granted the appellees' petitions to bypass. The cases were originally argued on September 7, 2011. Due to a change in court personnel and the presence of a constitutional issue, we ordered reargument before a new panel and supplemental briefing.

III. ASSIGNMENTS OF ERROR

In the parents' action, the City assigns, restated and renumbered, that the district court erred in (1) finding the City liable for negligence, (2) apportioning the comparative fault of Timothy, (3) interpreting § 13-926 to entitle each plaintiff to a separate damage cap of $1 million, and (4) assessing the amount of damages recoverable by the parents for their care of Rachel.

In the action brought on behalf of the daughters, the City assigns, restated and renumbered, that the district court erred in (1) finding the City liable for negligence and (2) apportioning the comparative fault of Timothy.

In Rachel's cross-appeal, she asserts, by and through her parents, that the district court erred in holding § 13-926(1) was constitutional.

IV. STANDARD OF REVIEW

[1] In actions brought pursuant to the PSTCA, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong. When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.[6]

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[5] *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

[6] *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012); *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[7]

[3] Whether a statute is constitutional is a question of law; accordingly, we are obligated to reach a conclusion independent of the decision reached by the court below.[8]

[4] While the amount of damages presents a question of fact, the proper measure of damages presents a question of law.[9]

V. ANALYSIS

1. Determination of Liability

[5] The City contends that the district court erred in finding it liable. Subject to certain exceptions, "in all suits brought under the [PSTCA] the political subdivision shall be liable in the same manner and to the same extent as a private individual."[10] Thus, a negligence action brought under the PSTCA has the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages.[11]

[6] This is a premises liability case, as the City owns Memorial Park, the tree struck by the sled was a condition on the premises, and Timothy, Rachel, and Chelsea were lawful visitors to the park when the accident occurred.[12] We have recognized that an owner or occupier is liable for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves:

> (1) the owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner

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[7] *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011); *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

[8] See, *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012); *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011).

[9] *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009).

[10] § 13-908.

[11] See, *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001); *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000).

[12] See *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

> or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the owner or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the lawful visitor.[13]

The City contends that the evidence at trial did not support the second and third elements.

(a) City's Realization of Risk

Evidence showed that at the time of the accident, the City knew the area of the park where the accident occurred was used by the public for sledding and knew there had been prior sledding accidents involving trees. Before planting the tree which Rachel and Chelsea's sled struck, the City was aware of public sentiment that new plantings should be avoided in the area of the park used for sledding. Indeed, the City had made that a goal of the project. After the crab apple trees were planted on the southeast slope, Pierce, the city forester, recommended that they be removed. One of the reasons for his recommendation was that the trees presented a hazard to sledders. And 12 days before the Connelly accident, a sled with two children on it struck one of the crab apple trees. Viewing this evidence in a light most favorable to the Connellys, as our standard of review requires, the district court did not err in finding that the City should have realized the crab apple trees posed an unreasonable risk of harm to sledders.

(b) Lawful Visitors' Realization of Risk

The City argues the evidence failed to show that it should have expected that lawful visitors such as the Connellys would either not discover or realize the danger posed by the crab apple trees or would fail to protect themselves against the

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[13] *Id.* at 807, 678 N.W.2d at 89, citing *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003).

danger. Succinctly stated, the City's position is that the "open and obvious tree did not present an unreasonable risk of harm to sledders who should [have] discover[ed] it, realize[d] the danger, and [gone] elsewhere."[14]

[7] Generally, when the danger posed by a condition is open and obvious, the owner or occupier is not liable for harm caused by the condition.[15] But the Restatement (Second) of Torts § 343A,[16] which we have adopted, states that despite this general rule, the landowner may be liable if the landowner "should anticipate the harm despite such knowledge or obviousness." Thus, a determination that a danger is "open and obvious" does not end the analysis; a court must also determine whether the landowner should have anticipated that persons using the premises would fail to protect themselves, despite the open and obvious risk.[17] Reason to anticipate harm from an open and obvious danger

> may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.[18]

Also pertinent to our analysis is another portion of the Restatement commentary, which provides:

> There is . . . a special reason for the possessor to anticipate harm where the possessor is . . . the government, or

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[14] Reply brief for appellant in case No. S-10-879 at 5 (emphasis omitted).

[15] *Aguallo, supra* note 12; *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982).

[16] Restatement (Second) of Torts § 343A(1) at 218 (1965). See, *Aguallo, supra* note 12; *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

[17] *Aguallo, supra* note 12; *Burns, supra* note 16. See, also, Restatement, *supra* note 16, comment *f*.

[18] Restatement, *supra* note 16, comment *f*. at 220.

> a government agency, which maintains land upon which the public are invited and entitled to enter as a matter of public right. Such defendants may reasonably expect the public, in the course of the entry and use to which they are entitled, to proceed to encounter some known or obvious dangers which are not unduly extreme, rather than to forego [sic] the right.
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> Even such defendants, however, may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid. This is true particularly where a reasonable alternative way is open to the visitor, known or obvious to him, and safe.[19]

The district court concluded that "regardless of whether the crab apple tree was an open and obvious danger, the City should have anticipated a plaintiff, such as the Connelly's [sic] 'would fail to protect himself or herself against the danger.'" The court reasoned that the City was a "government agency maintaining land upon which the Connelly's [sic] were entitled to enter as a matter of public right" and that it should have anticipated that persons sledding in the park "would fail to protect themselves, because they may be distracted by the other people and activities involved with the sledding."

The City argues that the court should not have included the "distraction" argument in its rationale, because there was no evidence that Rachel and Chelsea were actually distracted at the time of the accident. This argument has merit. We agree with the reasoning of an Illinois appellate court that "in order for the distraction exception to apply, it must have been foreseeable that [the] plaintiff would become distracted *and* there must be evidence that [the] plaintiff actually became distracted."[20]

But we agree with the district court's alternative reasoning that as a governmental entity operating a park that was open

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[19] *Id.*, comment *g*. at 221-22.

[20] *Belluomini v. Stratford Green Condominium*, 346 Ill. App. 3d 687, 695, 805 N.E.2d 701, 708, 282 Ill. Dec. 82, 89 (2004) (emphasis in original).

to the public and commonly used for sledding, the City should have expected the public to encounter some dangers which were not unduly extreme, rather than forgo the right to use the park for sledding. The danger posed by the tree was based on its position along one side of the sledding slope. The tree did not present an unduly extreme danger, as evidenced by the fact that Slaven did not appreciate the danger when she determined the location for the tree, or even after Pierce suggested that it be removed because of its proximity to the sledding area. Viewing the evidence in a light most favorable to the Connellys, as our standard of review requires, we conclude that the district court did not err in finding that the City should have expected that lawful visitors such as the Connellys would fail to protect themselves against the danger posed by the crab apple trees.

2. Comparative Fault Apportionment

The City makes two arguments with respect to the district court's determination of Timothy's comparative fault. First, although it makes no specific assignment of error on this point, the City contends that the daughters' claims "must be reduced by Timothy's negligence."[21] The district court, relying upon long-established precedent of this court,[22] determined as a matter of law that Timothy's fault could not be imputed to either Rachel or Chelsea so as to reduce each of their recoveries. This determination was correct, and to the extent that the City's argument to the contrary was preserved, it is without merit.

The City also argues that in the parents' separate action, the district court erred in determining that Timothy bore 25 percent of the fault for the accident, when compared to the negligence of the City. It argues that Timothy's negligence "exceeds the blameworthiness of the City's conduct"[23] and should therefore bar recovery on the parents' claims.

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[21] Brief for appellant in case No. S-10-879 at 33.

[22] See, *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007); *Wilson v. Thayer County Agricultural Society*, 115 Neb. 579, 213 N.W. 966 (1927).

[23] Brief for appellant in case No. S-10-880 at 31.

Under Nebraska's comparative fault statutes,

> [a]ny contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery.[24]

[8,9] This court has recognized that "a plaintiff is contributorily negligent if (1) she or he fails to protect herself or himself from injury, (2) her or his conduct concurs and cooperates with the defendant's actionable negligence, and (3) her or his conduct contributes to her or his injuries as a proximate cause."[25] Because the purpose of comparative negligence

> is to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.[26]

We conclude that there is credible evidence, as summarized above, to support the district court's apportionment of fault and that the apportionment bears a reasonable relationship to the respective elements of negligence proved at trial. The City, as the owner of a public park historically used for sledding, knew that the crab apple trees posed a risk to those who used the park for sledding, yet took no action to decrease or eliminate the risk. The record reflects that the district court carefully considered the City's factual arguments regarding Timothy's comparative responsibility for the accident, but determined that it was significantly less than that of the City. Under our deferential standard of review, we cannot conclude

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[24] Neb. Rev. Stat. § 25-21,185.09 (Reissue 2008).

[25] *Baldwin v. City of Omaha*, 259 Neb. 1, 12, 607 N.W.2d 841, 850 (2000).

[26] *Id.* at 18, 607 N.W.2d at 853.

the district court erred in its apportionment of comparative fault.

3. Measure of Damages for In-Home Nursing Care

[10] A person who suffers injury as a result of the negligence of another "is entitled to recover for the reasonable value of medical care and expenses incurred for the treatment of the injuries."[27] The City concedes that this element of damage may include services provided in the home of the injured party. But it takes issue with the manner in which the district court valued the nursing services which Kelly provides to Rachel.

The district court found the proper measure of damages was the replacement cost of the services, which it assessed at $20 per hour based upon expert testimony regarding the average charges of Omaha businesses which provide in-home health care. The City contends this measure of damages results in a windfall, because it gives the parents "the same profit, overhead, and other elements of pricing that a business would include in its charges."[28] The City argues that the services should have been valued in the range of $7.50 and $12.50 per hour, representing the compensation that a home health aide employed by an agency would receive for providing in-home services. In rejecting this argument, the district court reasoned that its concern was "not that the Parents may receive a windfall but that the City not avoid liability for its negligence merely because a mother and father chose to care for their child themselves."

The evidence supports a reasonable inference that if Kelly were unable or unwilling to provide the in-home nursing services which Rachel requires, she and Timothy would have been required to contract with a commercial provider of such services at a cost to them of $20 per hour. Their expert testified that this was "the only option," due to certain requirements applicable to in-home health care providers. We conclude that

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[27] *Steinauer v. Sarpy County*, 217 Neb. 830, 843, 353 N.W.2d 715, 724 (1984), citing *Stanek v. Swierczek*, 209 Neb. 357, 307 N.W.2d 807 (1981).

[28] Brief for appellant in case No. S-10-880 at 45.

the district court did not err in finding that the reasonable value of the services provided to Rachel by her parents was $20 per hour.

4. Damage Cap

All parties assign error with respect to the district court's disposition of issues pertaining to § 13-926, which limits the amount recoverable under the PSTCA to "(1) One million dollars for any person for any number of claims arising out of a single occurrence; and (2) Five million dollars for all claims arising out of a single occurrence." Rachel contends the district court erred in rejecting her claim that the cap unconstitutionally deprives her of a substantive due process right to compensation for proven economic damages. The City argues the district court erred in rejecting its argument that all claims resulting from Rachel's injury were subject to a single cap of $1 million.

(a) Constitutionality: Substantive Due Process

[11-14] We consider Rachel's constitutional challenge within the framework of well-established legal principles. A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[29] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[30] The unconstitutionality of a statute must be clearly established before it will be declared void.[31] The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality.[32]

[15-17] The Due Process Clauses of both the federal and the state Constitutions forbid the government from infringing upon a fundamental liberty interest, no matter what process is

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[29] *Sarpy Cty. Farm Bureau, supra* note 8; *Kiplinger, supra* note 8.

[30] *Id.*

[31] *Id.*

[32] See *Staley, supra* note 5.

provided, unless the infringement is narrowly tailored to serve a compelling state interest.[33] "Substantive due process relates to the content of the statute specifying when a right can be lost or impaired."[34] "When a fundamental right or suspect classification is not involved in the legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest."[35]

We upheld the constitutionality of the damage cap established by § 13-926 in *Staley*.[36] In rejecting a substantive due process challenge, we reasoned that the cap did not involve a fundamental right or a suspect classification and "the Legislature had a rational basis for limiting the amount of damages recoverable in claims under the [PSTCA]."[37] We noted that the damage cap was enacted "because of legislative concern regarding the cost and availability of liability insurance for political subdivisions, and the perceived need of the state to protect the fiscal stability of its political subdivisions."[38]

Rachel attempts to distinguish *Staley*, arguing that the damage cap as applied in that case deprived the plaintiff of only 4 percent of his proven economic damages, whereas Rachel is deprived of more than 75 percent of her proven economic damages by application of § 13-926(1). Rachel argues that this case affects her fundamental rights because "[c]ompensating negligently injured individuals for economic damages—which, unlike noneconomic damages, can be fully compensated by the payment of money—is the fundamental motivating purpose of our tort system."[39] But this argument overlooks the context in which these claims are asserted. An injured party

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[33] *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

[34] *Staley, supra* note 5, 271 Neb. at 555, 713 N.W.2d at 469, citing *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001).

[35] *Id.*, citing *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997).

[36] *Staley, supra* note 5.

[37] *Id.* at 555, 713 N.W.2d at 470.

[38] *Id.* at 554, 713 N.W.2d at 469.

[39] Brief for appellees in case No. S-10-879 at 48.

has no fundamental right to a tort recovery against a political subdivision. In the absence of legislation, all such claims are barred by sovereign immunity. The PSTCA eliminates, in part, the traditional immunity of political subdivisions for the negligent acts of their employees.[40] But we have characterized this as a "limited waiver," because certain types of tort claims are exempt from its operation.[41] Because the right of an injured party to recover in tort against a political subdivision exists solely as a matter of legislative grace, it cannot be considered a fundamental right.

[18] And we are not persuaded by Rachel's argument that the Legislature lacked a rational basis for including Omaha with all other political subdivisions to which § 13-926 applies. They contend that the Legislature's concerns regarding insurability and fiscal stability of political subdivisions which led to the enactment of the damage cap do not apply to Omaha, due to its size and ability to self-insure. But that is a determination best left to a legislative body, not a court. As we said in *Staley*, courts will not independently review "the factual basis on which a legislature justified a statute, nor will a court independently review the wisdom of a statute. Instead, courts inquire whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based."[42] The PSTCA creates a single class of tortfeasors, consisting of all political subdivisions.[43] The scope of § 13-926 is consistent with that scheme. We will not second-guess the decision of the Legislature to treat the City in the same manner as all other political subdivisions with respect to capping damages recoverable under the PSTCA. We conclude, as we did in *Staley*, that the Legislature had a rational basis for enacting § 13-926. Rachel's substantive due process challenge is without merit.

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[40] *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

[41] *Britton v. City of Crawford*, 282 Neb. 374, 380, 803 N.W.2d 508, 514 (2011), citing *Stonacek, supra* note 6.

[42] *Staley, supra* note 5, 271 Neb. at 554, 713 N.W.2d at 469.

[43] *Id.*; *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976).

(b) Statutory Interpretation: Number of Caps

[19] The City contends that the district court erred in determining that Rachel's injuries triggered three separate damage caps—one for Rachel and one for each of her parents. It argues that the parents' claims are "derivative" and "must logically be subsumed" in the $1 million cap applicable to Rachel's tort claim.[44] This argument requires us to interpret § 13-926. 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.[45]

[20,21] Under Nebraska law, injury to a minor results in two causes of action—one on behalf of the minor and the other on behalf of the minor's parent.[46] The minor's claim is based on damages caused by the personal or bodily injury sustained by the minor, while the claim of a parent is based on the loss of services during minority and the necessary expenses of treatment for the injured child.[47] The cause or right of action of parents is distinct from the cause of action of their child.[48] Thus, from Rachel's significant injuries, two separate causes of action arose—one in favor of Rachel and the other in favor of her parents for loss or damage sustained on account of Rachel's injury. The issue presented here is whether all of these claims are subject to a single damage cap of $1 million.

(i) Parents Entitled to Cap Separate From That of Rachel

In support of the City's argument that the parents' claims are subsumed within Rachel's claim and therefore are subject to a single damage cap, the City relies on *City of Austin v.*

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[44] Brief for appellant in case No. S-10-880 at 41.

[45] *American Amusements Co., supra* note 7; *Skaggs v. Nebraska State Patrol*, 282 Neb. 154, 804 N.W.2d 611 (2011).

[46] *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984).

[47] *Id.*

[48] *Id.*

Cooksey.[49] In that wrongful death case, several heirs asserted claims against a city under the Texas Tort Claims Act, which limited liability "'to $100,000 per person and $300,000 for any single occurrence for bodily injury or death.'"[50] The issue presented was whether the statutory phrase "per person" referred to the injured person, or a person asserting a claim as a result of an injury to someone else. In concluding that it meant the former, the court noted that under insurance law, phrases such as "per person" or "each person" refer to the person injured, and further noted that "[t]his is especially true in cases in which the words of limitation refer to 'bodily injury' as they do in the Texas Tort Claims Act."[51]

We do not find the reasoning of *Cooksey* persuasive in this case, because of differences in the language used in the Texas and Nebraska statutes. As we have noted, § 13-926 limits damages under the PSTCA to "[o]ne million dollars for any person for any number of claims arising out of a single occurrence." The term "person" necessarily refers to a person asserting a tort claim, as the PSTCA provides "the exclusive means" by which a person may maintain a "tort claim . . . against a political subdivision."[52] The PSTCA defines a "[t]ort claim" as

> any claim against a political subdivision for money only . . . on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the political subdivision, while acting within the scope of his or her office or employment, under circumstances in which the political subdivision, if a private person, would be liable to the claimant for such damage, loss, injury, or death.[53]

Based on this definition, a party may recover up to the statutory limit of $1 million if the party is "any person" asserting "any

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[49] *City of Austin v. Cooksey*, 570 S.W.2d 386 (Tex. 1978).

[50] *Id*. at 387, quoting Tex. Rev. Civ. Stat. Ann. art. 6252-19, § 3 (West 1970).

[51] *Id*. at 388.

[52] *Geddes v. York County*, 273 Neb. 271, 275, 729 N.W.2d 661, 665 (2007). See, *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003); *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003); § 13-902.

[53] § 13-903(4).

claim . . . on account of personal injury." The U.S. Supreme Court has recognized that "[t]he words '*any claim* against the United States . . . *on account of* personal injury' . . . are broad words in common usage" and "are not words of art."[54] This court has also determined that a claim for contribution against a joint tort-feasor constituted a "[t]ort claim" within the meaning of Neb. Rev. Stat. § 81-8,210(4) (Cum. Supp. 2010), which is the State Tort Claims Act equivalent to § 13-903(4).[55] Thus, one need not suffer bodily injury to assert a tort claim under § 13-903(4).

Other courts have interpreted damage cap statutes similar to § 13-926 as providing a cap for the claims of an injured minor and a separate cap for his or her parents' claims. In *Independent School Dist. I-29 v. Crawford*,[56] parents of a child injured in a school bus accident asserted in a single action both the child's personal injury claim and their claim for medical expenses. An Oklahoma statute provided that the liability of a political subdivision "'shall not exceed . . . Fifty Thousand Dollars (50,000.00) to any claimant for all other claims arising out of a single accident or occurrence.'"[57] The court noted that under Oklahoma law, a "parent's right of action for consequential damages based on loss of services and on the expenses incurred as a result of the child's injury is distinct from the child's right of action for his or her own injuries."[58] Accordingly, the court concluded that the parents and the child were separate "claimants" within the meaning of the damage cap provision and could recover a maximum of $100,000 from the school district.[59]

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[54] *United States v. Yellow Cab Co.*, 340 U.S. 543, 548, 71 S. Ct. 399, 95 L. Ed. 523 (1951) (emphasis in original).

[55] See *Northland Ins. Co. v. State*, 242 Neb. 10, 492 N.W.2d 866 (1992).

[56] *Independent School Dist. I-29 v. Crawford*, 688 P.2d 1291 (Okla. 1984) (superseded by statute as stated in *Carlson v. City of Broken Arrow*, 844 P.2d 152 (Okla. 1992)).

[57] *Id.* at 1293, quoting Okla. Stat. tit. 51, § 154 (Supp. 1979) (emphasis omitted).

[58] *Id.* at 1293-94.

[59] *Id.* at 1294.

Other courts have similarly held that persons having separate and distinct claims arising from a single occurrence are entitled to separate statutory damage caps. In *Faber v. Roelofs*,[60] a Minnesota statute limited a municipality's liability to "'$25,000 when the claim is one for death by wrongful act or omission and $50,000 to any claimant in any other case.'"[61] The court held that under this statute, an injured minor and his father were separate claimants, each entitled to recover up to $50,000, because the father's action was separate and distinct from that of the minor. In *Schwartz v. Milwaukee*,[62] the court held that under a statute which limited "'[t]he amount recoverable by any person for any damages'" to $25,000, a husband's claim for loss of consortium was separate and distinct from his wife's personal injury claim, and that each was therefore entitled to recover up to $25,000. And in *State, Bd. of Regents v. Yant*,[63] the court held that because the claim of an injured minor child was separate and distinct from his mother's claim for medical expenses incurred as a result of his injury, each was entitled to recover up to $50,000 under a statute which limited the state's liability to $50,000 on "'a claim or a judgment by any one person.'"

The City would have us read § 13-926(1) to limit its liability to $1 million for all claims arising from a single bodily injury. The Legislature could have written the statute that way, but it did not. Instead, it imposed the $1 million cap on "*any person for any number of claims* arising out of a single occurrence."[64] Rachel and her parents are separate persons under § 13-926(1), as the parents' claims are separate and distinct from Rachel's claim. Therefore, Rachel's claim and her parents' claims are subject to separate damage caps.

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[60] *Faber v. Roelofs*, 298 Minn. 16, 212 N.W.2d 856 (1973).

[61] *Id.* at 24, 212 N.W.2d at 861, quoting Minn. Stat. Ann. § 466.04(1)(a) (West 1963).

[62] *Schwartz v. Milwaukee*, 54 Wis. 2d 286, 288, 195 N.W.2d 480, 482 (1972).

[63] *State, Bd. of Regents v. Yant*, 360 So. 2d 99, 100 (Fla. App. 1978).

[64] § 13-926(1) (emphasis supplied).

(ii) Claims of Parents Subject to Single $1 Million Cap

[22,23] We must next determine whether Kelly and Timothy are each entitled to recover up to $1 million for their claims against the City under § 13-926(1), or whether their combined claims are subject to a single $1 million cap. In response to our order for supplemental briefing on this issue, the Connellys briefed the substantive issue but also argued that it was not preserved for appeal. In the City's opening brief, it argued that the district court erred in determining that "the damages limit in the [PSTCA] allows the maximum recovery not just for Rachel, who suffered personal injury, but also for *each of her parents* who only incurred damages derivatively through their daughter."[65] We acknowledge that this argument does not focus squarely on the question of whether the claims of each parent are subject to a separate damage cap in the event that they are not subsumed within the cap applicable to Rachel's claim. But the City's assignment of error and argument did raise the issue of whether all claims related to Rachel's injury are subject to a single cap, as the City contends, or multiple caps, as the district court held. In order to provide a meaningful resolution of this question of law, we conclude that it is necessary to determine whether the parents' claims are subject to one or two caps. For that reason, we requested supplemental briefing on this issue. To the extent that it was not preserved in the City's opening brief, we reach the issue under the doctrine of plain error. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.[66] Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[67]

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[65] Brief for appellant in case No. S-10-880 at 40 (emphasis supplied).

[66] *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011); *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007).

[67] *Id.*

In determining that the parents' claims were not subject to the same damage cap as Rachel's personal injury claim, we focused on the separate and distinct nature of a minor's personal injury claim and her parents' claims for damages resulting from the injury. Applying the same reasoning here, we must determine whether the claims asserted by Kelly and Timothy are separate and distinct from each other. It is clear from the record that they are not.

The district court held as a matter of law that Kelly and Timothy had no cause of action for loss of consortium, and that holding was not challenged on appeal. But the court awarded damages for loss of Rachel's services during minority, which is permissible under Nebraska law.[68] These damages, which differ from loss of consortium damages,

> arose in a day when children during minority were generally regarded as an economic asset to parents. Children went to work on farms and in factories at age 10 and even earlier . . . A child's earnings and services could be generally established and the financial or pecuniary loss which could be proved became the measure of damages for the wrongful death of a child.[69]

The district court noted that in seeking these damages, the parents claimed that due to Rachel's injury, she would not have a job, thereby "eliminating her ability to contribute some of her earned money to the household" and would be unable to assist with household chores. The parents collectively requested $450,000. The district court found the evidence did not support damages in this amount, but based upon evidence of Chelsea's earnings at a part-time job during high school, it awarded $15,984.

The district court employed similar reasoning with respect to the parents' claim for past and future medical expenses and modifications to their home and vehicles to accommodate Rachel's loss of mobility.

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[68] See *Macku, supra* note 46.

[69] *Selders v. Armentrout*, 190 Neb. 275, 278, 207 N.W.2d 686, 688 (1973). See, also, *Dorsey v. Yost*, 151 Neb. 66, 36 N.W.2d 574 (1949).

> [E]ach parent has a separate interest in the recovery of medical expenses and neither recovery will be impacted by the other spouses [sic] contributory negligence. However, this is subject to ensuring that there will be no double recovery. Therefore, if Timothy and Kelly . . . establish they have jointly provided medical expenses, each will be entitled to half the amount, with Timothy's recovery being reduced by his contributory negligence.

Following the trial on damages, the district court found that the parents' proven damages totaled $1,663,550.32, which included past and future medical expenses, accommodation costs, and the loss of Rachel's services. The court divided this amount by two, reduced Timothy's "share" by the 25-percent factor attributable to his comparative fault, and awarded $623,661.02 to Timothy and $831,775.17 to Kelly. In ruling that each parent's claim would be subject to a separate damage cap, the district court reasoned that each parent had a separate cause of action for medical expenses, which could be asserted by each parent individually or by them jointly.

But it is clear that the parents' claims were not distinct from one another, in the same sense that the parents' claims were distinct from those of Rachel. The parents asserted their claims jointly, the claims were established by the same proof, and the claims became "separate" only when the district court divided the proven damages by two and then reduced Timothy's award due to his comparative fault.

In deciding to treat the parents' claims as separate from each other and thus subject to separate caps, the district court relied in part on *Dunkel v. Motorists Mut. Ins. Co.*,[70] in which an Ohio appellate court held that an injured child and each of her parents could recover up to $100,000 each under an insurance policy with limits of $100,000 for each person up to a limit of $300,000 per accident. The trial court treated each parent's claim for loss of services as separate, not joint, and reasoned, "'To suggest that [a mother] does not suffer a loss unique

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[70] *Dunkel v. Motorists Mut. Ins. Co.*, 41 Ohio App. 3d 130, 534 N.E.2d 950 (1987).

from that of her husband . . . for the society, love, comfort, and companionship of her daughter is to deny what any parent knows in relation to their own special relationships with their children as individuals.'"[71] The appellate court adopted this reasoning.

But the claims asserted by Kelly and Timothy here do not depend upon any "special relationship" that each may have with Rachel. As noted, their loss of consortium claims which may have been based on such relationships were rejected as a matter of law. Their loss of services claim is based upon the services that Rachel would have provided to the household, not to each parent individually, and the medical expenses claim is likewise joint in nature. Accordingly, we do not find *Dunkel* persuasive on the issue before us.

In *Elkhart Community Schools v. Yoder*,[72] an Indiana appellate court took what we believe is the correct approach to determining whether two parents' claims for damages resulting from a child's personal injury were entitled to separate caps. Indiana's Tort Claims Act limited a governmental entity's liability to $300,000 "'for injury to or death of one [1] person in any one [1] occurrence.'"[73] A jury returned a verdict of $450,000 in favor of the parents of a child who was seriously injured in a school bus accident. Pursuant to the statutory cap, the trial court reduced the award to $300,000. On appeal, the parents contended that a separate cap should have applied to each of their claims. The appellate court rejected this argument. Although recognizing that under Indiana law, the parents of a negligently injured minor child had a separate cause of action than that of the minor, the court opined:

> [I]n analyzing the effect of the Tort Claims Act limitation of liability, it is necessary to determine whether there are separate causes of action for each plaintiff seeking to recover separately up to the statutory limit. The limitation cannot be invoked for the benefit of each plaintiff found

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[71] *Id.* at 132, 534 N.E.2d at 952.

[72] *Elkhart Community Schools v. Yoder*, 696 N.E.2d 409 (Ind. App. 1998).

[73] *Id.* at 416, quoting Ind. Code § 34-4-16.5-4 (1986).

> to be a "person" under the Act without regard for whether his or her claim is separate from others in the action.[74]

The court noted that under Indiana law, a parent's action for damages resulting from injury to a child could be brought by the parents jointly, or by either parent individually, if the other parent was joined as a codefendant. The court determined that because the parents were awarded an undivided joint verdict, the parents "suffered a single injury, regardless of whether each parent is a separate 'person.'"[75] Thus, the court concluded that a single $300,000 cap applied to the parents' joint claims.

The same principle was applied in a slightly different context by the Wisconsin Supreme Court in *Wilmot v. Racine County*.[76] There, the applicable statute limited a governmental subdivision's tort liability to $50,000 for "'any person for any damages, injuries or death in any action.'"[77] The issue presented was whether the injured plaintiff and a subrogated health fund that had paid some of his medical bills were subject to one or two $50,000 caps. The court concluded that only one cap applied because the plaintiff's cause of action was not separate and distinct from that of his subrogee. The court relied in part on its prior decision in *Schwartz*[78] for the proposition that in order for multiple caps to apply, "not only must each claimant be 'a person' but . . . each claimant must also have a separate cause of action, be it independent or derivative."[79] As noted, we relied on *Schwartz* in concluding that the parents' claims were subject to a damage cap separate from the cap applicable to Rachel's claim.

Clearly, Kelly and Timothy are both "persons" having "claims" resulting from Rachel's injury, but their claims for

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[74] *Id.*

[75] *Id.*

[76] *Wilmot v. Racine County*, 136 Wis. 2d 57, 400 N.W.2d 917 (1987).

[77] *Id.* at 62, 400 N.W.2d at 919, quoting Wis. Stat. Ann. § 893.80(3) (West 1983).

[78] *Schwartz, supra* note 62.

[79] *Wilmot, supra* note 76, 136 Wis. 2d at 62-63, 400 N.W.2d at 919.

medical expenses and loss of services are not separate and distinct. Rather, these claims are joint in nature. The parents' joint claims were based on the same proof, and the parents could not each separately recover the full amount of damages for medical expenses and loss of services. As the district court correctly found, and the parties do not dispute, "all expenses associated with the accident are paid out of the coffers of the marital unit." The parents' claims did not become separate and distinct merely because the district court divided the total damages by two. Based upon our independent interpretation of § 13-926(1), we conclude that the parents' claims are subject to a single damage cap of $1 million.

There remains the issue of how to apportion Timothy's comparative fault against the single damage cap applicable to the joint parental claim, given that Kelly was not found to be at fault. We agree that a statutory limitation on damages such as that of § 13-926(1) "applies to cap the total recovery after the reduction of the plaintiff's damages for his or her comparative negligence, rather than applying to the total damages established before the reduction for comparative negligence, since the latter approach would multiply the effect of the damage limitation."[80] Here, the district court determined that the parents sustained damages in the total amount of $1,663,550.32. It reduced one half of that amount by 25 percent due to Timothy's comparative fault, thus arriving at an award for Timothy of $623,661.02 and an award for Kelly of $831,775.17. The total of these awards is $1,455,436.19. We conclude that this award must be reduced to $1 million pursuant to § 13-926(1), with this judgment payable jointly to Kelly and Timothy. We modify the judgments in the parents' action accordingly, and affirm as modified.

VI. CONCLUSION

For the reasons discussed, we affirm the judgment in the daughters' action awarding damages to Chelsea in the amount

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[80] 57 Am. Jur. 2d *Municipal, etc., Tort Liability* § 602 at 611 (2012). See, also, *University of Texas at El Paso v. Nava*, 701 S.W.2d 71 (Tex. App. 1985).

of $8,176.84 and to Rachel in the amount of $1 million. In the parents' action, we modify the judgment in favor of Kelly and Timothy by combining the amounts and reducing the total to $1 million payable to them jointly; and we affirm as modified.

JUDGMENT IN NO. S-10-879 AFFIRMED.

JUDGMENT IN NO. S-10-880 AFFIRMED AS MODIFIED.

WRIGHT, J., not participating.

MCCULLY, INC., DOING BUSINESS AS MCCULLY RANCH COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. BACCARO RANCH, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEE.

816 N.W.2d 728

Filed July 20, 2012. No. S-11-952.

1. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
2. **Witnesses: Evidence: Appeal and Error.** An appellate court will not reevaluate the credibility of the witnesses or reweigh testimony but will review the evidence for clear error.
3. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
4. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
5. **Brokers: Contracts.** In determining whether a commission is due a broker, the court must look to the terms and conditions of the listing agreement.
6. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
7. ____. If a contract is unambiguous, the court will enforce the contract in accordance with the plain meaning of the words of the contract.
8. ____. Enforcement of a contract depends upon the terms of the contract and the facts that are applicable to the contract.
9. **Brokers: Real Estate: Contracts: Sales.** Ordinarily, a real estate broker who, for a commission, undertakes to sell land on certain terms and within a specified period is not entitled to compensation for his or her services unless he or she produces a purchaser within the time limit who is ready, willing, and able to buy upon the terms prescribed.